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 One (IP/10)

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1. Introduction

1.1. The Attorney-General and Cabinet have referred to the Samoa Law Reform Commission ('Commission') for review and reform the *Supreme Court (Civil Procedure) Rules 1980* (**'Supreme Court Rules'**) and the *Magistrates' Court Rules 1971*[1] (together, **'civil procedure rules'**). The civil procedure rules have not been comprehensively reviewed since their enactment over thirty and forty years ago respectively, and members of the judiciary and the legal profession have noted the need to update both language and content, bringing the civil procedure rules in line with modern legal practice in Samoa.

1.2. The present review is part of a larger review of a bundle of legislation concerning the judiciary, the courts and the legal profession. In particular, the review of the civil procedure rules is closely associated with a concurrent review of the *District Courts Act 1969* being undertaken by the Commission. The District Courts Act and the Magistrates' Court Rules are being reviewed simultaneously to ensure that related and overlapping issues are effectively and efficiently addressed.

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. This Issues Paper, the first in a series of two, highlights sections of the civil procedure rules that may require reform, including: procedures which are not in conformity with modern expectations and practice; areas where rules and procedures are lacking or should be put in place; and use of archaic language. These issues have been identified with the assistance of stakeholders who provided commentary and feedback throughout the preparation of this Issues Paper, including the Office of the Attorney-General, the Ministry for Justice and Court Administration, the Ministry for Police and Prisons, the Law Society, members of the judiciary, and members of the legal profession.

1.5. Issues Paper One deals with the following areas that were identified as priorities by stakeholders during preliminary consultations:

i) Commencement of proceedings (including actions and motions);
ii) Service;
iii) Interlocutory Motions;
iv) Extraordinary Remedies; and
v) Garnishee proceedings.

[1] The name of these Rules was never changed when the Magistrates' Court became the District Court in 1990. While the change of name is well overdue, the Commission refers to the rules by their old name in this Issues Paper to minimise confusion.

1.6. This Issues Paper also discusses two additional subjects which stakeholders have indicated would be useful additions to the Rules and would enhance the efficiency of the Supreme Court:

vi) Summary Judgment; and

vii) Case Management.

1.7. After addressing the substantive issues in the Rules themselves, this Issues Paper then proposes a larger reform of civil procedure rules for the consideration of stakeholders. This is 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.

1.8. Whether or not this is an attractive option will in part depend on whether the jurisdiction of the District Court is increased, a question the Commission has raised in its review of the *District Courts Act 1969*.[2] An increase in the jurisdiction of the District Court would mean that procedures until now only used in the Supreme Court may become useful, or perhaps necessary, in the District Court. Your feedback is sought on these issues which are raised in the discussion below and the questions that follow.

[2] Samoa Law Reform Commission, *District Courts Act IP/09* (2012) Ch 2.

2. Commencement of Proceedings

2.1. Part III of the Supreme Court Rules provides that proceedings may be commenced by way of action (where proceedings are for recovery of debt or damages, recovery of land or chattels, or for an order for specific performance)[3] or motion (all other civil proceedings).[4] Actions are commenced by filing and serving a statement of claim, whereas motions are commenced by filing a notice of motion supported by affidavit.

2.2. It is unclear on the face of the Supreme Court Rules why this distinction between actions and motions exists. During preliminary consultations, practitioners differed about whether the distinction was useful, but those who felt that it served a purpose did not articulate that purpose beyond it being "a matter of practice".

2.3. One submission received during preliminary consultations stated that it is clear what sort of remedies must be sought by way of motion (usually being public remedies) and by way of action (usually private law remedies). While this submission provided welcome insight into the distinction, the Commission feels that this public/private division is not in fact clear from the Supreme Court Rules. In addition, the Commission is uncertain about the need to divide public and private proceedings in this way. In Part 5 (Extraordinary Remedies) the Commission discusses further the trend in other jurisdictions toward simplifying public law remedies and making them available only through statement of claim.

2.4. While rr 11 and 12 of the Supreme Court Rules set out the circumstances in which actions and motions are filed, some practitioners are not confident about the distinction. Two former practitioners told the Commission during preliminary consultations that a first step taken by the Attorney-General's Office (**'AGO'**) on receiving a Supreme Court summons is to analyse whether it was correctly commenced by way of action or motion. The AGO will seek to have the proceedings struck out under r 70 if it appears the proceedings may have been commenced in the wrong way. This suggests that the system may be overly technical, and the Commission is concerned that time and cost is wasted during this process.

2.5. Although some other jurisdictions require certain proceedings to be commenced in different ways,[5] it may be that the reason for the distinction in the Supreme Court of Samoa is purely historical. This was the reasoning offered by two stakeholders during preliminary consultations. In other jurisdictions all proceedings are commenced by way of statement of claim.[6] The procedure for commencing proceedings in the Supreme Court could be simplified by

[3] *Supreme Court (Civil Procedure) Rules 1980* r 11.
[4] Ibid r 12.
[5] *Uniform Civil Procedure Rules 2005* (NSW) rr 6.2–6.4 (proceedings commenced by statement of claim or summons); *Supreme Court (General Civil Procedure) Rules 2005* (Vic) rr 4.01, 4.04, 4.05 (proceedings commenced by writ or originating motion).
[6] *Federal Court of Australia Rules 2011* (Aus) r 8.01 (all proceedings commenced by Originating Application); *District Courts Rules 1992* (NZ) r 112, cf r 452).

amending the rules to require that all proceedings be commenced by way of statement of claim.

2.6. In the District Court all proceedings are commenced by filing a statement of claim,[7] whether classed as an 'ordinary action' or a 'default action'.[8]

2.7. In both the District and Supreme Courts, statements of claim may be amended at any time before or during the trial with leave of the Court,[9] and must contain the following information:

i) Names and descriptions of plaintiff and defendant;
ii) Nature of the cause of action[10]; and
iii) Relief Claimed.[11]

Question 1: Should the *Supreme Court (Civil Procedure) Rules 1980* be amended to require all proceedings to be commenced by statement of claim?

Question 2: Alternatively, should rules 11 and 12 of the *Supreme Court (Civil Procedure) Rules 1980* state in clearer terms the circumstances where actions and motions are used, reflecting the public/private actions divide?

Filing

2.8. The Magistrates' Court Rules do not set out any procedures for filing. The Supreme Court Rules stipulate that when a statement of claim is filed, the Registrar must enter the action in the Actions book, fix a day for hearing, and issue a summons (per form 1).[12] No guidelines are provided to parties about how documents are filed, but preliminary consultations revealed that it is generally understood that parties simply attend the court registry and submit the document for filing.

2.9. The Commission understands that documents filed in the District and Supreme Courts of Samoa must be printed on bond paper, although this is not provided for in the civil procedure rules. A document not printed on bond paper will not be accepted by registry for filing, even if it otherwise complies with the civil procedure rules. The Commission is concerned that the need to use bond paper for filing creates unnecessary costs for parties. Of further concern is that parties may not be aware of the requirement, which is not set out in the civil procedure rules.

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[7] *Magistrates' Court Rules 1971* r 3.
[8] Default actions are discussed in Part 7 below:
Summary judgment.
[9] *Magistrates' Court Rules 1971* r 9; *Supreme Court (Civil Procedure) Rules 1980* r 17.
[10] In the Supreme Court, this includes particulars as set out in the *Supreme Court (Civil Procedure) Rules 1980* r 15.
[11] *Magistrates' Court Rules 1971* r 3; *Supreme Court (Civil Procedure) Rules 1980* rr 13, 15.
[12] *Supreme Court (Civil Procedure) Rules 1980* r 14.

2.10. In New South Wales, documents may be filed in person or by sending the documents by post to the registry.[13] In the Federal Court of Australia, documents may also be faxed to the registry or filed electronically.[14] The Commission is aware that there may not be a need to initiate these other methods of filing in Samoan courts, due to the close proximity of the courts to most practitioners and parties, and also that the court registry may not have the systems to support electronic filing at this stage. We would value your comments on this matter, however.

2.11. One practitioner noted that the time taken to receive a return date on filing a summons is too slow. The procedure takes days to weeks where it should be immediate or, at the latest, the day after filing. While r 14 of the Supreme Court Rules provides that the registrar must fix a day for hearing, there is no time limit set for this. The Commission is not aware of other jurisdictions providing in their court rules a timeframe for the setting of fixtures, and it is unlikely that such a provision would be enforceable in any way against a registrar. The Commission is open to any suggestions about how this may be resolved within the civil procedure rules, but is of the preliminary view that the problem may be better resolved at the administrative level within the court.

Question 3: Should the requirement to use bond paper for filing documents:
(a) be inserted into the *Supreme Court (Civil Procedure) Rules 1980* and the *Magistrates' Court Rules 1971*; or alternatively
(b) be abolished?

Question 4: Should the *Supreme Court (Civil Procedure) Rules 1980* be amended to stipulate that filing is carried out by attending the registry in person, or should they be expanded to include methods of filing such as by post or electronically?

Question 5: Should r 14 of the *Supreme Court (Civil Procedure) Rules 1980* be amended to include a timeframe for when a date for hearing must be fixed (being the day after filing at the latest)?

Question 6: Should the rules for filing documents in the *Supreme Court (Civil Procedure) Rules 1980* be replicated in the *Magistrates' Court Rules 1971*?

[13] *Uniform Civil Procedure Rules 2005* (NSW) r 4.10(1).
[14] *Federal Court Rules 1977* (Aus) r 2.21.

3. Service of documents

Which documents must be served?

3.1 Documents requiring service are listed throughout the Supreme Court Rules:

i) Summons and statement of claim (implicit in r 14 and Part V);
ii) Motion for third party notice (on plaintiff), third party notice (on third party/co-defendant), and statement of defence (on plaintiff and defendant (rr 43–44, 47);
iii) Witness summons (r 53);
iv) Notice to admit specific facts (implicit in r 63(2));
v) Interlocutory motions on notice (r 65);
vi) Orders required to be filed under Part VIII (r 76);
vii) Order for discovery (r 86);
viii) Notice to produce documents for inspection (r 87);
ix) Form 22 notice that money is paid into court (r 103) and notice of acceptance (r 104);
x) Memorandum of discontinuance (r 109);
xi) Form 28 notice of reinstatement (r 139);
xii) Form 29 notice of new hearing (r 140);
xiii) Application for rehearing and affidavit, and form 30 order for rehearing (r 141);
xiv) Summons for garnishee proceedings (r 144), notice by creditor accepting amount paid (r 146), notice by debtor disputing amount (r 149);
xv) Interpleader summons (r 161) and claimant disclaimer or particulars (r 164);
xvi) Form 44 order to change parties (r 170); and
xvii) Writ of sale (r 175).

3.2 The Magistrates' Court Rules only require service of:

i) Summons and statement of claim (implicit, eg r 4);
ii) An order directing the defendant to file a defence, together with summons and statement of claim, where the amount involved exceeds $100 (r 7(2));
iii) Notice of intention to defend, or counterclaim (r 16); and
iv) Memorandum of discontinuance (r 20).

3.3 The Commission is interested to receive submissions on whether these service requirements reflect current practice or whether there are additional documents that require – or ought to require – service. In New South Wales, the *Uniform Civil Procedure Rules 2005* eliminate any confusion about which documents should be served, by stipulating that any document filed in court must be served upon all other active parties.[15] In addition, affidavits which have not been filed, but which a party intends to rely on in court, must be served on all interested parties.[16]

[15] Rule 10.1(1).
[16] *Uniform Civil Procedure Rules 2005* (NSW) r 10.2.

Question 7: Should service for any documents in addition to those listed at paras 3.1 and 3.2 be required explicitly by the *Supreme Court (Civil Procedure) Rules 1980* or the *Magistrates' Court Rules 1971*? (For example, affidavits, injunctions.) If so, which documents?

Question 8: Should the *Supreme Court (Civil Procedure) Rules 1980* and the *Magistrates' Court Rules 1971* stipulate that *any document filed in court* must be served on all active parties?

How is service effected?

3.4 Part V of the Supreme Court Rules sets out procedures governing the following aspects of service of actions:

i) *who* may effect service (r 18: police officer; officer of the Court; plaintiff or plaintiff's agent, as determined by the Registrar);
ii) *how* service is effected (rr 19–22: in person; in a company or partnership with a person of authority; on an agent with leave of the court; or on the defendant's premises in actions for recovery of land);
iii) *when* service may be effected (rr 24, 26: within 12 months from date of issue of summons and 10 clear days before hearing, or 28 clear days for certain actions, and not on certain holidays);
iv) *where* service may be effected (rr 27–28: within Samoa, or outside of Samoa with leave of the Court);
v) *what proof* of service is required (r 29: form 3 or a witness at hearing);
vi) circumstances where the Court may dispense with service (r 23); and
vii) circumstances were a summons may be renewed (r 25).

3.5 Part V of the Supreme Court Rules only deals with service of a summons on a defendant, although some of the rules in that Part are likely to be applied for service of other documents requiring personal service in the Supreme Court, for example r 43(5) third party notice. One practitioner noted during preliminary consultations that personal service is, in practice, required for all documents needing to be served, although this is not stated in the Supreme Court Rules.

3.6 No rules about procedure for service in the District Court are provided in the Magistrates' Court Rules, but the process for proof of service is detailed in the *District Courts Act 1969*. This requires an affidavit or deposition or, if the document was served by an officer of the Court or a constable, an endorsement on a copy of the document.

3.7 While both the Supreme Court Rules and the Magistrates' Court Rules require the service of various documents (as discussed above at 3.1 and 3.2), in most cases the rules do not explicitly provide for how or when this should be carried out. In comparable jurisdictions, ambiguity of this kind is eliminated as rules for

service are set out in such a way as to apply to the service of any document required by the rules to be served.[17]

3.8 One stakeholder during preliminary consultations noted that once documents are filed, it is often left to the court registry to serve them on the parties. Some small jurisdictions, for example the Local Court of New South Wales,[18] allow or require service by an officer of the court, but this is not expressly provided for by the Supreme Court Rules. If procedures for service of documents are clearly set out in the civil procedure rules, parties may be more likely to follow the procedures set.

Question 9: Should Part V of the *Supreme Court (Civil Procedure) Rules 1980*, which sets out only the method for service of a summons, be extended to include procedures for service for all documents required by the rules to be served?

Question 10: Should rules for service be added to the *Magistrates' Court Rules 1971*?

Timing

3.9 Only some of the rules for service in the Supreme Court provide timeframes (for example, interlocutory motions must be served not less than 24 hours before hearing of the application – r 65(1)(c)). While differences in the nature of documents to be served means that time imperatives will vary, it may be prudent to set out a general timeframe for service of all documents, unless earlier service is required by a certain rule. Alternatively, timeframes could be set out in each rule dealing with service of a document (that is, those rules set out at 3.1 and 3.2 above).

3.10 During preliminary consultations, one stakeholder noted that the current practice of the Courts is to order service of documents and to include a timeframe for service within the order. These orders will generally coincide with the dates set for court appearances. This stakeholder submitted that if timeframes are to be included in the civil procedure rules, they should reflect this practice and should be subject to the discretion of the Court. Alternatively, the existing practice, relying on the general case management powers of the Court, may be considered satisfactory. The Commission is interested to hear your views on this.

3.11 The *Uniform Civil Procedure Rules 2005* (NSW) specify at the outset that a party must serve documents on all other parties *as soon as practicable* after filing them in court.[19] This differs from the rules in the Samoan Supreme Court

[17] See, for example, *Uniform Civil Procedure Rules 2005* (NSW) rr 10.1–10.2, 10.17; *District Court Rules 1992* (NZ) r 214; *Judicature Act 1908* (NZ) Sch 2 (High Court Rules) r 6.1; *Federal Court Rules 2011* (Aus) r 10.31.
[18] *Uniform Civil Procedure Rules* (NSW) r 10.1(2).
[19] Rule 10.1(1).

which, if at all, only provide for outer time limits. No encouragement is given to parties to act efficiently in the service of documents.

Question 11: Should an outer time limit be given for the service of documents in the *Supreme Court (Civil Procedure) Rules 1980* or the *Magistrates' Court Rules 1971*, noting that more urgent applications may need to be served earlier? If so, what would be an appropriate timeframe?

Question 12: Alternatively, should timing be stipulated in each rule in the *Supreme Court (Civil Procedure) Rules 1980* or the *Magistrates' Court Rules 1971* that requires service of a particular document?

Question 13: In addition to, or instead of, providing outer time limits for the service of documents, should the *Magistrates' Court Rules 1971* and Part V of the *Supreme Court (Civil Procedure) Rules 1980* be amended to include a requirement that service be effected 'as soon as practicable' after filing?

Methods of service

Personal service

3.12 Under Part V of the Supreme Court Rules, service of a summons must generally be done personally (r 19, cf r 23). This is in line with the court rules of comparable jurisdictions.[20] Other documents requiring personal service in the Supreme Court are: a third party notice (r 43); notice of reinstatement (r 139); and a summons in garnishee proceedings (r 145). Other than those documents, personal service is not explicitly required by the Supreme Court Rules. It is not clear from the Magistrates' Court Rules when, if at all, personal service is required. According to practitioners interviewed by the Commission during preliminary consultations, however, personal service is always used in Samoa.

3.13 The Victorian Supreme Court rules relating to service state at the outset that 'any document required or permitted to be served in a proceeding may be served personally, but unless personal service is required by these Rules or by order, need not be served personally'.[21]

3.14 The rules for how service may be effected in New South Wales for each type of document are summarised neatly in rule 10.20 of the *Uniform Civil Procedure Rules 2005*. This is a convenient and clear way of setting out the procedures for service in a comparatively large jurisdiction, but the Commission is interested to receive submissions on whether alternative methods of service are necessary in a small jurisdiction like Samoa. Questions for discussion are set out below.

[20] For example, *Uniform Civil Procedure Rules 2005* (NSW) r 10.20; *Federal Court Rules 2011* (Aus) r 8.06; *District Court Rules 1992* (NZ) r 132.
[21] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 6.01.

3.15 If no alternative methods are available nor are to be made available, it may be prudent to clarify in the civil procedure rules that personal service is required for service of all documents.

3.16 In the Supreme Court, service may be proved by affidavit or by a witness,[22] but there is no definition for personal service in the Supreme Court Rules other than the r 19 requirement that '[t]he summons shall be served on the defendant in person'. The Courts in Samoa therefore need to rely on the common law standard for 'personal service'. This will generally be met where the document has been seen by, or has come into contact with, that person. For example, when Sonny Bill Williams refused to accept service by a French process server at a training session in Toulon, France, the server threw the document onto the ground toward him saying "you've been served". A trainer then picked up the documents, handing them to Williams and saying, "Williams, *c'est pour toi*" ("it's for you"). The Supreme Court of New South Wales held he had been personally served.[23]

3.17 For clarity, however, the insertion into the civil procedure rules of a more instructive definition of personal service (or various definitions as required – see below) should be considered. Of particular concern is service of documents on a person who not only refuses to accept service but threatens violence. Definitions for personal service in the court rules of comparable jurisdictions vary from the general to the specific, with the New South Wales definition providing a procedure for service in violent circumstances (see 3.19 below).[24]

3.18 In the Federal Court of Australia, the definition for personal service is simple: 'A document that is to be served personally on an individual must be served by leaving the document with the individual.'[25] New Zealand's *District Courts Rules 1992* provides more clarification about what 'leaving the document with the individual' entails: 'Personal service of a document may be effected by leaving the document with the person to be served, or, it [sic] that person does not accept it, by putting it down in that person's presence and bringing it to that person's notice.'[26]

3.19 The New South Wales *Uniform Civil Procedure Rules 2005* go to the extent of defining personal service in the case of anticipated or actual violence:[27]

> (1) Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.
> (2) If, by violence or threat of violence, a person attempting service is prevented from approaching another person for the purpose of delivering a document to the other person, the person attempting service may deliver the

[22] *Supreme Court (Civil Procedure) Rules 1980* r 29.
[23] *Bulldogs Rugby League Club Ltd v Williams* [2008] NSWSC 822 at [25].
[24] See, for example, *Uniform Civil Procedure Rules 2005* (NSW) r 10.21; *Federal Court Rules 2011* (Aus) r 10.01; *District Courts Rules 1992* (NZ) r 219.
[25] *Federal Court Rules 2011* (Aus) r 10.01.
[26] Rule 219.
[27] Rule 10.21.

document to the other person by leaving it as near as practicable to that other person.

3.20 The Supreme Court Rules give some guidance as to how documents may be personally served on a corporation (r 20), on members of a firm (r 21), or on an agent (r 22), and s 345 of the *Companies Act 2001* provides further detail about service of documents to a company. Other jurisdictions include separate requirements for personal service on various other legal persons: a local corporation; a foreign corporation; an unincorporated society; a partnership; a Crown Solicitor; a judicial officer; an inmate of a correctional facility/penal institution; a person who 'keeps house' (ie, refuses to come out of a premises to accept service); a defendant on board ship; a serving member of armed forces; the attorney or agent of an absentee; a person under legal incapacity (ie, a child or a person with a disability); and spouses or partners.[28] While they may not all be considered necessary in Samoa, it may be useful to add some of these categories of personal service to the civil procedure rules.

Question 14: In either the *Magistrates' Court Rules 1971* or the *Supreme Court (Civil Procedure) Rules 1980*, is there a need to clarify which documents must be served personally, or to set out that all documents must be served personally?

Question 15: Should either or both of the *Supreme Court (Civil Procedure) Rules 1980* and/or the *Magistrates' Court Rules 1971* include a general definition for personal service?

Question 16: If a general definition for personal service is included in either the *Supreme Court (Civil Procedure) Rules 1980* or the *Magistrates' Court Rules 1971*, should specific definitions also be used to apply to certain categories of persons? If so, to which categories?

Postal, fax and electronic service

3.21 As discussed above, the civil procedure rules in their current form do not detail the methods for service of documents, other than summonses in the Supreme Court. While practitioners have noted that personal service is used in Samoa for any documents requiring service, the Rules do not explicitly require personal service for all documents. Other methods of service could be considered for documents other than summonses, third party notices, notices of reinstatement and summonses in garnishee proceedings (all of which explicitly require personal service).

3.22 In the District Court of New Zealand, documents not requiring personal service may be served: by personal service; by service at an address for service given by a party or directed by the court or registrar; by posting to a supplied post office box or document exchange; or by sending to a supplied facsimile number.[29]

[28] See *Uniform Civil Procedure Rules 2005* (NSW) rr 10.21–10.26; *District Courts Rules 1992* (NZ) rr 220–231; *County Court Civil Procedure Rules 2008* (Vic) r 6.04.
[29] *District Court Rules 1992* (NZ) r 214.

3.23 Similarly, service of documents not requiring personal service in New South Wales may be carried out in the following ways:[30]

i) by personal service;
ii) by post or hand delivery to an active party's address for service;
iii) by post or hand delivery to a non-active party's residential or business address;
iv) where the other party is represented by a solicitor, by post, fax or electronic service; or
v) as per an agreement between parties.

3.24 During preliminary consultations, some practitioners were concerned that alternative methods of service could result in documents not arriving. One stakeholder noted that service by post would mean that documents may not arrive within a timeframe set for service. While there is a presumption in other jurisdictions that documents served by post have arrived a few business days after sending,[31] the postal service in Samoa may not be sufficiently reliable to allow this. In addition, unrepresented litigants may not have postal addresses.

3.25 The likelihood of documents failing to arrive could be reduced by requiring that documents may only be served on active parties if they have provided an address/fax number/email address for service. Fax machines provide information about whether a document has been correctly sent, and the sender of an email is generally notified by the server when emails have not been successfully delivered, and can usually issue a request for a receipt upon delivery.

3.26 Personal service is of course the most reliable method of service, and should always be required for service of the originating process. Technological advances since the inception of the Supreme Court Rules in 1980 have made other methods of service available and, given the need for efficiency in court practices, alternative methods of service should be considered for other documents.

3.27 On the other hand, during preliminary consultations some stakeholders were of the opinion that there is no need for other forms of service in Samoa, given that legal practitioners work within a small radius of one another and that unrepresented litigants need to be served personally due to lack of access to fax machines, email and even postal addresses.

Question 17: Should the *Supreme Court (Civil Procedure) Rules 1980* and the *Magistrates' Court Rules 1971* be amended to include rules for service by post to a party, and by fax and/or email to a party's solicitor of documents other than summons and other documents expressly requiring personal service under the rules?

[30] *Uniform Civil Procedure Rules 2005* (NSW) rr 10.5–10. 6.
[31] For example, on the fourth day after sending: *Federal Court Rules 2011* (Aus) r 10.32.

Service on those without legal capacity

3.28 The *Supreme Court (Civil Procedure) Rules 1980* do not provide for service on a person under legal incapacity (for example, a child or a person with a disability that interferes with that person's ability to communicate and effectively manage his/her own affairs).

3.29 In New South Wales, where a civil proceeding concerns a person under legal incapacity, a document (unless it must be served personally under r 10.12(8)) can be served on:[32]

i) the person's tutor in the proceedings;
ii) a person approved by the court; and

if the person is under incapacity because he/she is a minor:

iii) on the minor, if aged 16 and above;
iv) on a parent/guardian of the minor; or
v) on the person with whom the minor resides, if there is no parent/guardian.

Most Australian jurisdictions consider 16 years to be a sufficient age to accept service of a court document.

3.30 In the Victorian Supreme Court a minor is served through a parent, guardian or person with whom the minor resides or in whose care the minor is, and a 'handicapped person' is served through a litigation guardian or person with whom the handicapped person resides or in whose care the handicapped person is.[33]

3.31 The *Convention on the Rights of Persons with Disability* (**'CRPD'**), to which Samoa intends to become a party, provides that persons with disabilities should 'enjoy legal capacity on an equal basis with others in all aspects of life', and that 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.[34] Given Samoa's intention to comply with the provisions of the CRPD, it may be prudent to insert a provision into the Rules providing for service on a person under a legal incapacity.

Question 18: Should the *Magistrates' Court Rules 1971* and Part V of the *Supreme Court (Civil Procedure) Rules 1980* be amended to provide for service to persons under legal incapacity (ie, children and persons with disability)?

Service overseas

Leave of the Court

3.32 Service of a Supreme Court summons may be effected outside of Samoa with leave of the Court, where the cause of action has arisen in Samoa or where the subject matter of the action is properly situated in Samoa. The application for

[32] *Uniform Civil Procedure Rules 2005* (NSW) r 10.12.
[33] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 6.04.
[34] *Convention on the Rights of Persons with Disability*, opened for signature 30 March 2007, 2515 UNTS 3, art 12 (entered into force 3 May 2008).

such leave is an ex parte motion supported by evidence.[35] No overseas service is provided for in the Magistrates' Court Rules.

3.33 While some stakeholders, during preliminary consultations, said they were happy with the existing procedure, others raised concerns that the requirement for leave of the Court to serve a summons outside of Samoa creates unnecessary delays. The need to apply to the Court for leave could be removed if the Rules are amended to include more detailed guidelines about what constitutes a 'cause of action or some material part thereof (that) has arisen in Samoa' and when 'the subject matter of the action is properly situated in Samoa'. This is the approach taken in other jurisdictions.

3.34 In New South Wales, instead of seeking leave of the Court to serve an originating process,[36] a plaintiff must include with the originating process a notice that it is to be filed overseas. Essentially, this may be done where the cause of action has arisen in New South Wales, or where there is some other link to New South Wales that satisfies the detailed guidelines set out in a schedule to the Act.[37] If these rules are not complied with, the Court may set aside the originating process.[38]

3.35 In the New Zealand District Court, an originating process may also be served outside the jurisdiction without leave where the matter is sufficiently connected to New Zealand, according to the guidelines set out in the rules.[39] In other circumstances, documents may be served outside of New Zealand with leave.[40]

Manner of service

3.36 There is no provision in the Rules for *how* service of a summons outside of Samoa may be effected. One practitioner explained during preliminary consultations that documents are normally served by a lawyer practising in the overseas jurisdiction where the document is to be served. In New South Wales, a document to be served outside Australia need not be served personally, provided it is served according to the laws of the overseas jurisdiction.[41] To avoid doubt, this rule could be explicitly stated in the *Supreme Court (Civil Procedure) Rules 1980*.

3.37 Practitioners have indicated in preliminary consultations that service of a summons overseas is often impracticable and that use of a Samoan-based agent to do this would increase efficiency of the process. Samoa is not a party to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*[42] (**'Hague Service Convention'**). The purpose of this Convention is to facilitate and expedite procedures for service of legal

[35] *Supreme Court (Civil Procedure) Rules 1980* r 28.
[36] Note that leave of the Court is required in New South Wales for service overseas of a document other than originating process: *Uniform Civil Procedure Rules 2005* (NSW) r 11.5.
[37] *Uniform Civil Procedure Rules 2005* (NSW) rr 11.2–11.3, sch 6.
[38] Ibid r 11.7.
[39] *District Courts Rules 1992* (NZ) r 242.
[40] Ibid r 243.
[41] *Uniform Civil Procedure Rules 2005* (NSW) r 11.6.
[42] Opened for signature 15 November 1965, 658 UNTS 165 (entered into force 10 February 1969).

documents overseas. If Samoa were party to the Hague Service Convention, a local lawyer could serve documents in overseas countries also party to the Convention.

3.38 Under the Hague Service Convention, a 'Central Authority' is designated by each States Party to accept requests for service from a 'judicial officer' who is competent to serve process in the state of origin. It is up to the contracting state to determine who is a competent judicial officer, but lawyers and process servers are likely to be included.[43] A standard form 'request for service' and summary of proceedings is sent to the Central Authority (art 4), who arranges for service in a manner permitted within the receiving state (art 5). Once service is effected, the Central Authority sends a certificate of service to the judicial officer who made the request (art 6). There is no charge for this service (art 12), and the Hague Service Convention process need not be used if a party chooses to use other legitimate means to serve a document (arts 8, 10).

3.39 At present, as Samoa is not a party to the Hague Service Convention, overseas agents must be used to ensure that overseas service complies with the laws of the jurisdiction. Service under the Hague Service Convention is likely to be cheaper because it allows service to be effected by a local lawyer, without hiring a foreign lawyer to advise on how to serve. On the other hand it may involve some cost to Samoa which, as a signatory, would need to also designate a Central Authority to provide this service, at no cost, to international litigants wishing to service documents in Samoa.

3.40 Perhaps most relevantly to Samoa, Australia, the United States of America, China and India are all party to the Hague Service Convention, but at present New Zealand is not.

Question 19: Should the requirement in s 28 of the *Supreme Court (Civil Procedure) Rules 1980* to seek leave of the Court to serve a summons outside of Samoa be removed, and more guidelines be provided on the situations in which a summons (or any other document) may be served overseas?

Question 20: Should the *Supreme Court (Civil Procedure) Rules 1980* be amended to include a provision stating that a document to be served outside Samoa need not be served personally provided it is served according to the laws of the overseas jurisdiction?

Question 21: Should Samoa become party to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, and provide for service under that Convention in the *Supreme Court (Civil Procedure) Rules 1980*?

Question 22: Should rules for service outside of Samoa be inserted into the *Magistrates' Court Rules 1971*?

[43] Hague Conference on Private International Law, 'Outline of the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*' (November 2009) 1 (fn 3).

4 Interlocutory Motions

4.1 Part VIII of the Supreme Court Rules sets out the procedure for interlocutory motions, which are applications that take place during the course of proceedings. These may be made either ex parte or on notice and must be accompanied by an affidavit. On hearing an application the Judge or Registrar may make any order that is just.[44]

4.2 The following interlocutory procedures are detailed under Part VIII:

i) directions given by a Judge on application of a party or of own motion (r 67);
ii) adjournment of proceedings by Judge or Registrar on application of a party or of own motion (r 68);
iii) strike-out of proceedings where no action disclosed (r 70);
iv) interim and other orders made by Judge or Registrar on application of a party or of own motion (rr 71–76);
v) interrogatories, which can be delivered by any party with leave (rr 77–85);
vi) discovery (r 86); and
vii) notice to produce documents by parties (s 87) or by the Court (rr 91, 92).

4.3 Special rules for dealing with interlocutory motions are set out where Government (r 94), infants or 'mentally defective persons' (r 95) are party to proceedings.

4.4 The Magistrates' Court Rules do not set out procedures for interlocutory motions.

Question 23: Should the procedures for any or all interlocutory motions be provided for in the *Magistrates' Court Rules 1971*?

Discovery

4.5 During preliminary consultations, one legal practitioner noted that where an order for discovery has been made and served upon a party, there is a discrepancy in timing requirements between r 86(3) and Form 17. Form 17 (to be used by a party ordering discovery) requires that the requested party file in court and serve its list of documents 7 days after service of the order, whereas r 86(3) gives 10 days. The legal practitioner commented that 10 days, being the longer time period, is usually accepted.

Question 24: Should Form 17 (Order for Discovery of Documents) in the *Supreme Court Civil Procedure Rules 1980* be amended to allow a party ordered to make discovery 10 days, rather than 7 days, to file and serve an affidavit of documents?

[44] *Supreme Court (Civil Procedure) Rules 1980* r 65.

Strike-out proceedings

4.6 Under r 70 of the Supreme Court Rules, a defendant may apply to have proceedings struck out by a Judge where no cause of action is disclosed. Strike-out proceedings are not explicitly available in the District Court under the Magistrates' Court Rules.

4.7 One stakeholder noted during preliminary consultations that the strike-out provision is routinely used by some defence lawyers in the Supreme Court as a 'first defence' to any proceedings filed. While the Commission is concerned by the waste of time and cost that may be caused by the use of the strike-out procedure in this way, we have been unable to identify any amendment to the civil procedure rules, other than judicial case management practices, that might prevent this from happening. The Commission is, of course, open to all suggestions.

4.8 A member of the judiciary indicated that the strike-out procedure is not effective for frivolous or vexatious proceedings, because the process wastes time and cost. While the strike-out procedure is used for this same purpose in various other jurisdictions, the Federal Court of Australia has introduced novel ways of dealing with frivolous or vexatious proceedings.

4.9 Firstly, a Federal Court Registrar may refuse to accept a document (including an originating application) for filing if satisfied that the document is an abuse of the process of the Court or is frivolous or vexatious.[45] While Registrars of the Federal Court of Australia are experienced lawyers with extensive training, the Commission is aware that Registrars of the District and Supreme Courts of Samoa may not have the necessary knowledge, skills and experience to enable them to make such a decision.

4.10 Once a Federal Court Registrar accepts an originating process for filing, a defendant may apply to have the matter struck out or the document removed from the court file,[46] or may apply for summary judgment[47] or use strike-out proceedings[48] (not dissimilar to the procedure available under r 70 of the *Supreme Court (Civil Procedure) Rules 1980*).

4.11 There is an additional procedure available for parties considered to be vexatious litigants. If a person starts a vexatious proceeding[49] in the Federal Court, r 6.02 of the *Federal Court Rules 2011* (Aus) can be used by the respondent, the Attorney-General, the Registrar or an interested person to

[45] *Federal Court Rules 2011* (Aus) r 2.26.
[46] Ibid r 6.01.
[47] Ibid r 26.01.
[48] Ibid r 16.21.
[49] A 'vexatious proceeding' is defined as: '(a) a proceeding that is an abuse of process of the Court; or (b) a proceeding started or conducted in a way to harass or annoy, cause delay or detriment, or for any other wrongful purpose; or (c) a proceeding started or pursued without any reasonable ground': *Federal Court Rules 2011* (Aus) Sch 1.

apply to the Court for an order that the person must not continue the proceeding or start or continue any other proceeding in the Court without the leave. This may be an effective way of dealing with people who continually file vexatious proceedings, as leave of the Court is required before further proceedings may be commenced.

Question 25: Should the civil procedure rules introduce either or both of the following procedures to deal with vexatious documents and vexatious litigants?

(a) The Registrar may refuse to accept a document for filing if satisfied that it is an abuse of the process of the Court or is frivolous or vexatious.

(b) If a person starts a vexatious proceeding, the defendant or the Attorney-General, Registrar or other interested person may apply to the Court for an order that a person may not continue a proceeding or start or continue any other proceeding without leave.

Undertaking as to damages

4.12 Under r 66(b) of the Supreme Court Rules the Court may require a person applying for an interlocutory motion to 'give an undertakings [sic]'. This undertaking as to damages is an undertaking to the court to submit to a later order for the payment of compensation to any person affected by the operation of the interlocutory order.

4.13 During preliminary consultations a member of the judiciary expressed concern that such an undertaking may prove worthless where the party making the undertaking has no assets. There is no requirement to supply evidence of capacity to pay the undertaking if it is later enforced.

4.14 While the Commission is not aware of an explicit requirement in the civil procedure rules of any other jurisdiction that an undertaking as to damages be accompanied by evidence of ability to pay such damages, the Supreme Court Rules could be amended to include such a requirement, or to include a requirement that the applicant pay a bond into court. On the other hand, judges could impose such conditions on an ad hoc basis under the power of the Court in r 66 to 'impose such terms and conditions as it thinks fit' on an application for interlocutory motion.

Question 26: Should the requirement for undertakings as to damages in r 66(b) of the *Supreme Court (Civil Procedure) Rules 1980* be amended to require the applicant to:

(a) file an affidavit or other evidence demonstrating ability to pay; or

(b) pay a bond into court?

5. Extraordinary Remedies

5.1 Extraordinary remedies are typically used in the context of judicial review of administrative decisions; that is, in relation to actions done or not done by government officials. They were traditionally granted by way of prerogative writ, a practice since done away with in many courts because it is no longer relevant to modern legal systems. Extraordinary remedies are not generally favoured by the courts, and in the State of Utah are available only 'where no other plain, speedy and adequate remedy is available'.[50]

5.2 Four extraordinary remedies are set out in part XIX of the Supreme Court Rules:

i) mandamus: a judicial command compelling the respondent – usually a public official – to perform a duty incumbent upon him/her;[51]

ii) injunction: an order restraining the respondent – usually a public official – from breaching a duty he or she has committed or may commit;[52]

iii) prohibition: an order prohibiting an inferior Court, tribunal, Magistrate or Fa'amasino Fesoasoani from exercising any jurisdiction which he/she/it is not by law empowered to exercise;[53] and

iv) certiorari: a direction that an action be removed from an inferior Court or from any statutory tribunal into the Supreme Court.[54]

5.3 A request for extraordinary remedy is made by motion on notice, accompanied by a statement of claim and a supporting affidavit (r 196). A defendant must file a defence, which may be accompanied by an affidavit in reply (r 197).

5.4 A member of the judiciary noted during preliminary consultations, in the context of injunctions, that there is no procedure in the Supreme Court Rules for testing the truth of supporting affidavits and affidavits in reply, which often contradict each other as to basic facts. Such a situation is often resolved by the judge setting the extraordinary remedy down for hearing and, if necessary, issuing an interim injunction. This can cause delays of up to 3 to 6 months.

5.5 The Commission is of the preliminary view that a court hearing is the appropriate way to resolve such a conflict, and that this intention is shown by the r 196 requirement to file a statement of claim. This may be problematic where an urgent injunction is sought and an immediate decision is required. The Commission believes, however, that urgent injunctions would usually be applied for by way of interlocutory motion.

5.6 There is a distinction between the equitable injunction and injunction as a public law remedy, as it is under r 193. Where an urgent injunction is sought in

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[50] *Utah Rules of Civil Procedure* (as at 28/12/2011) r 65B.

[51] *Supreme Court (Civil Procedure) Rules 1980* r 192; Mark Aronson, Bruce Dyer, Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 720, 723.

[52] *Supreme Court (Civil Procedure) Rules 1980* r 193.

[53] Ibid r 194.

[54] Ibid r 195. Note that certiorari generally empowers the Court to quash or expunge the decision of the inferior court, and the record of the decision: Mark Aronson, Bruce Dyer, Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 691.

relation to another proceeding already underway (for example, to prevent a debtor from leaving the jurisdiction, or to prevent the burial of a person on land whose ownership is under dispute) the equitable remedy can be sought as an interlocutory motion under Part VIII, r 71 of the Supreme Court Rules.

5.7 One stakeholder took issue with the r 196 requirement to file a statement of claim with an application for extraordinary remedy, arguing that statements of claim are reserved for private law remedies. The Commission is unaware of any such restriction, either in Samoan jurisdictions or elsewhere (see also discussion in Part 2 Commencement of Proceedings). There does not appear to be any justification for excluding public actions from the requirement to set out the facts upon which a claim is based. In fact, some jurisdictions have done away with the traditional mechanism of granting extraordinary remedies by way of 'writ', now requiring an ordinary originating application (statement of claim) to be filed, requesting an order 'in the nature of' mandamus/prohibition/certiorari, etc.

5.8 The Supreme Court of British Columbia is one jurisdiction that has abolished the writs of mandamus, prohibition, certiorari and habeas corpus. Applications for relief in the nature of these remedies are made by way of petition (originating application), and the relief is given as an order of the Court.[55] In the Federal Court of Australia, applications for these types of relief under the *Administrative Decisions (Judicial Review) Act 1977* and s 39B of the *Judiciary Act 1903* are also made by originating application.[56] In the interests of modernising and streamlining civil procedure in Samoa, it is worth considering whether all extraordinary remedies should be sought by way of statement of claim, and granted as orders rather than as writs.

5.9 Mandamus, prohibition, certiorari and injunction are not provided for in the Magistrates' Court Rules. Some stakeholders noted during preliminary consultations that it would be useful to make these remedies, particularly injunctions, available in the District Court if its jurisdiction is increased. Others thought there would be no need for most extraordinary remedies in the District Court, and one stakeholder questioned whether the District Court could be given the jurisdiction to apply some of these remedies.

5.10 As discussed above, mandamus, prohibition, and certiorari operate to correct administrative decisions. Typically their exercise belongs in courts of superior record. Since the District Court does not have jurisdiction to carry out judicial review, it appears that there is no rationale for providing these procedures in the Magistrates' Court Rules. Equitable injunctions may still be available in the District Court. The Commission is open to differing views on this matter.

Question 27: Should the procedure for Extraordinary Remedies under Part VIII of the *Supreme Court (Civil Procedure) Rules 1980* be done away with entirely, with orders of mandamus, injunction, prohibition and certiorari being available through the use of statement of claim?

[55] *Supreme Court Civil Rules* (BC) r 21-3(1)–(2).
[56] *Federal Court Rules 2011* rr 31.01(1), 31.11.

Question 28: If the jurisdiction of the District Court is increased, should any of the extraordinary remedies set out in Part XIX of the *Supreme Court (Civil Procedure) Rules 1980* be replicated in the rules for that Court? If so, which remedies?

6 Garnishee proceedings

6.1 Part XIV of the Supreme Court Rules provides for garnishee proceedings, whereby a court order for the payment of a sum of money may be enforced against a third party (**'sub-debtor'**) who owes money to, or holds money for, the judgment debtor (**'debtor'**). Garnishee proceedings are instituted by way of affidavit (r 144) and the Registrar issues a summons to the sub-debtor and a notice to the debtor (r 144). These are to be served personally at least 10 days before hearing (r 145).

6.2 If the sub-debtor does not pay the amount into court before the hearing, and does not appear at the hearing, the Judge may make an enforceable order for payment of the money (r 148). If the amount owing or paid is disputed by either the creditor or the sub-debtor, the Judge may determine the question of liability, order a trial of the question, or order that the creditor may sue the sub-debtor (r 149).

6.3 Stakeholders noted during preliminary consultations that garnishee proceedings are rarely used in the Supreme Court because the process is too cumbersome. The apparent complexity of Part XIV may in part be due to the fact that garnishee proceedings, by their nature, can turn up various situations. The following circumstances are provided for in the Supreme Court Rules:

i) where the sub-debtor pays money into court before the garnishee proceedings (rr 146, 147);
ii) where the sub-debtor fails to pay the money or appear in court (r 148);
iii) where the sub-debtor disputes liability (r 149);
iv) where a third person has a claim to the money claimed by the judgment creditor ('creditor') from the sub-debtor (r 150);
v) where the sub-debtor owes money to the debtor under a court order or judgment (r 153); and
vi) where money has been paid into court and held for the debtor (r 154).

6.4 The rules for garnishee proceedings in comparable jurisdictions are not dissimilar,[57] and Part XIV of the Supreme Court Rules in fact represents a simplified version of the rules for garnishee proceedings in the New Zealand *District Courts Rules 2009*.[58] Which provisions are applicable will depend on the circumstances of a case, and the basic procedure for using garnishee proceedings does not appear on the face of it to be too complex or onerous. However, the very fact that garnishee proceedings are used so rarely indicates that the rules could be made more user-friendly, and the Commission would appreciate any suggestions as to how this could be achieved.

6.5 Garnishee proceedings are permitted under s 98 of the *District Court Act 1969* but the procedure for carrying these out is not provided for in the Magistrates' Court Rules.

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[57] See, for example, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 71; *Uniform Civil Procedure Rules 2005* (NSW) rr 39.34–39.43.
[58] See rr 15.74 – 15.92.

6.6 With the present jurisdiction of the District Court, stakeholders have noted, use of such proceedings is not practical because the sums of money in question are so small. If the jurisdiction were increased, however, some stakeholders thought that garnishee proceedings would be useful in the District Court, given the considerable number of debt recovery cases that will go to that Court.

Question 29: Should the procedure for garnishee proceedings be simplified? If so, in what way?

Question 30: Should garnishee proceedings be added to the rules of the District Court if the jurisdiction of that Court is increased?

7. Summary judgment

7.1 Neither the Magistrates' Court Rules nor the Supreme Court Rules contain procedures for summary judgment. In other jurisdictions, a plaintiff may use the summary judgment procedure to file an application for judgment against the defendant on the basis that the defendant has revealed no defence to a claim.[59]

7.2 In some jurisdictions, the summary judgment process can also be used by a defendant where the plaintiff has disclosed no cause of action in the statement of claim.[60] In the Supreme Court of Samoa, r 70 of the *Supreme Court (Civil Procedure) Rules 1980* enables a defendant to make an application to have the matter struck out in these circumstances (as discussed above at 4.6).

7.3 The grounds for seeking summary judgment are described differently across jurisdictions. Some court rules have a basic formulation, while others provide more detail.

7.4 In the Federal Court of Australia a party may apply for summary judgment where:

i) the applicant has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding; or
ii) the proceeding is frivolous or vexatious; or
iii) no reasonable cause of action is disclosed; or
iv) the proceeding is an abuse of the process of the Court; or
v) the respondent has no reasonable prospect of successfully defending the proceeding or part of the proceeding.[61]

7.5 In the Victorian Supreme Court and in New South Wales, a plaintiff can obtain summary judgment against the defendant where there is evidence that the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed.[62] Summary judgment can be used to resolve part of a claim, with the remainder of the proceedings continued as normal.[63] Summary dismissal – a separate procedure similar to r 70 of the *Supreme Court (Civil Procedure) Rules 1980* (Samoa) – may be used in both jurisdictions by a defendant to have a plaintiff's action dismissed where it is frivolous or vexatious, reveals no cause of action or is an abuse of process.[64]

7.6 In the New Zealand District and High Courts the summary judgment procedure may be used against a defendant if the plaintiff satisfies the Court that the

[59] See, for example, *Federal Court Rules 2011* (Aus) r 26.01; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 22.02; *Uniform Civil Procedure Rules 2005* (NSW) r 13.1; *District Courts Rules 1992* (NZ) r 152(1).
[60] See, for example, *District Courts Rules 1992* (NZ) r 152(2); *Federal Court Rules 2011* (Aus) r 26.01. Other jurisdictions use strike-out proceedings in such instances.
[61] *Federal Court Rules 2011* (Aus) r 26.01.
[62] *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 22.02; *Uniform Civil Procedure Rules 2005* (NSW) r 13.1.
[63] *Uniform Civil Procedure Rules 2005* (NSW) r 13.3.
[64] Ibid r 13.4; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 23.01.

defendant has no defence to a claim or to part of a claim.[65] This procedure is commenced by interlocutory application on notice with a supporting affidavit making out the claim.[66] The High Court has stressed the high onus on the plaintiff to show that the defendant has no defence or, in other words, there is no real question to be tried.[67]

Question 31: Should a summary judgment procedure be added to the *Supreme Court (Civil Procedure) Rules 1980* and/or the *Magistrates' Court Rules 1971* for use by a plaintiff where the defendant has revealed no defence?

Question 32: Should the strike-out procedure in r 70 of the *Supreme Court (Civil Procedure) Rules 1980* be added to the *Magistrates' Court Rules 1971* for use by a defendant where the plaintiff has raised no cause of action?

Default actions in the District Court

7.7 Default judgment differs from summary judgment in that it applies where the defendant has not filed any defence or responded to the plaintiff's claim within the time required by court rules. In comparable jurisdictions, default judgment may be used for any sort of claim in these circumstances.[68] In the District Court of Samoa it is limited to the recovery of a debt or liquidated demand, including interest.

7.8 Under the default judgment process in the District Court, a plaintiff may have judgment entered immediately if the defendant does not pay or dispute the plaintiff's claim within 7 days after the service of the summons.[69] At the written request of the plaintiff, default judgment may be entered by 'a Magistrate or Fa'amasino Fesoasoani or the Registrar' for the amount of the claim, or any part thereof, and costs.[70]

7.9 A default action may not be brought against an infant, a mentally defective person, or against the government. Nor may it be used: by a moneylender; to recover money payable under a hire-purchase agreement; or to recover interest if the rate of interest is more than 10 percent.[71]

7.10 During preliminary consultations, one practitioner remarked that the default proceedings procedure is very useful. This stakeholder was of the opinion that there is no reason to exclude moneylenders and financial institutions charging more than 10 percent interest.

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[65] *District Courts Rules 1992* (NZ) r 152; *Judicature Act 1908* (NZ) Sch 2 r 12.2. The process may also be used against a plaintiff where none of the causes of action can succeed

[66] *District Courts Rules 1992* (NZ) r 154; *Judicature Act 1908* (NZ) Sch 2 r 12.4.

[67] *New Zealand Breweries v Jays* [2004] HCNZ (14 December 2004) [15]–[19] citing *Pemberton v Chappell* [1987] 1 NZLR 3.

[68] See for example, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) Order 21; *Uniform Civil Procedure Rules 2005 (NSW)* Order 16.

[69] *Magistrates' Court Rules 1971* rr 4(b), 6(2), 16.

[70] Ibid r 16.

[71] Ibid r 6.

7.11 A possible justification for the exclusions is that moneylenders and banks have a disproportionate amount of power in comparison to most debtors, and there is often more at stake in the dispute. In such circumstances, the consequences could be very serious for an individual deprived of his/her right to have the matter heard before an independent tribunal due to a simple failure to contest the claim within seven days.

7.12 On the other hand, the Commission is not aware of any exception of this nature in the default judgment procedures of other jurisdictions.[72] In New South Wales, default judgment is available for any claim for which the defendant has not filed a defence within the time required.[73] Where the process is used for the recovery of a liquidated demand (including interest up to judgment and costs), there is no limitation provided the plaintiff's affidavit in support sets out the following:

i) the amount due to the plaintiff as at the time the originating process was filed;
ii) particulars of any reduction of that amount, and costs, as a consequence of any payments made, or credits accrued, since the time the originating process was filed;
iii) the source of the deponent's knowledge of the matters stated in the affidavit concerning the debt or debts;
iv) the amount claimed by way of interest;
v) whether costs are claimed and, if so, how much, indicating a break-down of professional costs, filing fees, and the costs of serving the originating process;
vi) when and how the originating process was served on the defendant.[74]

7.13 Various stakeholders suggested that the default action procedure might also be useful in the Supreme Court, where it is not currently available.

Question 33: Should r 6 of the *Magistrates' Court Rules 1971* be amended to remove the exclusion from default actions of moneylenders and financial institutions charging more than 10 percent interest? If so, should requirements to provide information similar to that required by r 16.6 of the *Uniform Civil Procedure Rules 2005* (NSW) be inserted into the *Magistrates' Court Rules 1971*?

Question 34: Should the default procedure as described in rr 4, 6 and 15-18 of the *Magistrates' Court Rules 1971* also be set out in the *Supreme Court (Civil Procedure) Rules 1980*?

[72] See for example, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) rr 21.02, 21.03; *Uniform Civil Procedure Rules 2005 (NSW)* r 16.6.
[73] *Uniform Civil Procedure Rules 2005 (NSW)* rr 16.2, 16.3.
[74] Ibid r 16.6.

8 Case management and alternative dispute resolution

8.1 A primary concern of the legal profession and judiciary in Samoa is the speed with which cases are heard and judgments delivered in the District and Supreme Courts. Where the Supreme Court is concerned, this problem can in part be attributed to the referral of a large number of cases from the District Court to the Supreme Court due to the restricted jurisdiction of the former.[75] Practitioners have noted in preliminary consultations, however, that more streamlined case management practices would eliminate a lot of unnecessary procedures and ultimately expedite proceedings and delivery of judgments.

8.2 The Commission is aware that various attempts have been made in the past to reform case management in the District and Supreme Courts. In some areas progress has been made, including in the enactment of the *Alternative Dispute Resolution Act 2007*, which acknowledges the benefits of alternative dispute resolution in case management. The Commission has also been informed during preliminary consultations that judges in the Supreme Court are discussing the existing case management challenges and are taking steps themselves to reform the system.

8.3 The Commission is of the preliminary view that if any reform to the Courts' approach to case management is to be effective it should be incorporated in the civil procedure rules. This will ensure that judicial officers are empowered to take appropriate steps in case management, and that these powers, and the general approach to case management, are clear to parties. For this reason, notwithstanding the reform process being undertaken by the judiciary, the Commission believes that discussion of issues relating to case management is an important part of this review of the civil procedure rules.

Objectives and models of case management

8.4 'Case management' refers to the techniques used by practitioners and judicial officers to progress legal proceedings. The two basic models of case management are the 'Master List' model and the 'Individual List' model.[76] The system currently used in the District and Supreme Courts could be described as a Master List system: parties are required to report to the court at fixed milestones and the court exercises routine and structured control.

8.5 The Commission understands from preliminary consultations that under the current system of case management in the Supreme Court, mentions are scheduled each fortnight and a 'call-over' hearing is held prior to hearing of the case. At call-over, trial dates and judges are allocated to each matter and parties are required to indicate whether they are ready to proceed to hearing.

8.6 One key stakeholder stated during preliminary consultations that this system of case management was operating well. Others were less satisfied and one

[75] See discussion in Samoa Law Reform Commission, *District Courts Act IP/09* (2012) Ch 2.
[76] See Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* (1999), 'Case Management' 97-98.

stakeholder told the Commission that parties, in particular defendants, often fail to attend call-over. The party present (usually the plaintiff) will indicate readiness to proceed, and shortly before hearing the other party will contact the court with reasons as to why they cannot proceed. This wastes the time of the court and the other party/parties, and may contribute to increased cost.

8.7 In the District Court, a list day is used to set fixtures for all cases, both civil and criminal. The Commission heard during consultations that attendance of parties at these events is more regular.

8.8 The routine case management events used in the Supreme and District Courts may be useful in some cases, but it has been the experience of other jurisdictions that by providing for more flexibility in case management, cost and time can be significantly reduced.[77]

8.9 In the Individual List model used in comparable jurisdictions one judge exercises continuous control over the matters allocated to him/her, personally monitoring each case on a flexible basis. Interlocutory steps can be minimised and the genuine points of contention between the parties can be identified and isolated. Over the past decade, the advantages of Individual List system have been recognised by various reviews[78] and implemented in several jurisdictions, including Ontario, Hong Kong and in the Federal Court of Australia.[79] The principle that has prompted such change is that justice requires not only a correct outcome and fair procedures, but also speed, efficiency, and the lowest possible cost to the parties and the court.[80]

Alternative dispute resolution and case management

8.10 Alternative dispute resolution (**'ADR'**) has an important place within case management because it offers ways to divert unnecessary litigation away from the courts. ADR is probably most effective in jurisdictions where judges are involved in active case management because the court is empowered – in some cases *required* – to consider the possibility of ADR very early in the case management process. This typically happens when a judge is undergoing other case management steps such as identifying and narrowing the issues in dispute,

[77] Ibid; Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2009) 388.
[78] For example, Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* (1999), 'Case Management'; Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2009).
[79] Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2009) 397; Law Council of Australia, *Federal Court of Australia Case Management Handbook* (2011) 12 (also citing other sources).
[80] *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 (5 August 2009) at [98] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* (1999), 'Case Management' 97-98; Adrian Zuckerman, "The Challenge of Civil Justice Reform: Effective Court Management of Litigation", (2009) 1 City University of Hong Kong Law Review 49 at 49; Law Council of Australia, Federal Court of Australia Case Management Handbook (2011) 12 (also citing other sources).

setting an early trial date and minimising unnecessary interlocutory steps.[81] Early referral to ADR avoids the parties becoming too entrenched in the litigation mindset, and too committed to the costs associated with the litigation, to consider an alternative means of resolution. It also saves court time and resources.

8.11 Alternative dispute resolution has been recognised in Samoa, through the enactment of the *Alternative Dispute Resolution Act 2007* (**'ADR Act'**), as a means of enhancing the efficiency of the courts in finalising disputes, and of improving case management. Alternative dispute resolution is defined in s 2 of the ADR Act as 'any process used to resolve disputes between parties in civil and criminal proceedings which is outside the usual Court-based litigation model'.

8.12 Under the ADR Act a party may make a pre-trial application to the Court for an order to have the proceedings referred to ADR.[82] Alternatively, the Court of its own motion may refer a matter to mediation or arbitration, or promote reconciliation or conciliation.[83] While the framework for alternative dispute resolution is provided in the ADR Act, the mechanisms for ordering ADR, and its relationship with case management, are not addressed in the civil procedure rules.

8.13 In January 2009 a Registrar and Mediator from the Federal Court of Australia came to Samoa to conduct workshops in mediation skills and mediation policy through the Ministry for Justice and Courts Administration. Federal Court Mediator Mr Julian Hetyey recommended that 'a formal regulatory regime', achieved either through Regulations under the ADR Act or by rules of the court, be enacted to 'enshrine court annexed mediation within the Court system'.[84] According to Mr Hetyey, this would provide a general framework for ADR within the courts as well as help secure funding for mediators, who as public servants were conducting mediations for no pay outside their usual work hours and job descriptions. Part of the rationale for this opinion was that the mediation referrals that had so far been made by the Courts did not specify who was to undertake the mediation, and therefore did not enable the parties to apply for funding to meet the costs of the mediation.

8.14 The Commission understands that a consultant has been engaged to assist the Chief Justice to develop court rules for mediation. Such rules could be well supported by procedural provisions within the Supreme Court Rules and the Magistrates' Court Rules.

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[81] Federal Court of Australia, Pacific Governance Support Program, "Report on Pacific Mediation Project: Samoa" (2010) 21.
[82] *Alternative Dispute Resolution Act 2007* s 4.
[83] Ibid ss 7, 14, 15.
[84] Federal Court of Australia, Pacific Governance Support Program, "Report on Pacific Mediation Project: Samoa" (2010) 16.

Case management in comparable jurisdictions

New South Wales

8.15 The approach to case management in New South Wales courts reflects the view that some litigants may not be motivated to save time and cost in the preparation and presentation of their cases. Judges therefore have a responsibility, through their own active case management, to assist in ensuring matters proceed efficiently and expeditiously.[85]

8.16 The civil procedure rules relating to case management are set out in Part 2 of the *Uniform Civil Procedure Rules 2005* (NSW). At the outset this Part gives a broad discretion to judges to 'give such directions and make such orders for the conduct of any proceedings as appear convenient (whether or not inconsistent with these rules or any other rules of court) for the just, quick and cheap disposal of the proceedings' (r 2.2).

8.17 Rule 2.3 provides further guidance as to the matters about which the court may give directions, without limiting the wide discretion provided in r 2.1. These are:

i) the filing of pleadings;
ii) the defining of issues, including requiring the parties, or their legal practitioners, to exchange memoranda in order to clarify questions;
iii) the provision of any essential particulars;
iv) the filing of "Scott Schedules";
v) the making of admissions;
vi) the filing of lists of documents, either generally or with respect to specific matters;
vii) the delivery or exchange of experts' reports and the holding of conferences of experts;
viii) the provision of copies of documents, including their provision in electronic form;
ix) the administration and answering of interrogatories, either generally or with respect to specific matters;
x) the service and filing of affidavits, witness statements or other documents to be relied on;
xi) the giving of evidence at any hearing, including whether evidence of witnesses in chief must be given orally, or by affidavit or witness statement, or both;
xii) the use of telephone or video conference facilities, video tapes, film projection, computer and other equipment and technology;
xiii) the provision of evidence in support of an application for an adjournment or amendment;
xiv) a timetable with respect to any matters to be dealt with, including a timetable for the conduct of any hearing; and
xv) the filing of written submissions.

[85] Hon Spigelman CJ, "Case Management in New South Wales", Address to the Annual Judges Conference, Malaysia (2006) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman220806> at 20 February 2012.

8.18 The array of topics dealt with in this rule gives some idea as to the scope and potential for active judicial case management.

ADR in New South Wales

8.19 Judges in New South Wales may also order that a matter be referred to alternative dispute resolution, including mediation. This is provided for under the *Civil Procedure Act 2005* (NSW) and supported by Part 20 of the *Uniform Civil Procedure Rules 2005* (NSW), 'Resolution of proceedings without hearing'. Part 20 provides the practices and procedures for alternative resolution, including the power for judges to order how the dispute will be managed. For example, the court may give directions in relation to the practice and procedure to be followed in mediation.[86]

New Zealand High Court

8.20 Judges of the High Court of New Zealand are also given explicit powers in relation to case management and may convene case management conferences to 'assist the parties in the just, speedy and inexpensive determination of the proceeding' and to make interlocutory orders.[87] Rule 7.9 empowers judges to make interlocutory orders in relation to case management, including: giving directions to secure the just, speedy, and inexpensive determination of a proceeding; fixing the time by which steps in a proceeding (including interlocutory steps) must be taken; directing the steps that must be taken to prepare a proceeding for substantive hearing; and directing how the hearing of a proceeding is to be conducted.

ADR in the New Zealand High Court

8.21 Rule 7.9 is probably sufficiently broad to empower a judge to order parties to attempt to resolve a matter through alternative dispute resolution, but the New Zealand High Court Rules do not specifically provide for alternative dispute resolution in case management.

Magistrates Court of Victoria

8.22 In some jurisdictions, including the Magistrates' Court of Victoria, the basic principles of case management are framed as the 'overriding objective' of civil procedure.[88] The overriding objective in r 1.2 of the *Magistrates' Court General Civil Procedure Rules 2010* (Vic) is formulated as follows:

> (1) The overriding objective of these Rules is to enable the Court to deal with a case justly.
> (2) Dealing with a case justly includes, so far as is practicable—
> (a) effectively, completely, promptly and economically determining all the issues in the case;
> (b) avoiding unnecessary expense;

[86] *Uniform Civil Procedure Rules* (NSW) r 20.2.
[87] *Judicature Act 1908* (NZ) Sch 2 r 7.2.
[88] *Magistrates' Court General Civil Procedure Rules 2010* (Vic) Part 5.

(c) dealing with the case in ways which are proportionate to—
(i) the amount of money involved;
(ii) the complexity of the issues;
(d) allocating to the case an appropriate share of the Court's resources, while taking into account the need to allocate resources to other cases.

8.23 The parties have a duty to help the Court to further this overriding objective,[89] and the Court itself must further the overriding objective by giving any direction or imposing any condition it thinks fit according to the powers provided in the rules,[90] and by actively managing cases.[91]

8.24 Active case management is defined more generally in Victoria than in New South Wales, to include:

i) encouraging the parties to cooperate with each other in the conduct of proceedings;
ii) identifying the issues at an early stage;
iii) deciding promptly which issues need full investigation and a hearing and accordingly disposing summarily of the others;
iv) deciding the order in which the issues are to be resolved;
v) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate and facilitating the use of such procedure;
vi) helping the parties to settle the whole or part of the case;
vii) fixing timetables or otherwise controlling the progress of the case;
viii) considering whether the likely benefits of taking a particular step justify the cost of taking it; and
ix) dealing with as many aspects of the case as it can on the same occasion.[92]

ADR in the Victorian Magistrates Court

8.25 As noted above at 8.23(v), active judicial case management in the Victorian Magistrates Court explicitly includes an expectation that Judges will encourage parties to use ADR where appropriate, and will also facilitate this. Rule 50.04 specifically empowers a judge to refer all or part of a proceeding to mediation. This power is derived from s 108 of the Magistrates' Court Act 1989 (Vic) which enables the Court to order mediation with or without the consent of the parties.

8.26 The procedures for court ordered mediation are set out in O 50 Pt 2 of the *Magistrates' Court General Civil Procedure Rules 2010* (Vic). These rules address matters including: the consequences of parties' failure to attend mediation; orders for mediation by consent; adjournment of mediation; mediation reports; confidentiality; and extension of time limits.

[89] Ibid r 1.22.
[90] Ibid r 1.23.
[91] Ibid r 1.24.
[92] Ibid r 1.24.

Federal Court of Australia

8.27 The Federal Court of Australia has been particularly proactive in reform of case management practices. Part VB of the *Federal Court of Australia Act 1976* (Aus) places responsibility with parties and lawyers to run their cases efficiently,[93] at the same time allowing Judges flexibility in the directions they may give about how a proceeding should be managed.[94] The *Federal Court Rules 2011* (Aus) also contain extensive provisions on alternative dispute resolution.

8.28 The Federal Court of Australia Act also takes the 'overriding objective' approach, stating that the overall aim of Part VB, and of Federal Court practices and rules in general (including case management) is to 'facilitate the resolution of disputes according to the law and as quickly, inexpensively and efficiently as possible'.[95] Practice and procedure must be interpreted in the way that best promotes this overarching purpose[96] and parties must conduct proceedings in a way that is consistent with it.[97] The Court may order a party to bear costs where he/she has not complied with this duty[98] and other strict measures are available to Judges where parties have failed to comply with their directions about practice and procedure, including dismissing proceedings or striking out a claim or defence.[99]

ADR in the Federal Court of Australia

8.29 Part 28 of the *Federal Court Rules 2011* (Aus) is dedicated to alternative dispute resolution. At the outset Pt 28 requires parties and the Court to consider options for ADR 'as early as is reasonably practicable'.[100] A party may apply for an order referring the proceeding or part of it to an arbitrator, mediator or other person for resolution by ADR,[101] or the Court may order this of its own motion.[102]

8.30 Alternatively, the parties may arrange alternative dispute resolution themselves, provided that within 14 days of doing so, the applicant applies to the Court for directions as to the future management and conduct of the proceeding.[103] This arrangement means that the Court does not lose control of case management, and that the alternative dispute resolution remains within the regime set out in Part 28. In particular, r 28.22 stipulates that 'a mediation must be conducted in accordance with any orders made by the Court'.

8.31 The remainder of Part 28 details the practice and procedure requirements for alternative dispute resolution, including: termination of an ADR process;

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[93] Section 37M.
[94] Subsection 37P(3).
[95] *Federal Court of Australia Act 1976* (Aus) s 37M.
[96] Ibid subs 37M(3).
[97] Ibid subs 37N(1).
[98] Ibid subs 37N(4) and (5).
[99] Ibid subs 37P(6).
[100] Rule 28.01
[101] *Federal Court Rules 2011* (Aus) r 28.02.
[102] Ibid r 28.03.
[103] Ibid r 28.05.

appointment of arbitrators, mediators and other persons to conduct an ADR process; ways to register with the Court (as orders or otherwise) agreements arising out of ADR; rules for international arbitration; and procedures for referring matters to a referee for inquiry and report.

8.32 These procedures are subsequent to the power of the Court under s 53A of the *Federal Court of Australia Act 1976* (Aus) to order proceedings to be referred to ADR, with or without the consent of the parties (except arbitration, which requires consent). Section 53A specifies that such an order must be in accordance with the Rules of Court, and is subject to the Rules of the Court. This demonstrates the importance of the Federal Court's civil procedure rules in regulating ADR under the case management regime.

Other case management practices in the Federal court of Australia

8.33 The overarching purpose of civil practice and procedure provisions provided in s 37M of the Federal Court Act has been the basis for more specific case management procedures in the Federal Court, including the 'individual docket system' and 'Fast Track'.

8.34 Under the individual docket system, as soon as proceedings are commenced the file is randomly allocated to a judge's 'docket'[104] and generally stays there for case management and hearing. Central to the individual docket system is the notion that the judge has the power, and thus the responsibility, to ensure proceedings are conducted 'as quickly, inexpensively and efficiently as possible'. This system recognises that it is the judge who is responsible for: identifying the issues in dispute and assessing their complexity; setting a trial date; only permitting interlocutory steps relevant to the issues in dispute; and exploring options for alternative dispute resolution.[105] Judges are encouraged to take these steps as early as possible after being allocated the case.

8.35 Out of the individual docket system emerged an even more streamlined process for case management in selected cases: 'Fast Track'. Litigants may apply to use Fast Track in any registry for commercial disputes whose trial length is expected to be no longer than five days. The aim of Fast Track is to allow for cases to be heard within five to eight months (from time of filing to date judgment delivered) and to reduce costs by limiting discovery and interlocutory disputes.

8.36 Two of the most important elements of Fast Track are: the early setting of a trial date at a realistic but early date, which acts to accelerate the conduct of proceedings; and the focus on the relevant parts of the dispute, discarding what is not relevant. The timeframes for filing of documents in Fast Track are

[104] Judges are members of specialist panels (for example, taxation law, maritime law, intellectual property law), and if a case requires particular expertise, it is allocated to a judge who is a member of the panel with relevant expertise.
[105] Federal Court of Australia, Practice Note CM 1, 'Case Management and the Individual Docket System' 3.2.

limited[106] and judges are expected to deliver judgment within 6 weeks after the end of the trial.

8.37 Fast Track enables lawyers to more accurately predict costs, because the issues in dispute and the dates for case management and trial have been set, and discovery and interlocutory disputes are limited. The Chief Justice and the Chief Executive of the Federal Court have observed that fast track has also motivated a cultural change in lawyers' practices, not limited to Fast Track proceedings. Lawyers are becoming more focused on managing cases more efficiently and abandoning trivial arguments.[107]

Case management reform in Samoa

8.38 The individual docket system and Fast Track as used in the Federal Court of Australia may present some useful ideas for reform of case management in Samoa's District and Supreme Courts. The emphasis on judge-led case management in the Federal Court of Australia and other jurisdictions may be usefully applied in Samoa to improve efficiency and reduce cost. A comprehensive overhaul of case management systems in the District and Supreme Courts is beyond the scope of this review, however. The Commission therefore does not intend on proposing any substantive reform to the existing case management systems, especially given that judges of the Supreme Court are currently working toward this.

8.39 This review does provide an opportunity, however, to include in the civil procedure rules a general statement about the overarching purpose of civil procedure in the District and Supreme Courts, to provide a framework for case management. This might be a more general statement similar to that found in the Magistrates' Court of Victoria and the Federal Court of Australia, discussed above, or might follow the more detailed formulation used in the *Uniform Civil Procedure Rules 2005* (NSW) or the New Zealand High Court Rules. This type of provision might refer to the aim of the civil procedure rules, emphasising speed, cost and efficiency, as well as clearly outlining the duties of the parties and judges in relation to this. It might empower judges to make certain orders to achieve the overall objective.

8.40 This reference also provides an opportunity to incorporate the *Alternative Dispute Resolution Act 2007* into the civil procedure rules. This could be achieved simply by providing for the courts' power to order referral to alternative dispute resolution, as in the *Magistrates' Court General Civil Procedure Rules 2010* (Vic). This would support the more detailed regime set out in the ADR rules currently being developed. Alternatively, the civil procedure rules could incorporate more detail about the procedures for referral to alternative dispute resolution, who may be appointed to conduct the ADR, how the process is managed and resolved, and how outcomes are recorded.

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[106] Chief Justice, Federal Court of Australia, *Fast Track Directions CM8* (2009) para 4.7 <http://www.fedcourt.gov.au/how/practice_notes_cm8.html> at 20 February 2012.
[107] Alex Boxsell, "Fast track wins judges' vote" *Australian Financial Review* (24 April 2009) 22.

Question 35: Should a provision about the overriding objectives of civil procedure rules, and the roles of litigants and judges in this, be inserted into the *Supreme Court (Civil Procedure) Rules 1980* and the *Magistrates' Court Rules 1971*?

Question 36: If you answered yes to the preceding question, what formulation should such provision/s take and what sorts of case management powers should be given to judges?

Question 37: What provisions in relation to alternative dispute resolution should be included in the civil procedure rules?

9. Uniform Civil Procedure Rules

9.1 Samoa currently has different rules for civil procedure in each of its courts exercising the civil jurisdiction: the District Court, where the *Magistrates' Court Rules 1971* apply; the Supreme Court, where the *Supreme Court (Civil Procedure) Rules 1980* apply; and the Court of Appeal, where the Court of Appeal Rules in the First Schedule to the *Judicature Ordinance 1961* apply.[108] During preliminary consultations a number of inconsistencies and inadequacies emerged both within and between these rules. This led the Commission to consider whether one single set of rules, either for the District and Supreme Courts alone, or for all three courts exercising the civil jurisdiction in Samoa, might eliminate confusion, uncertainty and complexity.

9.2 While the Supreme Court Rules are reasonably comprehensive, the Magistrates' Court Rules are quite sparse. One stakeholder remarked in preliminary consultations that due to the limitations of the current jurisdiction of the District Court, the rules of that Court are often ignored in practice, because litigants are frequently unrepresented and the Court is lenient about procedure. On the one hand, this fact may support an argument that the Magistrates' Court Rules be kept to a minimum. On the other hand, confusion about court procedures may advance the case for simple and user-friendly rules: a 'one-stop shop'.

9.3 Another factor for consideration is that, if the jurisdiction of the District Court is increased in the future,[109] it is likely that more litigants will have legal representation and, consequently, that practitioners will need to be more familiar with District Court procedure.

9.4 Other jurisdictions have simplified their court rules by enacting 'uniform civil procedure rules' to apply to all courts exercising civil jurisdiction. New South Wales is one example. In New South Wales prior to 2005, litigants and the general public had become concerned about the long waiting times for matters to be resolved in the courts. After the efficiency of the court system was called into question, an inquiry into waiting times carried out by the Public Accounts Committee of the Legislative Assembly recommended that the rules and procedures for civil matters be rationalised and simplified.[110] Now all New South Wales Courts exercising the civil jurisdiction adhere to the *Uniform Civil Procedure Rules 2005* (NSW), although some rules are exclusive to a particular court or courts, for jurisdictional reasons.

9.5 The aim of creating uniform civil procedure rules in New South Wales was to promote access to justice and facilitate the fair, quick and cheap resolution of cases by:

i) simplifying court procedures;

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[108] Note that the Court of Appeal Rules in the First Schedule to the *Judicature Ordinance 1961* are not directly being reviewed by the Commission under this reference.

[109] As part of its review of the *District Courts Act 1969*, the Commission is considering a proposal to increase the jurisdiction of the District Court Act to claims of up to $50,000.

[110] Parliament NSW Public Accounts Committee, *Inquiry into Court Waiting Times*, Report no. 133 (2002) xiv, Recommendation 13.

ii) removing the need for practitioners to keep up to date with more than one set of court rules;
iii) reducing the number of court forms needed; and
iv) rationalising court computer systems.[111]

9.6 The same argument can be made for creating uniform civil procedure rules for Samoan courts, whose various systems are confusing to practitioners and litigants.

9.7 The creation of uniform civil procedure rules in New South Wales required considerable work in reviewing, consolidating and restructuring all existing civil procedure rules and court practices. This made the reform an arduous and time-consuming task, taking over two years to complete.[112] Given resource constraints in Samoa, a key consideration is whether it is possible to complete such a task in an acceptable timeframe. On the other hand, New South Wales is a very large jurisdiction with several different courts and hundreds of judicial officers. If only the District and Supreme Courts of Samoa are to be merged, this task may not be especially onerous, given the minimalistic nature of the existing *Magistrates' Court Rules 1971* and the large scope of the present review in reforming both sets of rules in their entirety in any case.

9.8 Jurisdiction is another issue to take into account in considering uniform civil procedure rules for Samoa. One stakeholder noted that not all processes used in the Supreme Court will apply in the District Court. For example, at present, District Court judges do not have the power to grant extraordinary remedies. Provided most practices can be brought into line, however, a handful of jurisdictional differences should not provide an impediment to uniform rules. Any rule available in one Court but not the other can be drafted in such a way as to make this clear.

9.9 An alternative to creating one set of uniform civil procedure rules to apply in both the District and Supreme Courts is to retain the two separate sets of rules, but provide for identical procedures wherever possible. Stakeholders have noted that where the Magistrates' Court Rules are silent on a matter of procedure, the judge will usually apply the Supreme Court Rules. To formalise this procedure, a clause could be added to the Magistrates' Court Rules (of course renamed the District Court Rules), requiring the application of the Supreme Court Rules where a rule is not provided. In the District Court of New Zealand, this system is effected by the following rule:

> If any case arises for which no form of procedure is prescribed by any Act or rule or regulation or by these rules, the Court shall dispose of the case as nearly as may be practicable in accordance with the provisions of the rules affecting any similar case or in accordance with the provisions of the High Court Rules, or, if there are no such provisions, in such manner as the Court thinks best calculated to promote the ends of justice.[113]

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[111] Nheu, N & McDonald, H, *By the people, for the people? Community participation in law reform*, Law and Justice Foundation of NSW, Sydney (2010) Ch 4.3.
[112] Ibid.
[113] *District Courts Rules 1992* (NZ) r 9.

9.10 In any case, even if the present review is limited to updating the rules in the form they are in, it is worth keeping in mind the advantages of uniform civil procedure rules for efficiency and accessibility of the courts. It is the Commission's view that where the Magistrates' Court rules and the Supreme Court rules can be brought in line with one another, including through streamlining the forms used, this will assist litigants and practitioners and help eliminate confusion. If in the future Samoa should wish to devise uniform rules for all civil procedures, this preliminary work should make such a task less onerous.

Uniformity of practice directions

9.11 The Commission has become aware during preliminary consultations that a number of practice directions have been issued by judges individually. These practice directions are used to alter or refine the operation of the civil procedure rules. The Commission has been unable to obtain copies of these documents, and has discovered that practitioners and even individual judges are sometimes unaware of the existence of a practice direction, with the result that it may not be applied uniformly even within the same court. The Commission is concerned that this practice may inhibit the development of consistent civil procedure rules, as well as access to justice.

9.12 The Commission strongly believes that practice directions should not be used to update the civil procedure rules, but to regulate court procedure by providing parties with practical advice on how to interpret and implement the rules. It is therefore the hope of the Commission that the present substantive review and update of the civil procedure rules might reduce the need for practice directions.

9.13 In the interests of consistency and accessibility of court procedures, the Commission is of the preliminary view that the method for issuing practice directions should entail a level of consensus within the Courts sufficient to achieve uniformity in court practice and procedure, and a degree of publicity that enables most members of the legal fraternity to become aware of new practice directions.

9.14 In other jurisdictions, practice notes and directions are included on Court websites, which are updated regularly and also include copies of relevant legislation such as civil procedure rules. This is a useful way for practitioners and self-represented litigants to access this information.

9.15 While the Ministry of Justice and Courts Administration (MJCA) has its own website, at http://www.mjca.gov.ws, this site does not provide specific information about Samoa's jurisdictions, including court procedures. Alternatively or additionally to making practice directions accessible online, they might also be made freely available as hard copies through MJCA (noting that many unrepresented litigants in Samoa will not have access to the internet in any case) and/or via the Law Society.

Question 38: Which of the following approaches do you prefer for the overall updating of the civil procedure rules?

(a) That the rules for civil procedure in all three Samoan courts be made uniform, with one set of rules only.

(b) That the rules for civil procedure in the District and Supreme Courts only be made uniform, with two sets of rules: one for the District and Supreme Courts; and one for the Court of Appeal (First Schedule to the *Judicature Ordinance 1961*).

(c) That the civil procedure rules remain separate, but identical where possible, with a referring clause from the *Magistrates' Court Rules 1971* to the *Supreme Court (Civil Procedure) Rules 1980* where the Magistrates' Court Rules are silent on a matter of procedure.

(d) That the *Magistrates' Court Rules 1971* and the *Supreme Court (Civil Procedure) Rules 1980* be updated separately, and that inconsistent procedures are left as they are unless there is an independent reason to change them.

Question 39: What method should be used by the courts to issue practice directions, and how should these be distributed and made available to lawyers, unrepresented litigants and other interested parties?

Summary of questions

1. *Should the* Supreme Court (Civil Procedure) Rules 1980 *be amended to require all proceedings to be commenced by statement of claim? (See p 6)*

2. *Alternatively, should rules 11 and 12 of the* Supreme Court (Civil Procedure) Rules 1980 *state in clearer terms the circumstances where actions and motions are used, reflecting the public/private actions divide? (See p 6)*

3. *Should the requirement to use bond paper for filing documents:*
   a) *be inserted into the* Supreme Court (Civil Procedure) Rules 1980 *and the* Magistrates' Court Rules 1971*; or alternatively*
   b) *be abolished? (See p 7)*

4. *Should the* Supreme Court (Civil Procedure) Rules 1980 *be amended to stipulate that filing is carried out by attending the registry in person, or should they be expanded to include methods of filing such as by post or electronically? (See p 7)*

5. *Should r 14 of the* Supreme Court (Civil Procedure) Rules 1980 *be amended to include a timeframe for when a date for hearing must be fixed (being the day after filing at the latest)? (See p 7)*

6. *Should the rules for filing documents in the* Supreme Court (Civil Procedure) Rules 1980 *be replicated in the* Magistrates' Court Rules 1971*? (See p 7)*

7. *Should service for any documents in addition to those listed at paras 3.1 and 3.2 be required explicitly by the* Supreme Court (Civil Procedure) Rules 1980 *or the* Magistrates' Court Rules 1971*? (For example, affidavits, injunctions.) If so, which documents? (See p 9)*

8. *Should the* Supreme Court (Civil Procedure) Rules 1980 *and the* Magistrates' Court Rules 1971 *stipulate that any document filed in court must be served on all active parties? (See p 9)*

9. *Should Part V of the* Supreme Court (Civil Procedure) Rules 1980*, which sets out only the method for service of a summons, be extended to include procedures for service for all documents required by the rules to be served? (See p 10)*

10. *Should rules for service be added to the* Magistrates' Court Rules 1971*? (See p 10)*

11. *Should an outer time limit be given for the service of documents in the* Supreme Court (Civil Procedure) Rules 1980 *or the* Magistrates' Court Rules 1971*, noting that more urgent applications may need to be served earlier? If so, what would be an appropriate timeframe? (See p 11)*

12. *Alternatively, should timing be stipulated in each rule in the* Supreme Court (Civil Procedure) Rules 1980 *or the* Magistrates' Court Rules 1971 *that requires service of a particular document? (See p 11)*

13. *In addition to, or instead of, providing outer time limits for the service of documents, should the* Magistrates' Court Rules 1971 *and Part V of the* Supreme Court (Civil Procedure) Rules 1980 *be amended to include a requirement that service be effected 'as soon as practicable' after filing? (See p 11)*

14. *In either the* Magistrates' Court Rules 1971 *or the* Supreme Court (Civil Procedure) Rules 1980*, is there a need to clarify which documents must be served personally, or to set out that all documents must be served personally? (See p 13)*

15. *Should either or both of the* Supreme Court (Civil Procedure) Rules 1980 *and/or the* Magistrates' Court Rules 1971 *include a general definition for personal service? (See p 13)*

16. *If a general definition for personal service is included in either the* Supreme Court (Civil Procedure) Rules 1980 *or the* Magistrates' Court Rules 1971, *should specific definitions also be used to apply to certain categories of persons? If so, to which categories? (See p 13)*

17. *Should the* Supreme Court (Civil Procedure) Rules 1980 *and the* Magistrates' Court Rules 1971 *be amended to include rules for service by post to a party, and by fax and/or email to a party's solicitor of documents other than summons and other documents expressly requiring personal service under the rules? (See p 14)*

18. *Should the* Magistrates' Court Rules 1971 *and Part V of the* Supreme Court (Civil Procedure) Rules 1980 *be amended to provide for service to persons under legal incapacity (ie, children and persons with disability)? (See p 15)*

19. *Should the requirement in s 28 of the* Supreme Court (Civil Procedure) Rules 1980 *to seek leave of the Court to serve a summons outside of Samoa be removed, and more guidelines be provided on the situations in which a summons (or any other document) may be served overseas? (See p 17)*

20. *Should the* Supreme Court (Civil Procedure) Rules 1980 *be amended to include a provision stating that a document to be served outside Samoa need not be served personally provided it is served according to the laws of the overseas jurisdiction? (See p 17)*

21. *Should Samoa become party to the* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, and provide for service under that Convention in the* Supreme Court (Civil Procedure) Rules 1980*? (See p 17)*

22. *Should rules for service outside of Samoa be inserted into the Magistrates' Court Rules 1971? (See p 17)*

23. *Should the procedures for any or all interlocutory motions be provided for in the Magistrates' Court Rules 1971? (See p 18)*

24. *Should Form 17 (Order for Discovery of Documents) in the Supreme Court Civil Procedure Rules 1980 be amended to allow a party ordered to make discovery 10 days, rather than 7 days, to file and serve an affidavit of documents? (See p 18)*

25. *Should the civil procedure rules introduce either or both of the following procedures to deal with vexatious documents and vexatious litigants?*
    a) *The Registrar may refuse to accept a document for filing if satisfied that it is an abuse of the process of the Court or is frivolous or vexatious.*
    b) *If a person starts a vexatious proceeding, the defendant or the Attorney-General, Registrar or other interested person may apply to the Court for an order that a person may not continue a proceeding or start or continue any other proceeding without leave. (See p 20)*

26. *Should the requirement for undertakings as to damages in r 66(b) of the* Supreme Court (Civil Procedure) Rules 1980 *be amended to require the applicant to:*
    a) *file an affidavit or other evidence demonstrating ability to pay; or*
    b) *pay a bond into court? (See p 20)*

27. *Should the procedure for Extraordinary Remedies under Part VIII of the* Supreme Court (Civil Procedure) Rules 1980 *be done away with entirely, with orders of mandamus, injunction, prohibition and certiorari being available through the use of statement of claim? (See p 22)*

28. *If the jurisdiction of the District Court is increased, should any of the extraordinary remedies set out in Part XIX of the* Supreme Court (Civil Procedure) Rules 1980 *be replicated in the rules for that Court? If so, which remedies? (See p 23)*

29. *Should the procedure for garnishee proceedings be simplified? If so, in what way? (See p 25)*

30. *Should garnishee proceedings be added to the rules of the District Court if the jurisdiction of that Court is increased? (See p 25)*

31. *Should a summary judgment procedure be added to the* Supreme Court (Civil Procedure) Rules 1980 *and/or the* Magistrates' Court Rules 1971 *for use by a plaintiff where the defendant has revealed no defence? (See p 27)*

32. *Should the strike-out procedure in r 70 of the* Supreme Court (Civil Procedure) Rules 1980 *be added to the* Magistrates' Court Rules 1971 *for use by a defendant where the plaintiff has raised no cause of action? (See p 27)*

33. *Should r 6 of the* Magistrates' Court Rules 1971 *be amended to remove the exclusion from default actions of moneylenders and financial institutions charging more than 10 percent interest? If so, should requirements to provide information similar to that required by r 16.6 of the* Uniform Civil Procedure Rules 2005 (NSW) *be inserted into the* Magistrates' Court Rules *1971? (See p 28)*

34. *Should the default procedure as described in rr 4, 6 and 15-18 of the* Magistrates' Court Rules 1971 *also be set out in the* Supreme Court (Civil Procedure) Rules 1980*? (See p 28)*

35. *Should a provision about the overriding objectives of civil procedure rules, and the roles of litigants and judges in this, be inserted into the* Supreme Court (Civil Procedure) Rules 1980 *and the* Magistrates' Court Rules 1971*? (See p 38)*

36. *If you answered yes to the preceding question, what formulation should such provision/s take and what sorts of case management powers should be given to judges? (See p 38)*

37. *What provisions in relation to alternative dispute resolution should be included in the civil procedure rules? (See p 38)*

38. *Which of the following approaches do you prefer for the overall updating of the civil procedure rules?*
    a) *That the rules for civil procedure in all three Samoan courts be made uniform, with one set of rules only.*
    b) *That the rules for civil procedure in the District and Supreme Courts only be made uniform, with two sets of rules: one for the District and Supreme Courts; and one for the Court of Appeal (First Schedule to the* Judicature Ordinance 1961*).*

c) *That the civil procedure rules remain separate, but identical where possible, with a referring clause from the* Magistrates' Court Rules 1971 *to the* Supreme Court (Civil Procedure) Rules 1980 *where the Magistrates' Court Rules are silent on a matter of procedure.*

d) *That the* Magistrates' Court Rules 1971 *and the* Supreme Court (Civil Procedure) Rules 1980 *be updated separately, and that inconsistent procedures are left as they are unless there is an independent reason to change them. (See p 42)*

39. *What method should be used by the courts to issue practice directions, and how should these be distributed and made available to lawyers, unrepresented litigants and other interested parties? (See p 42)*