

**SAMOA**  
**LAW REFORM COMMISSION**

**CRIMINAL PROCEDURE ACT 1972**  
**Report 07/12**

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## Preface

The need to reform the criminal law of Samoa was one of the driving factors in the establishment of the Samoa Law Reform Commission ('the Commission').

In November 2008, the Commission was given a major criminal law reference by Cabinet and the Attorney General. The reference included the review and reform of the *Crimes Ordinance 1962*, the *Criminal Procedure Act 1972*, the *Evidence Ordinance 1962* and the development of a Sentencing Bill.

The Commission's report on the reform of the *Crimes Ordinance 1962* was finalised in June 2010 and tabled in Parliament on 6 December 2010. That report made 62 recommendations for the reform of Samoa's criminal laws. Reports on the *Evidence Ordinance* and the development of a Sentencing Bill will be released at a later date.

This Report sets out 34 recommendations for the reform of the *Criminal Procedure Act*. The recommendations made in this report are based on the need for Samoa's criminal procedure laws to protect and promote the right of all persons charged with a criminal offence to a fair trial and the need for a just and efficient criminal justice system that serves the needs of the Samoan community.

The recommendations in this report have been developed with the assistance of representatives of government, members of the legal profession and members of the public. In 2009, a Sub-Committee of the Working Group for the Criminal Law Review, consisting of senior representatives of the Ministry of Justice, the Office of the Attorney General (AGO) and the Ministry of Police and Prisons was established. A representative of the AGO chaired the Sub-Committee. It met six times between February 2009 and February 2010 to discuss issues concerning the application and interpretation of the *Criminal Procedure Act* and to provide suggestions for its reform.

In March 2010, the Commission released Issues Paper IP 06/10. The Issues Paper sought feedback from members of the public on 19 potential reforms to the *Criminal Procedure Act*. The Commission received three written submissions in response to the Issues Paper. In addition, in November 2011, the Commission conducted consultations with members of the judiciary and the legal profession to seek their views about proposed reforms to the *Criminal Procedure Act*. A list of submissions and people consulted by the Commission is at Appendix 3. The Commission would like to thank all those who contributed their time, expertise and views to assist the Commission to develop fair and workable recommendations for the reform of the *Criminal Procedure Act*.

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# 1. Introduction

1.1 This Report considers specific issues relating to the *Criminal Procedure Act 1972 (CPA)* and explores options for its reform. The issues discussed in this Report include areas of concern raised by the Sub-Committee of the Working Group for the Criminal Law Review ('the Working Group'), members of the judiciary and legal profession, and members of the public.

## ***The role of criminal procedure laws***

1.2 Rules of criminal procedure exist to provide a fair and just framework for determining whether a person is guilty or not guilty of a criminal offence. Criminal procedure laws must take into account the right of every individual to a fair trial, as well as the interests of the community as a whole.

1.3 Both international human rights law and Samoa's *Constitution* set out the minimum requirements for a fair trial: the right of all persons to a fair and public hearing by a competent, independent and impartial tribunal;<sup>1</sup> the presumption that all persons charged with a criminal offence are innocent until proven guilty according to the law;<sup>2</sup> and the right of everyone convicted of a crime to have his or her conviction or sentence reviewed by a higher tribunal.<sup>3</sup> These international standards and constitutional guarantees are intended to minimise the risk of convicting innocent persons and to maintain public confidence in the criminal justice system.

1.4 In addition to the protection of individual rights, rules of criminal procedure should also promote a fair, just and efficient criminal justice system for the benefit of the community.

## ***A need for change***

1.5 The rules governing procedures in criminal trials in Samoa are primarily contained in the *CPA* and in common law. The *CPA* includes: provisions governing police powers for arresting persons suspected of committing a crime; the court procedures for hearing and determining whether a person is guilty of an offence; rules about sentencing; and procedures for hearing appeals. The Criminal Procedure Bill was introduced into Parliament on 20 June 1972.<sup>4</sup> It was noted in the second reading of the Bill that it was drafted in order to suit the conditions of Western Samoa, but at the same time was in line with legislation of a similar nature in overseas countries.<sup>5</sup> The Bill was passed and the *CPA* commenced on 8 December 1972.

1.6 Apart from the insertion of rules governing appeals from the Supreme Court to the Court of Appeal in 1992-93 and general revisions in 2008, the *CPA* has not been substantially reviewed or updated since 1972.

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1 *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171, art 14(1) (entered into force on 23 March 1976); *Constitution of the Independent State of Samoa 1960* art 9(1).

2 *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171, art 14(2) (entered into force on 23 March 1976); *Constitution of the Independent State of Samoa 1960* art 9(3).

3 *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171, art 14(5) (entered into force on 23 March 1976).

<sup>4</sup> First Reading Speech, Criminal Procedure Bill 1972 (Samoa), 20 June 1972, Hon T Amoa.

<sup>5</sup> Second Reading Speech, Criminal Procedure Bill 1972 (Samoa), 1 December 1972, Hon S Ulugia.

1.7 In the forty years since the enactment of the *CPA*, the way in which courts hear and determine criminal cases has changed with new technology, increasing demands on the criminal justice system and the codification of new offences. Legislative reform is required to update the rules governing criminal procedure to better reflect current needs and to clarify the operation of the Act where issues have arisen in practice. In the absence of legislative amendments to the *CPA*, courts have looked to common law to guide the exercise of judicial powers. While this is an important and legitimate means of making the law just, workable and relevant, it has led to some uncertainty and inconsistency in the rules and procedures that apply in some circumstances. Legislative codification of some common law rules will provide clarity for the courts as well as the parties involved in criminal proceedings.

1.8 Since the introduction of the *CPA*, Samoa has also enacted other legislation relevant to some aspects of criminal procedure, including legislation relating to: police powers; the jurisdiction of the District Court and Supreme Court; evidence; and young offenders. This Report therefore considers the interaction between the *CPA* and such legislation where relevant.

### ***Focus of recommendations for reform***

1.9 The recommendations for reform of the *CPA* contained in this Report focus on furthering two key principles:

- the protection and promotion of each defendant's right to a fair trial and other fundamental human rights; and
- the need for a just, effective and efficient criminal justice system that serves the interests of the community of Samoa.

1.10 The case for change cannot simply be based on the premise that other jurisdictions have updated their criminal procedure legislation. In making recommendations for reform, the Commission has considered the unique requirements of Samoan customs and traditions as well as the current circumstances and needs of the community.

1.11 The Commission has also kept in mind the benefit of codifying court rules and procedures in legislation so that all people involved in criminal proceedings understand their rights and obligations. However, the Commission has sought to balance this with the need for judges to retain some discretion so that they have the flexibility to address novel situations as they arise.

1.12 The Commission has not undertaken a section-by-section review of the *CPA*. Rather, the Commission has addressed the key issues and problems with the *CPA*, identified during consultations with stakeholders. These issues include:

- the scope and operation of police powers;
- the content of informations;
- decisions to grant or refuse bail;
- the court's powers when a party does not appear in court;
- pre-trial case management, including issues relating to the powers of registrars of the court, pre-trial disclosure and pre-trial hearings;
- selected issues relating to the giving of evidence;
- the protection of victims and vulnerable witnesses;

- the role of trial by assessors in the criminal justice system;
- retrials; and
- costs and restitution.

1.13 Part V of the *CPA*, which relates to sentencing and enforcement of penalties, is not considered in this Report. The Commission will consider the reform of sentencing laws in its inquiry into the proposed Sentencing Bill. As the Commission is also to undertake a review of evidence laws in the near future, this Report does not engage in a comprehensive review of all issues relating to evidence.

## 2. Police Powers

2.1 Sections 4 to 9 of the *CPA* deal with the powers of police officers to arrest with and without warrant, including provisions regarding the powers of police to enter premises to make arrests. Two issues have been raised with respect to police powers: the definition of ‘constable’; and police powers to stop and search vehicles.

### Definition of ‘constable’

2.2 Section 2 of the *CPA* defines the term ‘constable’ to include any member of the police.

2.3 During Working Group meetings, the Ministry of Police and Prisons expressed concerns about the wide application of this definition in relation to police powers, noting that police members can be either ‘sworn’ or ‘un-sworn’. ‘Sworn’ members are members of the police force who have taken an oath of office in accordance with s 7 of the *Police Service Act 2009*. Only ‘sworn’ members can exercise the constabulary powers prescribed under the *CPA*, such as executing warrants or filing informations.<sup>6</sup> ‘Un-sworn’ members of the police force, on the other hand, include accountants, office clerks, members of the police band and the like. The Working Group therefore suggested that the definition section and other relevant sections of the *CPA* should clearly distinguish between these two different types of police members.

### *Commission’s views*

2.4 The Commission recommends that the definition of ‘constable’ for the purpose of the Act should be amended in order to clarify that the police powers granted in the *CPA* may only be exercised by ‘sworn’ members of the police force.

**Recommendation 1:** The definition of ‘constable’ in s 2 of the *Criminal Procedure Act 1972* should be amended so as to only include sworn members of the police, as defined by s 6(2) of the *Police Service Act 2009*, who have taken the oath of office in accordance with s 7 of the *Police Service Act 2009*.

### Police powers to stop and search vehicles

2.5 The police can exercise significant powers on behalf of the state in order to regulate and enforce public order, morals and health and safety for the benefit of citizens and their general

<sup>6</sup> *Police Service Act 2009* s 8(1).

welfare. However, these powers must be executed appropriately and with respect for individuals' rights.

- 2.6 The police power to stop and search people suspected of committing or having committed an offence, and their property, is an important means of preventing as well as investigating crime. The primary purpose of stop and search powers is to enable officers to allay or confirm suspicions about individuals without exercising their power of arrest. However, powers to stop and search must be used fairly and responsibly, with respect for the people being searched and without unlawful discrimination. In addition, the intrusion on the liberty of the person stopped and/or searched must be limited to what is necessary for the prevention and/or investigation of the crime.<sup>7</sup>

### **Current practice and comparable jurisdictions**

- 2.7 Section 36 of the *Police Powers Act 2007* gives police constables the power to stop, search and detain a person if they suspect on reasonable grounds that the person is carrying a thing relevant to a serious offence and it is necessary to exercise the power without the authority of a search warrant. The legislation does not include an express power to stop vehicles; rather, this is implied in the power to stop and search people.

- 2.8 Section 14A of the *Narcotics Act 1967* gives police constables the power to search without a warrant if a constable has reasonable cause to believe that there, is in or on any building, aircraft, ship, carriage, vehicle or place, any narcotic in relation to which an offence against the *Narcotics Act* has been committed, and under the circumstances, an immediate search must be carried out and there is no time to apply for a search warrant.<sup>8</sup>

- 2.9 Police officers are also authorised under the *Road Traffic Ordinance 1960* to stop vehicles and remove them from the road to enforce the provisions of that Ordinance in the interest of road safety.<sup>9</sup>

- 2.10 The *CPA* also provides police with powers to arrest without warrant,<sup>10</sup> enter premises without warrant to arrest an offender or prevent an offence,<sup>11</sup> and arrest a person with warrant.<sup>12</sup> Section 83 deals with the court's powers to issue warrants for the police to stop and search vehicles. There is, however, no specific provision relating to stopping and searching vehicles without a warrant when there is reasonable suspicion that a crime is being or has been committed by someone in or with the vehicle.

- 2.11 The traditional English approach to powers of criminal investigation and law enforcement was to require warrants for their exercise. The approach was also carried

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7 *Police and Criminal Evidence Act 1984* (UK), 'Code A, Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search; and Police Officers and Police Staff of Requirements to Record Public Encounters' (2010) 4-5.

8 On the practicability of obtaining a search warrant see *Police v Feesago and Rankin* [2009] WSSC 115 (9 November 2009).

9 *Road Traffic Ordinance 1960* s 72B.

10 *Criminal Procedure Act 1972* s 4.

11 *Ibid* s 5.

12 *Ibid* ss 6-7.

forward in Australia and New Zealand and in the legislation of jurisdictions with close historical ties to these countries, such as Samoa.<sup>13</sup> In these jurisdictions, legislation includes provisions on arrest with warrant, search warrants and arrests without warrant.<sup>14</sup> A police officer is authorised to make an arrest without warrant on the basis of ‘good cause to suspect’ that certain categories of offence have been committed.<sup>15</sup>

2.12 In the United Kingdom (UK), the police's powers to stop and search are contained in ss 1-7 of the *Police and Criminal Evidence Act 1984* (UK) (*PACE Act*). Section 1 of the *PACE Act* gives police officers the right to stop and search people and vehicles in a public place. To exercise this power, the officer must have reasonable grounds for suspecting that the person is in possession of (or the vehicle contains) stolen or prohibited articles. Prohibited articles include such items as offensive weapons and articles for use in connection with burglary or theft. Before searching anyone or anything, a constable must: identify him or herself as a constable and show his or her warrant card; state his or her name and the name of the constable's police station; state the reasons for the search and the legal grounds for the search; and notify the person that a copy of the search form will be available on demand for 12 months. These powers are given to both full-time and volunteer police officers.

### ***Submissions and consultations***

2.13 In the Issues Paper, the Commission asked if a general power for the police to stop vehicles and carry out road blocks should be inserted into the *CPA* (question 1), and if so, whether there should be guidelines in the *CPA* to clarify the proper procedures for the police to follow when exercising powers of this kind (question 2).

2.14 The Commission received two submissions from the general public, which were both in favour of the reforms suggested. One stakeholder pointed out that guidelines were necessary so that members of the public knew their rights in relation to searches of private property (whether it be a car, office or house) that result in destruction or damage of property and failure to restore it to its original condition by the police. Other stakeholders consulted were also generally in favour of these reforms. One stakeholder noted that the police already use road blocks even though they do not expressly have the power to do so, and that legislation was required to ensure that police use their powers correctly and that professional standards and measures to ensure police accountability are observed.

2.15 In Working Group meetings, the group considered it desirable to introduce a provision into the *CPA* to not only provide for the same powers as contained in the *Police Powers Act 2007* and the *Narcotics Act 1967*, but also to set out guidelines for the proper procedures that police should follow when exercising these powers.<sup>16</sup> The Working Group proposed that the *CPA* should allow police to stop vehicles and check driver's licenses, and also empower the police to carry out road blocks provided there are reasonable grounds for doing so.

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13 E Colvin, ‘Criminal Procedure in the South Pacific’ (2004) 8(1) *Journal of South Pacific Law* 11, [http://epublications.bond.edu.au/law\\_pubs/19](http://epublications.bond.edu.au/law_pubs/19) at 2 November 2011.

14 *Criminal Procedure Act 1972* ss 4-9, 83-84.

15 *Ibid* s 4.

16 Criminal Law Review Working Group, *Report: Criminal Procedure Act 1972* (2011) 2-3.

- 2.16 A member of the Working Group suggested that a new section should be inserted into the *CPA* to allow a constable to stop a vehicle for the purpose of conducting a search if the constable is satisfied that the grounds for exercising that statutory power to search exist, or a search warrant has been issued and is in force. Legislation should oblige the constable exercising the power to stop and search to produce evidence that he or she is a member of the police (eg by wearing a uniform or by being in a police vehicle), to identify him or herself to the driver, and to inform the driver of the statutory search power being exercised. It was further proposed that procedural guidelines should allow the constable to require any person in or on the vehicle to state his or her name, address and date of birth or other particulars. Under this proposal, failure to stop a vehicle when required to do so by a constable would be a criminal offence. It was claimed that these proposed provisions would not only make the police's job easier but also would provide better guidelines to the police on what they can and cannot do when exercising their powers.
- 2.17 The same member of the Working Group also proposed that a new section be inserted into the *CPA* in relation to the power of police constables to authorise a road block if necessary for the purpose of searching for stolen goods, narcotics or to arrest a person.
- 2.18 During consultations with members of the legal profession, there was a general opinion that all police powers should be assembled in one piece of legislation rather than scattered across different acts. Most stakeholders considered that such provisions should be included in the *Police Powers Act 2007* as this was specifically designed to contain police powers.

#### ***Commission's views***

- 2.19 The Commission considers that the police power to stop and search vehicles should be carefully controlled so as to safeguard the rights of individuals. Statutory guidelines that govern the use of police powers are desirable to promote the proper execution of the powers for the benefit of the public as well as the police constables who exercise the powers. The Commission is of the view that legislation should clearly set out rules about such matters as: the statutory authority to stop and search; the persons authorised to act under that authority; the time and manner in which a search may be made; the notification to be given to persons affected; and the general procedures to be followed.
- 2.20 The Commission considers that the appropriate piece of legislation to provide for police powers to stop and search vehicles is the *Police Powers Act 2007*, rather than the *CPA*. The *Police Powers Act 2007* already contains rules as to the police power to stop and search, but does not explicitly mention the power to stop vehicles. The Commission is of the view that it would be beneficial if all provisions relating to police powers were contained in one Act. Collating essential police powers in one piece of legislation will assist the police to understand and lawfully exercise their powers and will ensure that the procedures for exercising police powers are clear and consistent. The Commission notes that s 83 of the *CPA*, which permits the court to issue a search warrant and sets out the procedures that police must follow when executing such a warrant, deals with the execution of a court order, rather than an independent police power, and should therefore remain in the *CPA*.

**Recommendation 2:** The *Police Powers Act 2007* should be amended to include a new provision, modeled on s 36 (power to stop and search a person), establishing the power to stop a vehicle or use a road block where a police officer has reasonable grounds for suspecting that a person in the vehicle is in possession of, or the vehicle contains, a thing relevant to a serious offence or a thing stolen or otherwise unlawfully obtained. The new provision should also set out the procedures that police constables must follow when exercising the power, including that the constable:

- be wearing a uniform or be in a vehicle which identifies him or her to be a member of the police, or produce evidence that he or she is a member of the police;
- immediately after the vehicle has stopped, identify himself or herself to the driver of the vehicle by giving his or her name and station;
- inform the driver of the statutory stop and search power that the constable proposes to exercise, or of the warrant issued and in force; and
- make a report on the search exercised and provide the driver with a copy.

### 3. Informations

3.1 Criminal proceedings are generally commenced when the police file an information in court and serve a copy on the defendant.<sup>17</sup> An information is a sworn statement in writing that sets out the details of the offence that the person is alleged to have committed.<sup>18</sup>

3.2 The *Constitution* provides that every person charged with a criminal offence has the right to be informed promptly in a language which he or she understands, and in detail, of the nature and cause of the accusation made against him or her.<sup>19</sup> It is important that an information contains a sufficient level of detail so that the defendant can properly understand the charge and prepare a defence. The information must also inform the court of the nature of the offence.

3.3 Section 16 of the *CPA* requires that the information state the time and place of the alleged offence as far as possible using the words of the legislation creating the offence. The information must also set out the person against whom the offence was committed or the thing in respect of which it was committed. If the information does not state in substance a criminal offence, the court may amend or quash the information.<sup>20</sup>

3.4 Section 15 of the *CPA* requires that every information contain one offence only, except where several charges are brought in the alternative. Where an information is framed in the alternative, the court may divide or amend the information in order to avoid the defendant being embarrassed in his or her defence. This provision is based on New Zealand legislation,

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17 *Criminal Procedure Act 1972* s 10. A criminal proceeding may also be commenced where a person is arrested without warrant (*Criminal Procedure Act 1972* s 4). In such cases details of the offence are set out in a charge sheet, which is treated as the information.

18 *Criminal Procedure Act 1972* s 16.

19 *Constitution of the Independent State of Samoa 1960* art 9(4)(a).

20 *Criminal Procedure Act 1972* s 18.

which also requires that the charging document contain only one charge, and that a charge must relate to a single offence.<sup>21</sup> In contrast, most Australian jurisdictions allow a charge sheet or indictment to include several offences where they are founded on the same facts or form part of a series of offences of a similar nature.<sup>22</sup> Where more than one offence is included in the charge sheet, the particulars must be set out separately for each offence.

### ***Submissions and consultations***

3.5 A member of the Working Group proposed an amendment to s 16 of the *CPA* to state that an information will be sufficient if it contains ‘in substance a statement that the accused has committed the offence’ and if it gives the defendant ‘reasonable information’ of the act or omission to be proved against him or her. As part of this proposal it was suggested that the *CPA* should provide that insufficient detail in the information shall not vitiate the information or deem it defective, and should list circumstances in which an information shall not be deemed objectionable or insufficient — namely, where the information:

- does not contain the name of the person injuriously affected;
- does not state who is the owner of any property mentioned in the information;
- charges an intent to defraud without naming or describing the person whom it was intended to defraud;
- does not set out any document which may be the subject of the charge;
- does not set out the words used, where words used are the subject of the charge;
- does not specify the means by which the crime was committed; or
- does not name or describe with precision any person or thing.

3.6 In consultations, one stakeholder questioned the practicality of the requirement that there be only one charge per information. He noted that where there are numerous counts of the same offence, each offence must be set out in a separate information, which causes practical difficulties when informations must be amended or withdrawn and re-filed.

### ***Commission’s views***

3.7 The Commission does not consider that the amendments proposed to s 16 of the *CPA*, regarding adequacy of informations, are necessary or desirable. The Commission notes that the degree of particularity required to inform the defendant of the substance of the charge will vary according to the nature of the offence.<sup>23</sup> For this reason, prescriptive rules about when an information may not be deemed objectionable or insufficient may be too prescriptive, and may risk curtailing the discretion of the court. Further, the Commission notes that the detail included in the information is important to ensure that the defendant receives a fair trial, in particular, that he or she is informed of the charges against him or her. As such, the Commission recommends retaining the current approach, which leaves to the discretion of the court decisions about the sufficiency of an information and the consequences that flow if an information is defective.

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21 *Criminal Procedure Act 2011* (NZ) ss 16-17.

22 See, eg, *Criminal Procedure Act 1986* (NSW) s 23; *Criminal Code* (Qld) s 567; *Criminal Procedure Act 2009* (Vic) sch 1 cl 5.

23 *Meredith Ainu'u Lawyers v Muagututagata Peter Ah Him* [2006] WSSC 55 (25 October 2006), citing *Police v Wyatt* [1966] NZLR 1118.

3.8 The Commission does, however, see merit in amending the *CPA* to permit an information to include more than one offence where the offences are founded on the same facts or form, or are part of a series of offences of the same or a similar character. For example, this would permit several counts of the offence of theft as a servant to be set out in the one information, rather than the prosecution filing a separate information for each count. The particulars for each count would still have to be set out separately, but could be contained in the one document. The Commission considers that this would simplify proceedings without compromising the defendant's right to be informed of the charges against him or her.

**Recommendation 3:** Section 15 of the *Criminal Procedure Act 1972* should be amended to provide that an information may include more than one offence where the offences are founded on the same facts or form, or are part of a series of offences of the same or similar character. Where more than one offence is charged in an information, the particulars of each offence must be set out in a separate paragraph.

## 4. Bail

4.1 Bail enables a person charged with an offence to be released from custody between the time of his or her arrest and sentencing. In Samoa, the police do not have the power to make decisions about bail. Rather, art 6(4) of the *Constitution* requires a person to be brought before a court or registrar within 24 hours of his or her arrest (excluding the time of any necessary journey). The court or remanding officer then has a general discretion to authorise further detention, or alternatively, release the person on bail.<sup>24</sup>

4.2 This chapter discusses several issues with respect to the system of bail established by the *CPA*.

### Presumptions for and against bail

4.3 Legislative provisions regarding bail must balance two competing interests. The first is the principle that a person charged with an offence is innocent until proven guilty, and so should not be deprived of his or her liberty without good reason. The second is the public interest in ensuring that a defendant appears in court when required to do so, and does not commit offences or interfere with witnesses while awaiting trial.

4.4 The provisions of the *CPA* reflect the basic presumption that a person accused, but not convicted, of an offence is entitled to be released from custody.<sup>25</sup> The *CPA* creates two categories of defendant. First, a person charged with an offence for which the maximum penalty is a fine or imprisonment for less than two years is 'bailable as of right'.<sup>26</sup> In these cases, the court or remanding officer must grant the defendant bail.

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24 *Criminal Procedure Act 1972* ss 70-82.

25 *International Covenant on Civil and Political Rights*, 16 December 1966, 99 UNTS 171, art 9(3) (entered into force 23 March 1976).

26 *Criminal Procedure Act 1972* s 71(3). Persons charged with particular offences listed in the *CPA* are also bailable as of right. These offences include contraventions of the following sections of the *Crimes Ordinance 1961*: s 76 (duty to provide necessities of life); s 77 (duty of a parent or guardian to provide necessities); and s 100 (false statement by public officer).

- 4.5 The second category covers defendants who are not bailable as of right. These are persons who are charged with offences punishable by imprisonment for more than two years,<sup>27</sup> or who have previously been convicted of an offence punishable by imprisonment.<sup>28</sup> In such cases, the court or remanding officer has discretion to grant or refuse bail. The *CPA* provides no guidance as to how that discretion should be exercised, so courts have looked to general principles to develop criteria to guide decision-making about bail.<sup>29</sup>
- 4.6 Under the *CPA* there is always a presumption in favour of bail. This means that where a person is not bailable as of right, the prosecution bears the responsibility of satisfying the court that there are reasons why the defendant should be remanded in custody. Such reasons may include that there is a risk that the defendant may abscond or otherwise fail to appear in court, interfere with witnesses or offend while on bail.
- 4.7 Legislation in some overseas jurisdictions establishes a presumption against bail in certain situations. For example, in some Australian states, there is a presumption against bail where the defendant has been charged with certain kinds of serious offence.<sup>30</sup> In these cases, the defendant seeking to be released on bail bears the responsibility of satisfying the court that there are reasons why he or she should not be remanded in custody.
- 4.8 Legislation in New Zealand sets out a scheme to restrict bail where the defendant has a previous conviction for a ‘specified offence’ and is charged with a further ‘specified offence’. Specified offences include sexual violation, murder, manslaughter, attempted murder, wounding or injuring with intent, commission of a crime with a firearm and robbery. In such cases, the defendant seeking bail must satisfy the court that he or she will not commit any offence involving violence against or danger to the safety of any other person.<sup>31</sup> There is also a presumption against bail where the defendant is alleged to have committed the offence while on bail awaiting trial for another offence punishable by more than three years imprisonment.<sup>32</sup>
- 4.9 In Fiji, the presumption in favour of granting bail is displaced where the defendant has previously breached a bail condition.<sup>33</sup>

### ***Submissions and consultations***

- 4.10 In the Issues Paper, the Commission asked whether the category of those bailable as of right should be extended or limited (question 10).
- 4.11 One stakeholder submitted that it was important for any regime to consider the protection of the public and victims when limiting the category of defendants who are bailable as of

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27 *Criminal Procedure Act 1972* s 71(3).

28 *Ibid* s 71(4).

29 This issue is discussed further below.

30 *Bail Act 1992* (ACT) s 9B; *Bail Act 1978* (NSW) pt 2 div 2A; *Bail Act 1982* (NT) s 7A; *Bail Act 1980* (Qld) s 16(3); *Bail Act 1985* (SA) s 10A.

31 *Bail Act 2000* (NZ) s 10.

32 *Ibid* s 12.

33 *Bail Act 2002* (Fiji) s 3(4).

right. A member of the Working Group proposed that the *CPA* be amended to limit the category of persons bailable as of right to defendants charged with an offence not punishable by imprisonment, or for which the maximum punishment is less than two years imprisonment, unless the offence involved assault or violence against a child or by a male on a female.

4.12 The Commission heard mixed views about this proposal during consultations with judges and members of the legal profession. Many considered that the current system works well. Some noted that many offences associated with domestic violence, except common assault, are already caught within the category of those defendants not bailable as of right, as they carry a high penalty. Other stakeholders supported the proposal, noting that it is important to ensure that victims of domestic violence are protected, including through the use of bail conditions. If domestic violence is suspected, the defendant should be bailable only at the discretion of the court so that the court can make any appropriate conditions to protect victims.

4.13 In the Issues Paper, the Commission also asked whether the *CPA* should specify situations when the court ought to consider custody over bail, such as when the accused is charged with an offence of a violent and/or sexual nature (question 12).

4.14 A member of the Working Group suggested that the *CPA* be amended to include a presumption against bail along the same lines as that set out in the *Bail Act 2000* (NZ). This would require a defendant previously convicted of a specified offence who is charged with another specified offence to satisfy the court on the balance of probabilities that he or she will not, while on bail, commit any offence involving violence against, or danger to the safety of, any other person. That stakeholder further proposed that the *CPA* should specify that, when deciding whether to grant bail to such a defendant, the need to protect the safety of the victim or victims of the alleged offence is a primary consideration.

4.15 All judges and members of the legal profession consulted by the Commission were opposed to creating a presumption against bail. Some commented that it is important for the protection of the defendant's rights that the onus remain with the prosecution to show cause why the defendant should be remanded in custody based on the risks that the defendant will fail to meet bail.

### ***Commission's views***

4.16 The Commission considers that the current system, in which bail for persons who are charged with more serious offences is at the discretion of the court or remanding officer, respects the rights of defendants and is working well in practice.

### **Presumption against bail**

4.17 The Commission is strongly of the view that there should always be a presumption in favour of bail in relation to defendants awaiting trial. While several overseas jurisdictions have legislated to provide that there is a presumption against bail when a person is charged with specific serious offences, the Commission is not persuaded that Samoa should follow this example.

4.18 A person who is on bail awaiting trial has not been convicted of an offence, and is presumed to be innocent until proven guilty. As such, the decision to remand a person in custody while awaiting trial is a serious one, and should be made only for good reasons. A decision to refuse bail should be based on the grounds that there is a risk that, if released, the defendant will abscond or otherwise fail to appear at court for trial, will commit an offence while on bail, will endanger the safety of any person or the public, or will interfere with witnesses or otherwise obstruct the course of justice.<sup>34</sup> Decisions about bail should therefore focus on assessing and managing these risks. Bail should not be refused in order to punish the defendant for an offence for which he or she has not yet been found guilty. While the seriousness of the offence with which the defendant has been charged is a relevant consideration when assessing these risks,<sup>35</sup> it is not the sole, or even most important, consideration. The Commission is concerned that a provision which favours custody over release on bail based primarily on the seriousness of the alleged offence (proposed by a member of the Working Group and discussed above), obscures risk as the key consideration in granting or refusing bail.<sup>36</sup> Further, the Commission is of the view that the prosecution should bear the onus of satisfying the court that a defendant should be remanded in custody rather than released on bail. Depriving a person of his or her liberty is a serious decision. It should not be left to the defendant to satisfy the court that he or she should not be remanded in custody.

4.19 For these reasons, the Commission does not recommend changes to the current bail system to create a presumption against bail with respect to persons awaiting trial.

### **Limiting the category of persons bailable as of right**

4.20 The proposed amendments to limit the category of persons bailable as of right are based on s 7(2) of the *Bail Act 2000* (NZ), which excludes from this category persons charged with an offence relating to assault on a child or by a male on a female.. The Commission considers there is merit in ensuring that, where an offence appears to relate to domestic violence, the remanding officer considers imposing conditions on bail aimed at protecting victims of the domestic violence. Amending the *CPA* to require that persons charged with an offence that appears to have occurred in the context of domestic violence are not bailable as of right would give the court or remanding officer the opportunity to consider allegations of domestic violence when making orders with respect to bail. The Commission does not believe that this amendment would dramatically increase the workload of the courts, as most offences associated with domestic violence carry a penalty of more than two years imprisonment, and so persons charged with such offences fall within the category of persons not bailable as of right. The only exception is common assault, which carries a maximum penalty of imprisonment for one year.

4.21 The Commission is of the view that the wording proposed by the Working Group, which covers any offence relating to an assault on a child or by a male on a female is broader than

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34 *R v Blaikie* (1999) 17 CRNZ 122, cited in *Papu v Police* [2006] WSSC 39 (10 July 2006); Victorian Law Reform Commission, *Review of the Bail Act Final Report* (2007) ch 3.

35 *R v Blaikie* (1999) 17 CRNZ 122, cited in *Papu v Police* [2006] WSSC 39 (10 July 2006).

36 Victorian Law Reform Commission, *Review of the Bail Act Final Report* (2007) ch 3.

necessary to capture domestic violence offences, as it could apply to offences committed outside the family context. The Commission notes that the Family Safety Bill 2011 seeks to establish a system in which a victim of domestic violence, or person acting on his or her behalf, may apply for a protection order. A court may issue a protection order if it finds, on the balance of probabilities, that the respondent has committed or is committing an act of domestic violence, which includes physical, sexual or emotional abuse, intimidation, harassment or controlling or abusive behaviour. The Commission therefore considers that any amendments to bail laws aimed at protecting victims of domestic violence must be consistent with this proposed regime. As such, the Commission recommends that the *CPA* be amended to provide that a person is not bailable as of right where he or she is charged with an offence that occurred in the context of domestic violence, as defined in the Family Safety Bill.

**Recommendation 4:** The *Criminal Procedure Act 1972* should not include provisions that direct the court to consider custody in favour of release on bail for defendants awaiting trial. The prosecution should bear the onus of satisfying the court that a defendant awaiting trial should be remanded in custody rather than released on bail.

**Recommendation 5:** The *Criminal Procedure Act 1972* should be amended to provide that a person is not bailable as of right where he or she is charged with an offence that occurred in the context of domestic violence, as defined in the Family Safety Bill 2011.

### **Discretion of the court where a person is not bailable as of right**

4.22 Where a person is not bailable as of right, a court or remanding officer has discretion to release that person on bail.<sup>37</sup> There are no provisions in the *CPA* to guide the court or remanding officer's decision about whether to grant or refuse bail. Rather, courts have looked to general principles in common law for the criteria to consider when determining whether to grant or refuse bail.

4.23 In the case of *Vitale v Police*,<sup>38</sup> the Court of Appeal set out the criteria that a court should consider when exercising its discretion to release a person on bail. The Court of Appeal held that the court should consider two main tests: first, the likelihood of the defendant appearing in court for his or her trial; and secondly the public interest. Criteria relevant to determining the risk that the defendant will fail to appear at trial include:

- the nature of the offence with which the person is charged, and whether it is a grave or less serious one of its kind;
- the strength of the evidence and probability of conviction;
- the seriousness of the punishment to which the person is liable and the severity of the punishment that is likely to be imposed;
- the character and past conduct of the defendant; and
- any other matter that is relevant in the particular circumstances to the likelihood of the accused appearing or not appearing.

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<sup>37</sup> *Criminal Procedure Act 1972* s 71(5).

<sup>38</sup> [1999] WSCA 4 (8 December 1999).

- 4.24 Criteria relevant to determining the public interest include:
- how soon the defendant’s trial will be held and the extent of any delay;
  - whether there is a risk of the defendant tampering with witnesses;
  - whether there is a risk that the defendant may offend while on bail;
  - the possibility of prejudice to the defendant in the preparation of his or her defence; and
  - any other matter that is relevant in the particular circumstances to the public interest.<sup>39</sup>
- 4.25 Courts have held that no one factor is decisive, but that the court or remanding officer must weigh up all factors before arriving at a decision about bail.<sup>40</sup>
- 4.26 The generality of the court’s discretion regarding decisions about bail under the *CPA* may be contrasted with the approach taken in many other common law jurisdictions, where legislation expressly sets out criteria to guide decision-making about bail.<sup>41</sup> While the organisation and language of legislative provisions of this kind vary across jurisdictions, legislation generally provides that a court, when making a decision about whether to grant or refuse bail, must consider: the probability of the person appearing in court for his or her trial; the interests of the defendant; and the protection and welfare of the community and/or any victims of the alleged offence. Generally, the legislation then also sets out more specific guidance on matters that may inform the court’s views on each of these grounds, including those set out below.
- 4.27 *The nature of the alleged offence, strength of the evidence and seriousness of the punishment:* These considerations appear in nearly all legislative provisions as factors relevant to whether there is a risk that the defendant will abscond or otherwise not appear at trial. A serious charge and potential penalty and the likelihood of a conviction can increase the incentive for the defendant to try to abscond.<sup>42</sup>
- 4.28 *The character and past conduct of the defendant:* The past conduct of the defendant, in particular a history of offending while on bail or breaching bail conditions, is relevant to determining whether the defendant is likely to meet bail or offend while on bail. In addition, factors such as the defendant’s background, community ties, residence, employment and family situation are relevant to determining if the defendant is a flight risk.
- 4.29 *The interests of the defendant:* Interests of the defendant that are relevant to a decision whether or not to release the defendant on bail include the length of time the defendant is likely to remain in custody before his or her trial and whether being held in custody will prejudice the defendant in obtaining legal advice and preparing his or her defence. Other

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39 Ibid, citing *Hubbard v Police* [1986] 2 NZLR 738.

40 *Papu v Police* [2006] WSSC 39, citing *R v Blaikie* (1999) 17 CRNZ 122.

41 See, eg, *Bail Act 2000* (NZ) s 8; *Bail Act 2002* (Fiji) ss 18-19; *Bail Act 1977* (PNG) s 9; *Bail Act 1990* (Tonga) s 4; *Bail Act 1992* (ACT) s 22; *Bail Act 1978* (NSW) s 32; *Bail Act 1982* (NT) s 24; *Bail Act 1980* (Qld) s 16; *Bail Act 1985* (SA) s 10; *Bail Act 1977* (Vic) s 4; *Bail Act 1982* (WA) sch 1 pt C.

42 *Papu v Police* [2006] WSSC 39 (10 July 2006).

relevant factors include whether the defendant needs to be at liberty for other purposes, such as employment, education or to care for dependents; or whether the defendant is incapacitated by injury or in need of physical protection.<sup>43</sup> Some legislation directs the court to consider whether it is necessary for the defendant's own protection for him or her to be in custody.<sup>44</sup>

4.30 *Protection of any victims of the alleged offence:* Some bail legislation requires the court to consider the protection of any victim of the alleged offence.<sup>45</sup> In New Zealand, the *Bail Act 2000* expressly requires the court to consider the views of victims of: a sexual or other serious assault; an offence that resulted in serious injury or death; or an offence that has led the victim to have ongoing fears for his or her safety.<sup>46</sup> Some Australian jurisdictions take a different approach, and permit the court to consider the views of alleged victims only where the victim has expressed concern to the prosecutor or the court.<sup>47</sup>

4.31 *Any other relevant considerations:* The list of considerations in legislation is generally not exhaustive. Often, the legislation makes it clear that the court may consider any other matter that is relevant in the particular circumstances when determining bail.

### ***Submissions and consultations***

4.32 In the Issues Paper, the Commission asked whether the factors to be taken into account when determining whether or not to grant bail should be codified in the *CPA* (question 11).

4.33 A member of the Working Group proposed that a new section should be included in the *CPA* setting out criteria that the court or remanding officer must consider when determining whether to grant bail. The provision proposed is based on s 8 of the *Bail Act 2000* (NZ), with some omissions. It was proposed that the court or remanding officer, when considering whether to grant bail, should take account of:

- the nature and gravity of the offence with which the defendant is charged;
- the seriousness of the punishment to which the defendant is liable;
- the character and past behavior of the defendant, particularly any proven criminal behavior;
- whether the defendant has a history of offending while on bail or of breaching court orders and/or bail conditions;
- whether there is a risk to the safety of others;
- whether there is a risk that the defendant may fail to appear in court;
- whether there is a risk that the defendant may interfere with witnesses or evidence;
- any views of a victim of an offence or of a parent or legal guardian of a victim; and
- any other matter that is relevant in the particular circumstances.

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43 See, eg, *Bail Act 1978* (NSW) s 2(a)(ii).

44 See, eg, *Bail Act 1977* (PNG) s 9(1) (e); *Bail Act 1990* (Tonga) ss 4(1)(ii); 4(3)(ii); *Bail Act 1980* (Qld) s 16(1)(b).

45 See, eg, *Bail Act 1978* (NSW) s 32(1)(b1); *Bail Act 1982* (NT) ss 24(3)-24(5).

46 *Bail Act 2000* (NZ) s 8(4).

47 *Bail Act 1982* (NT) s 24(6); *Bail Act 1992* (ACT) s 23A; *Bail Act 1977* (Vic) s 4(3)(e).

4.34 This stakeholder considered that these criteria reflect the current practice of courts when exercising their discretion to grant or refuse bail. However, the proposal does not direct the court to consider the likely length of time before the matter comes to trial or the possibility of prejudice to the defendant in preparing his or her defence if remanded in custody. Some members of the Working Group considered that the safety of the defendant should also be a relevant factor, particularly where the defendant is in the public eye.

4.35 Another stakeholder submitted that all the factors relating to the discretion to grant bail could not be put down on paper, but expressed the view that it might be helpful to have a non-exhaustive list in the *CPA*. Other stakeholders consulted by the Commission were in favour of setting out criteria in legislation to guide courts' decision making about bail.

### ***Commission's views***

4.36 The Commission considers that there is merit in setting out in the *CPA* a non-exhaustive list of criteria to guide decision making about bail. Including criteria in the legislation will ensure that the prosecution and defendant, as well as the court or remanding officer, consider all relevant issues when making submissions or decisions about bail.

4.37 As discussed in the previous section, the primary considerations when determining whether to grant or refuse bail are the risks that the defendant: will abscond or otherwise not appear in court for trial; will commit an offence while on bail; will endanger the safety of any person or the public; or will interfere with witnesses or otherwise obstruct the course of justice. The Commission is therefore of the view that the *CPA* should provide that the court or remanding officer, when considering whether a defendant should be remanded in custody or released on bail, *must* take each of these risks into account.<sup>48</sup>

4.38 The Commission also considers that the *CPA* should specify that, in determining whether there is such risk, the court or remanding officer *may* consider:

- the nature and seriousness of the offence with which the person is charged;
- the strength of the evidence against the defendant;
- the severity of the punishment to which the person is liable;
- whether the defendant has failed to observe any conditions previously imposed on bail;
- the character and past conduct of the defendant (including the defendant's background, community ties, residence, employment and family situation, and any prior convictions);
- how soon the defendant's trial will be held and the extent of any delay;
- the possibility of prejudice to the defendant in the preparation of his or her defence;
- whether the defendant needs to be at liberty for other purposes, such as employment, education, care of dependents or medical reasons;
- the safety and welfare of any victims of the alleged offence;
- the risk of harm to the defendant while on remand; and
- any other matter relevant in the particular circumstances.

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48 Victorian Law Reform Commission, *Review of the Bail Act Final Report* (2007) ch 3.

4.39 The Commission is of the view that these criteria reflect the kinds of matters that courts and remanding officers already consider when exercising their discretion to grant or refuse bail. In particular, the Commission considers it important that the statutory list should include matters relevant to the interests of the defendant, including the length of time before the trial and any prejudice to the defendant in preparing his or her defence.

4.40 The Commission does not recommend that the *CPA* direct the court to consider whether it is necessary for the defendant's own protection for him or her to be in custody. Instead, the Commission prefers more open statutory language that directs the court to consider the risk of harm to the defendant while on remand, noting that, depending on the circumstances, a defendant may be at risk of harm while in custody, as well as if released on bail.

4.41 The Commission notes the suggestion that the court should take account of any views of the victim of the alleged offence or of a parent or legal guardian of the victim. This suggestion is based on a similar provision in the New Zealand *Bail Act 2000*. The Commission notes, however, that New Zealand has a comprehensive legislative regime relating to the rights of victims of crime, which, amongst other things, imposes obligations on the prosecutor to ascertain the views of victims about the release of the defendant on bail.<sup>49</sup> Further, in New Zealand, this requirement applies only to victims of specific kinds of serious offences.

4.42 The Commission is reluctant to make a recommendation that imposes an obligation on the prosecution and/or the court to ascertain the views of any alleged victims in all cases where a decision about bail is being made. Further, there is a risk that a victim may be of the view that the alleged offender should be remanded in custody in punishment for the offence, even though the offence has not yet been proven at trial. The Commission therefore prefers that the court or remanding officer consider the safety and welfare of any victims of the alleged offence. Of course, in order to make an assessment about the safety and welfare of any victim, any views expressed by the victim may be relevant and, if so, may be considered by the court. For similar reasons, the Commission does not propose to include as a specific consideration the protection of a person from domestic violence, as this issue would arise for consideration as part of the court's assessment of the safety and welfare of any victims of the alleged offence.

**Recommendation 6:** The *Criminal Procedure Act 1972* should be amended to provide that, when considering whether a defendant should be remanded in custody or released on bail, the court or remanding officer *must consider* whether there is a risk that the defendant will:

- abscond or fail to appear at court as required;
- commit an offence while on bail;
- endanger the safety of any person or the public; or

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<sup>49</sup> *Victims' Rights Act 2002* (NZ) s 30.

- interfere with witnesses or otherwise obstruct the course of justice.

The *Criminal Procedure Act 1972* should further provide that, in determining whether there are any such risks, the court or remanding officer *may take into account*:

- the nature and seriousness of the offence with which the person is charged;
- the strength of the evidence against the defendant;
- the severity of the punishment to which the person is liable;
- whether the defendant has failed to observe any conditions previously imposed on bail;
- the character and past conduct of the defendant (including the defendant's background, community ties, residence, employment and family situation, and any prior convictions);
- how soon the defendant's trial will be held and the extent of any delay;
- the possibility of prejudice to the defendant in the preparation of his or her defence;
- whether the defendant needs to be at liberty for other purposes, such as employment, education, care of dependents or medical reasons;
- the safety and welfare of any victims of the alleged offence;
- the risk of harm to the defendant while on remand; and
- any other matter relevant in the particular circumstances.

### **Bail pending sentence and appeal**

4.43 The previous sections discussed decisions regarding bail of persons who have been charged with an offence but not convicted. In these circumstances, there is a presumption in favour of bail consistent with the presumption of the defendant's innocence. Different considerations arise when a defendant who has been convicted seeks release on bail pending sentencing or an appeal.

### **Bail pending sentencing**

4.44 After a verdict is delivered at trial, a proceeding is usually adjourned to a later date for the defendant to be sentenced. The *CPA* does not have a specific provision that governs the grant of bail during the time between conviction and sentencing. Samoan courts use the general test from *Vitale v Police*<sup>50</sup> described above when exercising their discretion to grant bail or remand the offender in custody during this period.<sup>51</sup>

4.45 There is some variation in bail legislation across other jurisdictions with respect to bail pending sentencing. Most legislation in Australia and the Pacific applies the usual bail provisions to the court's decision-making. In the Australian Capital Territory, where a person seeks bail pending sentencing, the court must consider the likelihood of the person being given a sentence of imprisonment, in addition to the usual criteria which apply to all decisions regarding bail.<sup>52</sup>

4.46 The *Bail Act 2000* (NZ) takes a different approach, and provides that the court must not grant bail to a person who has been convicted and is awaiting sentencing unless it would be in the interests of justice to do so. The responsibility is placed on the convicted defendant to

<sup>50</sup> [1999] WSCA 4 (8 December 1999).

<sup>51</sup> See, eg, *Police v Milo* [2007] WSSC 36 (11 May 2007).

<sup>52</sup> *Bail Act 1992* (ACT) s 22(2).

show cause why bail should be granted. Instead of the usual criteria regarding decisions about bail, courts must consider three other criteria when making a decision about bail pending sentencing, namely:

- whether the defendant is likely to receive a sentence of imprisonment (if a sentence of imprisonment is unlikely, this must count against the defendant being remanded in custody);
- the likely length of time that will pass before the defendant is sentenced; and
- the personal circumstances of the defendant and the defendant's immediate family.<sup>53</sup>

4.47 The New Zealand *Bail Act 2000* further provides that a defendant convicted of a specified offence who has a previous conviction for another specified offence may not be granted bail or allowed to go at large while waiting to be sentenced.<sup>54</sup>

### ***Submissions and consultations***

4.48 In the Issues Paper, the Commission asked whether there should be guidelines in the *CPA* regarding decisions about the bail of a defendant awaiting sentencing (question 13).

4.49 A member of the Working Group considered that, in light of the number of defendants who fail to appear in court for sentencing, it was important to include a separate section in the *CPA* dealing with bail pending sentence. Such amendments would be based on the provisions of the New Zealand *Bail Act 2000* outlined above. Other stakeholders were in favour of including guidelines in the *CPA* regarding bail pending sentence.

### ***Commission's views***

4.50 The consideration of bail pending sentencing differs from the consideration of whether or not to grant bail to a person awaiting trial, because in the former case, the defendant has been found guilty of the offence. However, the outcome of the sentencing process may be that the defendant is not sentenced to a period of imprisonment and in such cases it is unfair to remand the defendant in custody as a matter of course. Further, even if convicted of an offence, the primary purpose of remanding a person in custody rather than releasing him or her on bail is the same as for bail applications in general, namely to ensure that the defendant appears in court for sentencing and does not commit offences or endanger any person or the public in the interim. Bail should not be used to punish the defendant.

4.51 For these reasons, the Commission does not consider it necessary to impose a stricter test for the question of bail pending sentencing than for bail applications in general. The Commission therefore recommends that questions of bail pending sentencing should be governed by the same rules and criteria that apply to the consideration of bail pending trial, with the additional requirement that, when considering the question of bail pending sentencing, the court must consider whether the defendant is likely to be given a sentence of imprisonment. The prosecution should still bear the onus of showing cause why the defendant should be remanded in custody.

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53 *Bail Act 2000* (NZ) s 13.

54 *Ibid* s 11. Specified offences are set out in the section on presumptions for and against bail, above.

**Recommendation 7:** The *Criminal Procedure Act 1972* should be amended to provide that when a court or remanding officer is exercising the discretion to grant or refuse bail to a person who has been convicted and is awaiting sentencing, the court or remanding officer must consider the likelihood of the person being given a sentence of imprisonment, in addition to the criteria set out in Recommendation 6.

### **Bail pending appeal**

4.52 Parts VII and VIIA of the *CPA* include provisions about the bail of a defendant who has been convicted and imprisoned and is appealing that conviction or sentence.

4.53 Sections 148 to 150 of the *CPA* deal with the bail of a person who is appealing the outcome of a trial in the District Court. An appellant who is in custody for the conviction to which the appeal relates is bailable at any time before the hearing of the appeal at the discretion of the Judge or *Fa'amasino Fesoasoani* who presided over the trial or some other remanding officer.<sup>55</sup> If granted bail, the appellant may be released from custody on entering a bond subject to the condition that the appellant attend court for the hearing of the appeal.

4.54 Section 164C of the *CPA* deals with the grant of bail to a person who is appealing the outcome of a trial in the Supreme Court before the Court of Appeal. It provides that the appellant may apply for bail to the Court of Appeal or the judge who presided at trial. The court or judge may grant bail to the appellant on such terms and subject to such conditions as the court or judge thinks fit.

4.55 In both cases, the *CPA* provides no guidance as to how the court's discretion is to be exercised.

### **Comparable jurisdictions**

4.56 Those jurisdictions in the Pacific with specific bail legislation leave the question of bail pending appeal to the discretion of the court, to be exercised as for bail decisions more generally.<sup>56</sup> The *Fiji Bail Act 2002* provides that when a court is considering the grant of bail to a person who has appealed against conviction or sentence, the court must take into account: the likelihood of success in the appeal; the likely time before the appeal hearing; and the proportion of the original sentence which will have been served by the applicant when the appeal is heard.<sup>57</sup>

4.57 In some Australian jurisdictions, a defendant who is in custody awaiting appeal may only be released on bail where there are special or exceptional circumstances justifying the grant of bail. The onus is on the defendant to satisfy the court of such exceptional circumstances, as well as the other criteria relevant to the grant of bail more generally.<sup>58</sup> Special or

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55 *Criminal Procedure Act 1972* s 148.

56 *Bail Act 2002* (Fiji) s 17; *Bail Act 1990* (Tonga) s 3; *Bail Act 1977* (PNG) s 11. This approach is also taken in the *Bail Act 1980* (Qld) and *Bail Act 1985* (SA).

57 *Bail Act 2002* (Fiji) s 17(3).

58 See, eg, *Bail Act 1992* (ACT) s 9E; *Bail Act 1978* (NSW) s 30AA; *Bail Act 1982* (NT) s 23A; *Bail Act 1982* (WA) sch 1 pt C cl 4A.

exceptional circumstances may include that the entire sentence will be served before the appeal is determined or that the ground of appeal is certain to succeed.<sup>59</sup>

4.58 Section 14 of the *Bail Act 2000* (NZ) requires that the court must not grant bail to a person who is in custody and appealing his or her conviction or sentence unless it is satisfied on the balance of probabilities that it would be in the interests of justice to do so. The onus is on the defendant seeking bail to show cause why bail should be granted. The legislation directs the court to consider the following criteria:

- the apparent strength of the grounds of appeal;
- the length of the sentence that has been imposed on the appellant;
- the likely length of time that will pass before the appeal is heard; and
- the personal circumstances of the appellant and the appellant's immediate family.

### ***Submissions and consultations***

4.59 In the Issues Paper, the Commission asked whether there should be guidelines in the *CPA* regarding bail pending appeal (question 13).

4.60 A member of the Working Group proposed that the *CPA* be amended to include a specific section to deal with bail pending appeal. The member proposed a new section along the same lines as s 14 of the *Bail Act 2000* (NZ), outlined above. Other stakeholders were in favour of including guidelines in the *CPA* regarding bail pending appeal. One stakeholder submitted that there was a need for guidelines to ensure there are no grey areas, noting that there is a public perception that convicted persons will appeal so they can be released from prison on bail.

### ***Commission's views***

4.61 The Commission considers that a higher threshold for the grant of bail to a person who has been convicted and is serving a sentence of imprisonment is justified. It is also important to guard against the misuse of the appeals process to obtain release on bail.

4.62 The Commission therefore recommends that the *CPA* include a specific provision to deal with bail of a person in custody following conviction. The Commission notes that, in substance, the 'exceptional circumstances' test that applies in some Australian jurisdictions and the statutory test set out in the New Zealand *Bail Act 2000* are largely similar. The Commission prefers the approach in the New Zealand *Bail Act 2000*, however, because it includes the criteria for determining whether it is in the interests of justice to grant bail to a person who is in custody and appealing his or her conviction or sentence.

**Recommendation 8:** Sections 148 and 164C of the *Criminal Procedure Act 1972* should be amended to set out criteria to guide the exercise of the court's discretion to grant bail to a person who is in custody and appealing his or her conviction or sentence. The onus should be on the person seeking bail to satisfy the court that it would be in the interests of justice to release the person on bail. When determining whether it is in the interests of justice to grant bail, the court should consider:

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<sup>59</sup> See *Marotta v The Queen* (1999) 160 ALR 525.

- the strength of the grounds of appeal;
- the length of the sentence that has been imposed on the appellant;
- the likely length of time that will pass before the appeal is heard;
- the personal circumstances of the appellant and the appellant's immediate family; and
- any other matter the court considers relevant.

### **Conditions on bail**

4.63 A court or remanding officer may place conditions on the defendant's release on bail. Section 75(1) of the *CPA* provides that the defendant may be required to report to police at such times and places as the court or remanding officer thinks fit. The court or remanding officer may also place other conditions on bail which, as a matter of practice, commonly include that the defendant: surrender his or her passport; reside at a particular location; refrain from visiting a particular location; abide by a curfew; or have no contact with specified persons. A defendant may also be 'remanded at liberty', that is, released on bail with no conditions except that he or she appear in court as required.

4.64 The *CPA* also provides that a defendant may be released on bail upon paying a monetary bond. A bond is a sum of money that the defendant deposits with the court or promises to pay if he or she does not attend court.<sup>60</sup> The *CPA* also permits the defendant to enter into a bond with a surety.<sup>61</sup> A surety is another person (such as a friend or family member) who undertakes to ensure that the defendant will meet his or her bail conditions. The surety provides security, such as money or property which may be forfeited if the defendant does not attend court.

4.65 Section 76 of the *CPA* provides that the defendant may apply for a court order to vary the terms or conditions imposed on bail. If sureties have been provided, any variation to the conditions of bail must not take effect until the sureties have consented in writing to the variation.

### **Comparable jurisdictions**

4.66 Many other jurisdictions set out in legislation the circumstances in which a court or remanding officer may impose conditions on bail, and the types of conditions that may be imposed.

4.67 For example, in some Australian jurisdictions, bail legislation generally provides that conditions may only be placed on bail if they are necessary to securing the purposes for which bail is granted, namely to reduce the risk that the defendant fails to attend court, commits an offence while on bail, endangers safety or welfare of members of the public, or interferes with witnesses or evidence.<sup>62</sup>

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60 *Criminal Procedure Act 1972* s 75.

61 *Ibid* s 75(2).

62 The language of such provisions differs across jurisdictions, see *Bail Act 1992* (ACT) s 25; *Bail Act 1978* (NSW) s 37; *Bail Act 1982* (NT) s 28; *Bail Act 1980* (Qld) s 11; *Bail Act 1985* (SA) s 11; *Bail Act 1977* (Vic) s 5; *Bail Act 1982* (WA) sch 1 pt D cls 1-2.

4.68 Legislation in many Australian jurisdictions also sets out a non-exhaustive list of the kinds of conditions that a court or remanding officer may place on bail, including that the defendant:

- report to police at specified times;
- pay a bond or give security to the court;
- reside at a particular place;
- refrain from visiting a particular place;
- not associate or communicate with specified persons;
- undertake medical treatment or participate in a rehabilitation program; or
- surrender his or her passport.

4.69 The New Zealand *Bail Act 2000* takes a more general approach. Section 31 provides that a condition on all bail is that the defendant attend court as required. The court or remanding officer may impose a further condition that the defendant report to the police, or any other condition reasonably necessary to ensure that the defendant: appears in court as required; does not commit an offence while on bail; and does not interfere with witnesses or evidence. The *Bail Act 2000* (NZ) does not list the kinds of conditions that may be placed on the defendant's conduct. This is left to the discretion of the court or remanding officer.

4.70 In 1987, New Zealand abolished the practice of requiring a defendant released on bail to pay a monetary bond or provide a surety in the District Court.<sup>63</sup> The reasons for making this change included doubts about the effectiveness of bonds in reducing failure by defendants to answer bail; the potential for the use of bonds to discriminate against people with low incomes; and difficulties in administering and enforcing monetary bonds.<sup>64</sup>

4.71 Legislation in other jurisdictions generally also allows the court or remanding officer to vary any conditions placed on bail on application by either the prosecution or defendant.<sup>65</sup>

### ***Submissions and consultations***

4.72 In the Issues Paper, the Commission asked whether bail conditions should be codified to reflect current practice. The Commission provided as examples of bail conditions a requirement that the defendant report to the police or surrender his or her travel documents (question 14).

4.73 A member of the Working Group considered that the *CPA* should be amended to reflect current court practices of imposing conditions on bail. This proposal included suggestions that the *CPA* provide a mandatory condition, to be imposed on all bail, that the defendant attend personally at every court hearing, and that the *CPA* include a list of conditions that the court *may* impose, including:

- that the defendant report to the police at times and places as ordered by the court or remanding officer;

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63 *Bail Act 2000* (NZ) s 31(4).

64 New Zealand Ministry of Justice, *Bail in New Zealand: Reviewing Aspects of the Bail System Public Consultation Document*, March 2011, 9.2.

65 See, eg, *Bail Act 2000* (NZ) s 34; *Bail Act 1977* (PNG) s 20; *Bail Act 1990* (Tonga) s 6; *Bail Act 1992* (ACT) s 19; *Bail Act 1980* (Qld) s 30; *Bail Act 1985* (SA) s 6(4); *Bail Act 1977* (Vic) s 18AC.

- that the defendant surrender his or her travel documents; or
- any other conditions that the court or remanding officer considers reasonably necessary to ensure that the defendant appears in court on the date to which the defendant has been remanded, does not interfere with any witnesses or evidence, and does not commit any offence while on bail.

4.74 Other stakeholders were generally in favour of codifying bail conditions in the Act, with one stakeholder suggesting that other conditions could relate to place of work, places a person may or may not go, association with people and access to alcohol.

4.75 A particular issue discussed during meetings of the Working Group related to the difficulties that arise when a court orders the defendant to surrender his or her travel documents. Participants noted that where a defendant does not have a passport or other travel documents, the defendant may only be released if Samoa Immigration confirms this in writing. In practice, this requires the defendant's lawyer, or, in most cases, a friend or family member, to request this information from Immigration. Sometimes the Court Registry assists by providing a letter for the person to take to Immigration, but the Commission has heard that this is not always the case. Representatives from the Ministry of Police and Prisons expressed a concern that delays in obtaining confirmation from Samoa Immigration sometimes mean that a defendant is held in custody for a longer period than necessary.<sup>66</sup>

### ***Commission's views***

4.76 The Commission considers there is merit in setting out in the *CPA* the circumstances in which a court or remanding officer may impose conditions on bail, and a non-exhaustive list of types of conditions that may be imposed. This will ensure that the *CPA* reflects current practice, in which courts and remanding officers frequently impose conditions on the defendant's conduct in addition to the reporting requirements already specified in the Act.

4.77 Earlier, the Commission expressed its view that the key considerations when determining whether to grant or refuse bail are to address the risk that the defendant: will not appear at court for trial; will commit an offence while on bail; will endanger the safety of any person or the public; or will interfere with witnesses or otherwise obstruct the course of justice. In light of this, conditions should only be imposed on bail where they are reasonably necessary to reduce these particular risks.

4.78 The Commission recommends that the *CPA* be amended to expressly state that it is a condition on all bail that the defendant attend personally at each court hearing. The Commission further recommends that the *CPA* include a list of the kinds of conditions that a court or remanding officer, may, in his or her discretion, impose on bail, including that the defendant:

- report to the police at specific times and places;
- surrender all travel documents;
- reside at a particular place;
- refrain from visiting a particular place; or

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66 Discussions at the Criminal Law Review Working group (see minutes attached to Attorney General's letter of 11 January 2010, paras 13-32).

- refrain from having any contact with a specified person.

4.79 This is not intended to be an exhaustive list of the conditions that a court or remanding officer may place on bail. Rather, it is intended to reflect in legislation the kinds of conditions that are commonly placed on bail. In order to be clear, the Commission recommends that the *CPA* expressly permit the court or remanding officer to impose any other condition on bail reasonably necessary to ensure the defendant appears in court as required, and does not commit an offence, endanger the safety of any person or the public nor interfere with witnesses while released on bail. This will allow the court or remanding officer to impose conditions on bail that take account of the particular circumstances of the defendant.

### **Bail bond**

4.80 The Commission notes that, in practice, courts or remanding officers rarely require the defendant to provide a monetary bond as a condition of his or her release on bail. Despite this, the Commission is of the view that, in some cases, requiring the defendant to deposit a sum of money that the defendant will forfeit if he or she does not meet bail is an effective means to ensure that the defendant appears in court as required. For these reasons, the Commission considers that the payment of a bond, by the defendant or a surety, should be included in the list of conditions that the court or remanding officer may place on the defendant's release on bail.

### **The surrender of travel documents as a condition of bail**

4.81 The Commission notes concerns expressed by the police and members of the public that imposing a condition of bail that the defendant surrender any travel documents causes difficulties in practice. The Commission is particularly concerned that the defendant bears the responsibility of satisfying the court that he or she does not possess a passport or other travel documents. This is particularly difficult if the defendant is in custody and is unrepresented or does not have family and friends to assist him or her. As such, the Commission recommends that systems be put in place so that the court registry or police can check directly with Samoa Immigration whether or not the defendant holds a passport or other travel documents.

### **Variation of conditions**

4.82 Currently the *CPA* provides that the defendant may apply to the court or remanding officer to vary the terms on which bail has been granted or any conditions relating to the bail bond. The Commission considers that this provision should be amended to permit the prosecution to also apply to vary the conditions imposed on bail if circumstances change.

**Recommendation 9:** The *Criminal Procedure Act 1972* should be amended to provide that a court or remanding officer has discretion to impose any conditions on a defendant's release on bail that are reasonably necessary to ensure that the defendant will appear at court as required, will not commit an offence while on bail, will not endanger the safety of any person or the public; and will not interfere with witnesses or otherwise obstruct the course of justice, including, but not limited to:

- requiring the defendant to report to the police at specific times and places;

- requiring the defendant to surrender all travel documents;
- requiring the defendant to reside at a particular place;
- prohibiting the defendant from visiting a particular place;
- prohibiting the defendant from having any contact with a specified person; or
- requiring the defendant or surety to pay a monetary bond to the court.

**Recommendation 10:** The *Criminal Procedure Act 1972* should be amended to permit the defendant and the prosecution to apply to the court for a variation of any conditions imposed on bail.

**Recommendation 11:** The Ministry of Justice and Courts Administration, Samoa Immigration and the Ministry of Police and Prisons should develop and implement a system so that the court, remanding officer or police can check directly with the Department of Immigration to determine whether or not a defendant who is to be released on bail on the condition that he or she surrender any travel documents does or does not possess travel documents.

### Consequences of breach of bail

4.83 Sections 78 to 81 of the *CPA* set out what happens if a defendant absconds or attempts to abscond, fails to report to police as required or fails to appear in court. In each case, the court or remanding officer may issue a warrant for the arrest of the defendant so that the defendant is brought before the court so a further decision about bail can be made.<sup>67</sup> If a defendant absconds, attempts to abscond or fails to report to police as required, he or she is bailable only at the discretion of the court or remanding officer.<sup>68</sup> Where the defendant or a surety has entered into a monetary bond, a breach of a condition of bail by the defendant may also result in some or all of the bond money being forfeited (known as estreat of bail bond).<sup>69</sup>

4.84 In some other jurisdictions it is a criminal offence for the defendant to fail to appear or to breach a condition of bail. In New Zealand, it is an offence with a maximum penalty of one year imprisonment or a fine of \$2000 if a defendant on bail fails without reasonable excuse to personally attend court for any hearing.<sup>70</sup> If a defendant fails to comply with any other condition of bail, the court may certify that fact on the notice of bail and in the defendant's criminal record.<sup>71</sup>

4.85 In all Australian jurisdictions, it is a criminal offence for a defendant on bail to fail to appear in court as required.<sup>72</sup> In some jurisdictions, it is also a criminal offence to breach a condition imposed on bail.<sup>73</sup> In other jurisdictions, where there are reasonable grounds for

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67 *Criminal Procedure Act 1972* ss 78(1), 79(1), 80. Section 149 of the *CPA* deals in similar terms with an appellant who has absconded or is about to abscond while on bail.

68 *Criminal Procedure Act 1972* ss 78(2), 79(2).

69 *Ibid* s 81.

70 *Bail Act 2000* (NZ) ss 37, 62.

71 *Ibid* ss 38, 63.

72 *Bail Act 1992*(ACT) s 49; *Bail Act 1978* (NSW) s 51; *Bail Act 1982* (NT) s 37B; *Bail Act 1980* (Qld) s 33; *Bail Act 1985* (SA) s 17; *Bail Act 1994* (Tas) s 9; *Bail Act 1977* (Vic) s 30; *Bail Act 1982* (WA) s 51.

73 *Bail Act 1980* (Qld) s 29, *Bail Act 1985* (SA) s 17, *Bail Act 1994* (Tas) s 9.

believing that a person has failed to comply with a condition of bail, a police officer may arrest the defendant without warrant.<sup>74</sup>

### ***Submissions and consultations***

4.86 In the Issues Paper, the Commission asked whether the *CPA* should be amended to permit the arrest without warrant of a defendant on bail, and if so, in what circumstances (questions 15 and 16). The Commission also asked whether failure to abide by conditions on bail should be a criminal offence (question 17). Submissions and consultations were divided on this issue.

4.87 Some members of the Working Group considered that failure to comply with bail conditions was a recurring problem and reflected some defendants' carelessness towards court orders. Two proposals were made to give police power to arrest a defendant who breaches bail. First, police should be able to arrest a defendant without warrant if there are reasonable grounds to believe that the defendant has absconded or is about to abscond for the purpose of evading justice or that the defendant has failed to comply with any condition of bail. Secondly, it should be a criminal offence if a defendant released on bail fails, without reasonable excuse, to attend personally at court as required or to comply with any conditions imposed upon bail. The Working Group member proposing these measures considered that they would provide stronger enforcement of court orders. Other written submissions generally agreed with these views, except one stakeholder who noted that failure to abide by bail conditions was already an offence under the rules of contempt of court.

4.88 A different view was expressed during the Commission's consultations with members of the legal profession, who generally considered that there was no need to create a separate offence for breach of bail conditions. Many noted that the courts already have sufficient tools to enforce bail, including the ability to issue a warrant for the arrest of the defendant, the option to remand in custody a defendant who breaches bail and the possibility of proceedings for contempt. A breach of bail might also adversely affect any later application for bail made by the defendant. In addition, some stakeholders noted that the defendant on bail is already before the courts and subject to its orders, and that a separate charge for breach of bail would unnecessarily and perhaps unfairly complicate proceedings.

### ***Commission's views***

4.89 The Commission does not support the creation of an offence for failing to appear to answer bail or for breach of bail conditions. The Commission considers that the risk of revocation of bail and subsequent remand in custody is sufficient disincentive for the defendant to contravene conditions on bail. In more serious cases, such as repeated contravention of bail conditions, there is also the option of laying a charge for contempt. The Commission is concerned that creating an offence for breach of bail conditions would substantially increase the workload of police and courts, who have not only to deal with the proceedings for the offence for which the person has been granted bail, but a separate proceedings for the offence of breach of bail. There is also a risk that creating an offence for breach of bail would lead to inconsistent or arbitrary decisions to lay charges in some, but not all, cases of breach of bail.

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74 *Bail Act 1992 (ACT)* s 56A; *Bail Act 1978 (NSW)* s 50; *Bail Act 1982 (NT)* s 38; *Bail Act 1977 (Vic)* s 24.

4.90 The Commission does, however, consider that the *CPA* should permit a police officer to arrest a defendant without warrant where there are reasonable grounds for believing that he or she has failed to comply with any condition of bail. This means that the police can arrest a person who is contravening a condition such as a prohibition to stay away from the alleged victim at the time of contravention, without needing to seek a warrant from the court. Once arrested, the defendant must be brought before the court or remanding officer, who may then reconsider the question of bail.

**Recommendation 12:** Section 4 of the *Criminal Procedure Act 1972* should be amended to permit a police constable to arrest and take into custody without a warrant any person whom he or she has reasonable grounds to suspect has failed to comply with any condition of bail.

### Young defendants

4.91 Criminal justice systems generally treat children and young people differently from adults in light of their age, capacity and special vulnerabilities. In particular, it is a principle of international human rights law that young people should be detained in custody only as a measure of last resort and for the shortest appropriate period of time.<sup>75</sup>

4.92 In Samoa, different provisions regarding bail apply depending on whether the defendant is aged between 18 and 21, or between 10 and 17. Section 72 of the *CPA* provides that where a defendant is aged less than 21 and would not be bailable as of right under s 71 of the *CPA*, the court may direct that he or she be remanded in custody only if no other course is desirable in all circumstances. Section 72 of the *CPA* further provides that a defendant under the age of 18 years may be remanded in the custody of a Child Welfare Officer, a probation officer, the Commissioner of Police or ‘any reputable adult person’.

4.93 The *Young Offenders Act 2007* contains provisions that relate to bail for young people aged between 10 and 17 years of age. Section 22 of that Act gives the Youth Court (a division of the District Court) the discretion to remand a young person on bail or in custody. The *Young Offenders Act* does not set out the grounds on which a young person may be remanded in custody. It does, however, list some of the conditions that may be imposed on a young person’s bail, including that he or she:

- live with a specified person or persons;
- not associate with specified persons or a class of persons;
- abide by a curfew;
- attend school or any other specified place;
- not attend certain locations;
- report to the Probation Service;
- surrender travel documents; or

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<sup>75</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, art 37(b) (entered into force 2 September 1990). Samoa ratified this convention on 29 November 1994. See also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* Adopted by General Assembly Resolution 40/33 of 29 November 1985, paras 13.1-13.2.

- not take alcohol, drugs or drive a motor vehicle.<sup>76</sup>

4.94 The provisions of the *CPA* relating to breach of bail apply where a young person is in breach of any conditions on his or her bail.<sup>77</sup>

4.95 In Australia and New Zealand, the rules and procedures relating to the bail of young defendants and adults are generally set out in separate provisions or legislation.<sup>78</sup>

### ***Submissions and consultations***

4.96 In the Issues Paper, the Commission asked whether there should be one bail provision in the *CPA* for all matters pertaining to bail regardless of whether the offender is aged less than 17 years, or, alternatively, whether bail provisions for young offenders should be separate and be contained in the *Young Offenders Act 2007* (question 18).

4.97 A member of the Working Group expressed a preference for having a single set of bail provisions in the *CPA* that covered both young defendants and adults. Submissions from other stakeholders considered that bail provisions for young defendants should be separate from those for adults.

### ***Commission's views***

4.98 The Commission is of the view that the current provisions of the *CPA* relating to bail for young defendants are appropriate. In particular, the Commission considers that the strong presumption in favour of bail for young defendants reflects the special needs of children in the criminal justice system and the principle that the detention of children should be a measure of last resort. Of course, the question of bail is still for the court to determine, in its discretion, having regard to the tests outlined above in relation to bail more generally.

4.99 The Commission considers that it is important to retain the provisions relating to bail in the *Young Offenders Act 2007*. In particular, the *Young Offenders Act* sets out a range of conditions that the Youth Court can impose on bail that differ from those that would be appropriate for adults. As such, it is important that bail provisions relating to young defendants remain separate from those relating to adults.

4.100 The Commission notes that different legislative provisions apply to adults, people aged between 18 and 21 and people aged 17 and under. The Commission is currently undertaking a review of Samoa's laws to ensure compliance with the *Convention on the Rights of the Child*. As part of this review the Commission will determine and recommend a consistent definition, compliant with international human rights law, to apply to children across all Samoa's laws, including 'young persons' referred to in criminal procedure legislation.

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76 *Young Offenders Act 2007* s 22(4).

77 *Ibid* s 22(5).

78 *Children, Young Persons and Their Families Act 1989* (NZ) ss 234-243; *Bail Act 1992* (ACT) s 23; *Juvenile Justice Act 1992* (Qld) pt 3; *Children And Young Persons Act 1989* (Vic) ss 345-348; *Bail Act 1982* (WA) sch 1, pt C, cl 2.

## 5. Non Appearance

- 5.1 A criminal proceeding may be dismissed for want of prosecution if a party fails to appear in court for any hearing or trial. Sections 43 to 44 of the *CPA* set out different rules depending on which party fails to appear at a hearing.
- 5.2 Where the informant (that is, the prosecution, being the person who laid the information<sup>79</sup>) does not appear the court may dismiss the information for want of prosecution or adjourn the trial.<sup>80</sup> Where the defendant does not appear, the court may issue a warrant to arrest the defendant or adjourn the trial, and if the maximum penalty is a fine or not more than 3 months of imprisonment, it may also proceed with the trial and pass sentence where applicable.<sup>81</sup> If neither party appears, the court may dismiss the information or adjourn the proceedings.<sup>82</sup>
- 5.3 If an information is dismissed for want of prosecution, costs may be awarded to the defendant.<sup>83</sup> The dismissal of an information for want of prosecution does not, however, operate as a bar to any other proceedings in the same matter.<sup>84</sup>
- 5.4 In practice, if the informant does not appear, the prosecution may seek the leave of the court to withdraw the information, in order to prevent dismissal for want of prosecution. If an information is dismissed for want of prosecution, the prosecution may file a motion of reinstatement and affidavit giving reasons for the failure to appear. The court then considers whether to grant leave to reinstate or not. As these approaches have developed as a matter of court practice, which members of the legal profession are not all familiar with, they have given rise to some confusion.

### **Comparable jurisdictions**

- 5.5 The *Summary Proceedings Act 1957* (NZ) contains a provision similar to ss 43 and 44 of the *CPA*.<sup>85</sup> The dismissal of an information for want of prosecution does not operate as a bar to any other proceedings in the same matter.<sup>86</sup>
- 5.6 Likewise, in some Australian jurisdictions, legislation provides that if the defendant appears but the informant, having been notified of the time and place for the hearing, does not appear, the court must dismiss the information,<sup>87</sup> or, if it considers it appropriate to do so, adjourn the

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<sup>79</sup> *Criminal Procedure Act 1972* s 2.

<sup>80</sup> *Criminal Procedure Act 1972* s 43(b).

<sup>81</sup> *Ibid* s 42.

<sup>82</sup> *Ibid* s 44.

<sup>83</sup> *Ibid* s 43(c).

<sup>84</sup> *Ibid* s 45.

<sup>85</sup> *Summary Proceedings Act 1957* (NZ) s 62.

<sup>86</sup> *Ibid* s 64.

<sup>87</sup> *Magistrates Court Act 1930* (ACT) s 109(1)(b); *Criminal Procedure Act 1986* (NSW) ss 201(1), 249(1)(a); *Criminal Procedure Act 2009* (Vic) s 79(a).

hearing of the information to another day.<sup>88</sup> There are no provisions as to reinstatement in the cited Acts.

### ***Submissions and consultations***

5.7 In the Issues Paper, the Commission asked whether it should be open for the informant to apply to the Court to have an information reinstated if it has been dismissed for want of prosecution under ss 43 and 44 (question 5).

5.8 The Commission received two submissions in response to this question, one of which was in favour of the reform suggested. The other stakeholder submitted that, from a public perspective, reinstatement is not in the interests of justice where the prosecution does not fulfill its duties and fails to appear. In her view, a person not appearing should be held to account, and if the prosecution cannot make its case it should not be rewarded by being given the possibility to try again.

5.9 In Working Group meetings,<sup>89</sup> one stakeholder suggested that ss 43 and 44 of the *CPA* required reform to address the issue of serious charges being dismissed due to the absence of a prosecutor. At times, the prosecutor is not at fault when he or she fails to appear, for instance when the court schedule is changed but the prosecutor is not informed. That stakeholder therefore proposed that s 43 should be amended to serve the interests of justice and to avoid the dismissal of charges by introducing the possibility for the prosecution to apply to the court to have an information reinstated if it is dismissed without the prosecutor being present. It was also proposed that the same approach be reflected in s 44 where neither the informant nor the defendant appears.

5.10 Members of the legal profession consulted by the Commission were all against introducing the possibility of reinstatement because if the prosecution misses a hearing, it is usually its own fault. Some noted that if the prosecution can justify its absence, there is always the possibility to seek the leave of the court to withdraw the information and reinstate the case at a later stage.

### ***Commission's views***

5.11 The Commission notes that there will be cases where an information should not be dismissed because the prosecution or informant failed to appear. In some cases there may be good reason for the informant's non-appearance and the interests of justice may require the trial to proceed. In some cases, a dismissal for want of prosecution would be difficult to justify to the victim and/or the public.

5.12 On the other hand, it is extremely important for the prosecution and informant to appear at all court hearings. If the prosecution were given the opportunity to have its case reinstated each time it missed a hearing, there may be less incentive to appear. This would not be in the interests of justice. It would also impinge on the defendant's right to a prompt trial.

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88 *Magistrates Court Act 1930* (ACT) s 109(2); *Criminal Procedure Act 1986* (NSW) ss 201(2), 249(1)(b); *Criminal Procedure Act 2009* (Vic) s 79(b).

89 As reflected also in Criminal Law Review Working Group, *Report: Criminal Procedure Act 1972* (2011) 11.

- 5.13 Further, the prosecution has the resources to ensure that it is informed about changes in court schedules ahead of time. The defendant, on the other hand, may be spending the period of time between the original hearing and the reinstatement in custody or on bail, and in that case is further prejudiced by the other party's failure to appear.
- 5.14 The Commission notes that failure by the prosecution and/or informant to appear does not automatically lead to the dismissal of the information for want of prosecution. In all cases, the court has discretion to alternatively adjourn the trial depending on circumstances.
- 5.15 Applications for reinstatement should be granted only in very exceptional cases and when the informant's failure to appear is properly justified. An application to have the case reinstated should only be granted if the informant proves not to have been at fault for being absent, and if the reinstatement of the case is in the interests of justice. As this matter is currently handled sufficiently in the court's general discretion, and the dismissal of an information for want of prosecution does not operate as a bar to any other proceedings in the same matter, there is no immediate need to amend the *CPA* to expressly permit the prosecution to seek reinstatement.

**Recommendation 13:** The court should retain the discretion to dismiss an information for want of prosecution or to adjourn the trial when the informant does not appear. There is no need to amend the *Criminal Procedure Act 1972* to permit the informant to have the information reinstated.

## 6. Pre-trial Case Management

- 6.1 The right to a fair trial as set out in art 9 of the *Constitution* includes the right of every defendant to have their matter dealt with within a reasonable time. It is also said that 'justice delayed is justice denied'.
- 6.2 Good case management ensures that not only is justice done, but it is done efficiently and inexpensively. Public confidence in the courts is one of the vital ingredients of their success, and slow, inefficient and costly procedures diminish the community's trust in the legal system. While achieving justice was for a long time seen simply as the court coming to the right decision, regardless of time and cost, it is now considered that efficiency, inexpensiveness as well as the correct outcome are all relevant to justice being done and being seen to be done.<sup>90</sup>

### *Submissions and consultations*

- 6.3 According to the Ministry of Justice and Courts Administration, a criminal case in Samoa currently takes 8 to 12 months to go through the system, from commencement to sentencing after trial. The Commission heard an opinion during consultations that this was too long, and some of those consulted were concerned that it was inefficient for judges to manage the

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<sup>90</sup> A Zuckerman, 'The Challenge of Civil Justice Reform: Effective Court Management of Litigation' (2009) 1 *City University of Hong Kong Law Review* 49.

procedural and administrative matters associated with criminal proceedings as well as substantive legal issues, as is currently the case. Delays were also said to be caused by the police approach to filing documents in court: because there is no court system for checking documents filed with registry, police will often file several informations and withdraw, amend or add informations as the case goes on.

6.4 Members of the legal profession consulted by the Commission noted that mentions and callovers take up a lot of time, and expressed a wish for more efficient ways to manage the pre-trial process. Some suggested alternatives to formal court appearances to deal with matters such as listings, adjournments and exchange of documents, such as informal case management conferences with a judge and the other party, or a meeting with a court registrar to check the parties' readiness to proceed to trial. Another stakeholder remarked that callover lists are usually emailed around the day before, whereas no list is provided for mentions, or by the District Court. Having lists beforehand would help counsel to be better prepared and thus save not only their but also court time.

### **Previous case management proposals and initiatives**

6.5 An Institutional Strengthening Program, which included introducing a case management system in the Samoan Supreme Court, was conducted by an overseas judge in 2006-07. This initiative, however, appears not to have been continued. The Commission understands that the templates for court documents developed as part of this program are not currently in use.

6.6 In 2008, the Law Society submitted a written proposal on case management to the Chief Justice of the Supreme Court. The Law Society suggested that the court create a position for an administrative judge or associate (being a qualified lawyer) who would be responsible for the administrative workload of the Supreme Court. The Law Society also suggested that it may be possible for judges to make some kinds of orders from chambers, removing the need for the parties to attend court. The Commission understands that this proposal is still being considered.

6.7 In 2007-08, the Ministry of Justice and Courts Administration provided comments on proposed amendments to the *CPA* regarding case management and giving registrars of the court more administrative powers. Key proposed amendments were to empower registrars to conduct mentions and callovers. A draft bill is currently being discussed with stakeholders.

### ***Commission's views***

6.8 The Commission notes that a comprehensive case management system is essential to providing justice fairly and efficiently. It is, however, outside the scope of the Commission's reference to review the *CPA* to make recommendations for a detailed case management system. Instead, the Commission has focused on three key areas that have arisen as issues in themselves, but also contribute to effective case-management, namely the powers of registrars, pre-trial disclosure and pre-trial hearings.

6.9 The Commission hopes that its recommendations in relation to these issues will be consistent with a more general and holistic case management system for criminal courts currently being considered by other agencies.

## **Powers of Registrars of the Court**

6.10 The role of Registrars and Deputy Registrars of the court is to fulfill certain administrative functions so that judges can concentrate on their judicial functions.

6.11 In Samoa, Registrars are appointed by the Public Service Commission (PSC) and are responsible for the administration of the court. Registrars may be appointed to two or more courts including the Supreme Court. Deputy Registrars for any District Court are also appointed by the PSC and are subject to the control of the Registrar. They have the same powers and privileges, perform the same duties and are subject to the same provisions and penalties as the Registrar. In the Supreme Court, there is currently one Deputy Registrar (and one associate) allocated to each judge. The Principal Registrar and his staff are in charge of the registry system.<sup>91</sup>

6.12 In late 2007 the Ministry of Justice proposed amendments to the *CPA* and other legislation to reduce the administrative workload of judges and to enable them to devote their time and concentration to adjudicating cases. These amendments would give greater powers to the Registrars of the Courts to make administrative and procedural orders in criminal proceedings.<sup>92</sup>

## **Proposed new powers of Registrars and Deputy Registrars**

6.13 The Draft Criminal Procedure Act 1972 Amendment Bill (2008) proposes that the following administrative functions may be exercised by Registrars or Deputy Registrars: amending an information;<sup>93</sup> exercising the powers of the court when no defendant, informant or neither party appears;<sup>94</sup> taking the defendant's plea on being charged;<sup>95</sup> taking pleas on behalf of a corporation;<sup>96</sup> adjourning hearings;<sup>97</sup> and making decisions about when a defendant may be remanded in custody or released on bail.<sup>98</sup>

6.14 ***Amendment of information:*** Section 36 of the *CPA* gives the court the power to amend an information in any way, for example, by substituting one offence for another. An information may be amended at any time during the proceedings where the defendant appears. The defendant is then asked how he or she pleads to the charge as amended or substituted, and the trial proceeds on this basis. It is proposed that the power to amend an information be given to the Registrar, but only where the informant and the defendant both consent to the amendment.<sup>99</sup>

6.15 ***Powers of Court when defendant does not appear:*** If a summons has been served on the defendant a reasonable period of time before the trial, or the defendant has been released on

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91 Justice Slicer, *Working Paper – Listings, Callovers and Allocations*, 2.

92 Criminal Law Review Working Group, *Report: Criminal Procedure Act 1972* (2011) 42.

93 *Criminal Procedure Act 1972* s 36.

94 *Ibid* ss 42-44.

95 *Ibid* s 48.

96 *Ibid* s 49.

97 *Ibid* s 68.

98 *Ibid* s 70.

99 Criminal Law Review Working Group, *Report: Criminal Procedure Act 1972* (2011) 43.

bail on the condition that he or she attend personally at the trial, but the defendant does not appear at the trial, s 42 of the *CPA* gives the court the power to:

- issue a warrant for the arrest of the defendant or adjourn the trial, if the offence has a maximum penalty of more than three months imprisonment; or
- proceed with the trial and pass sentence, issue a warrant for the arrest of the defendant, or adjourn the trial, if the offence has a maximum penalty of a fine or less than three months imprisonment.

It is proposed to give the same powers to the Registrar, except the power to proceed with the trial under s 42(b),<sup>100</sup> meaning the Registrar can issue warrants or adjourn.

6.16 ***Powers of Court when informant does not appear:*** Where at the trial the defendant but not the informant appears, s 43 of the *CPA* gives the court the power to:

- adjourn the trial, if the defendant is in custody or has been released on bail, and the informant has not had adequate notice of the trial; or
- dismiss the information for want of prosecution or adjourn the trial in any other case.

It is proposed to allow the Registrar to exercise the court's power under s 43(a), meaning the Registrar may adjourn the hearing, but not dismiss the trial.<sup>101</sup>

6.17 ***Powers of Court when neither party appears:*** If neither the defendant nor the informant appears for trial, the court may dismiss the information for want of prosecution or adjourn the trial.<sup>102</sup> It is proposed to give the Registrar the power to adjourn the trial in such cases, but not to dismiss the information for want of prosecution.<sup>103</sup>

6.18 ***Plea on defendant being charged:*** Section 48 of the *CPA* provides that, before the charge is gone into, the defendant shall be called by name and the charge shall be read to him or her. If the court is satisfied that he or she understands the charge, the defendant is asked how he or she pleads. He or she may plead guilty or not guilty or give special pleas provided for in s 50 of the *CPA*. If the defendant does not reply, the court may enter a plea of not guilty. If the defendant pleads guilty, and the court is satisfied that he or she understands the nature and consequences of his or her plea, the court may convict the defendant or deal with the defendant in any other manner authorised by law.<sup>104</sup> If a plea of not guilty is entered, the trial will be conducted. It is proposed to confer on the Registrar the power to exercise the court's powers under s 48 except the power to convict the defendant under s 48(4).<sup>105</sup>

6.19 ***Plea on behalf of corporation:*** Section 49 of the *CPA* allows a corporation charged with an offence to have their plea entered in writing by a representative. If the corporation does not appear by representative or fails to enter a plea, the court shall order a plea of not guilty to be entered, and the trial shall proceed on this basis. It is proposed that the Registrar should

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100 Ibid 43.

101 Ibid 43-44.

102 *Criminal Procedure Act 1972* s 44.

103 Criminal Law Review Working Group, *Report: Criminal Procedure Act 1972* (2011) 44.

104 *Criminal Procedure Act 1972* s 48(4).

105 Criminal Law Review Working Group, *Report: Criminal Procedure Act 1972* (2011) 44.

have the power to enter a plea of not guilty in these cases, and to adjourn the trial to such time and place and on such conditions as he or she thinks fit.<sup>106</sup>

6.20 ***Special pleas:*** Section 50 of the *CPA* allows certain special pleas to be made, namely a plea of previous acquittal, a plea of previous conviction, and a plea of pardon. All other grounds of defence may be relied upon under the plea of not guilty. The pleas may be pleaded together, and every plea shall be disposed of before the defendant is called on to plead further. It is proposed that s 50 of the *CPA* be amended to clarify that a special plea may only be entered by a judge, and if a special plea is made before the Registrar, that Registrar shall adjourn the special plea to be determined by a judge.<sup>107</sup>

6.21 ***Power to adjourn hearing:*** Section 68 of the *CPA* provides that the hearing of any charge may from time to time be adjourned to a time and place appointed by the court. It is proposed that the same power to adjourn a hearing be given to the Registrar. This proposed amendment will enable the Registrar, acting outside his or her capacity as a Remanding Officer, to exercise his or her discretion to further remand a defendant in custody while the proceedings are adjourned.<sup>108</sup>

6.22 ***When defendant may be remanded in custody:*** Section 70 confers a general discretion on a court or remanding officer to release on bail a person charged with an offence, or, alternatively, to remand him or her in custody while the proceedings are adjourned. It is proposed<sup>109</sup> that s 70 be amended to enlarge the powers of a Registrar to remand a defendant, specifically enabling the Registrar to exercise this power during a criminal mention. Although s 70 gives a Registrar, acting as a Remanding Officer<sup>110</sup>, the power to remand a defendant in custody after he or she is charged, there is no explicit power for a Registrar to remand a defendant during criminal proceedings. As such, the use of such power by a Registrar during criminal mentions is open to legal challenge.

6.23 ***Registrar's powers may only be exercised prior to proceeding being heard before a Judge:*** It is proposed that a provision be included into the *CPA* clarifying that a Registrar may only exercise any of the above mentioned powers in a proceeding prior to any aspect of that proceeding being heard before a Judge.<sup>111</sup>

### ***Comparable jurisdictions***

6.24 Legislation in New Zealand and in some Australian jurisdictions confers powers on registrars beyond mere administrative functions.

6.25 In New Zealand, Registrars and Deputy Registrars have the power to deal with applications for a retrial or a rehearing if the defendant is found guilty or was sentenced in his/her absence in relation to offences not punishable by imprisonment, if the prosecution

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106 Ibid.

107 Ibid 45.

108 Ibid.

109 Ibid.

110 *Criminal Procedure Act 1972 s 2; Constitution art 6(4).*

111 Ibid.

does not object and the application for the retrial or rehearing is made on the grounds that the defendant was not notified of the trial or hearing.<sup>112</sup> Registrars may also make and renew interim suppression orders if the Registrar adjourns the hearing of any charge and both parties agree to the making of the order.<sup>113</sup> The *Summary Proceedings Act 1957* (NZ) confers even wider powers on Registrars: any person charged with a summary offence not punishable by imprisonment, may plead guilty by notice in writing to the Registrar;<sup>114</sup> the Registrar may receive and record a not guilty plea;<sup>115</sup> the Registrar may, upon application, adjourn the hearing of any charge, if the defendant is not in custody at the time of the application and the application is made before the commencement of the hearing;<sup>116</sup> and the Registrar may issue a warrant to arrest the defendant where the defendant fails to attend his or her trial.<sup>117</sup>

6.26 In Victoria, the Registrar in the Magistrates' Court may, on the defendant's application, adjourn the proceeding to a later date.<sup>118</sup>

6.27 Legislation in Western Australia provides that a superior court may confer on a Registrar jurisdiction to deal with applications and other matters that do not involve the final determination of a prosecution.<sup>119</sup>

### ***Submissions and consultations***

6.28 In the Issues Paper, the Commission asked whether the Registrars and Deputy Registrars should have the power to perform the kinds of judicial administrative tasks mentioned above (question 23).

6.29 The Commission received two submissions in response to this question. One was in favour of the reform proposed, while the other one opposed the suggestion, stating that in the public's opinion, Registrars do not seem qualified and experienced enough to make such decisions instead of a judge. That stakeholder suggested that one option may be to create a position for a judge associated with the District Court with the sole function of deciding administrative matters.

6.30 The general view expressed in consultations with members of the judiciary and legal profession was that, while there were many benefits to conferring more powers on Registrars, some Registrars currently lacked the training, qualifications, support and confidence to effectively exercise court powers. Stakeholders noted that, in order for case management to work, Registrars must have the necessary skills and training, and also the required qualifications and supervision, to fulfill certain tasks. Otherwise, lawyers would take advantage of Registrars which would result in them lacking the confidence to effectively deal with cases.

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112 *Criminal Procedure Act 2011* (NZ) s 127.

113 *Ibid* s 206.

114 *Summary Proceedings Act 1957* (NZ) s 41(1).

115 *Ibid* s 41A.

116 *Ibid* s 45A.

117 *Ibid* s 61A.

118 *Criminal Procedure Act 2009* (Vic) s 20.

119 *Criminal Procedure Act 2004* (WA) s 124(5).

6.31 Despite these practical concerns, there is a general consensus that Registrars should be able to: make orders by consent, as they already may do in civil matters or in uncontested divorces; enter pleas; and make basic administrative orders regarding adjournments and listings. Stakeholders acknowledged that it would not be enough to amend legislation to provide Registrars with these powers, but that there would need to be a cultural change in the practice of judges, lawyers and court staff.

#### ***Commission's views***

6.32 The proposed amendments to the *CPA* regarding the powers of Registrars of the court would confer administrative rather than judicial functions on Registrars, namely powers to: issue a warrant to arrest a defendant; adjourn proceedings where an informant or a defendant or both do not appear; and take guilty and not guilty pleas in certain circumstances. Further, the Commission notes that Registrars already have power to make decisions about bail, and undertake administrative functions when no judges are available.

6.33 The Commission is of the view that it is appropriate and desirable that registrars be able to exercise the above-mentioned functions, whereas judicial decisions such as the final determination of cases should remain with the judge. Mentions and callovers on the other hand, are tasks which could be exercised by Registrars provided they have the necessary qualifications and training and the ability to refer matters to a judge as required.

6.34 The Commission acknowledges that legislative changes to increase the powers of Registrars to deal with administrative matters in criminal proceedings are not sufficient to implement a comprehensive case management system. Practice will need to change as well. For this reason, the Commission recommends that legislative amendments be accompanied by ongoing training and support for Registrars in the exercise of these powers. The Commission notes that Judge Vaai of the District Court has previously conducted a four month training program for Registrars, aimed at building their capacity and confidence in exercising their current powers. A similar program could be introduced in the Supreme Court. In its review of the *District Courts Act 1969*, the Commission is also investigating whether there is a need for qualification requirements in the appointment of Registrars under s 11 of that Act.

6.35 The Commission also considers that legislation should provide for the administrative powers discussed above to be exercised by Registrars. Concerns about practicalities may mean that the powers are not widely used at an early stage, but other changes in case management and court administration might lead to a different situation allowing better trained and qualified Registrars with the relevant support to exercise these functions. Legislation should not only follow current practice but also open opportunities and possibilities for desirable future practice whilst not always making it imperative or prescriptive. Providing for these powers in the *CPA* would also be an incentive to implement a system of training and empowering Registrars in court procedures.

**Recommendation 14:** The Commission endorses the amendments to the *Criminal Procedure Act 1972* proposed by the Ministry of Justice and Courts Administration contained in the Draft Criminal Procedure Act 1972 Amendment Bill (2008) concerning powers of Registrars of the courts.

**Recommendation 15:** The Ministry of Justice and Courts Administration should develop and administer training programs for Registrars of the courts, about the tasks, obligations, qualifications and skills relevant to exercising their powers under the *Criminal Procedure Act 1972*.

### **Pre-trial disclosure**

6.36 Timely and adequate access to relevant information before a criminal hearing is important to ensuring that the defendant receives a fair trial and that proceedings are conducted efficiently. There are three aspects to pre-trial disclosure of information. The first is the requirement that the prosecution disclose to the defendant information relevant to the case. The second is a more limited obligation on the defendant to disclose some kinds of information to the prosecution. Finally, there is a question about whether Samoa should adopt a reciprocal disclosure regime to identify the issues in dispute before trial as part of a case management process.

### **Prosecution disclosure**

6.37 ‘Prosecution disclosure’ refers to the obligation on the prosecution to provide the defendant with any relevant material that has not already been disclosed, subject only to exceptions needed to avoid prejudice to wider public interests. The defendant’s right to a fair trial encompasses the right to access all relevant information held by the prosecution. The defendant is only able to answer the charges if he or she knows all the evidence that will be used in the case against him or her. The defendant must have an opportunity to prepare a defence, or, alternatively, plead guilty at an early stage. Prosecution disclosure also redresses the imbalance between the prosecution, which has the resources of the state and the benefit of police investigations to build its case, and the defendant, who does not have such support.

6.38 Prosecution disclosure is currently governed by the common law and provisions of the *CPA*. Common law requires the prosecution to disclose to the defendant any material in its possession that might be relevant to the defendant’s case, even if that evidence tends to weaken the prosecution’s case or strengthen the case for the defendant.<sup>120</sup> Section 89(1) of the *CPA* sets out a limited statutory regime for prosecution disclosure. It requires the prosecution to give to the defendant copies of all statements made by the defendant and any witnesses proposed to be called to give evidence at the trial. This provision applies only to trials heard by assessors in the Supreme Court. In cases heard by a Supreme Court judge sitting alone or in the District Court, a practice has developed whereby the court makes specific orders that the prosecution provide the defendant’s counsel with copies of witness

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120 *R v Ward* [1993] 2 ALL ER 577.

statements and all other documents which the prosecution intends to use at the trial, such as medical reports, photographs and statements made by the accused to police.<sup>121</sup>

### **Comparable jurisdictions**

6.39 Although prosecution disclosure is an essential part of ensuring the defendant receives a fair trial, jurisdictions vary in the extent to which the prosecution's obligations are set out in legislation.

6.40 Some jurisdictions, for example South Australia, rely primarily on the common law. In those jurisdictions, the court has the power to make specific orders about disclosure, for example setting out the time by which the prosecution must provide information to the defendant. Other jurisdictions set out the prosecution's disclosure obligations in policy documents. For example, in Australia disclosure policies are set out in the prosecution guidelines that govern the work of the directors of public prosecutions.<sup>122</sup>

6.41 Other jurisdictions have codified prosecution disclosure requirements in legislation. In the United Kingdom, the *Criminal Procedure and Investigations Act 1996* (UK) provides that the prosecutor must disclose to the defendant any prosecution material 'which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.'<sup>123</sup>

6.42 Several jurisdictions have more detailed legislative schemes for prosecution disclosure.<sup>124</sup> For example, New Zealand's *Criminal Disclosure Act 2008* (NZ) establishes a two stage process for prosecution disclosure. The prosecution must make 'initial disclosure' within 21 days of commencing proceedings. The prosecution must provide the defendant with a summary of the facts of the alleged offence, the penalties for the offence and a list of the defendant's previous convictions.<sup>125</sup> At this time, the defendant is also informed of his or her right to request further information before entering a plea. Further information may include the names of witnesses to be called by the prosecution, a list of exhibits, copies of interviews and police documents.<sup>126</sup> The second stage of disclosure, called 'full disclosure', must be made as soon as reasonably practicable after the defendant has made his or her first appearance, pleaded not guilty or elected to be tried by a jury.<sup>127</sup> At this stage, the prosecution must provide (if it has not already done so): copies of witness statements; a list of exhibits; briefs of evidence including evidence from any expert witnesses; the names of persons interviewed by the prosecutor even if the prosecution does not intend to call them as witnesses; and any convictions of a prosecution witness that may affect the credibility of that

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121 The practice in the District Court is described in *Toailoa Law Office v Duffy* [2005] WSDC 3 (25 January 2005).

122 See, eg, Commonwealth of Australia Director of Public Prosecutions, *Statement on Prosecution Disclosure*.

123 *Criminal Procedure and Investigations Act 1996* (UK) s 3(1)(a).

124 See, eg, *Criminal Code* (Qld) Ch 62 Div 3; *Criminal Procedure Act 2009* (Vic) pt 3.2, div 2; *Criminal Procedure Act 2004* (WA) ss 35, 42; *Criminal Procedure Act 1986* (NSW) pt 3 div 3.

125 *Criminal Disclosure Act 2008* (NZ) s 12(1).

126 *Ibid* s 12(2).

127 *Ibid* s 13(1).

witness.<sup>128</sup> The prosecution must also provide the defendant with a list of information that it is refusing to disclose and the reasons for withholding that information.<sup>129</sup>

6.43 Even where legislation sets out a timetable for the disclosure of information by the prosecution, most legislative regimes make it clear that the prosecution's duty to disclose is continuous. This means that if any new information comes into the possession of the prosecution after disclosure has been made, it must also be disclosed to the defendant as soon as practicable.<sup>130</sup>

6.44 A legislative regime may also set out the consequences where the prosecution does not comply with disclosure provisions. For example, the *Criminal Procedure Act 1986* (NSW) permits the court to refuse to admit evidence not disclosed before the trial, or to grant an adjournment.<sup>131</sup>

### ***Submissions and consultations***

6.45 In the Issues Paper, the Commission asked whether there should be a statutory scheme of prosecution disclosure to the defendant (question 6).

6.46 Many members of the legal profession noted that there is not currently a good practice of prosecution disclosure to the defendant's counsel. Several noted that prosecution documents were sometimes served incomplete, with documents still being provided one day before the trial. Others mentioned that they often had to write to the prosecution to request their witness statements. There was a general concern that late or incomplete disclosure undermined the defendant's ability to prepare a proper defence.

6.47 Most stakeholders were in favour of setting out the prosecution's duty of disclosure in legislation. Several stakeholders noted that this would make clear the rights and duties of all parties to criminal proceedings.

6.48 Some stakeholders commented on whether legislation should specify a timeframe for the disclosure of prosecution documents. Some members of the legal profession suggested linking disclosure to the callover process, which commences six weeks before the date of the trial. The prosecution could then be required to provide the documents four weeks before trial, or before the matter is set down for hearing. Some stakeholders expressed the view that the legislation should not specify a time, preferring to leave this to the discretion of the court. One stakeholder also expressed a concern that specifying a time would mean that the prosecution would leave it until that time to disclose, rather than disclosing the information earlier in the process.

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128 Ibid s 13.

129 Ibid s 13(2).

130 See, eg, *Criminal Procedure and Investigations Act 1996* (UK) s 7A; *Criminal Disclosure Act 2008* (NZ) s 13(5) and (6); *Criminal Code* (Qld) s 590AL; *Criminal Procedure Act 2009* (Vic) s 42; *Criminal Procedure Act 2004* (WA) s 42(6); *Criminal Procedure Act* (NSW) s 147.

131 *Criminal Procedure Act* (NSW) s 146.

### *Commission's views*

6.49 The Commission is of the view that the *CPA* should set out detailed requirements for prosecution disclosure. This will ensure that the prosecution's obligations to provide information, and the defendant's entitlement to receive it, are defined clearly in legislation for the benefit of both parties. Including a disclosure regime in legislation will also mean that the same rules apply to criminal proceedings in the District Court and Supreme Court.

6.50 The Commission considers that any legislative regime for prosecution disclosure should codify the common law position, rather than circumscribe it. The Commission therefore recommends that the *CPA* expressly state the prosecution's general duty to disclose to the defendant any material it has that might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the accused. A general statement of this kind will establish the purpose and objectives for a legislative disclosure regime.

6.51 There are four specific issues that a statutory regime for prosecution disclosure must address.

6.52 First, the legislative scheme should define the kinds of material that the prosecutor must disclose to the defendant. Noting the kinds of information used by the prosecution in trials in Samoa, as well as the disclosure legislation in other jurisdictions, the Commission considers that the *CPA* should set out a list of material that the prosecution must disclose to the defendant which includes:

- a list of persons that the prosecution proposes to call as witnesses, and their statements;
- all statements made by the defendant, whether given orally or in writing;
- a list of the defendant's previous convictions;
- any information, document or thing the prosecution intends to rely on at the hearing;
- a list of items the prosecution intends to tender as exhibits;
- any brief of evidence to be given, or report provided, by an expert witness;
- notice of anything adverse to the credibility of a proposed prosecution witness, including his or her criminal history; and
- any other information that is relevant to the alleged offence, including information that the prosecution does not intend to rely on at trial, and irrespective of whether it assists the prosecution or defendant.

6.53 Secondly, the legislation should indicate the circumstances in which material may be withheld from disclosure, such as where it is necessary to protect national security, police investigations or vulnerable witnesses. Including such a list in legislation is not strictly necessary, as the prosecution can rely on the general principles of privilege as a basis for withholding certain information. However, including the grounds for withholding information in the legislation will provide clarity about the rights and obligations of both parties. In the Commission's view, the *CPA* should include provisions that entitle the prosecution to refuse to disclose information that is subject to privilege or is confidential under other legislation, or where that disclosure is reasonably likely to:

- damage the security, defence or international relations of Samoa;
- prejudice the prevention, investigation or prosecution of criminal offences;

- endanger the life or physical safety of any person; or
- prejudice the protection of public safety.

6.54 Where information is withheld from disclosure, the prosecution should provide the defendant with a list of that information. It is important that the defendant know what information is being withheld and the grounds for doing so, so that he or she has the opportunity to challenge the prosecution's decision not to disclose it.

6.55 Thirdly, a legislative regime needs to set out the period of time in which the prosecution is to provide the information to the defendant. There are two options in this regard. The first is for the legislation to specify a timeframe for the disclosure of information to the defendant — for example, that the prosecution discloses the information at least four weeks before the trial. The second option is for the legislation to state that disclosure must be provided within a reasonable period of time, with the option for either party to seek more detailed orders from the court. This option has the advantage that orders can be made that take into account the circumstances of the parties and the extent and availability of the information that is involved in the case.

6.56 On balance, given the current concerns about late disclosure by the prosecution, the Commission is of the view that legislation should state that the prosecution must disclose information as soon as possible, but at least 30 days before the trial. Earlier disclosure should be encouraged in order to facilitate early settlement of cases, for example, the defendant may enter an early plea of guilty in light of the strength of the prosecution's case. The Commission also recommends that the legislation should state the prosecution's duty of continuous disclosure so that if any new information comes into the possession of the prosecution after disclosure has been made, the prosecution must disclose it to the defendant as soon as practicable.

6.57 Finally, a legislative regime may include a procedure to resolve disputes between the prosecution and defendant about disclosure. A provision of this kind should stipulate that the court has the power to order that information initially withheld from disclosure should be disclosed to the defendant in the interests of justice. The Commission does not consider that it is necessary to include any sanctions for non-compliance with the disclosure regime in legislation. It is more appropriate that the court consider how to remedy any instance of non-compliance in the context of the defendant's right to a fair trial. The Court has an overriding duty to ensure a fair trial and can make any orders to remedy non-disclosure in the interests of justice, for example by making orders for the disclosure of information at callovers, or granting an adjournment so that the defendant can prepare his or her case in light of the information received from the prosecution.

<p><b>Recommendation 16:</b> The <i>Criminal Procedure Act 1972</i> should include a regime for the disclosure of information by the prosecution to the defendant. The disclosure regime should:</p>
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- State that the prosecution has a general duty to disclose to the defendant any material it has that might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the accused.
- Provide that the prosecution must disclose to the defendant as soon as reasonably practicable after commencing proceedings and at least 30 days before the trial:
  - a list of persons that the prosecution proposes to call as witnesses, and their statements;
  - all statements made by the defendant, whether given orally or in writing;
  - a list of the defendant's previous convictions;
  - any information, document or thing the prosecution intends to rely on at the hearing;
  - a list of things items the prosecution intends to tender as exhibits;
  - any brief of evidence to be given, or report provided by, an expert witness;
  - notice of anything adverse to the credibility of a proposed prosecution witness, including his or her criminal history; and
  - any other information that is relevant to the alleged offence, including information that the prosecution does not intend to rely on at trial, and irrespective of whether it assists the prosecution or defence case.

This information should also be provided to the court at the same time.

- Provide that the prosecution may refuse to disclose information that is subject to privilege or which is reasonably likely to:
  - damage the security, defence or international relations of Samoa;
  - prejudice the prevention, investigation or prosecution of criminal offences;
  - endanger the life or physical safety of any person; or
  - prejudice the protection of public safety.
- Require that the prosecution provide the defendant with a list of any information it is refusing to disclose.
- Expressly state that the prosecution has a duty to disclose to the defendant as soon as reasonably practicable any new information that comes into the possession of the prosecution after disclosure has been made.
- Provide that the court has the power to order that information initially withheld from disclosure should be disclosed to the defendant in the interests of justice.

## Defence disclosure

6.58 The disclosure of information by the defendant to the prosecution is governed by different principles from those applied to prosecution disclosure. The defendant's obligation to disclose information before the trial is limited by the defendant's privilege against self-incrimination (sometimes called the right to silence) which is guaranteed by the *Constitution* (art 9(5)). The burden of proof is on the prosecution to prove its case against the defendant beyond reasonable doubt, including by disproving any defences. The defendant therefore has the right to remain silent and put the prosecution to proof of the alleged offence. In addition, the defendant does not have access to the same resources as the prosecution. As such, it is unfair to impose onerous disclosure requirements on the defendant or require the defendant to actively assist the prosecution to make its case.

6.59 At common law, the defendant is under no obligation to disclose any information to the prosecution. However, in some jurisdictions, legislation has imposed limited disclosure

obligations on defendants on the basis that knowledge of a defendant's case could save unnecessary attention by the prosecution on uncontested issues in the case and may avoid the surprise and cost of an unexpected defence as reason for adjournment of the trial.

6.60 In consultations with stakeholders, two aspects of defense disclosure were raised for consideration — the disclosure of an alibi defence and reliance on expert witnesses. A further issue relating to defence disclosure concerns the identification of issues in dispute before the trial, and the prospect of pre-trial hearings to determine legal issues and the admissibility of evidence. Each of these issues is discussed separately below.

### **Alibi defence**

6.61 An alibi defence is a claim by the defendant that he or she was elsewhere when the offence occurred. Criminal procedure legislation in several common law jurisdictions requires the defendant to provide the details of an intended alibi defence to the prosecution so that the prosecution has the opportunity to investigate the alibi before the trial.<sup>132</sup> For example, s 22 of the *Criminal Disclosure Act 2008* (NZ) requires the defendant to give written notice to the prosecution of the particulars of an alibi defence, including the name and address of any witness who will provide evidence in support of the alibi.

### ***Submissions and consultations***

6.62 In the Issues Paper, the Commission asked whether the defendant should be obliged to disclose to the prosecution information about an intended alibi defence (question 7). All stakeholders consulted by the Commission were in favour of this proposal.

6.63 The report of the Working Group noted that while there is a longstanding practice in which the defendant discloses an alibi defence to the prosecution before the hearing, it would be beneficial to include this duty in legislation. The Working Group suggested that the defendant should be obliged to give the prosecution information about an alibi defence within 14 days of being committed for trial. If the defendant failed to give notice, he or she could not adduce evidence in support of an alibi at trial without leave of the court.

6.64 Some members of the legal profession noted that it was difficult to put a time limit on when the defendant should disclose an alibi defence, as the defendant cannot be expected to disclose his or her defence before the prosecution has disclosed its material.

### ***Commission's views***

6.65 The Commission considers that the *CPA* should require the defendant to give the prosecution details of an intended alibi defence. Disclosure of an alibi defence would give the prosecution time to investigate the alibi before the trial and prevent it being taken by surprise at trial, without compromising the defendant's right to remain silent and put the prosecution to proof of the offence.

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132 See, eg, *Crimes Act 1961* (NZ) s 367A; *Criminal Procedure and Investigations Act 1996* (UK) s 6A; *Criminal Procedure Act 1986* (NSW) s 150; *Criminal Procedure Act 2004* (WA) s 62; *Criminal Code* (NT) s 331; *Criminal Code* (Tas) s 368A; *Law Consolidation Act 1935* (SA) s 285C; *Criminal Code* (Qld) s 590A; *Criminal Procedure Act 2009* (Vic) s 51.

6.66 Above, the Commission recommends that prosecution disclosure occur as soon as practicable after commencing proceedings and at least 30 days before the trial. In light of this, the Commission considers that the defendant should be required to give the prosecution notice of an alibi defence at least seven days before the trial. This gives the defendant sufficient time to assess the prosecution's case and gives the prosecution sufficient time to investigate the alibi.

6.67 In the Commission's view, failure by the defendant to give notice of an alibi defence should mean that the defendant must seek the leave of the court to introduce alibi evidence at trial. This means that the court can decide whether to admit the evidence in the interests of justice.

**Recommendation 17:** The *Criminal Procedure Act 1972* should require a defendant who intends to rely on an alibi defence to disclose to the prosecution at least seven days before the trial information about that defence, including the names and addresses of any witnesses to be called to give evidence in support of the alibi.

### **Expert evidence**

6.68 Expert evidence is evidence of a scientific or technical nature given by a person with formal qualifications and expertise in the area. The requirement that the defendant disclose information about any expert evidence that he or she intends to use at trial is based on efficiency. Expert evidence often requires careful consideration, and perhaps rebuttal by another expert. If not disclosed in advance, an unanticipated defence based on expert evidence may lead to delays as the prosecution seeks time to consider the evidence.

6.69 Criminal procedure legislation in comparable jurisdictions generally requires the defence to give the prosecution notice of its intention to call an expert witness and provide the prosecution with the written reports or findings of that expert.<sup>133</sup>

### ***Submissions and consultations***

6.70 In the Issues Paper, the Commission asked whether the defendant should be obliged to disclose to the prosecution information about an expert opinion that the defendant intends to rely on at trial (question 8). While some members of the legal profession noted that it was rare for the defendant to rely on expert evidence, all stakeholders consulted by the Commission were in favour of imposing this obligation on the defendant.

### ***Commission's views***

6.71 The Commission recommends that expert evidence obtained by the defendant to be used as evidence at the trial should be disclosed to the prosecution at least seven days before the trial.

6.72 In the preceding section, the Commission recommends that the defendant should disclose information about an alibi defence seven days before trial, on the basis that this gives the prosecution sufficient time to investigate the alibi. Similar reasoning applies to the disclosure

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<sup>133</sup> See, eg, *Criminal Disclosure Act 2008* (NZ) s 23; *Criminal Procedure Act 1986* (NSW) s 143; *Criminal Procedure Act 2004* (WA) s 62; *Criminal Code* (Qld) s 590B; *Criminal Procedure Act 2009* (Vic) s 50.

of expert evidence: the prosecution needs sufficient time before the trial to consider the expert's opinion. The Commission therefore recommends that the defendant be required to disclose information about any expert evidence to the prosecution seven days before the trial.

6.73 For the reasons discussed above in relation to the defendant's disclosure of an alibi defence, where the defendant fails to disclose information about expert evidence to the prosecution in the required time, the defendant should only be able to adduce such evidence at trial with the leave of the court.

**Recommendation 18:** The *Criminal Procedure Act 1972* should require a defendant who intends to call an expert witness to disclose to the prosecution at least seven days before the trial a brief of the evidence to be given, or report provided, by that expert witness.

### Language of court documents

6.74 Section 89 of the *CPA* provides that where an offence is triable by assessors, the prosecution must make witness statements available to the defendant and his or her lawyers within a reasonable period of time before the trial. Section 89(2) requires the translation of all statements into English and the certification of them as correct by a commissioned officer of the police.

6.75 One other section of the *CPA* deals with the language of court documents. Section 23 requires that a summons must be in English where it is to be served on a person who is known to the Registrar of the court to be able to read and understand English. In all other cases, such documents are to be written in Samoan or accompanied by a translation into Samoan.

### *Submissions and consultations*

6.76 In the Issues Paper, the Commission asked whether all statements from the prosecution should be translated into English, or should translations be required only where the judge is not Samoan (question 19).

6.77 One stakeholder agreed that translations should be made where the judge is non-Samoan. Another stakeholder submitted that this requirement should be optional and left to the discretion of the court, taking into account the need for the defendant, court and counsel to understand the proceedings. A third stakeholder submitted that all statements from the prosecution should be translated into English in light of the fact that if matters are appealed, some of the judges of the Court of Appeal are currently non-Samoan.

6.78 Members of the Working Group considered that English translations should only be required when a judge is non-Samoan or if there are special requirements.<sup>134</sup>

6.79 In relation to s 89 more generally, one stakeholder submitted that s 89 be amended to state that police reports to the prosecution and internal reports within the police are privileged

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<sup>134</sup> Discussions at the Criminal Law Review Working group (see minutes attached to Attorney General's letter of 19 February 2010, para 18).

documents and not to be served to the defendant.<sup>135</sup> In discussions in the Working Group, the same stakeholder noted that police officers sometimes disclose internal police reports (which are privileged) instead of separate witness statements and covering police reports.<sup>136</sup>

### ***Commission's views***

6.80 Criminal trials may be conducted in English, Samoan or a mixture of the two languages. The translation of all statements into English is a resource-intensive process and is unnecessary if the judge and all parties can understand Samoan. For this reason, the Commission recommends that s 89(2) should be repealed, and the question of the translation of documents left to the court to order at its discretion, for example if the judge is non-Samoan.

6.81 The Commission does not consider any other amendments to s 89 are necessary. Rules of procedure already mean that a privileged document need not be disclosed during pre-trial disclosure.

**Recommendation 19:** Section 89(2) of the *Criminal Procedure Act 1972*, which requires that the prosecution's witness statements be translated into English, should be repealed and the question of the language of documents left to the discretion of the court.

### **Pre-trial hearings**

6.82 Some overseas jurisdictions have legislated to require lawyers for the prosecution and defendant to identify before the trial any facts that are agreed, the issues in dispute and any evidence that the parties agree to admit by consent.

6.83 For example, s 257 of the *Criminal Procedure (Scotland) Act 1995* places a duty upon the prosecution and defendant to identify evidence that they believe is unlikely to be disputed by the other party and to take all reasonable steps to secure the agreement of the other party to that evidence. Sections 55 and 56 of the *Criminal Procedure Act 2011* (NZ) similarly require lawyers for the prosecution and defendant to engage in a pre-trial case management process. Where the trial is to be heard before a judge sitting alone, the case management process encourages the defendant to notify the prosecution of any evidence to be admitted by consent, the facts and issues that the defendant will not dispute at trial, and any issue on which the defendant intends to rely at trial.<sup>137</sup>

6.84 It is argued that refining the issues prior to the trial enables the prosecution to focus only on those issues that are in dispute. Some claim that this will ensure that the trial is not protracted or overly complex and witnesses do not unnecessarily attend court.<sup>138</sup> The underlying concern about any process that encourages the identification in advance of

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135 See the AGO's recommendations attached to letter from the Attorney-General dated 11 January 2010.

136 Discussions at the Criminal Law Review Working group (see minutes attached to Attorney General's letter of 19 February 2010, para 16.

137 The *Criminal Procedure and Investigation Act 1996* (UK) s 6A also imposes pre-trial case-management requirements on lawyers for the prosecution and defendant. The *Criminal Procedure Act 1986* (NSW) s 142 provides a regime for court-ordered pre-trial case management.

138 New Zealand Ministry of Justice and New Zealand Law Commission, *Discussion Document: Identification of the Issues in Dispute* (2009).

evidence to be admitted by consent and issues in dispute is that it imposes unfair obligations of disclosure on defendants and undermines the requirement that the prosecution bear the burden of proving the offence beyond reasonable doubt. Further, pre-trial issue identification may place undue pressure on defendants to make admissions early in the process that will be contrary to their interests.<sup>139</sup>

6.85 A related issue is whether legislation should provide for pre-trial hearings. Pre-trial hearings can be used to make orders about the disclosure of relevant information and to determine any disputes about the admissibility of evidence or points of law before the trial. The *CPA* does not currently specify a procedure for such pre-trial hearings. Issues about the admissibility of evidence are generally determined at trial.

6.86 In other jurisdictions, issues about the admissibility of evidence may be determined at a committal or other pre-trial hearing. In New Zealand, the *Criminal Procedure Act 2011* allows the prosecution or defendant to apply to the court for a pre-trial hearing to determine the admissibility of evidence where it believes that the other party may challenge the admissibility of that evidence.<sup>140</sup> Similarly, in Queensland, a party can apply to the court to decide questions of law before the trial, including questions about the admissibility of evidence.<sup>141</sup>

6.87 Arguments in favour of using pre-trial hearings to determine the admissibility of evidence include that doing so would reduce the length of trials and enable the trial to run more smoothly. However, the ability to identify evidentiary issues before the trial requires the prosecution and the defendant to know in advance the details of each other's case. Without a requirement for the defendant to disclose his or her case to the prosecution prior to trial, it is difficult for the parties to know what evidence to dispute, and for the court to determine the relevance and admissibility of evidence at a pre-trial hearing.<sup>142</sup>

### ***Submissions and consultations***

6.88 In the Issues Paper, the Commission asked whether the *CPA* should be amended to allow the option of a hearing to determine pre-trial issues, such as the admissibility of evidence (question 4).

6.89 A member of the Working Group submitted that providing for pre-trial hearings to determine the admissibility of evidence would enable the trial to run smoothly. That stakeholder proposed that the *CPA* be amended to include a procedure like that in the *Criminal Procedure Act 2011* (NZ), so that either party may apply to the court for a determination about the admissibility of evidence. The court would make a decision about the admissibility of the evidence after hearing submissions from both parties.<sup>143</sup> Some

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139 J Richardson, 'A Just Outcome: Losing Sight of the Purpose of Criminal Procedure' (2011) *Journal of Commonwealth Criminal Law* 105; New Zealand Law Commission, *Criminal Pre-trial Processes: Justice Through Efficiency*, Report 89 (2005) 178-179.

140 *Criminal Procedure Act 2011* (NZ) ss 78, 101.

141 *Criminal Code* (Qld) s 590AA(2)(e).

142 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, paras 20.18-20.19.

143 Criminal Law Review Working Group, *Report: Criminal Procedure Act 1972* (2011) 12-13.

members of the legal profession supported this proposal, noting that some judges have already instituted a practice of pre-trial hearings or conferences, particularly where the issues in dispute are not clear or there are a number of evidentiary issues to determine.

6.90 Other stakeholders considered that the current system, in which issues regarding evidence or other points of law are dealt with at the beginning of the trial, was working well, and expressed some concerns that a provision for pre-trial hearings may serve only to prolong criminal proceedings.

6.91 Some stakeholders commented on the desirability of optional or discretionary reciprocal disclosure regimes and the benefit of pre-trial hearings to check that all trial documents are in order and that other procedural requirements have been met. These stakeholders considered that this would ensure that the courts work with the prosecution, police and defence counsel so that the court receives trial documents within an appropriate timeframe and would allow the judge to deal directly with legal issues at the trial.

### ***Commission's views***

6.92 The Commission notes that in some jurisdictions, reciprocal disclosure regimes have been introduced with the aim of clarifying the issues in dispute before trial to address concerns about the efficiency of trials and costs and delays in criminal proceedings. In those jurisdictions, legislators have come to the view that imposing defence disclosure regimes will serve this purpose without compromising basic principles of criminal procedure, such as the requirement that the prosecution find and present all the evidence to establish the defendant's guilt beyond reasonable doubt.

6.93 The Commission is not convinced that there exists in Samoa the need to introduce a regime for reciprocal disclosure by the prosecution and defendant to identify issues before the trial. Reports from stakeholders do not suggest that undue delays in criminal trials are caused by uncertainty about the issues in dispute or protracted challenges to the admissibility of evidence. In light of the principles governing defence disclosure discussed above, the Commission does not think it fair to impose onerous disclosure requirements on the defendant unless it is necessary for the efficiency of criminal proceedings. The prosecution, when preparing the case against the defendant, will continue to canvass and consider all the issues relevant to proving, beyond reasonable doubt, that the defendant committed the offence.

6.94 In the absence of a comprehensive defence disclosure regime, the Commission considers that pre-trial hearings to determine the admissibility of evidence may, in practice, be of limited value. It is difficult for the parties, and the court, to determine whether evidence is relevant and therefore admissible, when the issues in dispute are not fully known. The Commission notes that some judges have already instituted a practice of pre-trial hearings where they consider the facts and issues of the case require it. As such, the Commission considers that this issue is best left to the discretion of the court.

## **7. Evidence**

7.1 Evidence forms the very foundation of criminal procedure. In criminal investigations, the police and prosecution gather evidence in order to determine who is responsible for a criminal act. The subsequent presentation of this evidence before the court is strictly governed by rules, the most important of which is that the prosecution must prove beyond reasonable doubt that the defendant committed the offence.

### **Deposition hearings**

7.2 A deposition is a witness's oral testimony given on oath before a judge at a time before the trial. Depositions are generally used in criminal proceedings where the witness is unable to appear at the trial. The testimony written down can then be used as evidence at the trial.

7.3 Sections 26 and 27 of the *CPA* provide for the taking of evidence statements from persons intending to depart from Samoa before the hearing, or being dangerously ill and therefore not capable of giving evidence in Court. If the Judge or *Fa'amasino Fesoasoani* is satisfied that it is in the interests of justice that this evidence should be taken, it may be tendered in the hearing as if it were given in the course of the trial. Section 90 of the *CPA* allows the Supreme Court in offences triable with assessors to order that depositions be taken if it considers it desirable in the interests of justice.

### ***Submissions and consultations***

7.4 The issue of depositions was discussed extensively throughout Working Group meetings.

7.5 One member of the Working Group recommended an amendment to sections 26 and 27 to clarify that they apply irrespective of whether the charge is triable by assessors or not. It also suggested that the Act permit that evidence may be recorded on videotape to be shown to the court during the hearing. The stakeholder further submitted that section 90 needs to be amended to specify that depositions may be taken for the purposes of offences triable with assessors.

7.6 Another member of the Working Group considered that the taking of depositions can be an alternative way of protecting victims and other vulnerable witnesses.

7.7 One stakeholder pointed out that the presence of the defendant at all hearings is mandatory for the exercise of his/her right to cross-examine witnesses. Further, depositions should not be introduced or become the rule for all witnesses because they use up too many resources, they are time-consuming and not favourable to the prosecution because they also mean having to disclose more evidence to the defence. The stakeholder therefore considered that the use of deposition hearings should depend on the circumstances.

7.8 In accordance with this, another stakeholder suggested that, in order for the prosecution not to have to deal with all matters twice, the reasons for applying for a deposition should be justified before being granted by the court, and that the defendant must be present both in the deposition hearing and at the trial.

### ***Commission's views***

7.9 The Commission is of the view that the current provisions of the *CPA* cater to all the issues brought forward by the Working Group. Sections 26 and 27 expressly state that the

provisions are applicable to cases before *any* judge, which includes judges sitting with assessors, so that there is no further clarification needed. Likewise, section 90 does not need to specify that depositions may be taken for the purposes of offences triable with assessors, as section 90 already expressly provides for this. That section gives the Court discretion to make such an order ‘if it considers it desirable in the interests of justice’. However, each application for the taking of depositions must be considered on its own facts and decided judicially according to the interests of justice.<sup>144</sup> For these reasons the Commission considers that the taking of depositions should remain at the discretion of the court, and not be made mandatory.

7.10 In its preliminary view, the Commission considers that video-taping evidence could be a useful way to record evidence, and not only in depositions, but where a witness has special needs or his or her identity requires protection. The Commission has received a reference from the Attorney-General to review the *Evidence Act 1961*. The Commission will consider the issues of video-taping evidence in more detail in that inquiry.

### **Evidence of witnesses overseas**

7.11 Section 28 deals with the evidence of a witness out of court. This section allows for the taking of evidence of the defendant, informant or a witness, at any place either within or outside of Samoa before any judge, *Fa'amasino Fesoasoani*, officer of the court or other person or persons, if the judge or *Fa'amasino Fesoasoani* is satisfied that it is desirable or expedient in the interests of justice that the evidence should be so taken. Evidence given in this way is tendered in the hearing as if it were given in the course thereof.

7.12 To keep up with technological developments, a proposal has been put forward to allow evidence via video-conference during a trial so that evidence of witnesses overseas can be given. This is a common procedure in many other jurisdictions, mostly in the case of child witnesses, victims of sexual offences, or if the witness is unable to attend the hearing due to illness or other reasons.

7.13 The *Mutual Assistance in Criminal Matters Act 2007* allows the Attorney-General to make a request to a foreign state for assistance in obtaining evidence and to allow the person giving the evidence or producing the document or other article to be examined through a video or internet link or any other means from Samoa by a party to the proceeding or a person being investigated.<sup>145</sup> It does not, however, specify the circumstances in which such a request may be made, or the procedure to be followed in court.

### **Comparable jurisdictions**

7.14 The UK's *Criminal Justice Act 1988* (UK) provides that a person other than the accused may give evidence through a live television link if the witness is outside the UK.<sup>146</sup> This procedure applies to trials on indictment, appeals to the criminal division of the Court of Appeal, hearings of references under s 9 of the *Criminal Appeal Act 1995* (UK) (cases dealt with on indictment in England and Wales) and to proceedings in youth courts.

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144 *Talo v The Police* [1994] WSCA 21; 11 1993 (28 March 1994).

145 *Mutual Assistance in Criminal Matters Act 2007* ss 9-10.

146 *Criminal Justice Act 1988* ch 33 (UK) s 32.

7.15 In India, the Supreme Court has held that it is in accordance with the law to record the evidence by video-conferencing in the ‘presence’ of the accused or his lawyer/attorney and this amounted to both parties being in the presence of each other.<sup>147</sup>

7.16 In Australia, the *Crimes Act 1914* (Cth) provides, in relation to sexual offences, for the giving of evidence by child witnesses (under the age of 16) by closed-circuit television (CCTV), video recording or other alternative means, and that a child witness may be accompanied by an adult when giving evidence.<sup>148</sup> The *Evidence (Children) Act 1997* (NSW) includes similar provisions for alternative means of giving evidence and for adult accompaniment. The Australian Capital Territory *Evidence (Closed-Circuit Television) Act 1991* allows for evidence given by a child under the age of 18 years in certain proceedings, or alleged victims of sexual offences, to be observed and heard on a closed-circuit television system.

7.17 In Canada, video-conferencing is used in civil courts for live expert witness testimony and through common law also in sexual assault cases involving witnesses who are minors and may be subject to trauma or intimidation.<sup>149</sup>

7.18 In the European Union, the *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union 2000* provides for the hearing of witnesses in other Member States by video-conference in a formalized procedure:

(1) *If a person is in one Member State’s territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by videoconference, as provided for in paragraphs 2 to 8.*

(2) *The requested Member State shall agree to the hearing by videoconference provided that the use of the videoconference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Member State has no access to the technical means for videoconferencing, such means may be made available to it by the requesting Member State by mutual agreement.*<sup>150</sup>

7.19 Article 11 of the same Convention provides for the hearing of witnesses and experts by telephone conference and refers to the provisions laid out in art 10 where applicable.

7.20 The *German Code of Criminal Procedure (StPO)* allows video-conference hearings of witnesses in need of special protection, mostly minors, if there is an imminent risk of serious detriment to the well-being of the witness, or of those hindered from appearing in the actual court hearing for a longer period of time (due to illness, infirmity, or other impediments, such

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147 *The State of Maharashtra v Praful* [2003] INSC 207.

148 *Crimes Act 1914* (Cth), Part IAD ss 15YI – 15YL.

149 Robert Palumbo, ‘Videoconferencing in the Parliamentary Setting’, Spring 1999 *Canadian Parliamentary Review* 18, 23.

150 *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union 2000* art 10 s (1) and (2).

as distance), insofar as this is necessary to establish the truth.<sup>151</sup> A simultaneous audio-visual transmission of the testimony must be provided in the courtroom and recorded if necessary.

### ***Submissions and consultations***

7.21 In the Issues Paper, the Commission asked whether the use of video-conferencing should be provided for under the *CPA* (question 3). The Commission received three responses to this question. These were all in favour of introducing the use of video-conferencing for overseas witnesses as this would be more cost-effective, in the case of witnesses having left the jurisdiction before a hearing, than making them stay or come back for the hearing. It was pointed out that this procedure would also ensure a full and timely hearing which could otherwise be jeopardised by witnesses not attending or being unable to return to Samoa for the trial. One submission encouraged the use of video-conferencing also for adult and child witnesses in Samoa in cases of sexual offences and abuse.

7.22 During Working Group meetings, one member proposed including an additional section in the *CPA* to allow for witnesses who are currently overseas to give evidence through video-conferencing during trial, provided that the video-conferencing from overseas is conducted either through the police or the equivalent of the Ministry of Justice of that country.

### ***Commission's views***

7.23 The use of video-conferencing is more practical and cost-effective than making people stay in or travel back to Samoa for their hearing. The fact that there are businesses in Samoa that offer tele-conferencing services or facilities makes this a viable option. Moreover, New Zealand and Australia may be willing to provide support by facilitating the giving of evidence by witnesses residing in their countries and by ensuring that the proper procedures are followed at their end.

7.24 However, hearings by video-conference will only be successful when they are well prepared by clear and focused discussions and agreements between the requesting and the requested states prior to hearing. Bilateral cooperation will be necessary to facilitate the preparation of hearings by video-conference, which is likely to be more complex and time-consuming than the actual hearing by video-conference itself. Not only must the circumstances in which video-conferencing is an option be clarified, but the conditions for video-conferences in the foreign country must also be laid out. Such details include where the video-conference hearing will be set up (eg in a foreign court room or an Embassy), and who will be in charge of carrying out the overseas hearing (eg a Samoan official, a foreign judge, an ambassador). Other issues include the availability of technical equipment, dealing with possible time-differences between Samoa and overseas locations, and who bears the costs of the overseas procedure.

7.25 The Commission considers that the *CPA* should be amended to permit the court, in its discretion, to allow witnesses overseas to give evidence by video-conference hearings. However, the Commission is of the view that it is more appropriate that the procedural details noted above be dealt with in the *Evidence Act 1961* and not the *CPA*. In this regard, art 10 of the *European Convention on Mutual Assistance in Criminal Matters between the*

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151 *German Code of Criminal Procedure (StPO)* ss 247A, 251(2), 58A.

*Member States of the European Union 2000* could serve as a guideline, but this would have to be carried out by means of bi-lateral or multi-lateral agreements.

**Recommendation 20:** The *Criminal Procedure Act 1972* should include provisions to allow witnesses overseas to give evidence by video-conference hearings. Procedural details will be considered by the Commission in its review of the *Evidence Act 1961*.

## 8. Protection of vulnerable victims and witnesses

8.1 The role of victims in any prosecution system has historically been limited to involvement as witnesses. Victims are to a large extent marginalised by the process<sup>152</sup> as criminal proceedings usually only focus on the defendant and the prosecution, whereas the victim is not a party to the case. The protection of victims and other witnesses has been put on the law reform agenda in many countries over the years, but it is recognised that the rights of a victim must be balanced with the defendant's right to a fair trial.

8.2 It is important to note that the law in Samoa reflects that it is not only victims who are vulnerable: child defendants also require protection. The *Young Offenders Act 2007* stipulates that proceedings conducted in the Youth Court (that is, criminal proceedings against a 'Young Person', aged 10 – 17 years<sup>153</sup>) are closed to the general public and the media.<sup>154</sup> In addition, it is an offence<sup>155</sup> to publish the name and identifying details of a Young Person,<sup>156</sup> or of any victim involved in an offence for which a Young Person is charged.<sup>157</sup>

### Suppression of names

8.3 Section 61 of the *CPA* provides that the Court *may* prohibit publication of the name and any identifying particulars of the defendant or of any other person connected with the trial, but does not *require* this in any particular situation. Such protection is particularly important with respect to crimes of a sexual nature as it provides a safeguard for the victim's reputation and wellbeing in the wider community. When cases involving sexual offences are heard in the Supreme Court, the prosecution will usually ask for a court order prohibiting publication or reporting of any kind likely to identify the victims.

8.4 In Australia and New Zealand, legislation requires that the names and details of some victims must be suppressed in certain cases, so that the prosecution does not have to expressly ask for such an order to be made by the Court. For example, s 139 of the *Criminal Justice Act 1985* (NZ) states that no particulars leading to the identification of a victim of a sexual offence shall be published unless the victim is over 16 years of age and the court permits publication by order. In addition, the legislation prohibits the publication of the particulars of child

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152 New Zealand Law Commission, *Criminal Prosecution*, Report 66 (2000) 5.

153 *Young Offenders Act 2007* ss 2, 5.

154 *Ibid* s 8(1).

155 *Ibid* s 8(4).

156 *Ibid* s 8(2).

157 *Ibid* s 8(3).

witnesses under the age of 17.<sup>158</sup> Similarly to s 61 of the CPA, s 140 of the *Criminal Justice Act 1985* (NZ) gives the court power to make an order prohibiting the publication of the particulars of any person connected with the proceedings, including the accused.

8.5 In its report on identity suppression in criminal proceedings, the New Zealand Law Commission (NZLC) did not endorse a suggestion to require the automatic suppression of names or identifying particulars of victims and witnesses. It did, however, recommend that the court should have the power to make an order preventing publication of the name, address or occupation of a victim or witness, or any particulars likely to lead to that person's identification, *where publication would endanger the safety of any person or would result in undue hardship to the victim or the witness*,<sup>159</sup> and in some cases also for persons connected with the accused, whether or not the name of the accused is suppressed.<sup>160</sup> It also recommended the repeal of the provision for automatic suppression of the publication of the particulars of child witnesses in s 139A of the *Criminal Justice Act 1985* (NZ). The basis for this was that there are many cases where the suppression of the victim's name is not necessary for the protection of the child, for example if the bicycle of a 12-year-old is stolen.<sup>161</sup> Also, automatic suppression of a child's identity may have the undesirable result of suppression of the parents' names when they offend against their child.<sup>162</sup> In the NZLC's view, the decision whether to suppress the name of a child victim should therefore be left to the discretion of the court, and in the interest of open justice is only necessary when publication would cause undue hardship.

8.6 The new *Criminal Procedure Act 2011* (NZ) provides for the automatic suppression of the identity of the defendant<sup>163</sup> and complainant<sup>164</sup> in specified sexual cases, as well as for the automatic suppression of the identity of child complainants and witnesses unless the court permits publication by order.<sup>165</sup> Additionally, the court may suppress the identity of witnesses, victims and connected persons if the court is satisfied that publication would be likely to: cause undue hardship to the witness, victim, or connected person; create a real risk of prejudice to a fair trial; endanger the safety of any person; lead to the identification of another person whose name is suppressed by order or by law; prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or prejudice the security or defence of the country.<sup>166</sup> The court must give reasons for making, varying, or revoking a suppression order.<sup>167</sup> A suppression order may be made permanently or for a limited period, and may be renewed or revoked<sup>168</sup> or reviewed and varied<sup>169</sup> by the court at any time.

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158 *Criminal Justice Act 1985* (NZ) s 139A.

159 New Zealand Law Commission, *Suppressing Names and Evidence*, Report 109 (2009), 38, 41, R9 and R10.

160 *Ibid* 41, R12.

161 *Ibid* 36.

162 *Ibid* 37.

163 *Criminal Procedure Act 2011* (NZ) s 201.

164 *Ibid* s 203.

165 *Ibid* s 204.

166 *Ibid* s 202.

167 *Ibid* s 207.

168 *Ibid* s 208(1).

169 *Ibid* s 208(3).

8.7 In Australia, the Supreme Court of Victoria has a broad power to ‘make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding’.<sup>170</sup> In New South Wales, suppression is regulated by the *Court Suppression and Non-Publication Orders Act 2010* (NSW).

### **Closed court**

8.8 A related issue is whether legislation should provide for a closed court for the hearing of sexual offences.

8.9 Following the principle of open justice, a fundamental rule of the common law is that the administration of justice must take place in open court.<sup>171</sup> However, where ‘the nature or the circumstances of the particular proceeding are such that a public hearing would frustrate or render impracticable the administration of justice’, the principle of open justice must yield to the more fundamental principle that the chief object of courts is to ensure that justice is done.<sup>172</sup> As well as serving the protection of witnesses, closed courts can also enable the victim or witness to provide better evidence when they feel more comfortable giving evidence in the presence of less people.

8.10 Article 9(1) of the *Constitution* allows the exclusion of members of the public and representatives of news services from all or part of the trial in the interests of justice, morals, public order or national security, or where the protection of children or the parties’ private life requires it. Sections 61 and 164V of the *CPA* provide for the making of such an order. The decision for or against closed court proceedings is therefore left at the discretion of the court and there is no automatic closed court for sexual offences or other specified cases.

8.11 In New Zealand, the *Criminal Procedure Act 2011* (NZ) provides for the court to be cleared when the complainant gives evidence in cases of sexual nature.<sup>173</sup> Section 197, following the NZLC recommendations,<sup>174</sup> gives the court additional power to close the court if necessary to avoid: undue disruption to the conduct of the proceedings; prejudice to the

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170 *Supreme Court Act 1986* (Vic) s 18(1)(c).

171 *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476 (McHugh JA).

172 *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1, 13.

173 The *Criminal Procedure Act 2011* (NZ) ss 199(1) and (2) provides that:

***Court must be cleared when complainant gives evidence in cases of sexual nature.*** (1) In any case of a sexual nature, no person may be present in the courtroom while the complainant gives oral evidence (whether in chief or under cross-examination or on re-examination), except for the following: (a) the Judge and jury, (b) the prosecutor, (c) the defendant and any person who is for the time being acting as custodian of the defendant, (d) any lawyer engaged in the proceedings, (e) any officer of the court, (f) the Police employee in charge of the case, (g) any member of the media (as defined in section 198(2)), (h) any person whose presence is requested by the complainant, (i) any person expressly permitted by the Judge to be present. (2) Before the complainant starts to give evidence, the Judge must (a) ensure that no person other than those referred to in subsection (1) is present in the courtroom; and (b) advise the complainant of the complainant’s right to request the presence of any person under subsection (1)(h).

174 New Zealand Law Commission, *Suppressing Names and Evidence*, Report 109 (2009) 47, R13.

security or defence of the country; a real risk of prejudice to a fair trial; endangering the safety of any person; and prejudicing the maintenance of the law, including the prevention, investigation and detection of offences. The court may only be closed if the court is of the opinion that a suppression order is not sufficient to avoid such risks. Members of the media are exempt from this provision.<sup>175</sup>

8.12 In Australia, the *Criminal Procedure Act 1986* (NSW) stipulates that proceedings must be held in a closed court when the complainant gives evidence in cases of sexual offences.<sup>176</sup> The court also has discretion to direct that any other part of sexual offence proceedings or the entire proceedings be held in closed court.<sup>177</sup> Incest offence proceedings are to be held entirely in closed court.<sup>178</sup> The *Criminal Procedure Act 2009* (Vic) contains similar specific rules applicable to sexual offences, allowing only certain people to be present while the complainant is giving evidence or a recording of the complainant's evidence or examination is being played.<sup>179</sup>

### ***Submissions and consultations***

8.13 In the Issues Paper, the Commission asked whether the legislation should provide specific protection for the victims of sexual offences through non-publication of their names (question 9). All three submissions received were in favour of automatically suppressing the names of victims in sexual offences.

8.14 Members of the legal profession consulted by the Commission were split on the question. Some were happy with the current system and the discretion exercised by the court; others were in favour of a presumption for the suppression of victims' names in sexual assault cases; and some said automatic name suppression should only be for children, as is provided for to some extent in the *Young Offenders Act 2007*, not only for the young offender,<sup>180</sup> but also for the victim(s) of offences a young offender is charged with.<sup>181</sup>

8.15 Members of the judiciary were in favour of automatic name suppression in sexual offence cases, as is currently granted routinely.

8.16 One stakeholder suggested including the following in the CPA as s 61A:

*(1) The name of the victim or complainant in a case of sexual nature is prohibited from publication on any report related to the trial except where the court is of the opinion that the interests of justice require publication.*

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175 Ibid R14; *Criminal Procedure Act 2011* (NZ) s 198.

176 *Criminal Procedure Act 1986* (NSW) s 291.

177 Ibid s 291A(1).

178 *Criminal Procedure Act 1986* (NSW) s 291B.

179 *These people are, according to s 133(3) of the Criminal Procedure Act 2009 (Vic): the informant, the accused, a person whom the complainant wishes to have present for the purpose of providing emotional support to him or her and who is available and approved by the court to be present, the legal practitioners representing the prosecution and the accused and not more than one assistant for each legal practitioner, the court officials whose presence is required, authorised officers whose presence is required for court security purposes, any person recording the evidence, and any other person who has been authorised by the court to be present.*

180 *Young Offenders Act 2007* s 8(2).

181 Ibid s 8(3). Note that this does not apply for child victims in cases other than those heard in the Youth Court.

- (2) *While the complainant or victim in a case of sexual nature is giving oral evidence, no person shall be present in the courtroom except the following:*
- (a) *the judge and assessors;*
  - (b) *the accused;*
  - (c) *any prosecutor or legal counsel engaged in proceedings;*
  - (d) *any officer of the court;*
  - (e) *any person who is for the time being responsible for the recording of the proceedings;*
  - (f) *the member of the police in charge of the case;*
  - (g) *any person whose presence is requested by the complainant or victim; and*
  - (h) *any person expressly required by the Judge to be present.*
- (3) *The provisions laid down in this section are not to limit any power of the court under section 61.*

8.17 In Working Group meetings, there was a general consensus that the automatic protection of victims in sexual cases through non-publication of their names should be guaranteed by legislation without the prosecution having to seek such an order. It was also suggested that matters of sexual offences should be carried out in closed court, especially during the giving of evidence by the victim.

8.18 Most members of the legal profession were against the introduction of automatic closed courts for sexual offences, mainly because they considered the publicity of a trial a powerful disincentive to commit offences. Some noted that the sensitivities about victims could and should be dealt with through other means such as video evidence, screens or name suppression, always taking into consideration the defendant's right to know his or her accuser. Some, however, agreed that automatically closing the courts in cases of young victims or indecent assaults by relatives would be a good option.

8.19 Members of the judiciary pointed out that there is a room in the court building for victims of sexual offences to give evidence, but it is rarely used. They also noted that the court lacks teleconferencing and recording facilities.

8.20 A member of the Working Group suggested also screening police witnesses from being seen and known by the defendant and his or her family (but not from his or her counsel), both inside and outside of court.

8.21 Another representative in the Working Group suggested introducing a duty for the media to apply to the court for authorisation to report on a case.

### ***Commission's views***

8.22 There is a general consensus that victims of sexual offences need to be protected from harm and stigmatisation through court proceedings, and that child witnesses and victims are also likely to be vulnerable and needing protection. There are, however, several ways to achieve such protection. Automatic suppression of names is one of them, but suppression at the discretion of the court could be equally efficient or maybe even better suited in some cases. Closed court proceedings are another possibility, and they may also enable the victim or witness to provide better evidence, but need to respect the right to a public trial set out in art 9 of the *Constitution*. It would also be possible to screen certain witnesses from the public or to videotape their evidence or have it broadcast via videolink so they do not have to face the defendant.

8.23 On the other hand, privacy is not an absolute right, and must be balanced against other rights and values in the community. These include the desirability of an open justice system, and the free flow of information to the public through the media and other outlets.<sup>182</sup> Moreover, the defendant has a right to face his or her accuser in court.

8.24 The Commission agrees with the NZLC's argument that the suppression of names should be limited to cases where publication or open court would endanger the safety of any person or cause undue hardship to the victim or witness. The Commission does not recommend the automatic suppression of the identity of a child witness, because there may be cases in which suppression is not necessary or desirable, as discussed above. Recognising that children in the justice system are often vulnerable, the Commission is satisfied that sufficient protection is offered to children through the existing provisions of the *Young Offenders Act 2007*, coupled with a revised version of s 61 of the *Criminal Procedure Act 1972* discussed below and set out in Recommendation 23.

8.25 The Commission considers, on the other hand, that in cases involving sexual offences that undue hardship is almost always caused to the victim where the details of that offence are made public. In such cases, therefore, the victim's name should be suppressed automatically. While the same harm or hardship can occur to other witnesses and in trials other than those dealing with sexual offences, the Commission considers that a decision to suppress the names of witnesses or to close the court, other than in sexual offence cases, should be left to the court to decide on a case by case basis.

8.26 Closed courts may also serve the function of enabling the victim or witness to provide better evidence, as well as protecting the witness, and should therefore be the practice in cases of sexual offences during the giving of evidence by the victim. Media access to closed court proceedings should not be granted. Although other jurisdictions, such as New Zealand, allow the media to be present in a closed court, the Commission is of the view that an important proviso to this admission is that the media provider is subject to a national regulation system.<sup>183</sup> At present, no such system of regulation exists in Samoa. Media access to proceedings in sexual offences outside of closed court proceedings should be regulated by the judge presiding over the trial.

8.27 If appropriate, the court could in such cases also make an order for a deposition hearing screening of witnesses, or other protection orders considered appropriate during the hearing.

**Recommendation 21:** The *Criminal Procedure Act 1972* should provide for the automatic suppression of the name and any particulars likely to identify a victim of a sexual offence. The court should be given power to permit publication at the victim's request.

<sup>182</sup> Australian Law Reform Commission, *Submission to NSW Legislative Council on the publication of names of children involved in criminal proceedings* (2007/2010) <<http://www.alrc.gov.au/submission-nsw-legislative-council-publication-names-children-involved-criminal-proceed>> at 26 October 2011.

<sup>183</sup> See, for example, *Criminal Procedure Act 2011* (NZ) ss 97(1)(g), 198(2).

**Recommendation 22:** The *Criminal Procedure Act 1972* should be amended to provide that during the taking of evidence from a victim, sexual offence proceedings should be dealt with in closed court with only the following persons present:

- the judge;
- the defendant and his or her counsel;
- the representative of the prosecution;
- court officers responsible and necessary for court proceedings and recordings;
- any person whose presence is requested by the witness (such as a support person); and
- any person whose presence is deemed necessary by the court.

**Recommendation 23:** Section 61 of the *Criminal Procedure Act 1976* should be amended to allow the court, at its discretion, to make an order of suppression, closed court, or any other protection orders, including hearing by deposition and screening of witnesses, where any other way of proceeding would endanger the safety of any person or would cause undue hardship to the victim or witness.

## 9. Assessors

9.1 Assessors are members of the community chosen ‘by reason of their character, education, ability and reputation’ to sit on criminal trials.<sup>184</sup> In an assessor trial, the judge sits with four assessors. The assessors’ role is to determine whether, on the facts of the case, the defendant is guilty beyond reasonable doubt. A defendant may only be convicted if three of the four assessors agree that the defendant is guilty. If the assessors do not agree, the defendant must be acquitted.<sup>185</sup>

9.2 Under the *CPA*, a defendant who is charged with an offence punishable by imprisonment for more than five years may elect to be tried by a judge sitting with assessors or a judge alone.<sup>186</sup> An assessor trial is mandatory only where a person pleads not guilty to an offence punishable by life imprisonment.<sup>187</sup>

9.3 The use of assessor trials in Samoa dates from colonial times when Samoa was a protectorate under German rule and later administered by New Zealand. Assessors were used to assist foreign judges who could not speak Samoan and did not necessarily have an understanding of Samoan traditions and customs. The use of assessors was one way of ensuring that the community values of Samoa were considered when determining a person’s guilt, and as such provided a limited ‘trial by one’s peers’.

9.4 The assessor system in Samoa differs from both trial by jury and advisory assessor systems in other jurisdictions. Unlike jurors, assessors are not randomly selected from members of the general public, but rather are selected by the Judicial Services Commission on the basis of their character, education, ability and reputation. Further, unlike advisory assessors in other

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184 *Criminal Procedure Act 1972* s 92.

185 *Ibid* s 99.

186 *Ibid* s 87.

187 *Ibid* s 87.

Pacific jurisdictions, assessors in Samoa determine the facts of the case and decide if the defendant is guilty or not guilty. However, in Samoa, a judge presiding at a trial with assessors may overrule a guilty verdict returned by assessors if he or she is of the opinion that the defendant should not be convicted.<sup>188</sup>

9.5 Consultations with stakeholders revealed serious concerns about the assessor system in Samoa. A number of members of the legal community expressed the view that they had no confidence in assessors; one likened an assessor trial to a roll of the dice.

9.6 The central concern expressed by stakeholders was that assessors lack the impartiality necessary to fairly and competently determine whether a person is guilty of an offence. Many stakeholders expressed the view that some assessors have made up their minds about the defendant's guilt before the trial. Some noted that, in their experience, assessors have deliberated too quickly to have given proper consideration to complex and serious issues raised in the trial. As a result, some stakeholders expressed grave concerns about the perverse outcomes of assessor trials.

9.7 Assessors are required to determine whether the defendant is guilty or not guilty based only on the evidence given at trial. However, the relatively small population of Samoa, and the strength of family relationships, closeness of village ties and church affiliations may impair the impartiality of assessors to the parties or the issues involved in the trial. Further, customs relating to cultural status may also affect the ability of individual assessors to come to an independent view on the issues in cases. For example, some stakeholders noted that individual assessors will often defer to the views of the assessor who holds greater cultural status and titles, rather than make their own assessment of the evidence given at trial.

9.8 In addition, the influence of media reporting of criminal cases means that it is unlikely that assessors would be unaware of the circumstances of the crime and the families involved. While assessors are required to put such affiliations and interests aside and determine the case only on the law, it may be unrealistic to expect that all influences of family, custom and pre-trial reporting can be completely removed.

9.9 Further, stakeholders noted that assessors are selected from a small elite pool of Samoans, namely *matai* title holders and senior members of churches. As such, panels of assessors tend to consist of older retirees who do not necessarily reflect modern Samoan community views and values. The small size of the assessor pool also means that the same people sit as assessors on many criminal trials, and some have become 'professional assessors' who apply their own views on law and criminality rather than the law itself.

### **Abolition of assessor trials**

9.10 In light of the serious concerns regarding assessors raised in consultations, the Commission asked stakeholders whether the current assessor system should remain or be replaced by a different system. There are three general alternatives to the assessor system.

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188 Ibid s 100.

- 9.11 **Juries:** New Zealand, Australia, the Cook Islands<sup>189</sup> and Tonga<sup>190</sup> use juries in trials for serious offences. A jury is a panel of seven to twelve people chosen from all members of the community who are eligible to vote. As such, trial by jury is intended to be a ‘trial by peers’ and to enhance community participation and confidence in the criminal justice system. The jury decides whether the defendant is guilty or not guilty on the basis of the evidence presented at the trial, and for this reason must be impartial and not biased towards any of the parties or issues in the case. The role of a judge in a jury trial is to determine issues of law and give directions about the applicable law to the jury. The judge has no power to overrule a verdict returned by a jury.
- 9.12 **Advisory assessors:** Assessors in other jurisdictions perform a strictly advisory role. Legislation in Fiji, Kiribati, Solomon Islands and Tuvalu provides that the judge must take account of assessors’ views when determining the defendant’s guilt, but is not bound to follow them.<sup>191</sup> Several European countries also use assessors in this way. The role of advisory assessors is open to criticism on the basis that it removes any meaningful role for assessors in the trial, and is not really necessary where judges are local or have the benefit of relevant expert evidence. In practice, there is a concern that advisory assessors ordinarily defer to the judge’s views.
- 9.13 **Trials by judge alone:** Criminal cases are heard by judges sitting alone in many Pacific nations. Provisions for the use of assessors in Vanuatu, Niue and Tokelau have been repealed<sup>192</sup> and judges sit alone in criminal cases in Papua New Guinea and Nauru. In practice, in many jurisdictions with provision for jury trials a judge alone often hears serious criminal cases where the defendant has a right to choose whether to have a trial by jury or judge alone.

### **Submissions and consultations**

- 9.14 Some stakeholders considered that the assessor system should be abolished and replaced with judge alone trials. They considered that judges were more impartial than assessors and can better understand complex evidence and apply the proper legal tests to the facts. Unlike assessors and juries, a judge sitting alone will provide written reasons for his or her decision, which allows the parties to understand how the case was determined and provide transparent grounds for an appeal. As such, it was considered that judge alone trials are more transparent, accountable and impartial than assessor trials. Finally, stakeholders noted that assessor trials tended to be subject to delays, and that judge alone trials would be quicker, less costly and more efficient.

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189 *Juries Act 1968* (Cook Islands).

190 *Supreme Court Act* ch 10 (Tonga). See generally Rose Lesley Kautoke, ‘The Jury System in Tonga’ (2009) 13(1) *Journal of South Pacific Law* 8.

191 *Criminal Procedure Code*, ch 21 (Fiji) s 299; *Criminal Procedure Code*, ch 17 (Kiribati) s 178; *Criminal Procedure Code*, ch 7 (Solomon Islands) s 275; *Criminal Procedure Code*, ch 7 (Tuvalu) s 178. See generally, E Colvin, ‘Criminal Procedure in the South Pacific’ (2004) *Journal of South Pacific Law* 8(1) at 19 via *Bond University epublications* <[http://epublications.bond.edu.au/law\\_pubs/19](http://epublications.bond.edu.au/law_pubs/19)> at 16 January 2012.

192 *Criminal Procedure Code*, ch 136 amended by *Criminal Procedure Code (Amendment) Act 1989* (Vanuatu); *Niue Act 1966 (NZ)* amended by the *Niue Amendment Act 2007*; Tokelau’s *Crimes, Procedure and Evidence Rules 2003* s 135 now provides for trials by judge alone.

- 9.15 It was generally considered that trial by jury would not be appropriate in Samoa. Stakeholders expressed concerns that the costs relating to the administration of a jury system would impose too great a burden on the limited resources of the court as well as members of the public selected to sit on a jury trial. It was also noted that many of the concerns about the impartiality of assessors noted above, particularly the strength of family and village ties and the influence of the media, would also apply to juries.
- 9.16 The idea of advisory assessors received limited support from a few stakeholders. However, most noted that an advisory assessor system would impose a great change on the assessor system without clear benefits.
- 9.17 Rather than introduce a new system, some stakeholders suggested that improvements should be made to the current system to ensure that assessors are impartial and competent and that the legal profession and the general community have renewed faith that assessors make proper and fair decisions in criminal trials.

#### ***Commission's views***

- 9.18 The Commission accepts that there are serious concerns about the fairness and effectiveness of the current assessor system. In particular, the Commission considers that concerns about the impartiality and competency of assessors undermine the community's faith in assessor trials as a proper and just means to determine whether a person is guilty of a criminal offence.
- 9.19 The historical reasons for judges to sit with assessors on criminal trials — that is, to ensure that foreign judges were informed about Samoan culture, customs and language — no longer apply. Therefore, assessor trials should be retained only if there are strong reasons why they are relevant and important to modern criminal procedure in Samoa. The most compelling reason for retaining assessor trials is that the use of assessors in serious criminal trials provides an avenue for community input into the criminal justice system. Input from the community is particularly important where offences include elements that depend on community standards, such as reasonableness, provocation or indecency. Community involvement in criminal trials is one means of ensuring that the criminal justice system is acceptable and accountable to the community and contributes to public confidence in criminal justice.
- 9.20 However, community input must support, rather than compromise, principles of justice and the right of the defendant to a fair trial before an impartial and competent court. Substantial reforms would be required in order to ensure that assessors are impartial, able to understand and competently perform their role and better reflect the current views and values of Samoa. The Commission is not persuaded that such reforms would be adequate to address the current issues regarding the partiality and competence of assessors and other shortcomings inherent in the system of trial by assessors.
- 9.21 On balance, the Commission considers that trial by assessors is outdated and not suited to determining trials in the context of modern Samoan criminal procedure laws and practices. The Commission has considered the three alternatives to the assessor system. In light of the shortcomings of trials by jury or advisory assessors noted by stakeholders, the Commission

considers that the most preferable alternative to an assessor system in Samoa is trial by judge alone. The Commission notes that judges already try many criminal offences sitting alone, as well as all civil cases. The majority of the current judges of the Supreme Court are Samoan, and can appreciate Samoan traditions and customs, as well as gauge community views on criminal justice issues. Where a judge is non-Samoan, or requires further evidence about traditional cultural practices, such information can be obtained from an expert witness or friend of the court. Decisions by judges are also more likely to be impartial and based on a solid understanding of the law. Importantly, judges provide written reasons for their decisions, and so decisions of judges are open to public scrutiny and accountability.

9.22 The Commission acknowledges that the abolition of trials by assessors would be a significant reform to criminal procedure laws in Samoa. For this reason, the Commission has decided to make two alternative recommendations. First, the Commission recommends that the *CPA* be amended to remove provisions for trials by assessors and instead provide that all criminal trials be heard by a judge sitting alone. However, should the government not accept this recommendation, the Commission makes a number of recommendations, below, for the reform of the assessor system aimed at improving the impartiality, competence and effectiveness of assessor trials.

**Recommendation 24:** The *Criminal Procedure Act 1972* should be amended to remove provisions for assessor trials, and criminal trials in the Supreme Court of Samoa should be heard by a judge sitting alone.

### **Alternative recommendations to reform assessor trials**

9.23 The remaining section of this chapter discusses reforms aimed at improving the assessor system, should the government not accept the Commission's recommendation to abolish assessor trials in favour of criminal trials conducted by judges alone.

### **Eligibility requirements**

9.24 Currently, the Judicial Services Commission is responsible for compiling a list of people qualified to be assessors. Section 92 of the *CPA* provides that the Judicial Services Commission can appoint any person who, in its opinion, is qualified to be an assessor by reason of their character, education, ability and reputation. Generally, assessors hold *matai* titles or are senior members of a church. The *CPA* requires that the list contain at least 250 persons, and that the Judicial Services Commission review the list annually.<sup>193</sup>

9.25 The qualifications of assessors differ in other Pacific nations. For example, in Fiji and the Solomon Islands, any resident aged between 21 and 60 with knowledge of English language is eligible to serve as an assessor.<sup>194</sup> In Kiribati and Tuvalu, the court appoints as assessors persons it considers 'suitable to assist the court'.<sup>195</sup>

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193 Ibid s 92.

194 *Criminal Procedure Code*, ch 21 (Fiji Islands) s 265; *Criminal Procedure Code*, ch 7 (Solomon Islands) s 242.

195 *Criminal Procedure Code*, ch 17 (Kiribati) s 177; *Criminal Procedure Code*, ch 7 (Tuvalu) s 177.

### ***Submissions and consultations***

- 9.26 Some members of the legal profession expressed the view that the list of assessors should be reviewed and updated more regularly. Some noted that some assessors are no longer able to effectively perform their task due to age or ill health, and yet are still on the list of assessors.
- 9.27 Other stakeholders noted that assessors tended to be older, retired people. They expressed concerns that assessors are not representative of the community and that this was unfair to many defendants, particularly young defendants. Others noted that the age of assessors meant that trials took longer as assessors were often late or required more frequent breaks.
- 9.28 Some members of the legal profession proposed that assessors be drawn from the electoral roll, so that any person over the age of 21 would be eligible to be on the list of assessors. One stakeholder cautioned against making the pool of assessors too large, however, noting that this would incur greater costs and make it more difficult to contact assessors prior to a trial. Others suggested amending s 92 so that the criteria for selecting assessors better reflected a mix of members of the community. Another stakeholder proposed that there be a mandatory age limit on assessors so that people over 65 are not eligible to be assessors.

### ***Commission's views***

- 9.29 The Commission considers that the eligibility requirements to be an assessor — namely that a person is qualified by reason of their character, education, ability and reputation — is too vague. It gives no guidance as to the desirable qualities of an assessor, leaving this to the opinion of the Judicial Services Commission.
- 9.30 The Commission considers that there is merit to amending the criteria in s 92 of the *CPA* relating to the selection of assessors so that the list of assessors reflects a cross section of the community. The Commission therefore recommends that the *CPA* should require that the Judicial Services Commission, when appointing assessors, must consider the desirability of ensuring that the list of assessors is broadly representative of the Samoan community, in particular that the list includes a range of ages, occupations, genders and backgrounds.
- 9.31 Further, the Commission notes that the examination of witnesses and submissions from counsel in criminal trials may occur in either Samoan or English. So that trials are not unnecessarily delayed by a requirement for interpreters, the Commission recommends that assessors must be able to speak and understand both English and Samoan. Finally, the Commission considers that only persons aged between 21 and 65 years be eligible for appointment as assessors.
- 9.32 As a matter of practice, the Commission considers that it would be beneficial for the Judicial Services Commission, before appointing a person to the list of assessors, to contact that person and ascertain whether he or she is willing and able to act as an assessor and understands that he or she may be called upon to be an assessor at short notice.

9.33 The Commission considers that the statutory requirement that the Judicial Services Commission review the list of assessors annually is important to ensuring that all persons on the list are competent and available to act as assessors, and that the list remains reflective of the community. This provision should therefore remain in the *CPA*.

### **Selection of assessors to sit on a trial**

9.34 The *CPA* provides that the judge who is to preside at the trial selects the assessors from the list of assessors.<sup>196</sup> In practice, the Supreme Court Registry prepares a list of possible assessors about three days before a trial. The list states each assessor's name, sex, title and village. The list is given to the presiding judge who selects four assessors and perhaps two reserves. Counsel for the prosecution and defence, or the defendant if he or she is unrepresented, then see the list and have the opportunity to object to any of the assessors.

9.35 The assessors selected to sit on the trial must be impartial and not prejudiced or biased in relation to any issues in the case or any of the parties. A common ground for objecting to an assessor is that there is an issue of conflict, for example that the assessor is a relative, business associate or has some other kind of relationship to the defendant, victim, witness, counsel or any other person involved in the trial.

### ***Submissions and consultations***

9.36 In consultations, members of the legal profession expressed two main concerns about the practice of selecting assessors to sit on trials.

9.37 First, stakeholders expressed a concern that the information on each assessor included in the list was insufficient to identify if there is a conflict. Some stakeholders suggested that it would be helpful in order to identify conflicts if the list of assessors provided to judges and counsel contained more information, including a photo of the assessor, his or her age, place of residence, other village affiliations (for example the home village, or that of his or her spouse) and all *matai* titles, noting that a person may hold several.

9.38 The second concern raised by stakeholders was that counsel received the list of assessors for a trial too late to have time to ask their clients and any witnesses if they know the assessors. This means that sometimes assessors or counsel only realise that there is a conflict when a witness or family member appears in court.

### ***Commission's views***

9.39 The Commission notes concerns that insufficient vetting of assessors prior to trial can result in conflicts going unidentified until the assessors are empanelled at the trial, or even during the trial, for example, when a witness gives evidence. This results in cost and delay as a trial is aborted while new assessors are found to replace those with a conflict of interest. There is also a risk that conflicts are not declared, possibly resulting in a partial or biased panel of assessors.

9.40 In order to minimise the risk of conflict, the Commission considers that the list of assessors should contain more information. This will give the presiding judge and counsel in

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<sup>196</sup> *Criminal Procedure Act 1972* s 93(2).

the case the opportunity to identify and investigate potential conflicts. The Commission therefore recommends that the *CPA* be amended to provide that the list of assessors include a recent photo of the assessor, his or her age, occupation, place of residence, other village affiliations and all titles that the person holds. Further, the Commission considers that counsel and the defendant, if he or she is unrepresented, should receive the list of assessors from the court at least two full working days before the trial, in order to have time to consider and investigate any potential conflicts.

### **Challenging assessors**

9.41 The Commission notes that improving the pre-trial process for the selection of assessors will not address all concerns about issues of conflict. Reforms in this area must be accompanied by improved processes at the trial to vet assessors to identify any issues of conflict or bias. For example, improving the information contained in the list of assessors will not assist the court to know if an assessor has been a victim of a similar offence to that which the defendant is charged, or whether he or she has had dealings with the police that make him or her biased against the prosecution.

9.42 Section 96 of the *CPA* permits the prosecution or defendant to challenge an assessor at any time before he or she is sworn. A challenge to an assessor must be ‘for cause’. Grounds for challenging an assessor include that the assessor is not eligible to serve, is incapable of performing the duties of an assessor, is related to a person involved in the trial, has a business relationship with any person involved in the trial, or has ‘actual bias’, meaning that the assessor has certain set views that would interfere with his or her ability to hear the trial impartially. If the judge is satisfied that there is reasonable and sufficient objection to the assessor, then the assessor must be replaced. The judge may also remove an assessor on his or her own motion.

9.43 Case law has made it clear that counsel do not have a general right to question assessors before a trial. Rather, counsel may only cross examine an assessor if the court accepts that grounds exist for challenging the assessor.<sup>197</sup> There is no provision in the *CPA* for ‘peremptory challenges’ to assessors, which are used in many jury systems and allow counsel for the prosecution and defendant, by right, to remove an assessor from the panel without providing any reasons for objecting to the assessor.

9.44 The Commission understands that, in practice, formal challenges to assessors are not often made in court. The judge or registry generally deals with issues about eligibility or conflict prior to the trial through the processes described above.

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<sup>197</sup> *Police v Taalili* [1994] WSSC 26 (4 July 1994).

9.45 In jurisdictions with jury trials, challenges without cause to potential jurors are commonplace. For example, the New Zealand *Juries Act* permits each party to challenge up to four jurors without cause.<sup>198</sup> Australian jurisdictions also give each party the right to peremptory challenge of between three and eight jurors.<sup>199</sup>

### ***Submissions and consultations***

9.46 Stakeholders consulted by the Commission held differing views about challenging assessors with and without cause.

9.47 One stakeholder suggested that there should be a pre-trial process in which counsel for the prosecution and defendant can question potential assessors to gauge their views and prejudices about the issues relating to the trial. Any information gained in this way could then form the basis for a challenge for cause under s 96 of the *CPA*. Another stakeholder suggested a different approach, whereby the judge is permitted, or even required by legislation, to inform the assessors about the nature of the case, the issues in dispute and the names of the defendant, victim and witnesses before the assessors are sworn. The judge would then give the assessors the opportunity to consider and declare if they have any relationship with the parties or reasons why they do not feel they can sit as impartial assessors on the case.

9.48 Other stakeholders expressed a preference for retaining the current system in which objections to assessors may be dealt with pre-trial before assessors are empanelled, rather than at trial. Some felt that a pre-trial process for questioning assessors would take up too much court time. This view was generally made subject to making improvements to the selection process so that issues of conflict could be identified early.

### ***Commission's views***

9.49 As discussed above, the Commission understands that there are serious concerns about the impartiality of assessors sitting in criminal trials in Samoa. This is one of the key reasons why the Commission recommends abolishing assessor trials in favour of judge alone trials. The Commission considers that there is merit in establishing a pre-trial process in which assessors can be questioned about their views on the issues in the case in order to determine if there are grounds to challenge for cause any assessors who are not sufficiently impartial to the parties or issues at dispute in the trial.

9.50 One problem with establishing a pre-trial process to question potential assessors is that it may delay the trial, particularly if vetting results in one party challenging an assessor for cause. However, given concerns about the impartiality of assessors, the Commission considers that the interests of justice require the establishment of a vetting process of this kind.

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198 *Juries Act 1981* (NZ) s 24.

199 *Juries Act 1967* (ACT) s 34 (eight peremptory challenges); *Jury Act 1977* (NSW) s 42 (three peremptory challenges); *Juries Act* (NT) s 44 (six peremptory challenges); *Jury Act 1995* (Qld) s 42 (eight peremptory challenges); *Juries Act 1927* (SA) s 61 (three peremptory challenges); *Juries Act 2003* (Tas) s 35 (six peremptory challenges); *Juries Act 2000* (Vic) s 39 (six peremptory challenges); *Criminal Procedure Act 2004* (WA) s 104 (three peremptory challenges).

9.51 The Commission is not, however, in favour of establishing a right of peremptory challenge, or challenge without cause. This would require that there are alternative assessors standing by ready to sit at the trial, a practice which would impose costs on the court and would inconvenience assessors.

9.52 The Commission considers that in addition to judges and counsel having more information about the background and affiliations of assessors, assessors must also have information about the issues and people involved in the case. This would allow assessors to remove themselves if there is a conflict, or if they have past experiences that mean that they are not indifferent or impartial to the parties in the case or any of the issues at trial. The Commission therefore recommends that the *CPA* be amended to require that, before the assessors are vetted by counsel and sworn, the judge presiding at an assessor trial explain to the assessors the nature of the case, the kinds of issues in dispute and the names of the defendant, victim and witnesses. At this time, the judge may also think it desirable to explain to the assessors the importance of impartiality and the kinds of conflicts and biases that may affect the assessor's ability to be an impartial adjudicator at the trial.

### **The presiding judge's power to overrule a guilty verdict returned by assessors**

9.53 There are two ways in which a guilty verdict returned by assessors may be set aside. First, s 100 of the *CPA* provides that if the judge presiding at the trial is of the opinion that the defendant should not be convicted, he or she can overrule the assessors' verdict.<sup>200</sup> This means that if the judge does not think that the defendant is guilty, but the assessors do, the judge's view prevails.<sup>201</sup> Secondly, the defendant can appeal against a guilty verdict returned by assessors on the grounds that it is unreasonable or cannot be supported by the evidence.<sup>202</sup> If a judge exercises his or her power under s 100, the defendant must be acquitted and there is no option for a retrial. In contrast, if a court upholds an appeal under s 164N, it has discretion to acquit the defendant, direct a new trial or make any other order as justice requires.<sup>203</sup>

9.54 Judges have overruled guilty verdicts returned by assessors on the basis that the prosecution has not proven its case beyond reasonable doubt.<sup>204</sup> In one such case, Nelson J stated that the purpose of s 100 is to prevent unfair convictions in which there is reasonable doubt as to the defendant's guilt. His Honour stated that:

*The provision is in some respects a safety valve reserved to the presiding judicial officer who is not a layman like the ordinary assessor but a trained qualified practitioner of the law, in many cases with years of experience and knowledge of criminal cases and evidentiary matters to substitute his view for that of a lay panel of assessors. The exercise however should not be undertaken lightly but where it is necessary the judge's duty is to intervene to prevent a miscarriage of justice.*<sup>205</sup>

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200 *Criminal Procedure Act 1972* s 100.

201 *Attorney General v Sefo* [2009] WSCA 7 (9 October 2009) para 8.

202 *Criminal Procedure Act 1972* s 164N(a).

203 *Ibid* s 164N(4).

204 See, eg, *Police v Otto* [2009] WSSC 31 (27 March 2009); *Attorney General v Sefo* [2009] WSCA 7 (9 October 2009).

205 *Police v Otto* [2009] WSSC 31 (27 March 2009), per Nelson J. The Court of Appeal agreed with this interpretation (*Attorney General v Otto* [2009] WSCA 6 (9 October 2009), para 6.

9.55 In another case, the Court of Appeal noted that a majority of three out of four assessors is not a large number to provide a definitive decision in a serious case. The Court stated that the purpose of s 100 is to balance the relatively small number of assessors and ensure that the defendant's guilt is proved beyond reasonable doubt.<sup>206</sup>

9.56 Section 100 has also been used to set aside a guilty verdict returned by assessors on the basis that the charge against the defendant had not been brought within the statutory time limit for commencing a prosecution.<sup>207</sup>

9.57 The Court of Appeal has recently held that, when exercising power under s 100, the judge must give reasons for his or her decision so that the parties know how their cases have been determined and to foster and promote transparency and public confidence in the judicial system.<sup>208</sup>

### ***Submissions and consultations***

9.58 In the Issues Paper, the Commission asked whether the presiding judge's power to overrule a conviction reached by assessors should be removed from the *CPA* (question 20).

9.59 A member of the Working Group submitted that s 100 should be removed from the *CPA*, on the basis that giving judges the power to overturn the assessors' decision defeats the purpose of having an assessor trial. The stakeholder noted that this power might make assessors hesitant to disagree with the judge, whose role in making decisions about legal issues (such as questions of evidence or the definition of an offence) and in summing up the issues for assessors, when coupled with the availability of an appeal, were adequate safeguards against a miscarriage of justice.<sup>209</sup> Another stakeholder also submitted that the veto power should be removed, and another considered that s 100 should be used rarely, if ever, noting that there are other avenues to redress potential miscarriages of justice, including through the appeals process and through a ruling that there is no case to answer after the prosecution has presented its case.

9.60 Members of the legal profession consulted by the Commission were generally in favour of retaining s 100. They considered that s 100 was an important check on assessors' decisions and a safeguard against miscarriages of justice. Some members of the legal profession noted that the judge's power to overrule a guilty verdict returned by assessors was important given concerns about the selection and impartiality of assessors and the fact that it is very difficult to successfully appeal a verdict returned by assessors.

### ***Commission's views***

9.61 The Commission is of the view that s 100 of the *CPA* should be retained so that judges may continue to overrule a conviction reached by assessors when he or she is of the opinion that the defendant should not be convicted. The Commission notes that courts use s 100

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206 *Attorney General v Sefo* [2009] WSCA 7 (9 October 2009) paras 8-9.

207 *Police v Stanley* [2008] WSSC 66 (25 July 2008).

208 *Attorney General v Sefo* [2009] WSCA 7 (9 October 2009), paras 10-16.

209 Discussions at the Criminal Law Review Working group (see minutes attached to Attorney General's letter of 19 February 2010, para 24).

rarely and only in cases where there is a clear and reasonable doubt about the defendant's guilt. Given the serious concerns about the competence and impartiality of assessors at the current time, the Commission considers that it is important for the courts to retain this power. The Commission further notes that the requirement that judges give written reasons for exercising their powers under s 100 means that the courts can develop jurisprudence about the appropriate use of the power.

9.62 The Commission does not, however, consider that s 100 should be extended to permit the presiding judge to overrule a 'not guilty' verdict returned by assessors. The primary purpose of s 100 is to protect against wrongful conviction, and the general principles of criminal law regarding the finality of verdicts and the rule against double jeopardy mean that acquittals should only be overruled or appealed in very limited circumstances.

### **Choice of a judge-only trial**

9.63 A trial with assessors is mandatory where a person pleads not guilty to an offence punishable by death or life imprisonment.<sup>210</sup> For other cases, the defendant may elect to be tried by a judge alone.<sup>211</sup> In other trials, the court has a discretion to sit with assessors. This discretion is exercised either on the court's own motion or on the application of the prosecution or defendant.<sup>212</sup> Some kinds of offences, including offences under the *Narcotics Act 1967* and offences punishable by a fine only, must be heard by a judge alone.<sup>213</sup>

9.64 Other jurisdictions that use a jury system permit the defendant to waive his or her right to a trial by jury.<sup>214</sup> Others require that a defendant may elect a judge alone trial only with the consent of the prosecutor.<sup>215</sup> The extent to which a defendant has a right to elect a judge alone trial reflects different views about the purpose and value of a jury trial. On one hand, the jury trial is intended to protect the rights of the defendant; on the other it is an important way in which community may be involved in the administration of justice.<sup>216</sup>

### ***Submissions and Consultations***

9.65 In consultations, a stakeholder suggested that one reform to the assessor system would be to allow the defendant the option to choose a judge only trial on any charge. Several members of the legal profession noted that most defendants, when given a choice, will choose a judge alone trial.

9.66 A member of the Working Group expressed a concern that the *CPA* is unclear about assessor trials where two or more charges against the same person are being heard together. For example, a defendant may be charged with both rape (for which the maximum penalty is life imprisonment and so must be heard by assessors) and attempted rape (for which the

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210 *Criminal Procedure Act 1972* s 87. The Commission notes that the reference to the death penalty is obsolete and should be removed from this provision: see Recommendation 33.

211 *Ibid.*

212 *Ibid* s 91.

213 *Ibid* s 88. These include offences under the *Narcotics Act 1967* and offences punishable by a fine only.

214 See, eg, *Juries Act 1927* (SA) ss 7(1)(b), 7(2) and 7(3); *Supreme Court Act 1933* (ACT) s 68B.

215 See, eg, *Criminal Procedure Act 1986* (NSW) s 132(2).

216 J O'Leary, 'Twelve angry peers or one angry judge: An analysis of judge alone trials in Australia' (2011) 35(3) *Criminal Law Journal* 154.

maximum penalty is 10 years imprisonment and so the defendant may elect to be tried by a judge sitting with assessors or a judge alone). In order to avoid separate trials, this stakeholder recommended that the *CPA* should require that where one of several charges gives rise to a mandatory assessor trial, all charges should be heard by assessors.<sup>217</sup>

### ***Commission's views***

9.67 The Commission is of the view that, given the concerns about the impartiality and competence of assessors at this time, judge alone trials are the preferable means of hearing criminal offences. The reasons for this view are discussed above, under the heading 'Abolition of assessor trials'. For the same reasons, the Commission recommends that the defendant should have the option to choose to be tried by a judge sitting alone or by assessors, including where the offence is punishable by imprisonment for life. As noted above, the Commission considers that decisions by judges are more likely to be impartial and based on a solid understanding of the law as well as Samoan customs and community values.

9.68 This would also avoid the issues relating to separate trials, discussed above. The Commission notes that s 31 of the *CPA* already provides that informations may be tried together, unless the court thinks it desirable or expedient in the interests of justice to try them separately. The Commission is of the view that it is preferable to leave the question of whether trials should be separate or joined to the discretion of the court. The appropriateness of having one information tried by assessors and another by a judge alone would be an appropriate consideration when determining whether to order separate trials.

**Recommendation 25:** If Recommendation 24 is not accepted, the Commission recommends the following reforms to the *Criminal Procedure Act 1972* relating to the eligibility, selection and role of assessors in criminal trials:

- Section 92 of the *Criminal Procedure Act 1972* should be amended to require that assessors must be aged between 21 and 65 and speak and understand English and Samoan.
- Section 92 of the *Criminal Procedure Act 1972* should also provide that the Judicial Services Commission, when compiling and updating the list of assessors, must ensure that the list is broadly representative of the Samoan community.
- The *Criminal Procedure Act 1972* should provide that the list of assessors sets out the age, occupation, place of residence, village affiliations and all titles held by each assessor. The list of assessors should also include a recent photograph of the assessor.
- The *Criminal Procedure Act 1972* should be amended to require that counsel for the prosecution and defendant, and the defendant if he or she is unrepresented, should receive the names and details of the assessors selected to sit on the trial at least two days before the trial.
- The *Criminal Procedure Act 1972* should be amended to require that before assessors are sworn, the judge presiding at the trial must explain to the assessors the nature of the case, the kinds of issues in dispute and the names of the defendant, victim and witnesses.

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217 Discussions at the Criminal Law Review Working group (see minutes attached to Attorney General's letter of 19 February 2010, para 15).

- The *Criminal Procedure Act 1972* should be amended to permit the prosecution and defendant to question assessors about their views on the issues in the case before they are sworn in order to determine if there are grounds to challenge for cause any assessors who are not sufficiently impartial to the parties or issues at dispute in the trial.
- Section 100 of the *Criminal Procedure Act 1972*, which allows a judge to overrule a guilty verdict returned by assessors if he or she is of the opinion that the defendant should not be convicted, should be retained.
- Section 87 of the *Criminal Procedure Act 1972* should be amended to entitle the defendant to elect to be tried by a judge sitting alone.

## 10. Retrials

10.1 Sections 107 and 108 of the *CPA* deal with retrials in the District Court and Supreme Court. A retrial is a new, second trial in which the entire trial is repeated, including adducing evidence, examining witnesses and counsel's submissions. Retrials are generally held if serious errors in the original trial require that a conviction be set aside and the trial heard again.

10.2 The *CPA* establishes procedures whereby the prosecution and defendant can apply to the court for a retrial, in addition to their rights to appeal against an acquittal or conviction, sentence or other order made at trial. Different procedures apply to retrials in the District Court and Supreme Court.

### Section 107 — retrials in the District Court

10.3 Section 107 provides that after a trial in the District Court, either the prosecution or the defendant can apply in writing to a higher court for a retrial. An application must be made within 14 days of the acquittal or conviction, or, if the application could not reasonably have been made in that time, within such period as the higher court allows.<sup>218</sup> Depending on the composition of the court at the original trial, a higher court may be the District Court presided over by a *Fa'amasino Fesoasoani* with extended jurisdiction, the District Court presided over by a Judge, or the Supreme Court.<sup>219</sup> The *CPA* does not set out the grounds on which the higher court may grant a retrial. Instead, this is left to the court's discretion, to be exercised in the interests of justice.

10.4 In addition to the ability to apply for a retrial under s 107, the prosecution and defendant are also able to appeal an acquittal or conviction, sentence or other order made in criminal proceedings in the District Court.<sup>220</sup> Appeals may only be made to the Supreme Court.<sup>221</sup> On appeal, the Supreme Court has the power to make a variety of orders,<sup>222</sup> including that there

<sup>218</sup> *Criminal Procedure Act 1972* s 107(3).

<sup>219</sup> *Ibid* s 107(1).

<sup>220</sup> *Ibid* pt VII.

<sup>221</sup> *Ibid* s 130.

<sup>222</sup> *Ibid* s 144(2)(b). The Supreme Court may confirm a conviction, enter an acquittal, convict the defendant of a different offence, confirm or vary a sentence; or determine the question of law and remit the matter to the lower court for decision: ss 136, 144.

be a retrial.<sup>223</sup> The *CPA* does not set out the grounds on which the prosecution or defendant may appeal.

10.5 The fact that s 107 permits the prosecution to apply for a retrial raises issues about double jeopardy. A principle of criminal law is that a defendant should not be tried again for an offence for which he or she is finally convicted or acquitted in accordance with the law. The rule against double jeopardy is intended to protect the rights of the defendant, as well as to prevent the misuse by the executive of its power to prosecute. For this reason, acquittals may only be questioned or appealed in very limited circumstances. In comparable jurisdictions, appeals against an acquittal are generally limited to where an error of law has occurred, for example, in the judge's directions to the jury or assessors. Some jurisdictions have introduced legislation to limit the rule against double jeopardy in serious criminal cases. For example, some jurisdictions permit the retrial of a person acquitted of a serious offence if 'new and compelling' evidence is found or the acquittal is tainted, for example by threatening of witnesses, jury tampering or perjury.<sup>224</sup>

### **Section 108 — retrials in the Supreme Court**

10.6 Section 108 allows a defendant convicted at a trial before the Supreme Court to apply to the presiding judge for a retrial within 14 days of conviction.

10.7 The judge has the discretion to grant or refuse a retrial on such terms as he or she thinks fit.<sup>225</sup> There is no right to appeal this decision.<sup>226</sup> If the application for a retrial is successful, the defendant's conviction and any other orders made at the trial cease to have effect and the court of retrial rehears the trial as if it were the original court.<sup>227</sup> Unlike s 107, there is no equivalent provision that allows the prosecution to apply for a retrial if the defendant is acquitted in the Supreme Court.

10.8 There are three key differences between the procedures relating to a retrial under s 108 of the *CPA* and those for an appeal. First, an application for a retrial is considered by the judge presiding at the original trial, while an appeal is heard and determined by the Court of Appeal. Secondly, only a defendant who is convicted may apply for a retrial, while both the prosecution and defendant have the right to appeal the outcome of the trial, as well as various orders made during the trial.<sup>228</sup> Finally, the *CPA* does not specify the grounds on which a judge may grant a retrial, leaving this issue to the discretion of the judge. The case law in relation to s 108 holds that one ground on which a retrial may be granted is where there is new and credible evidence that could not reasonably have been given at trial which might

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223 Ibid s 153.

224 See, eg, *Criminal Justice Act 2003* (UK) s 78; *Criminal Procedure and Investigations Act 1996* (UK) ss 54-55; *Criminal Procedure Act 2011* (NZ) s 154; *Crimes (Appeal and Review) Act 2001* (NSW) ss 100-101; *Criminal Code* (Qld) ss 678B, 678C.

225 *Criminal Procedure Act 1972* s 108(5).

226 *Posala v Police; Attorney-General v Police* [1995] WSCA 4 (18 August 1995).

227 *Criminal Procedure Act 1972* s 109.

228 The prosecution and defendant may appeal: a question of law; certain orders made during the trial (s 164B); decisions regarding bail (ss 164C, 164D); a refusal to reserve a question of law for the court of appeal (s 164H); conviction or sentence in the case of the defendant (s 164K); and acquittal or sentence in the case of the prosecution (s 164L).

lead to a reasonable doubt about the guilt of the defendant.<sup>229</sup> Another classic ground for a retrial is that the trial is tainted by procedural irregularities, such as misconduct by an assessor or judicial officer. In contrast, the grounds for appealing a conviction are set out extensively in the *CPA*, and include that the assessors' verdict was unreasonable or not supported by the evidence; that there was a wrong decision on a question of law; that there was a miscarriage of justice; or that the trial was a nullity.<sup>230</sup>

10.9 Article 10(3) of the *Constitution* guarantees that no person who has been tried for any offence shall, after conviction or acquittal, again be tried for that offence. This rule is subject to two exceptions: first, where a retrial is ordered by a court of higher jurisdiction in the case of a conviction or acquittal; or secondly, where a defendant is convicted in the Supreme Court and a retrial is ordered by a Judge of the Supreme Court on an application made within 14 days of that conviction. Sections 107 and 108 of the *CPA* reflect these constitutional provisions.

10.10 The *CPA* provisions are based on s 75 of the *Summary Procedure Act 1957* (NZ). This section gives a judge or magistrate discretion to rehear a proceeding in which the defendant has been convicted or any order made against him or her. This provision applies only in summary proceedings in New Zealand, that is, in trials for less serious offences heard by a judge or magistrate sitting alone.

#### ***Submissions and consultations***

10.11 In the Issues Paper, the Commission asked whether the procedures for retrials should be removed from the *CPA* on the basis that an appeal process is available (question 21).

10.12 The Commission's consultations revealed some uncertainty about the distinction between an appeal and a retrial, and when it would be appropriate to seek a retrial rather than lodge an appeal. For example, it was noted that new evidence could be grounds for seeking a retrial as well as an appeal. Consultations also revealed that it is rare for parties to use the retrial provisions of the *CPA*. Most lawyers consulted by the Commission noted that they generally use the appeals process rather than ss 107 or 108.

10.13 A member of the Working Group submitted that s 108 undermines the appeal process, as well as the certainty and finality of court decisions. The stakeholder noted that the defendant has the right to appeal the outcome of a Supreme Court trial, and recommended that s 108 be removed from the *CPA*.<sup>231</sup>

10.14 Some members of the legal profession consulted by the Commission were in favour of retaining the retrial provisions. They noted that retrials have a specific role to play in the criminal justice system, even if they are not used very often. Two stakeholders expressed the view that the grounds for ordering retrial — namely that there is new evidence or that the trial was tainted by procedural irregularities such as misconduct by an assessor or judicial

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229 *In re Lesa Farani Posala* [1994] WSSC 27 (12 July 1994); *Moeva v Attorney-General* [2000] WSSC 12 (13 June 2000).

230 *Criminal Procedure Act 1972* s 164N.

231 Criminal Law Review Working Group, *Report: Criminal Procedure Act 1972* (2011).

officer — differ from grounds that would support an appeal. They considered that it would be beneficial if the *CPA* set out the grounds on which a retrial may be ordered.

10.15 A number of stakeholders consulted by the Commission considered that the right to seek a retrial should be held by the defendant only. Some stakeholders also considered that an application for a retrial should be made by a different judicial officer than that presiding at the trial, or alternatively, that there be a right to appeal a decision to grant or refuse a retrial under s 108.

### ***Commission's views***

10.16 The Commission considers that the ability to conduct a retrial is an important part of a fair and just criminal system. A retrial may be necessary to ensure that the defendant ultimately receives a fair trial and that there is no miscarriage of justice. However, the Commission has several concerns about the procedures relating to retrials set out in ss 107 and 108 of the *CPA*.

### **Concerns with the current retrial procedures**

10.17 A central problem with the retrial procedures in ss 107 and 108 is that they fail to set out the grounds for requesting and granting a retrial so as to distinguish the retrial procedure from the appeals process. This leads to duplication and overlap between the two processes and confusion about when it is appropriate to apply for a retrial as opposed to lodging an appeal. There are extensive provisions in the *CPA* dealing with the right of both parties to appeal a decision or outcome of a trial in the District Court and Supreme Court. These provisions set out a comprehensive regime for appeals, and provide greater clarity about the grounds, procedures and powers of the court when determining criminal appeals in comparison with the broad discretion in ss 107 and 108 to order a retrial.

10.18 In addition, the Commission is concerned about the potential breadth of the prosecution's right to seek a retrial under s 107 of the *CPA*. As noted above, a central principle of criminal law is the rule against double jeopardy. While this rule is not absolute (for example, the prosecution may appeal against an acquittal where there has been an error of law during the trial) the prosecution's ability to retry the defendant must be circumscribed in the interests of finality and justice. The Commission notes that the time for making an application for a retrial is not strictly limited to 14 days (as is the case under s 108), but may be extended at the discretion of the court, meaning that the case of an acquitted defendant may potentially be reopened at any time on the grounds that the prosecution has discovered new evidence.<sup>232</sup> The Commission notes that while some other jurisdictions have legislated to give the prosecution the right to seek a retrial based on new evidence, this is limited to very serious crimes and only after the prosecution has met stringent procedural safeguards.

10.19 In relation to s 108, the Commission is of the view that a decision to grant or refuse a retrial should be made by a different decision-maker than the judge who presided at the trial.

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<sup>232</sup> This occurred in the case of *Eteuati v Ministry of Police Prisons and Fire Service (2)* [2004] WSSC 35 (9 July 2004). The Court rejected an application by the prosecution for a retrial on the grounds that the new evidence was not sufficiently compelling, significant and relevant to the issue which the Court had to decide.

This ensures that the decision to grant or refuse the defendant's application for a retrial is made by a decision maker who is, and appears to be, impartial.

### **Options for reform**

10.20 One option for reform is to repeal ss 107 and 108 of the *CPA*. Repealing the retrial provisions would mean that parties must lodge an appeal under the provisions in part VII and VIIA of the *CPA* in order to seek a retrial. Repealing ss 107 and 108 would thus remove the current duplication and overlap between the retrial and appeal processes. However, the retrial provisions should not be repealed if doing so reduces the rights of parties to challenge an unjust outcome or decision tainted by error.

10.21 The Commission is of the view that removing the retrial procedure in s 108 will not diminish the defendant's right to challenge a conviction or other decision at trial. It is difficult to foresee circumstances in which an application for a retrial under s 108 may be granted on grounds that would not otherwise be grounds for appeal. For example, case law provides that a retrial may be granted where there is new and credible evidence that could not reasonably have been given at trial which might lead to a reasonable doubt about the guilt of the defendant. However, the same grounds could support an appeal on the basis that failure to receive such evidence would result in a miscarriage of justice.<sup>233</sup> A similar argument could be made that a trial tainted by procedural irregularity is a miscarriage of justice. Further, because the Court of Appeal has the power to remit a matter to the Supreme Court for retrial, as well as the ability to make other kinds of orders (for example, to set aside or uphold the conviction), there are no procedural disadvantages if the defendant makes an appeal instead of applying for a retrial. The option of a retrial is still available – the difference is that it may be ordered by the Court of Appeal, rather than the judge who presided at the trial. As such, the Commission considers that the procedure for requesting and granting a retrial of a matter heard in the Supreme Court in s 108 of the *CPA* should be repealed on the basis that the appeal process is the preferable route to seek a retrial to redress any errors that occurred during a trial.

10.22 The repeal of s 107 raises more complex issues because this retrial provision does not completely overlap with the appeal process. Specifically, any court that is higher than the court that heard the original trial may hear an application for a retrial under s 107, whereas only the Supreme Court may hear an appeal. Channelling all retrial decisions through the Supreme Court imposes a new procedural burden on the defendant. It also has the potential to increase cost and workload in the Supreme Court. As such, the Commission considers that the preferable approach is to retain the retrial procedures relating to retrials in the District Court. However, the Commission considers that s 107 should be amended so that it clearly states that a retrial may be granted: where there is new and credible evidence that could not reasonably have been given at trial which might lead to a reasonable doubt about the guilt of the defendant; where the trial has been tainted by serious procedural irregularities; or where the interests of justice require a retrial. For the reasons discussed above, the Commission is also of the view that s 107 should be limited to allow only a defendant who has been convicted to seek a retrial. If the prosecution wishes to challenge an

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233 See comments in *Posala v Police; Attorney-General v Police* [1995] WSCA 4 (18 August 1995).

acquittal or seek a retrial, it may lodge an appeal following the procedures set out in part VII of the *CPA*.

**Recommendation 26:** Section 107 of the *Criminal Procedure Act 1972* should be amended to:

- remove the prosecution's right to apply for a retrial; and
- provide that a retrial may be granted where: the court is of the opinion that there is new and credible evidence that could not reasonably have been given at trial which might lead to a reasonable doubt about the guilt of the defendant; the trial has been tainted by serious procedural irregularities; or the interests of justice otherwise require that a retrial should be held.

**Recommendation 27:** Section 108 of the *Criminal Procedure Act 1972*, which allows a defendant convicted at a trial before the Supreme Court to apply to the presiding judge for a retrial, should be repealed.

## 11. Costs and restitution

### Costs in criminal cases

11.1 Section 167 of the *CPA* governs the award of costs. It distinguishes between costs in cases where the defendant is convicted and costs where an information is dismissed.

11.2 Where the court convicts a defendant, it may order the defendant to pay to the prosecution or informant such costs as it thinks just and reasonable to cover court fees, witnesses' and interpreters' expenses and solicitor's fees.<sup>234</sup>

11.3 Under s 167(2) costs can be awarded against the informant where an information is dismissed, to pay to the defendant such costs as the court thinks just and reasonable for Court fees, witnesses' and interpreters' expenses, and solicitor's fees.

11.4 Two issues have arisen in relation to costs in criminal proceedings.

### Costs against the prosecution

11.5 One stakeholder suggested that s 167(2) of the *CPA* should be repealed on the basis that fear of the lack of resources may deter the prosecution from prosecuting certain cases when they face the possibility of having to reimburse the defendant at the end of the trial.

11.6 There are different views on the extent to which the prosecution is liable to pay the defendant's costs where the defendant is acquitted. Some jurisdictions consider that a defendant who is acquitted should generally be awarded costs. For example, the Supreme Court of the Australian Capital Territory has held that it is inequitable to expect the defendant to bear the financial burden of exculpating himself or herself, unless the defendant has, by his or her conduct, brought the proceedings or their continuation upon himself or herself, or unless some other consideration makes it unjust to award costs to the defendant.<sup>235</sup>

234 *Criminal Procedure Act 1972* s 167(1).

235 *McEwen v Siely (ACT)* (1972) 21 FLR 131, 136.

Similarly, in England, orders for the payment of costs to a successful defendant can be made unless there are positive reasons for not doing so. Such reasons include that the defendant's own conduct brought suspicion on himself or herself and misled the prosecution into thinking that its case was stronger than it was; or that there was ample evidence to support a conviction but the defendant was acquitted on a technicality which had no merit.<sup>236</sup>

11.7 When considering the issue of costs in criminal proceedings, the NZLC came to a different view. It recommended that there should not be a presumption in favour of awarding costs to a defendant who has been acquitted, because there are cases where the defendant is acquitted because the prosecution has not quite been able to prove the offence beyond reasonable doubt, and the defendant is therefore 'lucky to get off'. The NZLC therefore recommended that the court should exercise its discretion in deciding whether to award costs against the prosecution, taking into consideration various factors including: whether the prosecution was brought for malicious or improper reasons or the prosecution was conducted in a negligent manner; whether the prosecution acted in good faith in bringing and continuing the proceedings; and whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point.<sup>237</sup>

### **The need to update the scale of costs**

11.8 Section 5 of the *Supreme Court (Fees and Costs) Rules 1971* provides that costs, when awarded, are to be determined and paid according to the scale of costs set out in the Second Schedule to those Rules. The Rules do allow the judge to fix costs in a sum greater or smaller than the sum set out in the scale of costs but s 167(5) of the *CPA* provides that costs allowed under the *CPA* shall not exceed the amount provided for in any scale prescribed by regulations or rules made under the *CPA* or any other Act.<sup>238</sup>

11.9 The schedules attached to the *Supreme Court (Fees and Costs) Rules 1971* have not been updated as to the amount of costs that can be awarded since the entry into force of the *CPA*.

### ***Submissions and consultations***

11.10 In the Issues Paper, the Commission asked whether s 167(2) of the *CPA* should be repealed to the effect that where the Court dismisses an information, no costs shall be awarded against the prosecution (question 22).

11.11 All written submissions received by the Commission were against repealing s 167(2) of the *CPA*. One stakeholder submitted that the costs provision against the prosecution should be maintained where it is clear that the prosecution had no merit. Another stakeholder pointed out that no price can be put on the loss of reputation, and it could lead to more care and attention in the preparation and conduct of a case if the prosecution knew that it could be liable to pay costs. One stakeholder voiced concerns in Working Group meetings that due to

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236 New Zealand Law Commission, *Costs in Criminal Cases*, Report 60 (2000) 8.

<sup>237</sup> New Zealand Law Commission, *Costs in Criminal Cases*, Report 60 (2000) 41.

238 In *Police v Maiava Safue Siau Tito and Tulagamua Maiava Safue* (unreported), the defendants sought costs of \$55,660.00, but the judge held that the maximum costs he had power to award was limited by s 167(5). The judge fixed the costs according to the scale in the sum of \$4894.00 (*Police v Tito* [2000] WSCA 2).

the economy of Samoa and the fact that there are no special funds for the payment of costs under

the Ministry of Justice and Courts Administration as in other jurisdictions, police might be deterred from bringing cases when they have to weigh the decision to prosecute against the government's other budgetary commitments. When laying an information, police should only consider whether there is sufficient evidence to charge the defendant and not have to consider the implications of an award of costs should the prosecution be unsuccessful. Therefore the stakeholder proposed that s 167(2) be repealed and replaced with a provision to provide that in accordance with the public interest, where the court dismisses any information, no costs may be awarded against the informant.

11.12 The same stakeholder also proposed that a new provision be included in the *CPA* to allow the prosecution and defendant to appeal costs orders.

11.13 Consultations with members of the judiciary revealed that the scale for costs is outdated and unrealistic and urgently needs to be updated.

### ***Commission's views***

#### **Costs against the prosecution**

11.14 The Commission acknowledges that when it comes to costs in criminal cases, there are competing public interests to be considered. On the one hand, the prosecution, unlike the plaintiff in a civil case who brings an action in his or her own interests, brings proceedings in the public interest, and so should be treated more tenderly regarding the award of costs.<sup>239</sup> On the other hand, defendants in criminal cases are put to a great deal of expense and personal commitment in defending themselves and do not have the option to simply settle the matter out of court as is possible in civil litigation. Their liberty, reputation and pocket are, or may be, at risk.<sup>240</sup> Automatically awarding costs to the successful party, as is the rule in civil litigation, would therefore not always be fair in criminal cases.

11.15 The purpose of a costs award is to indemnify a party in respect only of expenses that have been reasonably and properly incurred. Costs are not ordered to punish the unsuccessful party. They are compensatory in the sense that they are to indemnify the successful party.<sup>241</sup>

11.16 It is true that the prosecution brings proceedings in the public interest, and should therefore not be deterred from doing so for financial reasons. However, the prosecution is required to prepare its case thoroughly and only prosecute when there are sufficient grounds to support the case. Not having to face the threat of a possible costs award to the defendant might affect the quality of the prosecution's preparations and might even lead to increasing prosecution of innocent people. The possibility that costs may be awarded against the prosecution is therefore considered an important incentive to ensuring that standards of investigation and prosecution remain high.

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239 *Berry v British Transport Commission* [1962] 1 QB 306, 327.

240 *Acuthan v Coates* [1989] 6 NSWLR 472, 480, discussed in New Zealand Law Commission, *Costs in Criminal Cases*, Report 60 (2000) 8.

241 Western Australia Law Reform Commission, *Review of the criminal and civil justice system in Western Australia*, Project 92 Consultation Papers (1999) 951.

11.17 The Commission is not of the view that costs should be awarded simply because a defendant has been acquitted. The Commission notes that there may be cases where the defendant is just ‘lucky to get off’ or has encouraged the prosecution by his or her own misconduct or lack of candour.<sup>242</sup> Rather, the Commission thinks that it is reasonable that if a prosecution has been conducted in a negligent manner, for example if the facts have not been properly investigated, that the prosecution should be liable to pay the defendant’s costs.

11.18 The Commission therefore recommends that the court should retain the ability to award costs to the defendant where it thinks it is just and reasonable to do so. The decision to award costs, and the amount awarded, should be left to the discretion of the court, applying current legal principles.

11.19 The Commission further notes that the *CPA* does not expressly allow the parties to appeal orders as to costs. Section 138 of the *CPA* expressly *excludes* appeals from the District Court to the Supreme Court regarding orders for the payment of costs upon the dismissal of the information, while Part VIIA of the Act, which relates to appeals from the Supreme Court to the Court of Appeal, is silent as to appeals against costs orders. Given the delicate balance of considerations the court must undertake when making or refusing to make an order as to costs, and the fact that costs orders can impose significant obligations on the prosecution or defendant, the Commission considers that there should be a right to appeal a decision to make, or refuse to make, orders as to costs in criminal cases. The Commission notes that this would be consistent with criminal procedure legislation in comparable jurisdictions, which provide a right of appeal against a decision to make or refuse to make a costs order.<sup>243</sup> The Commission considers that it would provide clarity if the *CPA* expressly provided that the parties may appeal orders made as to costs.

### **The need to update the scale of costs**

11.20 The Commission notes that the *Supreme Court (Fees and Costs) Rules 1971* have not been amended as to the quantum of costs that may be awarded since their entry into force in 1971. The sums listed in the scales are out of date and need to be updated for the purpose of ensuring that awards of costs more closely reflect the actual costs of criminal litigation. The Supreme Court made this recommendation in 2000.<sup>244</sup>

11.21 Moreover, the Commission notes that s 5 of the *Supreme Court (Fees and Costs) Rules 1971*, allowing the court to award costs greater or smaller than the sums set out in the attached Second Schedule is inconsistent with s 167(5) of the *CPA*, which states that costs under that section shall in no case exceed the amount provided for in any scale. In New Zealand, where any maximum scale of costs is prescribed by regulation, the court may nevertheless make an order for the payment of costs in excess of that scale if it is satisfied

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<sup>242</sup> New Zealand Law Commission, *Costs in Criminal Cases*, Report 60 (2000), 8.

<sup>243</sup> *Criminal Procedure Act 2011* (NZ) s 271; *Criminal Appeal Act 1912* (NSW) s 5AA.

<sup>244</sup> *Police v Tito* [2000] WSCA 2, citing the judge in *Police v Maiava Safue Siau Tito and Tulagamua Maiava Safue*.

that, having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs is desirable.<sup>245</sup>

11.22 The Commission is of the view that Samoa should adopt a similar practice, and recommends that the *CPA* be amended to this effect.

**Recommendation 28:** Section 167(2) of the *Criminal Procedure Act 1972*, which permits the court to order the prosecution to pay the defendant's costs where the information against the defendant is dismissed, should be retained.

**Recommendation 29:** The *Criminal Procedure Act 1972* should be amended to remove the provision preventing an appeal of an order for costs in s 138(2) and to expressly permit the parties to appeal against costs orders.

**Recommendation 30:** The *Supreme Court (Fees and Costs) Rules 1971*, which provides for minimum and maximum amounts of costs, should be updated to reflect the actual reasonable costs of legal representation, medical services and living expenses.

**Recommendation 31:** Section 167(5) of the *Criminal Procedure Act 1972* should be amended so as to allow the court, having regard to the relevant scale and the interests of justice, to fix costs in a sum exceeding those set out in the relevant scales.

## Compensation and restitution

11.23 Section 165 of the *CPA* allows the court to order a convicted person to pay compensation to any person who has suffered loss or damage to their property through or by means of the offence.

11.24 Members of the judiciary consulted by the Commission commented that s 165 only refers to restitution and compensation for loss of property. As such, the court lacks the express power to order a convicted person to compensate a person for other kinds of loss, such as medical expenses or probation office costs.

11.25 Legislation in other jurisdictions provides that a convicted person may pay compensation for a variety of loss suffered. In Scotland, the court may make a compensation order against a convicted person requiring him or her to pay compensation to the victim for personal injury, loss or damage caused directly or indirectly; or alarm or distress caused directly.<sup>246</sup> In Fiji, any person who is convicted of an offence may be ordered to pay compensation to any person injured by, or who suffers damage to his property or loss as a result of, such offence and such compensation may be either in addition to, or in substitution for, any punishment or other sentence.<sup>247</sup>

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<sup>245</sup> *Costs in Criminal Cases Act 1967* (NZ) s 13 (3).

<sup>246</sup> *Criminal Procedure (Scotland) Act 1995* ch 46 (UK) s 249(1).

<sup>247</sup> *Criminal Procedure Code* (Fiji) s 160(2).

### *Commission's views*

11.26 The Commission is of the view that loss of property is not always the most serious harm occurring to victims of criminal offences but that in many cases, personal injury or loss impose much greater costs on victims. Facing high medical bills is often a second harm done to a victim already suffering from personal injury caused by the offence, and in many cases, personal harm is much more serious than the loss of property. The restitution and compensation provisions of the *CPA* should therefore reflect that criminal offences are not only committed against property but also against persons.

**Recommendation 32:** Section 165 of the *Criminal Procedure Act 1972* should be amended to permit the court to order a convicted person to pay to any person such sum as it thinks fit by way of compensation for personal injury, loss or damage, including medical costs, suffered by that person through or by means of the offence.

## 12. General recommendations

12.1 In this report, the Commission has made 32 recommendations to improve the operation of specific provisions of the *CPA*. This final chapter makes two general recommendations for the reform of the *CPA*.

### References to the death penalty

12.2 The death penalty for criminal offences was abolished in 2004.<sup>248</sup> However, the *CPA* still contains many references to the death penalty, for example in relation to powers of arrest,<sup>249</sup> bail<sup>250</sup> and assessor trials.<sup>251</sup> The *CPA* should be amended to remove these references.

**Recommendation 33:** The *Criminal Procedure Act 1972* should be amended to remove all references to the death penalty as a consequence of the repeal of the death penalty by the *Crimes (Abolition of Death Penalty) Amendment Act 2004*.

### Mode of legislative reform

12.3 There are two options for implementing the Commission's recommendations for the reform of the *CPA*. The first is to repeal the current *CPA* and redraft new criminal procedure legislation from scratch. The second is to incorporate the Commission's recommendations as amendments to the current *CPA*.

12.4 The Commission prefers the second option. The recommendations made in this report cover only selected parts of the *CPA* where stakeholders have expressed concerns about issues that have arisen in its operation. The Commission considers that it is important not to recommend reforms for the sake of it, but only where there is a demonstrated need for

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248 *Crimes (Abolition of Death Penalty) Amendment Act 2004*.

249 *Criminal Procedure Act 1972* ss 4, 5, 6.

250 *Ibid* ss 70, 71.

251 *Ibid* ss 87, 93.

change. Those provisions of the *CPA* that have been working well in practice, and around which substantial case law has developed, should therefore remain unchanged.

**Recommendation 34:** Legislative reform of the *Criminal Procedure Act 1972* should be by way of amendments to the Act, and not by way of redrafting the Act in its entirety.

## Appendices

### *List of recommendations*

**Recommendation 1:** The definition of ‘constable’ in s 2 of the *Criminal Procedure Act 1972* should be amended so as to only include sworn members of the police, as defined by s 6(2) of the *Police Service Act 2009*, who have taken the oath of office in accordance with s 7 of the *Police Service Act 2009*.

**Recommendation 2:** The *Police Powers Act 2007* should be amended to include a new provision, modeled on s 36 (power to stop and search a person), establishing the power to stop a vehicle or use a road block where a police officer has reasonable grounds for suspecting that a person in the vehicle is in possession of, or the vehicle contains, a thing relevant to a serious offence or a thing stolen or otherwise unlawfully obtained. The new provision should also set out the procedures that police constables must follow when exercising the power, including that the constable:

- be wearing a uniform or be in a vehicle which identifies him or her to be a member of the police, or produce evidence that he or she is a member of the police;
- immediately after the vehicle has stopped, identify himself or herself to the driver of the vehicle by giving his or her name and station;
- inform the driver of the statutory stop and search power that the constable proposes to exercise, or of the warrant issued and in force; and
- make a report on the search exercised and provide the driver with a copy.

**Recommendation 3:** Section 15 of the *Criminal Procedure Act 1972* should be amended to provide that an information may include more than one offence where the offences are founded on the same facts or form, or are part of a series of offences of the same or similar character. Where more than one offence is charged in an information, the particulars of each offence must be set out in a separate paragraph.

**Recommendation 4:** The *Criminal Procedure Act 1972* should not include provisions that direct the court to consider custody in favour of release on bail for defendants awaiting trial. The prosecution should bear the onus of satisfying the court that a defendant awaiting trial should be remanded in custody rather than released on bail.

**Recommendation 5:** The *Criminal Procedure Act 1972* should be amended to provide that a person is not bailable as of right where he or she is charged with an offence that occurred in the context of domestic violence, as defined in the Family Safety Bill 2011.

**Recommendation 6:** The *Criminal Procedure Act 1972* should be amended to provide that, when considering whether a defendant should be remanded in custody or released on bail, the court or remanding officer *must consider* whether there is a risk that the defendant will:

- abscond or fail to appear at court as required;
- commit an offence while on bail;
- endanger the safety of any person or the public; or

- interfere with witnesses or otherwise obstruct the course of justice.

The *Criminal Procedure Act 1972* should further provide that, in determining whether there are any such risks, the court or remanding officer *may take into account*:

- the nature and seriousness of the offence with which the person is charged;
- the strength of the evidence against the defendant;
- the severity of the punishment to which the person is liable;
- whether the defendant has failed to observe any conditions previously imposed on bail;
- the character and past conduct of the defendant (including the defendant's background, community ties, residence, employment and family situation, and any prior convictions);
- how soon the defendant's trial will be held and the extent of any delay;
- the possibility of prejudice to the defendant in the preparation of his or her defence;
- whether the defendant needs to be at liberty for other purposes, such as employment, education, care of dependents or medical reasons;
- the safety and welfare of any victims of the alleged offence;
- the risk of harm to the defendant while on remand; and
- any other matter relevant in the particular circumstances.

**Recommendation 7:** The *Criminal Procedure Act 1972* should be amended to provide that when a court or remanding officer is exercising the discretion to grant or refuse bail to a person who has been convicted and is awaiting sentencing, the court or remanding officer must consider the likelihood of the person being given a sentence of imprisonment, in addition to the criteria set out in Recommendation 6.

**Recommendation 8:** Sections 148 and 164C of the *Criminal Procedure Act 1972* should be amended to set out criteria to guide the exercise of the court's discretion to grant bail to a person who is in custody and appealing his or her conviction or sentence. The onus should be on the person seeking bail to satisfy the court that it would be in the interests of justice to release the person on bail. When determining whether it is in the interests of justice to grant bail, the court should consider:

- the strength of the grounds of appeal;
- the length of the sentence that has been imposed on the appellant;
- the likely length of time that will pass before the appeal is heard;
- the personal circumstances of the appellant and the appellant's immediate family; and
- any other matter the court considers relevant.

**Recommendation 9:** The *Criminal Procedure Act 1972* should be amended to provide that a court or remanding officer has discretion to impose any conditions on a defendant's release on bail that are reasonably necessary to ensure that the defendant will appear at court as required, will not commit an offence while on bail, will not endanger the safety of any person or the public; and will not interfere with witnesses or otherwise obstruct the course of justice, including, but not limited to:

- requiring the defendant to report to the police at specific times and places;
- requiring the defendant to surrender all travel documents;
- requiring the defendant to reside at a particular place;

- prohibiting the defendant from visiting a particular place;
- prohibiting the defendant from having any contact with a specified person; or
- requiring the defendant or surety to pay a monetary bond to the court.

**Recommendation 10:** The *Criminal Procedure Act 1972* should be amended to permit the defendant and the prosecution to apply to the court for a variation of any conditions imposed on bail.

**Recommendation 11:** The Ministry of Justice and Courts Administration, Samoa Immigration and the Ministry of Police and Prisons should develop and implement a system so that the court, remanding officer or police can check directly with the Department of Immigration to determine whether or not a defendant who is to be released on bail on the condition that he or she surrender any travel documents does or does not possess travel documents.

**Recommendation 12:** Section 4 of the *Criminal Procedure Act 1972* should be amended to permit a police constable to arrest and take into custody without a warrant any person whom he or she has reasonable grounds to suspect has failed to comply with any condition of bail.

**Recommendation 13:** The court should retain the discretion to dismiss an information for want of prosecution or to adjourn the trial when the informant does not appear. There is no need to amend the *Criminal Procedure Act 1972* to permit the informant to have the information reinstated.

**Recommendation 14:** The Commission endorses the amendments to the *Criminal Procedure Act 1972* proposed by the Ministry of Justice and Courts Administration contained in the Draft Criminal Procedure Act 1972 Amendment Bill (2008) concerning powers of Registrars of the courts.

**Recommendation 15:** The Ministry of Justice and Courts Administration should develop and administer training programs for Registrars of the courts, about the tasks, obligations, qualifications and skills relevant to exercising their powers under the *Criminal Procedure Act 1972*.

**Recommendation 16:** The *Criminal Procedure Act 1972* should include a regime for the disclosure of information by the prosecution to the defendant. The disclosure regime should:

- State that the prosecution has a general duty to disclose to the defendant any material it has that might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the accused.
- Provide that the prosecution must disclose to the defendant as soon as reasonably practicable after commencing proceedings and at least 30 days before the trial:
  - a list of persons that the prosecution proposes to call as witnesses, and their statements;
  - all statements made by the defendant, whether given orally or in writing;
  - a list of the defendant's previous convictions;
  - any information, document or thing the prosecution intends to rely on at the hearing;
  - a list of things items the prosecution intends to tender as exhibits;
  - any brief of evidence to be given, or report provided by, an expert witness;

- notice of anything adverse to the credibility of a proposed prosecution witness, including his or her criminal history; and
- any other information that is relevant to the alleged offence, including information that the prosecution does not intend to rely on at trial, and irrespective of whether it assists the prosecution or defence case.

This information should also be provided to the court at the same time.

- Provide that the prosecution may refuse to disclose information that is subject to privilege or which is reasonably likely to:
  - damage the security, defence or international relations of Samoa;
  - prejudice the prevention, investigation or prosecution of criminal offences;
  - endanger the life or physical safety of any person; or
  - prejudice the protection of public safety.
- Require that the prosecution provide the defendant with a list of any information it is refusing to disclose.
- Expressly state that the prosecution has a duty to disclose to the defendant as soon as reasonably practicable any new information that comes into the possession of the prosecution after disclosure has been made.
- Provide that the court has the power to order that information initially withheld from disclosure should be disclosed to the defendant in the interests of justice.

**Recommendation 17:** The *Criminal Procedure Act 1972* should require a defendant who intends to rely on an alibi defence to disclose to the prosecution at least seven days before the trial information about that defence, including the names and addresses of any witnesses to be called to give evidence in support of the alibi.

**Recommendation 18:** The *Criminal Procedure Act 1972* should require a defendant who intends to call an expert witness to disclose to the prosecution at least seven days before the trial a brief of the evidence to be given, or report provided, by that expert witness.

**Recommendation 19:** Section 89(2) of the *Criminal Procedure Act 1972*, which requires that the prosecution's witness statements be translated into English, should be repealed and the question of the language of documents left to the discretion of the court.

**Recommendation 20:** The *Criminal Procedure Act 1972* should include provisions to allow witnesses overseas to give evidence by video-conference hearings. Procedural details will be considered by the Commission in its review of the *Evidence Act 1961*.

**Recommendation 21:** The *Criminal Procedure Act 1972* should provide for the automatic suppression of the name and any particulars likely to identify a victim of a sexual offence. The court should be given power to permit publication at the victim's request.

**Recommendation 22:** The *Criminal Procedure Act 1972* should be amended to provide that during the taking of evidence from a victim, sexual offence proceedings should be dealt with in closed court with only the following persons present:

- the judge;
- the defendant and his or her counsel;

- the representative of the prosecution;
- court officers responsible and necessary for court proceedings and recordings;
- any person whose presence is requested by the witness (such as a support person); and
- any person whose presence is deemed necessary by the court.

**Recommendation 23:** Section 61 of the *Criminal Procedure Act 1976* should be amended to allow the court, at its discretion, to make an order of suppression, closed court, or any other protection orders, including hearing by deposition and screening of witnesses, where any other way of proceeding would endanger the safety of any person or would cause undue hardship to the victim or witness.

**Recommendation 24:** The *Criminal Procedure Act 1972* should be amended to remove provisions for assessor trials, and criminal trials in the Supreme Court of Samoa should be heard by a judge sitting alone.

**Recommendation 25:** If Recommendation 24 is not accepted, the Commission recommends the following reforms to the *Criminal Procedure Act 1972* relating to the eligibility, selection and role of assessors in criminal trials:

- Section 92 of the *Criminal Procedure Act 1972* should be amended to require that assessors must be aged between 21 and 65 and speak and understand English and Samoan.
- Section 92 of the *Criminal Procedure Act 1972* should also provide that the Judicial Services Commission, when compiling and updating the list of assessors, must ensure that the list is broadly representative of the Samoan community.
- The *Criminal Procedure Act 1972* should provide that the list of assessors sets out the age, occupation, place of residence, village affiliations and all titles held by each assessor. The list of assessors should also include a recent photograph of the assessor.
- The *Criminal Procedure Act 1972* should be amended to require that counsel for the prosecution and defendant, and the defendant if he or she is unrepresented, should receive the names and details of the assessors selected to sit on the trial at least two days before the trial.
- The *Criminal Procedure Act 1972* should be amended to require that before assessors are sworn, the judge presiding at the trial must explain to the assessors the nature of the case, the kinds of issues in dispute and the names of the defendant, victim and witnesses.
- The *Criminal Procedure Act 1972* should be amended to permit the prosecution and defendant to question assessors about their views on the issues in the case before they are sworn in order to determine if there are grounds to challenge for cause any assessors who are not sufficiently impartial to the parties or issues at dispute in the trial.
- Section 100 of the *Criminal Procedure Act 1972*, which allows a judge to overrule a guilty verdict returned by assessors if he or she is of the opinion that the defendant should not be convicted, should be retained.
- Section 87 of the *Criminal Procedure Act 1972* should be amended to entitle the defendant to elect to be tried by a judge sitting alone.

**Recommendation 26:** Section 107 of the *Criminal Procedure Act 1972* should be amended to:

- remove the prosecution’s right to apply for a retrial; and
- provide that a retrial may be granted where: the court is of the opinion that there is new and credible evidence that could not reasonably have been given at trial which might lead to a reasonable doubt about the guilt of the defendant; the trial has been tainted by serious procedural irregularities; or the interests of justice otherwise require that a retrial should be held.

**Recommendation 27:** Section 108 of the *Criminal Procedure Act 1972*, which allows a defendant convicted at a trial before the Supreme Court to apply to the presiding judge for a retrial, should be repealed.

**Recommendation 28:** Section 167(2) of the *Criminal Procedure Act 1972*, which permits the court to order the prosecution to pay the defendant’s costs where the information against the defendant is dismissed, should be retained.

**Recommendation 29:** The *Criminal Procedure Act 1972* should be amended to remove the provision preventing an appeal of an order for costs in s 138(2) and to expressly permit the parties to appeal against costs orders.

**Recommendation 30:** The *Supreme Court (Fees and Costs) Rules 1971*, which provides for minimum and maximum amounts of costs, should be updated to reflect the actual reasonable costs of legal representation, medical services and living expenses.

**Recommendation 31:** Section 167(5) of the *Criminal Procedure Act 1972* should be amended so as to allow the court, having regard to the relevant scale and the interests of justice, to fix costs in a sum exceeding those set out in the relevant scales.

**Recommendation 32:** Section 165 of the *Criminal Procedure Act 1972* should be amended to permit the court to order a convicted person to pay to any person such sum as it thinks fit by way of compensation for personal injury, loss or damage, including medical costs, suffered by that person through or by means of the offence.

**Recommendation 33:** The *Criminal Procedure Act 1972* should be amended to remove all references to the death penalty as a consequence of the repeal of the death penalty by the *Crimes (Abolition of Death Penalty) Amendment Act 2004*.

**Recommendation 34:** Legislative reform of the *Criminal Procedure Act 1972* should be by way of amendments to the Act, and not by way of redrafting the Act in its entirety.

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## ***List of abbreviations***

ACEO	Assistant Chief Executive Officer
ACT	Australian Capital Territory
AGO	Office of the Attorney General
CEO	Chief Executive Officer
Commission	Samoa Law Reform Commission
<i>CPA</i>	<i>Criminal Procedure Act 1972</i>
NSW	New South Wales, Australia
NT	Northern Territory, Australia
NZ	New Zealand
NZLC	New Zealand Law Commission
<i>PACE Act</i>	<i>Police and Criminal Evidence Act 1984 (UK)</i>
PNG	Papua New Guinea
PSC	Public Service Commission
Qld	Queensland, Australia
SA	South Australia, Australia
Tas	Tasmania, Australia
UK	United Kingdom
Vic	Victoria, Australia
WA	Western Australia, Australia
Working Group	Criminal Procedure Sub-Committee of the Working Group for the Criminal Law Review
WSCA	Court of Appeal of Samoa
WSDC	District Court of Samoa
WSSC	Supreme Court of Samoa