



GOVERNMENT OF SAMOA

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

**JUDICATURE ORDINANCE 1961**  
**Final Report 03/11**

30 March 2011



## **GOVERNMENT OF SAMOA**

### **OFFICE OF THE PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM COMMISSION**

The Honourable Speaker

#### **THE LEGISLATIVE ASSEMBLY OF SAMOA**

In compliance with section 9 (2) of the Law Reform Commission Act 2008, I have the honour of submitting to you copies of the Report on the review of the Judicature Ordinance 1961, as referred to the Samoa Law Reform Commission for review.

This report sets out the Commission's recommendations for reform of the Judicature Ordinance 1961 after public consultations and research in accordance with Section 4 of the Law Reform Commission Act 2008.

(Honourable Tuilaepa Fatialofa Lupesoliai Aiono Neioti Dr. Sailele Malielegaoi)  
**PRIME MINISTER AND MINISTER FOR THE SAMOA LAW  
REFORM COMMISSION**



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(Leota Theresa Potoi)

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

## Preface

In November 2008, the Samoa Law Reform Commission (“Commission”) was given a reference into the laws regulating the Samoan Court processes by the Cabinet and the Attorney General. The reference includes the review and reform of the *Judicature Ordinance 1961*, *District Court Act 1969*, *The Supreme Court (Civil Procedure Rules)* and *Magistrate Court Rules*.

This Report sets out the Commission’s recommendation for reform of the *Judicature Ordinance*. Reports on the *District Court Act*, *The Supreme Court (Civil Procedure Rules)* and *Magistrates Court Rules* will be released at a later date.

Recommendations have been based on the need for Samoa’s Courts to be relevant for modern times and in line with international trends thereby facilitating their work and ensuring that justice is easily achievable and accessible. However, Samoan custom and traditions have remained paramount considerations. Changes have only been recommended where the Commission considers it appropriate in order to improve judicial processes and enhance Samoa’s society, culture and economy, and better meet the needs of the government and the community.

Recommendations also have been shaped by the Commission’s consultations with the Ministry of Justice and Courts Administration, the Samoa Law Society and responses received. In this respect the Commission conducted consultations with the Honourable Chief Justice and other members of the Judiciary and invited submissions from the Samoa Law Society. In response the Commission received electronic submissions from some members of the Samoa Law Society.

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# 1. Background

1.1 This Report considers select issues relating to the *Judicature Ordinance* 1961, and explores options for reform. The issues discussed in this Report include areas of concern raised by the Honourable Chief Justice, members of the Judiciary and members of the Samoa Law Society. These include the existing appeal process from the Supreme Court to the Court of Appeal, the tenure of office for judges, the number of judges sitting in both the Supreme Court and Court of Appeal and realigning the relationship between the Land and Titles Court and Supreme Court. Inclusive in the Commission's recommendations are amendments that were not included in the recent consolidation of Samoa's laws.

## ***The role of Judicature Ordinance (“Ordinance”)***

1.2 The courts have an important function in Samoa's system of constitutional government. They are necessary for a free and fair society. In conjunction with the executive and parliament, they make up the pillars of a democratic state. The courts are charged with the interpretation and application of the law, upholding of constitutional relationships and protecting Samoans against abuses of power by the branches of the Government and to resolve all disputes peacefully and according to law.

1.3 Therefore, the structures of Samoa's courts must be suitable in order to satisfy what is expected of them. They must be fair, open, independent, impartial and established by law. This ensures that justice is accessible and any such matters before the courts are determined speedily and competently<sup>1</sup>. (*A detailed discussion of these requirements is done in a latter part of the paper*)

1.4 However, it is noted that the effectiveness of the local judicial system is weighed against available resources. This is a determining factor in how the judicial system is structured and organized in Samoa.

1.5 Importantly, it is not sufficient for courts or tribunals to be constituted merely through political statements of the legislature or the executive or the acts of other law enforcement agencies. They must be established autonomously by law to guarantee transparency, consistency, formality and prevent arbitrariness in decision making.

1.6 In law, courts can be established either through common law principles or by acts of the legislature. This was reflected in the decision of the Privy Council in *In re Lord Bishop of Natal*,<sup>2</sup> where the Privy Council explained that in the absence of a legislature the Queen has such prerogative powers. If a legislature exists, then the Queen no longer has prerogative power under common law to create a court. These

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<sup>1</sup> Constitution art. 9(1).

<sup>2</sup> (1864-5) 3 Moo. P.C.C. (N.S.) 115.

common law principles however, have been used to establish courts in countries where the legislature fails to enact relevant laws for courts in a jurisdiction<sup>3</sup>.

1.7 In Samoa, the Constitution explicitly provides for the establishment of the Judiciary<sup>4</sup>. Its existence in the Constitution, the supreme law of Samoa<sup>5</sup>, guarantees that courts are independent and are separate from the Executive and Parliament. Therefore, judges are free from interference by the government and parliament when carrying out their tasks. It ensures that the decisions as to the legal rights and obligations of all people, whether private individuals or government bodies, are determined on their legal merits, and not according to fear or favour of the government of the day.

1.8 The **Ordinance** was enacted in 1961 in anticipation of the Constitution coming into force upon Samoa becoming independent in 1962. The **Ordinance** initially provided for the constitution of all Samoa's Courts however, the Magistrates Court was later repealed and replaced by the District Court<sup>6</sup>.

1.9 The main purpose of the **Ordinance** was to establish Lower, Superior and Appellate Courts for Samoa to take effect upon independence<sup>7</sup>. This would replace the system established by the **Samoa Constitution Order 1920** (NZ), in operation during that time when appeals from the superior court (then High Court of Samoa) were being referred to the New Zealand Supreme Court for determination<sup>8</sup>.

1.10 In general, the **Ordinance** outlines the composition of the Supreme Court and the Court of Appeal. It prescribes the membership of each court, the processes involved in appointing its members, jurisdictions, powers and the requisite Corams for each Court when hearing or exercising its jurisdiction in particular cases.

1.11 It is important to note that in Samoa the courts are not the only means of settling disputes and enforcing the law. There has been an increase in use of alternative dispute resolution methods namely, arbitration, mediation, conciliations and reconciliations because such options are viewed as being cost effective for parties and matters entertained before such forums are resolved quickly compared to matters that go before a court. (*It is not the focus of this report to discuss alternatives to the court process*) However, in such cases, it is important to note that where the power of decision making is fettered elsewhere apart from a court, the courts must be given the opportunity to hear appeals and review the decisions of such quasi judicial bodies.

## **A need for change**

1.12 Since the enactment of the **Judicature Ordinance**, it has remained substantially unchanged. However, the Supreme Court and Court of Appeal have extended/limited

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<sup>3</sup> *In re Lord Bishop of Natal* (1864-5) 3 Moo. P.C.C. (N.S.) 115.

<sup>4</sup> Constitution (Samoa) Part VI.

<sup>5</sup> Constitution (Samoa) art 2(1); See *Samoa Party v Attorney General* [2010] WSCA 4 (7 May 2010)

<sup>6</sup> *District Court Act* 1969 s. 138.

<sup>7</sup> As per Hon. Anapu. S in Parliamentary Debates on 13<sup>th</sup> December 1961, p. 71.

<sup>8</sup> As per Hon. Anapu. S in Parliamentary Debates on 13<sup>th</sup> December 1961, p. 71.

their functions and jurisdictions in the absence of clear guidance in the *Ordinance*. This can be perceived as vibrant developments in the local common law but when the outcome of a case is dependent on who presides then the public confidence in the Judiciary is left to chance.

- 1.12 Another reason for making changes to the Ordinance is to improve the protection of the rights and freedoms particularly the right to a fair trial and rights concerning criminal law.

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

- 1.13 In its review of the *Judicature Ordinance*, the Commission has focused on:
- updating outdated provisions and language;
  - responding to submissions from the Judiciary and the Law Society; and
  - Judicial comments for law reform.

## **2. Supreme Court**

2.1 Part II of the *Ordinance* deals with the constitution of Samoa's Supreme Court. The Supreme Court has power, and authority to administer the laws of Samoa<sup>9</sup>. It is the superior court of record for the administration of justice throughout Samoa<sup>10</sup>.

2.2 A superior court has a wide jurisdiction to hear most kinds of civil and criminal proceedings<sup>11</sup>. A court of record keeps and maintains a permanent record of its acts and judicial proceedings. Additionally it signifies that the court concerned has power to punish for contempt of its proceedings. It is for this reason that virtually each Court's processes need to be set out in written documents and each Court proceeding must be recorded in writing by the judges who are hearing the case and sometimes by court stenographers.

**Recommendation 1:** Advancements in technology see Court proceedings being digitally recorded in the future. If such is the case then such developments will have to be provided for in the *Judicature Ordinance*.

2.3 Keeping record is important as it clearly shows what a case is about and what the parties and the courts have done in connection with the case. It lays out the respective rights and obligations of the parties as decided by the court so they can know what they must do or not do. A losing party in a case can also use the record to determine whether they can seek further redress by way of appeal, judicial review or statutory review. If the matter goes to appeal, the higher court relies on the decision of the lower court to determine the case on appeal.

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<sup>9</sup> *Judicature Ordinance* s. 31.

<sup>10</sup> Constitution (Samoa) art. 65; *Judicature Ordinance* s. 21.

<sup>11</sup> <http://www.oxfordreference.com/views/EMTRY.html?subview=Main&entry=t49.e1977> (Accessed 8 July 2010)

- 2.4 Previous recorded decisions of courts are also used by lawyers and judges for guidance in determining what the law is and how the court came to such a legal position. Comments and observations made by the court in such decisions can also give direction for law reform as per Honorable Justice Robertson in *Police v. Etelagi*<sup>12</sup> observing the need to set a definite time frame for the service of notices of appeal.
- 2.5 The procedure for the appointment of the Chief Justice<sup>13</sup> and Judges of the Supreme Court is set out in the *Ordinance*<sup>14</sup>. The Chief Justice is appointed by the Head of State on the advice of the Prime Minister. The other judges of the Supreme Court are appointed by the Head of State on the advice of the Judicial Service Commission. The Judicial Service Commission is made up of the Chief Justice (*President of the Judicial Service Commission*), the Attorney General<sup>15</sup> and a person nominated by the Minister of Justice.<sup>16</sup>
- 2.6 Similarly, the procedure for the appointment of the Registrar,<sup>17</sup> Deputy Registrar,<sup>18</sup> and other administrative staff,<sup>19</sup> of the Supreme Court are also provided under the *Ordinance*.

### ***Jurisdiction of the Supreme Court***

- 2.7 The Supreme Court has general, original, appellate and revisional jurisdiction<sup>20</sup>. Each Judge of the Supreme Court sitting alone or together with two or more Judges can exercise all the powers and functions of the Supreme Court in any part of Samoa and at any time or place<sup>21</sup>.
- 2.8 General jurisdiction means the Supreme Court has the right to hear civil, criminal and other matters which are dealt with by normal common law courts<sup>22</sup>. It implies that the court has the right to hear general matters instead of specialised matters. In *Samoa Party v Attorney General*,<sup>23</sup> the Court under its general jurisdiction entertained a motion by the plaintiffs seeking orders that the proviso to s. 105(1) of the *Electoral Act* 1963 was unconstitutional and therefore void. The Honorable Chief Justice in delivering the decision of the Court held that the proviso to s. 105(1) of the *Electoral Act* did not violate the Constitution.

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<sup>12</sup> [2001] WSCA 2 (23 November 2001) at p. 5.

<sup>13</sup> *Judicature Ordinance* s. 22.

<sup>14</sup> *Judicature Ordinance* ss. 29 and 30.

<sup>15</sup> The Chairman of the Public Service Commission can act if for any reason the Attorney General cannot act. See Constitution (Samoa) art. 72(b).

<sup>16</sup> Constitution (Samoa) art. 72.

<sup>17</sup> *Judicature Ordinance* s. 35.

<sup>18</sup> *Judicature Ordinance* s. 36.

<sup>19</sup> *Judicature Ordinance* s. 37.

<sup>20</sup> Constitution of Samoa art. 73; *Judicature Ordinance* 1961 ss. 33 and 39.

<sup>21</sup> *Judicature Ordinance* s. 32.

<sup>22</sup> <http://www.oxfordreference.com/views/EMTRY.html?subview=Main&entry=t49.e1977> (Accessed 8 July 2010)

<sup>23</sup> [2009] WSSC 23 (20 March 2009).

2.9 Original jurisdiction means that the Supreme Court of Samoa has the power or authority to hear a case for the first time. In other words, the case must be initiated, commenced or begun for the first time in the Supreme Court<sup>24</sup>. Original jurisdiction is also known as jurisdiction at first instance.

2.10 The Supreme Court also has jurisdiction to remove proceedings to be adjudicated by the Court of Appeal<sup>25</sup>. In *Ah Chong v The Attorney General*,<sup>26</sup> the Supreme Court dealt for the first time with a motion for removal of proceedings from the Supreme Court to the Court of Appeal<sup>27</sup>. The plaintiff in *Ah Chong v The Attorney General*,<sup>28</sup> moved the Supreme Court for orders to consolidate a number of proceedings in which he was a claimant and to remove them into the Court of Appeal for hearing. The Honourable Chief Justice in his judgment explained that the jurisdiction vested in the Supreme Court to order the removal of proceedings into the Court of Appeal is discretionary and how such discretion should be exercised must depend on the circumstances of each case<sup>29</sup>. The Chief Justice in his decision considered the interpretation of an identical proviso in the *Judicature Act 1908 (NZ)* by the High Court of New Zealand in *Re Erebus Royal Commission; Air New Zealand Ltd v Mabon*,<sup>30</sup> however he distinguished the position of New Zealand from that of Samoa and denied the motion.

2.11 A number of important considerations leading to the decision in *Ah Chong v The Attorney General*,<sup>31</sup> that were confirmed in *Malifa v Sapolu*,<sup>32</sup> were: the benefits of both a determination at first instance and a review on appeal, the value of the opinions and findings of the lower Court, the sparing nature of the jurisdiction, and the special circumstances of Samoa and its Court of Appeal. The Court of Appeal of Samoa as the final appellate court in the land is distinctive from the Court of Appeal of New Zealand which has the luxury of the Supreme Court of New Zealand as the final appellate court in New Zealand<sup>33</sup>.

2.12 In *Malifa v Sapolu*,<sup>34</sup> the Chief Justice stressed that any motion to remove any proceedings from the Supreme Court to the Court of Appeal must be exercised with care even if it concerns constitutional questions and fundamental rights. He explained that the application of such discretion to remove proceedings from the Supreme Court to the Court of Appeal in cases concerning constitutional questions and matters

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<sup>24</sup> <http://www.oxfordreference.com/views/EMTRY.html?subview=Main&entry=t49.e1977> (Accessed 8 July 2010)

<sup>25</sup> *Judicature Ordinance* s. 55.

<sup>26</sup> [1997] WSSC 9; CP 210-96 (24 March 1997).

<sup>27</sup> See *Malifa v Sapolu* [1998] WSSC 2; Misc 22229 (24 February 1998).

<sup>28</sup> [1997] WSSC 9; CP 210-96 (24 March 1997).

<sup>29</sup> *Judicature Ordinance* s. 55.

<sup>30</sup> [1981] 1 NZLR 614.

<sup>31</sup> [1997] WSSC 9; CP 210-96 (24 March 1997).

<sup>32</sup> [1998] WSSC 2; Misc 22229 (24 February 1998).

<sup>33</sup> <http://www.courtsofnz.govt.nz/about/system/structure/diagram> (Accessed 27 July 2010).

<sup>34</sup> [1998] WSSC 2; Misc 22229 (24 February 1998).

pertaining to fundamental rights limits the jurisdiction of the Supreme Court to interpret the Constitution<sup>35</sup>.

### **Commission's views**

2.13 The Court of Appeal is not a court of original jurisdiction. Therefore, matters should not be removed from the Supreme Court to be determined for the first time in the Court of Appeal.

2.14 In addition, after a matter has been adjudicated at first instance there must be an opportunity for such decision to be checked by a court of higher jurisdiction with revisionary powers. This is an internal checking mechanism which guarantees accountability within the judiciary and protects the right to a fair trial. The Court of Appeal being the highest court of the land means that there is no other court to review its findings on matters determined at first instance.

**Recommendation 2:** The jurisdiction of the Supreme Court to remove civil proceedings to be adjudicated by the Court of Appeal in section 55 of the *Judicature Ordinance* should be removed.

2.15 The appellate jurisdiction gives the Supreme Court of Samoa the power and authority to hear a case that has been previously decided by a lower court or tribunal<sup>36</sup>. The Supreme Court in *Toailoa Law Office v Duffy*,<sup>37</sup> in exercising its appellate jurisdiction allowed the appeal and set aside the decision of the District Court dismissing the charge against the respondent and referring the case back to the District Court for the respondent to stand trial. Theoretically, appeals lie from a lower court to a higher court. In some cases, appeals lie as of right or automatically to the next highest court,<sup>38</sup> whereas in other instances an appellant has to seek leave or approval of the trial or appellate court before proceeding with an appeal<sup>39</sup>.

2.16 A court with revisional jurisdiction has the power to supervise, review or revise the decisions of lower courts<sup>40</sup>. Revisional jurisdiction is usually conferred on higher subordinate courts and appellate courts but it is normally the domain of superior courts. A defining feature of this jurisdiction is that sometimes the courts vested with it have power to revise decisions of other courts on their own accord without waiting

<sup>35</sup> [1998] WSSC 2; Misc 22229 (24 February 1998).

<sup>36</sup> <http://www.oxfordreference.com/views/EMTRY.html?subview=Main&entry=t49.e1977> (Accessed 8 July 2010)

<sup>37</sup> [2005] WSSC 53; [2005] 2 LRC 138 (17 May 2005).

<sup>38</sup> *Criminal Procedure Act* 1972 ss. 138, 138A, 139; See *Aukuso v Police* [1997] WSSC 26; Misc 22088 (5 November 1997); Also *Toailoa Law Office v Duffy* [2005] WSSC 53; [2005] 2 LRC 138 (17 May 2005).

<sup>39</sup> *Vaai v Sivanila* [2008] WSSC 73 (4 June 2008); See also *Koko v Police* [1992] WSSC 11; CA 008 1992 (22 October 1992); *Saifoloi v Police* [2009] WSSC 45 (28 May 2009); *Toailoa Law Office v Duffy* [2005] WSSC 53; [2005] 2 LRC 138 (17 May 2005).

<sup>40</sup> <http://www.oxfordreference.com/views/EMTRY.html?subview=Main&entry=t49.e1977> (Accessed 8 July 2010)

for an application to be lodged by any person. They can do so on the basis of similar grounds for appeals, judicial review or where miscarriage of justice is suspected<sup>41</sup>.

2.17 In *Soavele v Lili*,<sup>42</sup> the Supreme Court in exercising its revisional jurisdiction, reviewed the decision of the District Court (then Magistrate Court) and remitted the case back to the District Court for a rehearing. In *Tevaseu v Attorney General of Western Samoa*,<sup>43</sup> the Supreme Court also exercised its revisional jurisdiction and passed judgment on the procedure of the Land and Titles Court and the validity of its decision in LC 2513 of 26 September 1962. Chief Justice Sapolu was explicit in stating that the decision in *Tevaseu v Attorney General of Western Samoa*,<sup>44</sup> should not be taken as meaning that the Supreme Court has jurisdiction to review or issue declaratory judgments in respect of decisions of the Land and Titles Court. However, in *Toailoa v Sapolu*,<sup>45</sup> Justice Bisson observed that the scope and effect of section 31 of the **Judicature Ordinance** extends the revisional powers of the Supreme Court to the Lands and Titles Court. The power of the Supreme Court to revise the decisions of the Land and Titles Court are limited to cases that affect fundamental rights under the Constitution<sup>46</sup>.

### **Commission's views**

2.18 The position of the Land and Titles Court in the hierarchy of the Courts in Samoa is unclear as to whether it is a special court whose decisions should only be revised by a separate special appellate body; a quasi judicial body in which case its decisions can be judicially reviewed by the Supreme Court; or an inferior court<sup>47</sup> whose decisions can be reviewed and overturned by the Supreme Court<sup>48</sup>.

2.19 The nature of proceedings of the Lands and Titles Court are distinctive. They adopt an inquisitorial system (as in the courts of civil jurisdictions). The Supreme Court on the other hand adopts an adversarial system (as in other common law jurisdictions). This raises the question on the eligibility of the Supreme Court (whose procedures are different from that of the Land and Titles Court) to revise or even judicially review the procedures of the Land and Titles Court. The Commission believes that, given the differences in procedures employed in the two systems, what is viewed as a fair trial in an adversarial system would be viewed as otherwise in an inquisitorial system. Moreover, an inquisitorial system is less concerned about

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<sup>41</sup> <http://www.oxfordreference.com/views/EMTRY.html?subview=Main&entry=t49.e1977> (Accessed 8 July 2010)

<sup>42</sup> [1993] WSSC 22; Misc 15431 (11 March 1993).

<sup>43</sup> [1992] WSSC 12; CP 136-92 (2 November 1992).

<sup>44</sup> [1992] WSSC 12; CP 136-92 (2 November 1992).

<sup>45</sup> [2004] WSSC 26 (17 December 2004).

<sup>46</sup> *Alomaina Ulisese & Others v Land and Titles Court & Others* (unreported, Supreme Court of Samoa, 1998); *Peniamina v Land and Titles Court* [2004] WSSC 12 (14 September 2004); *Lauvai v Land and Titles Court* [2010] WSSC 132 (20 September 2010); *Lauvai v Land and Titles Court* [2010] WSSC 99 (20 September 2010)

<sup>47</sup> *Toailoa Law Office v Duffy* [2005] WSSC 53; [2005] 2 LRC 138 (17 May 2005).

<sup>48</sup> *Aloimaina Ulisese & Anor v Lands and Titles Court Tuasivi* (unreported, Supreme Court of Western Samoa, 4 November 1998, Justice R L Young). See also *Pouniu v Land Titles Investigation Commission* [2003] WSSC 5 (3 March 2003) and *Toailoa v Land and Titles Court* [2004] WSSC 33 (11 May 2004).

providing a fair trial than it is about gathering enough facts so that the judges can make a decision<sup>49</sup>. Therefore, given the differences it would be unfair to use the principles of the adversarial system to determine the fairness of procedures of the Lands and Titles Court. Hence, the Commission is of the view that the Land and Titles Court is a special court hence any appeal from the Land and Titles Court should only be revised by a special appellate body of the Land and Titles Court and not the Supreme Court.

**Recommendation 3:** Section 31 of the *Judicature Ordinance* should be amended to provide that the Supreme Court shall not have jurisdiction to revise or review any decisions of the Land and Titles Court or any Court constituted under section 77 of the Land and Titles Act 1981. The relationship between the Supreme Court and the Land and Titles Court should be clearly clarified in the *Judicature Ordinance*. The Commission further recommends that a Special Appellate Body for the Land and Titles Court be created under its own structure to determine appeals against the decisions of the Land and Titles Court.

2.20 The Supreme Court has an advisory jurisdiction. In *Advisory Opinion on the Constitution (Legal Aid)*,<sup>50</sup> the Head of State (then Malietoa Tanumafili II) acting pursuant to article 73(3) of the *Constitution* and section 33(1) of the *Judicature Ordinance* sought to invoke the advisory jurisdiction of the Supreme Court to give an opinion on questions as to the interpretation and effect of article 9(4)(c) of the *Constitution*. The questions raised in the *Reference* by the Head of State were:

- 1) *Whether article 9(4)(c) of the Constitution requires the State to furnish every person charged with an offence with free legal assistance if he has insufficient means to pay for legal assistance and the interests of justice so require.*

*If the answer to Question 1 is "Yes", whether article 9(4)(c) of the Constitution requires the State to furnish every such person with legal assistance or with legal assistance of his own choosing.*"<sup>51</sup>

2.21 The Supreme Court has an inherent jurisdiction. This jurisdiction can be exercised to review decisions of quasi-judicial bodies, tribunals and administrative authorities,<sup>52</sup> to revise the validity of legislation<sup>53</sup> and to supervise and control its own processes<sup>54</sup>. In *Keil v Land Board*,<sup>55</sup> the Court exercised its inherent jurisdiction and reviewed the

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<sup>49</sup> Smith Rich (2007) *The Right to a Fair Trial*, p. 24.

<sup>50</sup> [1988] WSSC 4 (18 October 1988).

<sup>51</sup> *Advisory Opinion on the Constitution (Legal Aid)* [1988] WSSC 4 (18 October 1988).

<sup>52</sup> [2000] WSSC 41 (21 December 2000). Also see *Alii ma Faipule o Satapuuala v Attorney General* [2008] WSSC 88.

<sup>53</sup> *Samoa Party v Attorney General* [2009] WSSC 23 (20 March 2009).

<sup>54</sup> See *Agnew v Polynesian Airlines Holdings Ltd* [1997] WSSC 8 p.3. Also *In re Tapu Leota* [1964] WSCA 2; [1960-1969] WSLR 106 (24 July 1964); *Petaia v Supreme Court of Western Samoa* [1990] WSCA 1 (19 December 1990).

<sup>55</sup> [2000] WSSC 41 (21 December 2000).

decision of the Land Board to allow the second respondents to reclaim an area of the foreshore in front of the applicant's land. The Honourable Chief Justice Sapolu in delivering the Judgment of the Court concluded that the decision of the Land Board was invalid and illegal.

2.22 In *Samoa Party v Attorney General*,<sup>56</sup> the Court is seen exercising its inherent jurisdiction in revising the validity of a proviso to 105 (1) of the *Electoral Act 1963* and held that it was valid. In *Agnew v Polynesian Airlines Holdings Ltd*,<sup>57</sup> the Court exercised its inherent jurisdiction to supervise and control its own processes and prevented a barrister from further acting as counsel for the defendants in the interests of justice.

2.23 It is clear from the decision of the Honourable Justice in *Agnew v Polynesian Airlines Holdings Ltd*,<sup>58</sup> that the rationale for the inherent jurisdiction of the Court is to preserve public confidence in the integrity of the system of justice and of upholding the right to a fair hearing<sup>59</sup>. However, the court reminded itself in *Agnew v Polynesian Airlines Holdings Ltd*<sup>60</sup> that when exercising its inherent jurisdiction it must do so with caution<sup>61</sup>.

2.24 The Supreme Court has an inherent jurisdiction that is not specifically provided for in the Constitution or the *Judicature Ordinance*. The jurisdiction is not just limited to that specified in the Constitution and the *Judicature Ordinance*.

2.25 The Supreme Court can also devise its own rules of practice and procedure to guide it when exercising its authority. Such practices and procedures are subject to the provisions of the *Ordinance*, natural justice and convenience<sup>62</sup> and may be altered or revoked by the Head of State on the advice of the Prime Minister and the Rules Committee<sup>63</sup>. (*The Commission is also reviewing these rules of practice and procedure for the Supreme Court*)

### 3. Court of Appeal

3.1 Part III of the *Ordinance* provides for the constitution of the Court of Appeal. The Court of Appeal is also referred to in the *Constitution* and the *Ordinance* as a superior court of record<sup>64</sup>. All the Judges and Officers of the Supreme Court act in the like capacity as Judges and Officers of the Court of Appeal, with the Chief Justice

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<sup>56</sup> [2009] WSSC 23 (20 March 2009).

<sup>57</sup> [1997] WSSC 8 p.3

<sup>58</sup> [1997] WSSC 8 p.3

<sup>59</sup> *Agnew v Polynesian Airlines Holdings Ltd* [1997] WSSC 8 p.3.

<sup>60</sup> [1997] WSSC 8 p.3

<sup>61</sup> *Agnew v Polynesian Airlines Holdings Ltd* [1997] WSSC 8 p.3.

<sup>62</sup> *Judicature Ordinance* s. 39.

<sup>63</sup> *Judicature Ordinance* s. 40. Note: The Rules Committee consists of the Chief Justice, the Attorney-General and at least one qualified practising member of the legal profession in Samoa appointed by the Chief Justice for a term not exceeding 3 years. The Chief Justice, or in his or her absence the Attorney-General, shall be the convener and chairman of the Committee.

<sup>64</sup> Constitution (Samoa) art. 75; *Judicature Ordinance* s. 41(1).

sitting as the president<sup>65</sup>. In the absence of the Chief Justice, a senior Judge of the Court present at an appeal may preside as the President<sup>66</sup>. In ascertaining justice, Judges of the Court of Appeal are prohibited from sitting on appeals against their own decisions in the Supreme Court<sup>67</sup>.

3.2 Where a judge has a conflict of interest in a case before them, he or she would need to disqualify himself or herself from determining such a case<sup>68</sup>. In ensuring that the Court has enough Judges to satisfy the requisite Coram to determine appeals, the Ordinance authorises the appointment of temporary Judges of the Court of Appeal<sup>69</sup>. The appointment of temporary Judges is done by the Head of State on the advice of the Judicial Service Commission<sup>70</sup>.

3.3 The availability of temporary Judges coupled with the discretion of the President of the Court of Appeal to convene the Court of Appeal when deemed necessary,<sup>71</sup> operates to avoid a backlog of appeal cases arising from situations where permanent judges cannot sit on the Court of Appeal because they are engaged in the Supreme Court. It can also be used to lighten the burden of permanent judges when necessary although efficient case management would prevent such inconveniences.

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

3.4 The discretion of the Chief Justice to convene the Court of Appeal when needed is a cost effective strategy suitable for small jurisdictions such as Samoa with a small number of appeals received by the Court each year. It is the present practice that the Court of Appeal sits twice a year but it is not unusual for the Court to sit once when there are insufficient cases. This raises the question of whether any such delay affects the rights of a fair trial of an appellant or an appellant's rights with regards to criminal cases. This creates an opportunity for the miscarriage of justice or the denial of timely justice (*justice being denied/justice not being determined/ justice adjourned*).

3.5 An administration argument is that the convening of the Court of Appeal should be dependent on resources available but justice should trump resources.

**Recommendation 4:** To prevent any miscarriage of justice or the denial of timely justice the ***Judicature Ordinance*** must specify either the maximum and/or minimum number of times that the Court of Appeal should sit. The time between each sitting should be reasonable (taking into consideration the resources available).

<sup>65</sup> *Judicature Ordinance* s. 43(3).; *Constitution* (Samoa) art. 75(2) and 75(3).

<sup>66</sup> *Judicature Ordinance* s. 41(3).

<sup>67</sup> *Constitution* (Samoa) art. 77; *Judicature Ordinance* s.46; See *Stehlin v Police* [1993] WSCA 5; 13 1993 (23 March 1993).

<sup>68</sup> *Petaia v Supreme Court of Western Samoa* [1990] WSCA 1 (19 December 1990).

<sup>69</sup> *Judicature Ordinance* s. 41(2)(b); *Constitution* (Samoa) art. 75(5).

<sup>70</sup> The Judicial Service Commission consists of the Chief Justice, as President; The Attorney-General or if for any reason the Attorney-General is unable to act, the Chairman of the Public Service Commission and a person nominated from time to time by the Minister of Justice.

<sup>71</sup> *Judicature Ordinance* 1<sup>st</sup> Sch. rule 3.

**Recommendation 5:** An economical alternative to prevent any miscarriage of justice or the denial of timely justice is for the *Judicature Ordinance* to specify the nature of questions to be determined or appeals that cannot be postponed and must be heard (e.g. criminal, constitutional, environmental matters) outside the normal sitting times of the Court of Appeal. This would ensure that the matters affecting the constitutional rights or health of an individual/public are addressed within a reasonable time.

3.6 When commencing an appeal, an appellant or the party seeking to appeal a decision of the Supreme Court needs to file with the Registrar a notice of appeal or an order granting leave to appeal as the case may be<sup>72</sup>. The process for the commencement of appeals in the Court of Appeal is explained in the *Constitution*, *Judicature Ordinance*, *Criminal Procedure Act 1972* and *Court of Appeal Rules*.

3.7 All the powers of the Court of Appeal can be exercised by any three Court of Appeal Judges. It is possible however, for any two Judges of the Court of Appeal to exercise all the powers of the Court upon certification by the President of the Court of Appeal<sup>73</sup>. The judgments of the Court of Appeal can also be delivered by any two Judges of the Court. The judgments of the Court of Appeal are based on the decision of the majority of the Judges present<sup>74</sup>. (*If all the decisions of the Judges presiding are in harmony (unanimous decision) or if three Judges are presiding, then the decisions of any two judges that are in harmony would be the decision of the Court.*) However, if the Court is equally divided (*If all the Judges residing make different findings and arrive at different decisions*) then the appeal or application as the case may be shall be dismissed<sup>75</sup>. As the highest Court of Samoa, the decisions of the Court of Appeal are final<sup>76</sup>.

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

3.8 The Court of Appeal should always be in a position to reach a final decision at all times. An appeal or an application being dismissed because the Court is equally divided (*The Judges residing make different decisions*) is an unreasonable way to achieve justice. In ensuring that the Court reaches a final decision there should always be three judges residing. This is a question of justice versus resources. Justice should be the paramount consideration.

**Recommendation 6:** Section 43(a) and (b) should be repealed and the powers of the Court of Appeal should only be exercised by three Judges including the delivering of judgments.

<sup>72</sup> *Judicature Ordinance* 1<sup>st</sup> Sch. rule 4.

<sup>73</sup> *Judicature Ordinance* s. 43.

<sup>74</sup> Constitution (Samoa) art. 47(1).

<sup>75</sup> Constitution (Samoa) art. 47(2).

<sup>76</sup> *Judicature Ordinance* s. 48.

## ***Jurisdiction of the Court of Appeal***

3.9 The Court of Appeal has general jurisdiction to hear all appeals from any judgment, decree or order of the Supreme Court,<sup>77</sup> including proceedings removed by order of the Supreme Court to be adjudicated by the Court of Appeal<sup>78</sup> as discussed in *Ah Chong v The Attorney General*<sup>79</sup>. Appeals from the District Court to the Court of Appeal<sup>80</sup> are only with leave of the Supreme Court. *Section 63* of the *Ordinance* provides that no such leave shall be granted with respect to criminal proceedings<sup>81</sup>. Therefore, a party to a criminal proceeding that started in the District Court and then proceeded as an appeal to the Supreme Court is barred from pursuing a further appeal to the Court of Appeal.

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

- 3.10 The reasoning for the proviso in section 63 is the fact that a criminal case originating in the District Court would have had the opportunity to be revised by the Supreme Court. A second appeal can also be barred due to public interest against the unfair and inefficient use of legal resources and the need for disputes to be resolved and the parties involved to continue on with their lives. It also prevents the rich and wealthy from dominating the justice system.
- 3.11 Such underpinning policies are important when considering the availability of second appeals and also how such second appeals should be controlled so that they do not hinder the system.
- 3.12 In general however, first appeals from final decisions of the Supreme Court should be of right while appeals from interlocutory decisions, second appeals and any direct appeals from any court or quasi-judicial body other than the Supreme Court should be by leave. In the case of interlocutory appeals, leave could be granted by the Supreme Court or the Court of Appeal. In the case of second appeals and appeals from other courts or bodies other than the Supreme Court, only the Court of Appeal should grant such leave on grounds of general public importance for the clarification or development of the law.

**Recommendation 7:** Amend section 63 of the *Judicature Ordinance* to allow second appeals to the Court of Appeal in criminal cases originating from the District Court and have been revised by the Supreme Court only in circumstances where a convicted person(s) has been sentenced to serve a prison term and such leave should be as of right.

<sup>77</sup> *Judicature Ordinance* s. 52; See also *Police v Piula* [1993] WSCA 2; 02 1993 (4 February 1993).

<sup>78</sup> Constitution (Samoa) art. 79; *Judicature Ordinance* s. 45(1).

<sup>79</sup> [1997] WSSC 9; CP 210-96 (24 March 1997).

<sup>80</sup> Matters originating from the District Court and appealed against to the Supreme Court and then appealed against for the second time to the Court of Appeal.

<sup>81</sup> *Judicature Ordinance* s. 63.

- 3.13 The Court of Appeal also has jurisdiction to determine constitutional questions arising from any decision of the Supreme Court in any proceeding involving a substantial question of law as to the interpretation or effect of any provision of the Constitution<sup>82</sup>. An appeal under such circumstances must be certified by the Supreme Court.
- 3.14 In the case where the Supreme Court refuses to give the requisite Certificate, then the Court of Appeal can grant an appellant(s) special leave to appeal the decision concerned upon being satisfied that the matter involves a substantial question of law affecting the Constitution and the matter was wrongfully decided by the Supreme Court<sup>83</sup>.
- 3.15 Civil appeal cases from the Supreme Court to the Court of Appeal lie as of right when the matter in dispute has the minimum value of \$400<sup>84</sup>. Despite the minimum amount, leave may be sought to appeal if the question involved in the appeal is one which by reason of its general or public importance or the magnitude of the interests affected or any other reason, ought, to be submitted to the Court of Appeal for decision<sup>85</sup>.
- 3.16 All civil appeals to the Court of Appeal are by notice of motion stating the grounds of the appeal and whether the decision is appealed in whole or in part only. The Notice of Motion is filed with the Registrar and served on every party directly affected by the appeal<sup>86</sup>.
- 3.17 Irrespective of whether an appeal is as of right or not, the Court of Appeal will only entertain civil appeals from the Supreme Court when it receives from the Supreme Court an order granting leave to appeal which is granted only when a bond or security for cost is paid by the appellant<sup>87</sup>.

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

- 3.18 The *Judicature Ordinance* is unclear as to what happens to a case involving an important public issue that has to come before the Court of Appeal for the purpose of clarifying or developing the law, where the parties are reluctant to take the case further<sup>88</sup>.
- 3.19 The ***Ordinance*** authorizes the Supreme Court to reserve a question of law for the opinion of the Court of Appeal<sup>89</sup>. This is done through a stated case procedure and is only limited to civil proceedings. Whilst seeking the opinion of the Court of Appeal,

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<sup>82</sup> Constitution (Samoa) art. 80; *Judicature Ordinance* s. 45(2).

<sup>83</sup> Constitution (Samoa) art. 80; *Judicature Ordinance* s. 45(2).

<sup>84</sup> *Judicature Ordinance* s. 51(a); See also *Vaosa v Attorney-General* [2000] WSSC 23 (4 August 2000).

<sup>85</sup> *Judicature Ordinance* s. 51(b).

<sup>86</sup> *Judicature Ordinance* cl. 10 of First Schedule.

<sup>87</sup> *Judicature Ordinance* ss. 54(3) and 54(4); See *Vaai v Sivanila* [2008] WSSC 73 (4 June 2008).

<sup>88</sup> *M' Naghten* (1843) 10 Cl and Fin 200; *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147 CA.

<sup>89</sup> *Judicature Ordinance* s. 52.

the trial in the Supreme Court is stood over to a future date<sup>90</sup>. A reservation for a question of law under the **Ordinance** can be made before, during or after a trial.

3.20 In *Police v. Piula*<sup>91</sup> a stated case, the respondent argued that the informants could not reserve a question for the determination of the Court of Appeal under section 52 of the **Ordinance** as the nature of the proceeding in *Police v. Piula*<sup>92</sup> is criminal. The Court of Appeal held that despite section 52 expressly limiting such a procedure to civil proceedings, it can interpret section 52 to include a question of law that arises from criminal proceedings. The Court of Appeal then proceeded to determine the question asked in favour of the informants.

3.21 It is unclear how the Court of Appeal arrived at such an interpretation of section 52 of the Ordinance as it is quite clear that the provision excludes questions of law arising from criminal proceedings.

3.22 The Commission understands that section 52 originally provided for the reservation of any question of law that may arise from a civil or criminal proceeding. However, Parliament excluded criminal proceedings in 1992 by the *Judicature Amendment Act 1992*<sup>93</sup>. A reference to relevant parliamentary debates would have informed the Court of Appeal of the true spirit of section 52 and the Court would have found in *Police v. Piula*<sup>94</sup> that it lacked jurisdiction under section 52 of the **Ordinance** to determine the question asked.

3.23 The Commission believes that the appropriate section that the Court of Appeal could have relied on in *Police v. Piula*<sup>95</sup> to give it jurisdiction is section 164G of the **Criminal Procedure Act 1972**<sup>96</sup>. The amendments to section 164 of the **Criminal Procedure Act** coincided with amendment to section 52 of the **Ordinance** hence the Commission believes that the exclusion of criminal proceedings from section 52 was done because section 164G of the **Criminal Procedure Act** provided for such recourse.

3.24 The Commission is however concerned with the positioning of section 164G “Reserving question of law” together with appeal provisions. In the view of the Commission this is confusing as it suggests that an appellant(s) can rely on section 164G to commence an appeal.

3.25 The Commission notes that usefulness of section 52 of the **Ordinance** and section 164G of the **Criminal Procedure Act** is dependent on the stages of the trial such questions of law are raised and the willingness of the parties involved.

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<sup>90</sup> *Police v Piula* [1993] WSCA 2; 02 1993 (4 February 1993).

<sup>91</sup> [1993] WSCA 2; 02 1993 (4 February 1993).

<sup>92</sup> [1993] WSCA 2; 02 1993 (4 February 1993).

<sup>93</sup> *Judicature Amendment Act* No. 29 of 1992 s. 4.

<sup>94</sup> [1993] WSCA 2; 02 1993 (4 February 1993).

<sup>95</sup> [1993] WSCA 2; 02 1993 (4 February 1993).

<sup>96</sup> *Criminal Procedure Act* 1972 s. 164G.

- 3.26 The parties are most likely to be willing to apply to the Supreme Court to reserve questions of law for the opinion of the Court of Appeal under the above sections if these are done before the commencement of a trial or during a trial rather than at the end of a trial.
- 3.27 A losing party will most likely prefer to challenge the decision of the Supreme Court through the appeal process rather than spending money to pursue a case under section 52 of the *Ordinance* and section 164G of the *Criminal Procedure Act*. There is also the case of the parties being limited by resources.
- 3.28 Should the parties be forced to take the matter further? Who else should have legal standing to bring such a case before the Court of Appeal in Samoa? Should the Attorney General take the matter to the Court of Appeal at the public's expense as an Attorney General's Reference<sup>97</sup>? Should the matter just proceed to the Court of Appeal as a stated case as in Canada?<sup>98</sup>
- 3.29 In the United Kingdom, the Attorney General has a right of reference<sup>99</sup>. In a case where a person has been tried for the commission of a crime and has been acquitted, the Attorney General (UK) has the discretion to seek the opinion of the Court of Appeal on a point of law which has arisen in the case<sup>100</sup>. The procedure is to clarify the law and not to change the outcome of a case<sup>101</sup>.
- 3.30 The reference procedure provides certainty as to the position of law on a certain matter or issue. As per Lord Chief Justice Widgery in *Attorney General's Reference (No1 of 1975)*<sup>102</sup>, the procedure prevents the Courts from circulating incorrect decisions of law<sup>103</sup>.
- 3.31 A stated case on the other hand is a formal written statement of the facts in a case, which is jointly submitted by the parties to the court so that a decision may be rendered without trial. The facts being thus ascertained, it is left for the court to decide the question of law presented. A stated case is also called an amicable action, a case agreed on, or a friendly suit.<sup>104</sup>

**Recommendation 8:** It is suggested that a power be introduced in light of the United Kingdom model (Section 36 of the *Criminal Justice Act* 1972(UK) to provide for situations where a reservation for a question of law under section 164G of the Criminal

<sup>97</sup> See *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72 cited in *Faulkner v Police* [2006] WSCA 7 (26 April 2006); Also see *Attorney-General's Reference No. 3 of 1999* - UKHL 34 and *Attorney General's Reference (No 5 of 2002)* -UKHL 13.

<sup>98</sup> <http://www.gov.pe.ca/courts/supreme/rules/annotated/a-rule752.pdf> (Accessed 9 Feb 2011), Also see *Fong Sing v. The Queen*, [1963] S.C.R. 60.

<sup>99</sup> *Criminal Justice Act* 1972(UK) s. 36.

<sup>100</sup> *Criminal Justice Act* 1972 (UK) s. 36 (1).

<sup>101</sup> [http://www.cps.gov.uk/legal/a\\_to\\_c/criminal\\_justice\\_act/#can](http://www.cps.gov.uk/legal/a_to_c/criminal_justice_act/#can) (Accessed 16 Feb 2011).

<sup>102</sup> [1975] QB 773 at 778).

<sup>103</sup> *Attorney General's Reference (No1 of 1975)* [1975] QB 773 at 778).

<sup>104</sup> <http://definitions.uslegal.com/s/stated-case/> (Accessed 9 Feb 2011)

**Procedure Act** must be raised after a case has been determined by the Supreme Court and the parties are reluctant or are unable to bring such a case before the Court of appeal because of the lack of resources. This power will give the Attorney General a right of reference but with qualifications. The procedure should only be used in cases where it is sufficiently clear and precise to be capable of being challenged; it is concerned with a point of law, rather than the sufficiency of the evidence in the case; and it raises a point of practical importance which is likely to be followed in other cases.

**Recommendation 9:** Introduce a procedure as in rule 75.2 of *Canadian Supreme Court Rules*, which allows quasi-judicial bodies and lower courts to refer a question of law to a higher court by stating a case in writing setting forth the question or questions of law to be answered and filing it with the relevant court.

3.32 All criminal appeals to the Court of Appeal are by notice of appeal or a motion for leave to appeal<sup>105</sup>. Only persons convicted in the Supreme Court have the right of appeal to the Court of Appeal against their conviction or sentence unless the sentence is fixed by law<sup>106</sup>. Persons convicted or sentenced in the Supreme Court on appeal from the District Court will need to seek leave of the Court of Appeal to appeal against conviction; and against the sentence passed unless the sentence is one fixed by law<sup>107</sup>. The Court of Appeal has the power to pass sentence even in the absence of the appellant<sup>108</sup>.

3.33 The Court of Appeal can affirm, reverse, vary the judgment appealed, order a new trial or make any such order with respect to the appeal as the Court thinks fit and may award such costs as it thinks fit to or against any party to the appeal<sup>109</sup>.

3.34 It is important to note that if an appellant does not prosecute his or her appeal with due diligence, the respondent can apply either to the Supreme Court or Court of Appeal for an order dismissing the appeal for non-prosecution<sup>110</sup>. If upon the expiration of six weeks from the date of filing the notice of appeal or of the order granting leave to appeal, as the case may be, the appellant shall have failed to prepare and lodge the record as provided in clause 32, then the appeal shall be determined to have been abandoned<sup>111</sup>. If an order is granted then the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as that Court may direct<sup>112</sup>. The Attorney General also has the right to appeal against a sentence passed on any person unless the sentence is one fixed by law.

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<sup>105</sup> *Judicature Ordinance* cl. 27 of First Schedule; *Saifoloi v Police* [2009] WSSC 45 (28 May 2009); *Koko v Police* [1992] WSSC 11; CA 008 1992 (22 October 1992).

<sup>106</sup> *Criminal Procedure Act* s. 164K(1).

<sup>107</sup> *Criminal Procedure Act* s. 164K(2).

<sup>108</sup> *Criminal Procedure Act* s. 164U.

<sup>109</sup> *Judicature Ordinance* s. 56; See also *Criminal Procedure Act* s. 164O(1); *Criminal Procedure Act* s. 164R(1).

<sup>110</sup> *Judicature Ordinance* s. 61.

<sup>111</sup> *Judicature Ordinance* cl. 35 of First Schedule.

<sup>112</sup> *Judicature Ordinance* s. 61.

3.35 Any person who is found guilty in the Supreme Court of a criminal contempt of that Court or of any other Court, has a right of appeal against his or her sentence or conviction for contempt of Court<sup>113</sup>.

#### **4. The Standards for the operation of the Courts**

4.1 Equally important to the requirement that courts must be constituted in a set manner, is that they operate and carry out their judicial functions according to certain standards. These standards define how the courts are to conduct their judicial activities and determine how they should deal with cases before them.

4.2 In Samoa, these standards are clearly set out in the *Constitution, Judicature Ordinance, District Court Act, Court of Appeal Rules, Supreme Court Rules, District Court Rules* and principles of common law and equity.

4.3 A failure to abide by such standards may cause a court decision to be set aside on appeal to a higher court<sup>114</sup>. A consistent failure by the courts to abide by such standards can cause the public to lose confidence in the judiciary. This in turn may frustrate members of the public and cause them to take the law into their own hands resulting in lawlessness. In the decision of Justice Dixon in *R. v Dunbabin: Ex parte Williams*,<sup>115</sup> he pointed out that the authority of the law depends on the confidence of the public in the administration of the law by the courts. Therefore it is important that public confidence in the judiciary is maintained hence justice must not only be done but it must be seen to be done<sup>116</sup>.

#### **Constitutional and Statutory Requirements**

4.4 The Constitution protects the fundamental right to a fair trial and rights concerning criminal law<sup>117</sup>. These rights which are protected under the Constitution were adopted from the United Nation's *Universal Declaration of Human Rights Charter (1948)*<sup>118</sup> by the Constitutional Convention in 1960 in preparation for independence and in anticipation of joining the United Nations<sup>119</sup>.

4.5 In articulating such rights, the Constitution provides that when determining a person's civil rights and obligations or a charge against him or her for any offence, such a person is entitled to a fair and public hearing within a reasonable time by an

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<sup>113</sup> *Criminal Procedure Act* s. 164M.

<sup>114</sup> See *Healey v Rauhina* [1958] NZLR 945; *Jitoko v State* FJHC 37; Haa0094.90s (23<sup>rd</sup> May, 1991); *Teika v Maui* [1985/86] SILR 91; *State v. Dr. Jinadasa Ilangasinghe*.

<sup>115</sup> [1935] HCA 34; (1935) 53 CLR 434, at p. 247.

<sup>116</sup> *R v Sussex Justices* [1924] KB 256 at 259 as per Lord Hewart CJ.

<sup>117</sup> *Constitution* arts. 9 and 10.

<sup>118</sup> See *Article 10* of the *Universal Declaration of Human Rights Charter* which provides that every member of the human family is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him (*emphasis added*)<sup>118</sup>.

<sup>119</sup> Record of Constitutional Convention Debates vol. 1., pp. 167-197 (1 September – 5 September 1960. Samoa was *admitted* to the United Nations on the 15 December 1976.

independent and impartial tribunal established under the law<sup>120</sup>. The courts' judgments must be pronounced in public unless in the opinion of the Court such publicity would affect the interests of justice<sup>121</sup>. Therefore the public and representatives of news service may be excluded from all or part of a trial under certain circumstances namely in the interest of morals, public order, national security, where the interests of juveniles are affected or where the protection of the private life of the parties is necessary.

4.6 A person charged with an offence enjoys the right to be presumed innocent until proven guilty according to law<sup>122</sup> and should not be compelled to be a witness against himself or herself<sup>123</sup>. In addition, a person charged with an offence enjoys certain minimum rights specifically set out under the Constitution<sup>124</sup>. These are the minimum rights to:

- *be informed in detail and promptly of the nature and cause of the accusation against him or her in a language which he or she understands*<sup>125</sup>;
- *be given adequate time and facilities for the preparation of his or her defence*<sup>126</sup>;
- *be given the right to defend himself in person or through legal assistance of his own choosing and, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*<sup>127</sup>;
- *examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*<sup>128</sup>; and
- *have access to the free assistance of an interpreter, if any doubt exists as to whether he can understand or speak the language used in Court*<sup>129</sup>.

### **Fair Hearing**

4.7 The Constitution does not spell out in detail what is required to constitute a fair hearing. In *Furnell v Whangarei High Schools Board*<sup>130</sup>, the Court explains that a fair hearing is a hearing conducted in accordance with common law principles of natural justice<sup>131</sup>.

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<sup>120</sup> Constitution art. 9(1).

<sup>121</sup> Constitution art. 9(1).

<sup>122</sup> Constitution art. 9(3).

<sup>123</sup> Constitution art. 9(5).

<sup>124</sup> Constitution art. 9(4).

<sup>125</sup> Constitution art. 9(4)(a).

<sup>126</sup> Constitution art. 9(4)(b).

<sup>127</sup> Constitution art. 9(4)(c).

<sup>128</sup> Constitution art. 9(4)(d).

<sup>129</sup> Constitution art. 9(4)(e).

<sup>130</sup> *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 at 718 where Lord Morris of Borth-y-Gest.

<sup>131</sup> *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 at 718 where Lord Morris of Borth-y-Gest.

- 4.8 The rules of natural justice or procedural fairness were originally developed by the courts of equity to control the decisions of inferior courts and gradually extended them to apply equally to decisions of administrative and domestic tribunals and of any authority exercising an administrative power that affects a person's status, rights or liabilities. A decision reached in contravention of natural justice is invalid<sup>132</sup>.
- 4.9 There are two principal rules accommodated under the rules of natural justice. The first is the rule against bias<sup>133</sup>. The rule against biasness operates to invalidate any decision, however fair it may seem, if made by a person with any financial or hidden interest in the outcome of a case.
- 4.10 The second rule operates to give a person to be affected by a decision the opportunity to be heard and to hear any evidence against him or her<sup>134</sup>. It provides that a decision cannot stand unless the person directly affected by it was given a fair opportunity both to state his or her case and to know and answer to the opposing side's case.
- 4.11 In Fiji a decision of the Magistrates Court was quashed by the Fiji High Court in *State v. Dr. Jinadasa Ilangasinghe*,<sup>135</sup> for breaching the rules of natural justice. The High Court held that proper notice was never given to the applicants. Furthermore the applicants were not given any opportunity to defend themselves against the Magistrate's finding which was clearly adverse to their interests.

### ***Public Hearing or Openness***

- 4.12 This requirement operates to ensure that where possible the proceedings of a court must be held in a place that is open to the public. This requirement operates to ensure that the proceedings of a court are open to public scrutiny. This creates an environment or setting that is likely to discourage interference with the independent, impartial and fair operation of the courts and help to ensure that decisions about people's rights and obligations are made in accordance with their legal merits.
- 4.13 In *Jashwant Prasad v The Queen*,<sup>136</sup> the accused challenged his conviction claiming that there was a breach of the Constitutional requirement that the proceedings of a court must be held in public. The Court of Appeal agreed with the accused however, in determining that the breach did not cause any harm or prejudice to the accused, upheld the conviction<sup>137</sup>.

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<sup>132</sup> Elizabeth A Martin (2003) *A Dictionary of Law (5<sup>th</sup> Ed)* pp. 325-326. Also see

<sup>133</sup> Elizabeth A Martin (2003) *A Dictionary of Law (5<sup>th</sup> Ed)* pp. 325-326.

<sup>134</sup> Elizabeth A Martin (2003) *A Dictionary of Law (5<sup>th</sup> Ed)* pp. 325-326.

<sup>135</sup> *State v. Dr. Jinadasa Ilangasinghe*.

<sup>136</sup> (1978) 24 FLR 63.

<sup>137</sup> Also see *McBean v The Queen* [1977] A.C. 537 P.C.

## ***Impartiality and Unbiased***

- 4.14 Courts are required to be impartial and neutral when determining matters before them. They must determine a case without prejudice<sup>138</sup>. A member of the judiciary residing on a case may be asked to disqualify himself or herself from determining a controversial matter if he or she is seen as impartial.
- 4.15 In *Stehlin v Police*<sup>139</sup>, however, Sir Robin Cooke explained that a judge will be disqualified from a matter before him or her only if seen to be in real danger of being partial or bias.

## ***Competent Jurisdiction and established by law***

- 4.16 A court must have the competent jurisdiction to determine certain kinds of matters submitted before it and to make the requisite orders. A court must not determine matters that it is unauthorized to determine and neither should it make orders that it is not authorized to make. If it does, its decision will be held as invalid and any resulting orders regarded as without legal authority or jurisdiction.
- 4.17 In *Ngaumi v. Kaure*,<sup>140</sup> the High Court of the Solomon Islands dismissed a finding by the Magistrates Court in a claim for trespass on customary land because legislation has vested the Local Court exclusive jurisdiction to hear cases involving customary land.
- 4.18 In *Eri Mateni v The State*,<sup>141</sup> a decision of the High Court of Fiji was quashed by the Court of Appeal for lack of jurisdiction.
- 4.19 The scope of the right to a fair trial has been debated in a number of cases such as the *In re Article 9 Right to Counsel*,<sup>142</sup> *Toailoa Law Office v Duffy*,<sup>143</sup> and *Vaai v Lene*.<sup>144</sup>
- 4.20 In *In re Article 9 Right to Counsel*,<sup>145</sup> the Supreme Court was asked to determine whether the right to a fair trial requires that the State furnishes every person charged with an offence with free legal assistance if he or she has insufficient means. Secondly, if the answer to the question of whether the State provides free legal assistance to a charged person is yes, then is the person charged free to choose who to provide such legal assistance. The Court held that under the right to a fair trial guaranteed by the Constitution, the State is given the responsibility to provide free

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<sup>138</sup> *R v Gough* [1993] UKHL 1; (1993) AC 646; Also see *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004; [2000] 1 All ER 65; *Sonny Stehlin v Police* (1993) (Unreported judgment of the Court of Appeal) and *Faasootauloa Pati v Charlie Westerlund* (2000) (Unreported Supreme Court of Samoa).

<sup>139</sup> [1993] WSCA 5; 13 1993 (23 March 1993) .

<sup>140</sup> [2003] SBHC 53; HC-CC 219 of 2003 (28 October 2003).

<sup>141</sup> [1999] FJCA 30; Aau0021u.98s (14<sup>th</sup> May, 1999).

<sup>142</sup> [1988] WSSC 5; [1988] SPLR 421 (18 October 1988).

<sup>143</sup> [2005] WSSC 53; [2005] 2 LRC 138 (17 May 2005).

<sup>144</sup> [1996] WSCA 8; 06 1996 (29 October 1996).

<sup>145</sup> [1988] WSSC 5; [1988] SPLR 421 (18 October 1988).

legal assistance where the charged person has insufficient means. However, the charged person has no say in the selection of who is to represent him or her<sup>146</sup>.

4.21 In *Toailoa Law Office v Duffy*,<sup>147</sup> one of the questions that the Supreme Court had to determine was whether the failure of the appellant to comply with a court order to disclose trial documents to the respondent amounted to a breach of right to a fair trial and whether the appropriate remedy in such a case is an adjournment rather than a stay of prosecution. The Court in its determination held that a stay of prosecution or dismissal of the charge did not follow automatically where a prejudice to the right to a fair trial had arisen in a criminal proceeding. The Court should first determine whether any action could be taken to remove the prejudice in order to have a fair trial. If no action could be taken to ensure that a fair trial took place, then the prosecution had to be brought to an end by granting a permanent stay or dismissing the charge.

4.22 In *Vaai v Lene*,<sup>148</sup> the Court of Appeal determined the validity of section 117 of the Electoral Act 1963, which bars decisions under Part X of the Act from being appealed. This particular section barred an appeal which the appellant wished to bring. The appellant contended that the right to a fair trial protected under the Constitution includes a right to an appeal.

4.23 In determination, the Court of Appeal considered the decision by the Court of Appeal of England in *Ward v Bradford Corporation*,<sup>149</sup> where Lord Denning said that natural justice did not require the provision of an appeal, so long as the party concerned had a fair hearing by a fair-minded man or body of men<sup>150</sup>. The Court also considered the assertions by Learned Justice Phillimore in *Ward v Bradford Corporation*,<sup>151</sup> which goes to emphasise that the rules of natural justice did not require that there should be a right of appeal. Furthermore, the Court considered the decision of the European Court of Human Rights in the *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* ('The Belgian Linguistic Case (No. 2)'),<sup>152</sup> which supports the view that a right to a fair trial does not carry with it a right to an appeal. Accordingly, the Court of Appeal held that the right to a fair trial did not operate to invalidate section 117 of the Electoral Act 1963. Therefore the appeal was dismissed as incompetent.

4.24 The right of appeal was also considered in an earlier case *In re Tapu Leota*,<sup>153</sup> where the Court of Appeal also held that there was no right of appeal from committal and sentence of contempt. However in *Petaia v Supreme Court of Western Samoa*,<sup>154</sup>

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<sup>146</sup> *In re Article 9 Right to Counsel* [1988] WSSC 5; [1988] SPLR 421 (18 October 1988) as per Chief Justice Maxwell.

<sup>147</sup> [2005] WSSC 53; [2005] 2 LRC 138 (17 May 2005).

<sup>148</sup> [1996] WSCA 8; 06 1996 (29 October 1996).

<sup>149</sup> (1971) 70 LGR 27.

<sup>150</sup> *Ward v Bradford Corporation* (1971) 70 LGR 27 as per Lord Denning MR at 35.

<sup>151</sup> (1971) 70 LGR 27.

<sup>152</sup> [1968] ECHR 3; 1 EHRR 252 (European Human Rights Reports).

<sup>153</sup> [1964] WSCA 2; [1960-1969] WSLR 106 (24 July 1964).

<sup>154</sup> [1990] WSCA 1 (19 December 1990).

the Court of Appeal held that the decision in *In re Tapu Leota*,<sup>155</sup> should no longer be followed insofar as it denies the right of appeal to a person convicted of contempt of Court.

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

4.25 The right to a fair trial has been defined in numerous regional and international human rights instruments. It is also one of the most extensive human rights that has been heavily litigated and substantial case law has been established on its interpretation<sup>156</sup>. But, the Commission believes that any interpretation of the right to a fair trial should be done in light of its purpose which is to ensure the proper administration of justice. Thus, the right of a party to appeal the decision of a trial court will allow a higher court to review the correctness of the decision of that lower court. This guarantees accountability and transparency in the administration of justice. Therefore the right to a fair trial should be interpreted to include the right to an appeal at first instance as this encourages proper administration of justice.

4.26 In addition, Samoa has ratified the International Convention on Civil and Political Rights (ICCPR) on 15 February 2008. Therefore, Samoa as a party to ICCPR must fulfill its obligations under this Convention. One of Samoa's obligations under ICCPR is the recognition of the right to a fair trial in criminal proceedings. Historically the right to a fair trial was regarded as more important in criminal proceedings, because the consequences for a person are more severe in criminal proceedings compared to civil proceedings<sup>157</sup>. The right to a fair trial in criminal proceedings include the right of appeal at first instance to a higher court; the right to be notified of charges in a timely manner; the right to adequate time and means for the preparation of a defense; the right of the accused to defend him or herself, or the right to a counsel chosen by the accused and the right to communicate privately with the counsel; the right not to incriminate oneself; and the prohibition of double jeopardy<sup>158</sup>.

4.27 Therefore, the law in Samoa should recognize the right of a convicted person to challenge his or her conviction and sentence to a court of higher jurisdiction.

4.28 It is also important to note that the principles embraced under the ICCPR were developed from principles under the United Nations Charter on Human Rights (UNCHR) which are already entrenched as rights and freedoms in the Constitution of Samoa. Therefore, in the Commission's view, even though the Constitution does not specifically provide for an individual's right to an appeal at first instance, the relevant articles of the Constitution should be widely interpreted in light of the language of the UNCHR and the ICCPR to recognize such a right. In light of such

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<sup>155</sup> [1964] WSCA 2; [1960-1969] WSLR 106 (24 July 1964).

<sup>156</sup> Doebbler, Curtis (2006). *Introduction to International Human Rights Law*. CD Publishing. pp. 110. ISBN 9780974357027.

<sup>157</sup> Doebbler, Curtis (2006). *Introduction to International Human Rights Law*. CD Publishing. pp. 109. ISBN 9780974357027.

<sup>158</sup> International Convention on Civil and Political Rights, art. 14.

contention, any failure to recognize a person's right of appeal at first instance particularly in the case of criminal proceedings should be deemed as unconstitutional.

4.29 The Commission also notes the effect of section 117 of the *Electoral Act 1963* which was interpreted by the Court of Appeal in its decision in *Vaai v Lene*<sup>159</sup> that the right to a fair trial did not carry a right to appeal and in reaching its conclusion asserted that there is no right to appeal in election petitions. The policy reasoning behind section 117 is that a finality of election results is reached quickly. It is also important to point out that section 110 of the *Electoral Act* which stipulates that every election petition must be tried by two or more judges of the Supreme Court, provides some guarantee as to the fairness of the determinations in such petitions. The Commission believes that the fairness of the determination of election petitions can be improved if a full Court (3 Judges presiding) is maintained at all times.

**Recommendation 10:** Amend Articles 9 and 10 of the Constitution to specifically provide for the right to an appeal at first instance as part of the Right to a fair trial and Rights concerning criminal law. A limitation to this right of appeal would be in the case of election petitions (to allow for the finality of election results to be achieved quickly) provided that a full Court sits (3 Judges of the Supreme Court preside). Therefore section 110 of the *Electoral Act 1963* should be amended to provide that all election petitions must be tried by a full Court.

**Recommendation 11:** The Judicature *Ordinance* should provide a detailed interpretation of the right to a fair trial and rights concerning criminal law in light of the ICCPR which should include the right to an appeal at first instance particularly in the case of criminal proceedings.

4.30 The Constitution also provides further rights concerning criminal law<sup>160</sup>. (*Please refer to the related Criminal Law Review for a discussion of such rights*).

## 5. Other Issues

### *Tenure of Office for Judges*

5.1 The retiring age for Judges of the Supreme Court is specified differently in the Judicature Ordinance and the Constitution. The Ordinance provides that a Judge can hold office until 62 years of age and can be extended. The Head of State on the advice of the Prime Minister can extend the tenure of office for the Chief Justice beyond 62 years. The tenure of office of the other Judges of the Supreme Court can be extended by the Head of State on the advice of the Judicial Service Commission<sup>161</sup>.

<sup>159</sup> *Vaai v Lene* [1996] WSCA 8; 06 1996 (29 October 1996)

<sup>160</sup> Constitution art. 10.

<sup>161</sup> *Judicature Ordinance* s. 24.

5.2 The Constitution on the other hand specifies 68 years as the retiring age for Judges of the Supreme Court<sup>162</sup>. The process for the extension of the term of the Chief Justice and the other Judges of the Supreme Court is the same as that set out in the Ordinance.

### ***Submissions***

5.3 Stakeholders agreed that the age of retirement for Judges of the Supreme Court in the *Judicature Ordinance* should be made consistent with the Constitution. The retirement age should be 68 years.

5.4 The Chief Justice stated that this inconsistency of the *Judicature Ordinance* and Constitution was addressed in an amendment in 2004. This amendment however is not reflected in *Judicature Ordinance*.

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

5.5 The age of retirement for Judges in other jurisdictions, with a much larger pool of qualified lawyers that can be appointed as judges, is higher than Samoa. In New Zealand the retiring age of Judges is set at 72 years, however, increasing the age of retirement to 72 years means that the Constitution will have to be amended.

**Recommendation 12:** The age of retirement for Judges of the Supreme Court set out in section 24 of the *Judicature Ordinance* should be amended to be consistent with Article 68 of the Constitution which sets the age of retirement of Judges of the Supreme Court at 68 years. Section 24 of the *Judicature Ordinance* should also reflect the proviso in Article 68 of the Constitution which allows for the extension of the period of office of a Judge which has reached the age of 68 years by the Head of State, acting on the advice of the Prime Minister (*in the case of the Chief Justice*) or on the advice of the Judicial Service Commission (*in the case of any other Judge of the Supreme Court*).

### ***The appointment of Judges of the Supreme Court:***

5.6 The Chief Justice is appointed by the Head of State on the advice of the Prime Minister. The appointment of other Judges of the Supreme Court is also by the Head of State on the advice of the Judicial Service Commission<sup>163</sup>.

5.7 A person appointed must possess the qualifications prescribed by the Head of State on the advice of the Judicial Service Commission and must have been practising as a barrister in Samoa or in an approved country or in both for a period amounting in aggregate to not less than eight years<sup>164</sup>.

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

5.8 The Commission questioned the stakeholders whether the *Judicature Ordinance* should specify other conditions or qualifications to be considered for the appointment

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<sup>162</sup> Constitution art. 68.

<sup>163</sup> *Judicature Ordinance* s. 23.

<sup>164</sup> *Judicature Ordinance* s. 23.

of Judges other than the age prerequisite. The purpose of this question was to deduce a list of qualifications to guide the Judicial Service Commission when advising the Head of State under section 23(a) of the *Judicature Ordinance*. But apart from a submission to increase the age prerequisite from 8 to 10 years, stakeholders consulted stated that the current requirements in the *Judicature Ordinance* were sufficient.

5.9 The Commission was also of the view that providing a list under section 23(a) of the *Judicature Ordinance* will promote consistency when appointing Judges of the Supreme Court.

### *Submissions*

5.10 Stakeholders were not forthcoming on any qualifications that they thought should be considered and to be stated in the *Judicature Ordinance*. One of the stakeholders however stated that qualifications should be left to be determined by the Judicial Service Commission. Most of the stakeholders had no problems with the requisite eight years of practice. There was also a suggestion that the requisite years of experience for a person to be eligible to be appointed as a Supreme Judge should be increased to 10 years of practical experience.

**Recommendation 13:** The requisite years of experience to be eligible to be appointed as a Judge of the Supreme Court should remain at eight years and the appointment of Judges to be done by the Head of State on the advice of the Prime Minister when appointing the Chief Justice or on the advice of the Judicial Service Commission when appointing other Judges of the Supreme Court.

### ***Court of Appeal Rules - Service of Criminal Appeals***

5.11 In *Police v Etelagi*<sup>165</sup>, the appeals were filed within time, but the respondents were not served with notice of appeal. Justice Robertson pointed out that the rules are silent on the issue of service of criminal appeals and it would be appropriate to remedy such situation as it affects the rights of a criminal defendant which is fundamental in a legal system which maintains the principles of natural justice and to eliminate any possibility for doubt or misunderstanding.

### *Commission's views*

5.12 The practice direction should be incorporated into the Court of Appeal Rules. The Commission also noted that the time limits for criminal appeals set in the *Criminal Procedure Act 1972* and the *Judicature Ordinance 1961* are different. In the *Criminal Procedure Act* it sets it at 14 days after sentence or acquittal<sup>166</sup>. The *Judicature Ordinance* sets it at time limit at 21 days after sentence unless the Supreme Court or Court of Appeal grants enlargement of time for filing the notice or motion<sup>167</sup>.

<sup>165</sup> [2001] WSCA 2 (23 November 2001).

<sup>166</sup> *Criminal Procedure Act 1972*, s. 164Q.

<sup>167</sup> *Judicature Ordinance 1961* s. 28.

**Recommendation 14:** The practice direction should be incorporated into the Court of Appeal Rules.

**Recommendation 15:** The time limit for appeals should be consistent. Section 164Q of the *Criminal Procedure Act* must be amended from 14 days to 21 days. This will be consistent with Rule 28 of the Court of Appeal Rules in the First Schedule to the *Ordinance*.

## ***Commencement of Appeals***

5.13 The processes for the commencement of appeals to the Court of Appeal in its civil and criminal jurisdictions are different. In its civil jurisdiction appeals are by way of notice of motion.<sup>168</sup> The criminal jurisdiction on the other hand is either by notice of appeal or motion for leave to appeal.<sup>169</sup>

### ***Submissions***

5.14 A recommendation was made by the Honourable Chief Justice that the processes for appeals to the Court of Appeal in both civil and criminal jurisdictions should be uniform as there is no reason why they should be different. The Commission requested submissions from other stakeholders and presented possible options for the stakeholders to choose from. A number of stakeholders also agreed with the recommendation by the Honourable Chief Justice that the processes for civil and criminal appeals to the Court of Appeal should be the same. However, one stakeholder disagreed with the recommendation above emphasizing that criminal appeals are different from civil appeals therefore the process for the commencement of appeals in civil and criminal appeals cannot be uniform.

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

5.15 The Commission takes the general view that all appeals at first instance in civil and criminal matters should be of right. However, in the case of interlocutory decisions, second appeals and any direct appeals from any court or quasi-judicial body other than the Supreme Court appeals should be by leave as suggested earlier. In a jurisdiction like Samoa where there are limited resources, we have to rank appeals in the order of their importance. The Commission believes that preference should be given to criminal appeal proceedings over civil appeal proceedings. This is due to the fact that the penalties for criminal convictions result in prison sentences and/or large fines. Civil claims on the other hand usually result in monetary payments for restitution and/or compensation to the injured party(s). Therefore, since the outcome of criminal cases greatly affect the rights and freedoms of a person if he or she is given an imprisonment term, any criminal appeal proceeding should as of right and be given special attention, particularly if the penalty for the conviction is imprisonment. This is the reasoning behind the emphasis on criminal appeal proceedings in international human rights instruments such as the ICCPR as discussed above. It is for this reason that the Commission believes that criminal appeals should be treated

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<sup>168</sup> *First Schedule to Judicature Ordinance*, Rule 10.

<sup>169</sup> *First Schedule to Judicature Ordinance*, Rule 27.

distinctively from civil appeal proceedings. Therefore, the commencement of appeals in civil and criminal should remain different.

**Recommendation 16:** Commencement of appeals in civil and criminal jurisdictions should remain as they are.

### ***Time Limit for Civil Appeals***

5.16 A member of the Samoa Law Society voiced a concern regarding *Rule 18* of the *Court of Appeal Rules* pertaining to time limit for civil appeals. It was pointed out that although the rule explicitly provides that no appeal to the Court of Appeal from a decision of the Supreme Court shall be brought after the expiration of 30 days, there was no guidance as to how the rule can be applied in cases where the Supreme Court gives an oral judgment and a written judgment at a much later date.

### ***Submissions***

5.17 Responses from stakeholders were equally divided on this issue. Some stakeholders stated that the rule was clear and that it should apply once the judgment has been delivered, irrespective of its form. Other stakeholders stated that the rule should apply and time runs once a written judgment has been handed down. The reasoning for the second proposition is the fact that it can be difficult to prepare an appeal to the Court of Appeal in the absence of a written judgment from the Supreme Court. The proponents for the first position argue that the Court of Appeal Rules do provide solutions for such a concern. The counsel for the appellant can either seek enlargement of time for giving notice of appeal from the Supreme Court or Court of Appeal<sup>170</sup> or seek leave to amend grounds of appeal<sup>171</sup>.

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

5.18 The Commission notes that the main cause of the concerns is due to the fact that in some cases the time taken for a written judgment to be made available to the parties after an oral judgment has been given, has in some cases been in the vicinity of 12 months. Parties who might wish to appeal would need to peruse the reasoning of the Court's decision before deciding whether an appeal is worthwhile or not. In many cases the reason for the decision is not given in the oral judgment.

**Recommendation 17:** The *Ordinance* should expressly provide that a written decision must be made available to the parties involved within a reasonable time to allow for any potential appellant to prepare and to advise the appropriate Court. This will guarantee that finality is reached at a reasonable time and there is less paper work for the Court's administrative staff.

<sup>170</sup> Court of Appeal Rules, rule 18.

<sup>171</sup> Court of Appeal Rules, rule 19.

## **Salary of Judges**

5.19 A concern was raised with the Commission pertaining to the accuracy of the figures set out in *section 29* of the *Judicature Ordinance* which addresses the Salaries of Judges.

### **Submissions**

5.20 The Chief Justice suggested that the salaries of the Judges should appear in the *Judicature Ordinance*. However there were a number of stakeholders that suggested otherwise, stating that this is a private matter.

5.21 In Article 69 of the Constitution, it provides that the salaries of the Judges of the Supreme Court shall be determined by Act and charged on the Treasury Fund. The Commission notes that the salaries of the Chief Justice and other Judges of the Supreme Court are listed in the civil list but this is not reflected in the *Judicature Ordinance*.

**Recommendation 18:** The salaries of the Judges of the Supreme Court should be listed in the *Judicature Ordinance*.

**Recommendation 19:** The basic salary of the Chief Justice stated in the current Civil List and should be reflected in the *Ordinance* is ST\$157,000 per year exclusive of benefits under the terms of engagement.

**Recommendation 20:** The basic salary of a Judge of the Supreme Court stated in the current Civil List and should be reflected in the *Ordinance* is \$125,000/\$120,000 per year exclusive of benefits under the terms of engagement.

## **Section 51 – Appeals in Civil Cases**

5.22 Section 51 of the *Judicature Ordinance* provides that appeals in civil cases only shall lie from the Supreme Court to the Court of Appeal in any action, cause or matter – as of right when the matter in dispute amounts to or is of the value of \$400 or upwards; and with leave of the Court of Appeal or of the Supreme Court if in the opinion of either Court the question involved in the appeal is one which by reason of its general or public importance or the magnitude of the interests affected, or for any other reason, ought to be submitted to the Court of Appeal for decision.

### **Submission**

5.23 The Chief Justice stated that the amount of \$400 specified in section 51(a) has been amended to \$10,000 but this is not reflected in the *Judicature Ordinance* to date. (*The Commission was unable to find this Amendment*)

**Recommendation 21:** Section 51 of the *Judicature Ordinance* must be amended if it has not been so to reflect the amount of \$10,000.

## **Section 54 - Security for Costs of Appeal**

5.24 Section 54(3) of the *Judicature Ordinance* provides that leave to appeal shall be granted only on condition that the appellant pays a security for the payment of the costs of the appeal, an amount not exceeding \$200 within a period to be fixed by the Court, not exceeding 2 months from the date of the hearing of the application.

### ***Submission***

5.25 The Chief Justice stated that the amount of \$200 specified in section 54(3) has been amended to \$2000 but this is not reflected in the *Judicature Ordinance* to date. (*The Commission was unable to find this Amendment*)

**Recommendation 22:** Section 54(3) of the *Judicature Ordinance* must be amended if it has not been so to reflect the amount of \$2,000.

## List of Recommendations

**Recommendation 1:** Advancements in technology see Court proceedings being digitally recorded in the future. If such is the case then such developments will have to be provided for in the *Judicature Ordinance*.

**Recommendation 2:** The jurisdiction of the Supreme Court to remove civil proceedings to be adjudicated by the Court of Appeal in section 55 of the *Judicature Ordinance* should be removed.

**Recommendation 3:** Section 31 of the *Judicature Ordinance* should be amended to provide that the Supreme Court shall not have jurisdiction to revise or review any decisions of the Land and Titles Court or any Court constituted under section 77 of the Land and Titles Act 1981. The relationship between the Supreme Court and the Land and Titles Court should be clearly clarified in the *Judicature Ordinance*. The Commission further recommends that a Special Appellate Body for the Land and Titles Court be created under its own structure to determine appeals against the decisions of the Land and Titles Court.

**Recommendation 4:** To prevent any miscarriage of justice or the denial of timely justice the *Judicature Ordinance* must specify either the maximum and/or minimum number of times that the Court of Appeal should sit. The time between each sitting should be reasonable (taking into consideration the resources available).

**Recommendation 5:** An economical alternative to prevent any miscarriage of justice or the denial of timely justice is for the *Judicature Ordinance* to specify the nature of questions to be determined or appeals that cannot be postponed and must be heard (e.g. criminal, constitutional, environmental matters) outside the normal sitting times of the Court of Appeal. This would ensure that the matters affecting the constitutional rights or health of an individual/public are addressed within a reasonable time.

**Recommendation 6:** Section 43(a) and (b) should be repealed and the powers of the Court of Appeal should only be exercised by three Judges including the delivering of judgments.

**Recommendation 7:** Amend section 63 of the *Judicature Ordinance* to allow second appeals to the Court of Appeal in criminal cases originating from the District Court and have been revised by the Supreme Court only in circumstances where a convicted person(s) has been sentenced to serve a prison term and such leave should be as of right.

**Recommendation 8:** It is suggested that a power be introduced in light of the United Kingdom model (Section 36 of the *Criminal Justice Act* 1972(UK) to provide for situations where a reservation for a question of law under section 164G of the *Criminal Procedure Act* must be raised after a case has been determined by the Supreme Court and the parties are reluctant or are unable to bring such a case before the Court of appeal

because of the lack of resources. This power will give the Attorney General a right of reference but with qualifications. The procedure should only be used in cases where it is sufficiently clear and precise to be capable of being challenged; it is concerned with a point of law, rather than the sufficiency of the evidence in the case; and it raises a point of practical importance which is likely to be followed in other cases.

**Recommendation 9:** Introduce a procedure as in rule 75.2 of *Canadian Supreme Court Rules*, which allows quasi-judicial bodies and lower courts to refer a question of law to a higher court by stating a case in writing setting forth the question or questions of law to be answered and filing it with the relevant court.

**Recommendation 10:** Amend Articles 9 and 10 of the Constitution to specifically provide for the right to an appeal at first instance as part of the Right to a fair trial and Rights concerning criminal law. A limitation to this right of appeal would be in the case of election petitions (to allow for the finality of election results to be achieved quickly) provided that a full Court sits (3 Judges of the Supreme Court preside). Therefore section 110 of the *Electoral Act 1963* should be amended to provide that all election petitions must be tried by a full Court.

**Recommendation 11:** The Judicature *Ordinance* should provide a detailed interpretation of the right to a fair trial and rights concerning criminal law in light of the ICCPR which should include the right to an appeal at first instance particularly in the case of criminal proceedings.

**Recommendation 12:** The age of retirement for Judges of the Supreme Court set out in section 24 of the *Judicature Ordinance* should be amended to be consistent with Article 68 of the Constitution which sets the age of retirement of Judges of the Supreme Court at 68 years. Section 24 of the *Judicature Ordinance* should also reflect the proviso in Article 68 of the Constitution which allows for the extension of the period of office of a Judge which has reached the age of 68 years by the Head of State, acting on the advice of the Prime Minister (*in the case of the Chief Justice*) or on the advice of the Judicial Service Commission (*in the case of any other Judge of the Supreme Court*).

**Recommendation 13:** The requisite years of experience to be eligible to be appointed as a Judge of the Supreme Court should remain at eight years and the appointment of Judges to be done by the Head of State on the advice of the Prime Minister when appointing the Chief Justice or on the advice of the Judicial Service Commission when appointing other Judges of the Supreme Court.

**Recommendation 14:** The practice direction should be incorporated into the Court of Appeal Rules.

**Recommendation 15:** The time limit for appeals should be consistent. Section 164Q of the *Criminal Procedure Act* must be amended from 14 days to 21 days. This will be consistent with Rule 28 of the Court of Appeal Rules in the First Schedule to the *Ordinance*.

**Recommendation 16:** Commencement of appeals in civil and criminal jurisdictions should remain as they are.

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**Recommendation 20:** The basic salary of a Judge of the Supreme Court stated in the current Civil List and should be reflected in the *Ordinance* is \$125,000/\$120,000 per year exclusive of benefits under the terms of engagement.

**Recommendation 21:** Section 51 of the *Judicature Ordinance* must be amended if it has not been so to reflect the amount of \$10,000.

**Recommendation 22:** Section 54(3) of the *Judicature Ordinance* must be amended if it has not been so to reflect the amount of \$2,000.