



# **REVIEW OF THE JUDGEMENT SUMMONSES ACT 1965**

**Discussion Paper  
April 2019**

# SAMOA LAW REFORM COMMISSION

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

The Office of the Commission is at Level 1, FMFM II Building, Eleele-Fou, Apia.

Postal Address: PO Box 974, Apia, Samoa

Telephone: (+685) 28493/94

Email: [commission@samoalawreform.gov.ws](mailto:commission@samoalawreform.gov.ws)

Website: [www.samoalawreform.gov.ws](http://www.samoalawreform.gov.ws)

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This Issues Paper is also available on the Commission's website:  
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Submissions or comments (formal or informal) on this Issues Paper should be received by the Commission no later than close of business on 31 May 2019

Emailed submissions should be sent to:  
[commission@samoalawreform.gov.ws](mailto:commission@samoalawreform.gov.ws)

Written submissions should be addressed and sent to:  
**Executive Director**  
**Samoa Law Reform Commission**  
**Level 1, FMFM II Building**  
**Eleele-Fou, Apia, Samoa**

Oral Submissions should be voiced at our Public Consultations:  
**Dates, Time and Venues for public consultations will be announced on television, radio stations and newspapers for the public's information.**

The Commission seeks your views, comments and feedback on the questions set out in this Issues Paper.

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

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# PART 1: INTRODUCTION

## TERMS OF REFERENCE

- 1.1 On 20 November 2018, the Commission received a reference from the Office of the Attorney General (OAG) to review the Judgment Summonses Act 1965 (JSA 1965). The Terms of Reference require the Commission to:
- a) review the appropriateness of the current JSA 1965 in particular, the placement in custody of citizens for non-performance of a civil contract;
  - b) consult with stakeholders and the public on the current practice of the JSA 1965;
  - c) research relevant regional and international legislation that provide for alternative methods for debt repayments and consider adopting similar practices, only if applicable to the context of Samoa;
  - d) to make recommendations on an appropriate legal framework:
    - i. whether to reform the JSA 1965 (i.e. remove the terms of imprisonment as a punishment for non-payment of debts);
    - ii. introduce new alternative methods of debt repayments under the JSA; or
    - iii. remove government (by repeal of JSA) from any role in civil contracts for breach of debts.

## BACKGROUND

- 1.2 As stated in OAG's letter of 20 November 2018, the Ministry of Police (through the OAG) had taken the initiative to seek the assistance of the Commission to review the legislative framework against non-payment of debts and whether reform is necessary to remove the term of imprisonment as a punishment for the same.
- 1.3 The initiative stems from a growing number of failed business transactions, mostly petty amounts, between borrowers and lenders that result in arrests made by Police, mandated by court issued warrants of committal pursuant to section 15 of JSA 1965. This has created an unnecessary congestion in the judicial system and is exhausting limited Police and Correction resources in enforcing civil contracts

created in the private sector, at the expense of the public resourcing and the tax payer.

1.4 Moreover, the practice (in enforcing civil contracts under the JSA 1965), according to OAG's letter of 20 November, has been an effective method of extracting money from debtors through the assistance of the Courts and Police for many years now. The consideration to reform such laws (JSA 1965) followed an article published in the Samoa Observer in March 2017 that reported a mother and her 2 month old baby who were held in custody at the Tafaigata Prison for non-payment of a debt to a borrower. The fact that an infant was involved raised concerns by the public and also the (then) President of the Samoa Law Society who all shared the same view for legislative reform to remove the term of imprisonment as a means of punishment for non-payment of a debt.

1.5 Although the background of the TOR are concerns mainly on the administration and implementing of the JSA 1965, the focus of the Commission's review (as is the Commission's mandate) is on the Judgment Summons Act itself. In the respectful view of the Commission, these matters (administration etc) are not in the powers, mandate or expertise of the Commission to seek answers for. If a law is beneficial to the people it is to regulate, the Government will ensure such a beneficial law is allowed existence and with the provisions of the relevant infrastructure, budget and appropriate systems in place for implementation.

1.6 Thus, in light of the TOR provided by OAG to the Commission, two matters are to be considered and assessed in this review:

- a) the need for and the possible removal of the term of imprisonment as a punishment for non-payment of debts; and
- b) to introduce new alternative methods of debt repayments.

If alternatively after research and consultations with the main stakeholders and the public concerned, it is a finding and recommendation of the Commission's not to remove the Judgment Summons Act at all, there may be no need to consider (b) but perhaps a need only to update, and make this Act more user friendly to Samoa, and more particularly to those affected.

## PRELIMINARY RESEARCH

- 1.7 To generate effective and fruitful discussions on this review, the Commission’s preliminary research evolved around the following questions:
- a) how does the current legal framework (JSA 1965) work and what does it seek to achieve?
  - b) how have the courts of Samoa addressed matters brought under the JSA (case laws)?
  - c) are there similar laws such as the JSA 1965 in other countries in the region, if yes what do they do?; and
  - d) what proposed recommendations are there to respond to the TOR?
- 1.8 The aim of this Discussion Paper is to provide the public and stakeholders with research information to inform their submissions and input on this review. Accordingly, it is divided into the following parts:
- a. Part 1: The current law
  - b. Part 2: Case law analysis
  - c. Part 3: Analysis of laws (Acts) in other jurisdictions
  - d. Part 4: Summary of Issues
  - e. Part 5: Some Consultation Questions

## PART 2: THE CURRENT LAW

### JUDGEMENT SUMMONSES ACT 1965

- 2.1 The JSA 1965 was enacted by the Parliament of Samoa 3 years after Samoa gained independence in 1962. It is 54 years old and comprises of 21 sections. The Revision Notes of the OAG’s Consolidation of Laws to December 2018 shows that, since enactment in 1965, the JSA has only been amended once in 2017, by the Fees and Charges (Miscellaneous Amendments) Act 2017, No. 13. This sole amendment was to:
- a. omit the words “fees and” in section 20;
  - b. insert section 21 (Regulation making power).

The effect of the amendment to section 20 is that the Rule making powers under section 20 no longer sets fees under this Act. Rather the JS Act will only fix the scales of costs (not the fees) for judgment summonses. Section 21 was inserted to allow for regulation making powers under this Act.

2.2 The following table summarizes the JSA 1965:

<u>Sections</u>	<u>Summary of provisions</u>
Section 1	<b>Short title:</b> Judgment Summonses Act 1965
Section 2	<b>Interpretation:</b> defines important terms used throughout the Act
Section 3	<b>In general no imprisonment for non-payment of money:</b> provides for the general rule that no person shall be arrested or imprisoned for making default in payment of a sum of money.
Section 4	<b>Some exceptions to the general rule:</b> provides for the exceptions to the general rule. Some examples include 'default in payment of a penalty or sum in the nature of a penalty other than a penalty in respect of any contract' and 'default in payment of any sum recoverable otherwise than under the civil jurisdiction conferred by the Judicature Ordinance 1961'.
Section 5	<b>Discretion in some cases:</b> provides for the discretion of the court to grant or refuse any application made under either of the exceptions in section 4, for a writ of attachment from an arrest.
Section 6	<b>Court may imprison for non-payment of judgment debt:</b> it gives power to the court to imprison any person who makes any default in payments due against him or her pursuant to any judgment order.
Section 7	<b>When application for judgment summons may be made:</b> this provides at what occasion a Judgment Summons may be applied for by the Judgment Creditor i.e. when any sum of money due under any judgment or order of any Court remains unsatisfied.
Section 8	<b>Judgment creditor and witnesses may be examined on oath</b> – The judgment creditor, and all other witnesses whom the Court thinks requisite, may be examined on oath, on liability, on the disposal of property, on means of making payment etc.



Section 9	<p><b>When order may be made</b> – sets out 4 scenarios in which a Judgment Summons order may be made by the Court. These are where:</p> <ul style="list-style-type: none"> <li>a) the Judgment Debtor (JD) does not appear in court as required by the Judgment Summons (JS);</li> <li>b) if the JD does make appearance, refuses to be sworn or to disclose anything on his/her liability, disposal of property, means of payment etc;</li> <li>c) the JD does not respond to his/her liability, disposal of property, means of payment etc to the satisfaction of the Court</li> <li>d) the Court is satisfied, by oral testimony or affidavit or of both: <ul style="list-style-type: none"> <li>(i) that the JD contracted the liability which was the subject of the judgment or order by fraud; or</li> <li>(ii) that the JD has made or caused to be made any gift, delivery or transfer of any property... with intent to defraud the judgment creditor (JC); or</li> <li>(iii) that the JD has had since the judgment or order was obtained, sufficient means and ability to pay the sum so recovered against him/her; or</li> <li>(iv) that the JD is about to leave Samoa without paying so much of the money as is still unsatisfied, with intent to evade payment</li> </ul> </li> </ul> <p>The court is then empowered to order that unless the JD pays into the Court either forthwith or by instalments <b>the money so unsatisfied and the costs of any fruitless writs or warrants of execution and of levies thereunder, together with the costs of and occasioned by the summons and examination</b>, he or she shall be committed to prison for a period not more than 6 months.</p>
Section 10	<p><b>No order of committal where judgment debt assigned to debt collector</b> – this provides that no order can be made where a judgment creditor is a person or company whose business is that of collecting or recovering debts unless the Court is satisfied that the debt was</p>

	incurred to the judgment creditor directly, and was not acquired by assignment from the original creditor.
Section 11	<b>Original direction for payment by instalments</b> – this section provides that the court directs instalment payments and amount as it thinks fit.
Section 12	<b>Later direction for payment by instalments</b> – This provides that the Court may direct any debt due from any person pursuant to a judgment order to be paid in instalments, and may vary or rescind any such direction.
Section 13	<b>Committals to public prisons</b> - A person committed under this Act may be committed to such public prison within Samoa as the Court thinks fit.
Section 14	<b>Bankruptcy of judgment debtor</b> – this section provides that a judgment order shall not be made if the JD satisfies that he or she has been adjudicated as bankrupt.
Section 15	<b>Warrant of committal</b> – this provides that the Court shall issue a warrant of committal upon request of the judgment creditor if the payment of debt has not been made as per judgment order.
Section 16	<b>Execution of warrant</b> – this provides that all officers of the court, officers in charge of the prisons, and all constables are required to aid and assist in the execution of the warrant.
Section 17	<b>Imprisonment not to discharge debt</b> – provides that no term of imprisonment will discharge any debt owed.
Section 18	<b>Discharge from custody</b> –provides for situations where a person can be discharged from custody. For example, upon payment of the money for which the person was imprisoned.
Section 19	<b>Rehearing of summons</b> – provides that the Court can grant a rehearing of summons upon an application by a person against whom a judgment order has been made, at any time before or after the execution of a warrant issued under a judgment order
Section 20	<b>Rules of Court</b> –provides that the Head of State acting on the advice of the Prime Minister by Order make, alter or revoke such rules.

Section 21	<b>Regulations</b> – this section gives the Head of State, acting on the advice of Cabinet and with the concurrence of the Rules Committee, the power to make regulations to give effect to the provisions or the purpose of the Act.
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## JUDGEMENT SUMMONSES RULES 1965

2.3 The Judgment Summonses Rules 1965 (JS Rules 1965), made pursuant to section 20 of the JSA 1965, has 32 rules, 3 Schedules and 17 Forms. The Legislative Assembly’s Updated List of Acts and Ordinances and Statutory Regulations as at 31 December 2018 show that there have only been 2 amendments made to the JS Rules, in 1983 and 1988.<sup>1</sup> It is important to read the JS Rules together with the JS Act 1965 for an understanding of the full operation of the legal framework the JSA purports. The following table summarises the JS Rules 1965:

<b>Rule</b>	<b>Provisions</b>
Rule 1: Title	The Rules may be cited as the Judgment Summonses Rules 1965.
Rule 2: Interpretation	It provides for the interpretation of words used in the Rules
Rule 3: Forms	It provides for the different forms to be used for any application on judgment summonses in court.
Rule 4: Judgment Summonses Book	It provides that a Registrar of any court shall keep a judgment summonses book.
Rule 5: Application for judgment summonses	It provides that a judgment creditor is entitled to apply for the issuance of a judgment summons in the court which the judgment or order was made.
Rule 6: Where Judgment against a firm	It provides that if a person who is entitled to enforce a judgment or order against a firm, desires to issue a judgment summons against another person that alleges to be liable under the judgment or order, he or she shall

<sup>1</sup> Office of the Legislative Assembly’s List of Acts of Samoa and Samoa Regulations as at 31<sup>st</sup> December 2018 (Red Book 2018), page 48.

	file an application under Form 3 and a supplementary affidavit in form 4.
Rule 7: Application where order for payment by instalments	It allows the judgment creditor to apply in Form 3 for the issue of judgment summons in respect of any instalment so due.
Rule 8: Issue of judgment summons	It provides for the issuance of a judgment summons on receipt of an application under rules 5 – 7.
Rule 9: Service of judgment summons	It provides that either an officer of the Court or a police officer can serve a judgment summons.
Rule 10: Time for service and renewal	It provides for the timeframe for service and renewal of judgment summons, which is 1 year from the issuance of the original judgment summons.
Rule 11: Substitution of new judgment summons where judgment debtor moves	It provides that when a judgment debtor has moved to another location, the judgment creditor may apply to obtain a new judgment summons to be issued.
Rule 12: Witnesses	It provides that any witness can be summonsed to give evidence at the hearing of a judgment summons
Rule 13: Evidence by affidavit	It allows for the judgment creditor to give evidence by affidavit if he resides or is carrying out business more than 30 miles from the Court which the judgment summons is to be heard
Rule 14: Adjournment for attendance of judgment debtor, judgment creditor or witness	It provides that a hearing of a judgment summons can be adjourned if the judgment debtor, judgment creditor or witness cannot make it due to illness, accident or any other reasonable cause.
Rule 15: Order on judgment summons	This provides that Form 6 is to be used for a judgment summons.
Rule 16: Service of order	It provides that an order is to be served to the judgment debtor <u>upon request of the judgment creditor</u> and where the registrar knows that the judgment debtor does not

	understand the English language, the order must be served to him in the Samoan language.
Rule 17: Refusal of order or order for payment by instalments	When the Court refuses to make an order of committal but instead makes an order in form 7 - Order on a judgment summons for payment of debt by instalments.
Rule 18: Disposal of judgment summons referred to a foreign court	It provides for the disposal of any judgment summons if the amount due is paid.
Rule 19: Entry of particulars of decision in home Court	It provides that a judge or magistrate or faamasino fesoasoani shall note or create memorandum of his decision in the Court's civil record book.
Rule 20: Second or subsequent judgment summons after refusal to make an order	It allows the judgment creditor to apply for a second or subsequent judgment summons if the Court has refused to make an order in the first place.
Rule 21: Application for rehearing of judgment summons	This rule relates to section 19 of the principal Act that allows for applications for rehearing of a judgment summon.
Rule 22: Stay of proceedings on application for rehearing	It provides that a warrant of committal issued before an application of rehearing shall be suspended.
Rule 23: Rehearing	This is where the Court makes an order cancelling or varying the original order and such original order shall cease to have effect if there is a rehearing
Rule 24: Warrant of committal	It provides for the Form which will be used if the judgment creditor desires to issue a warrant of committal
Rule 25: Expiry of warrant	It provides for situations where a warrant of committal is expired with the order upon which it was founded

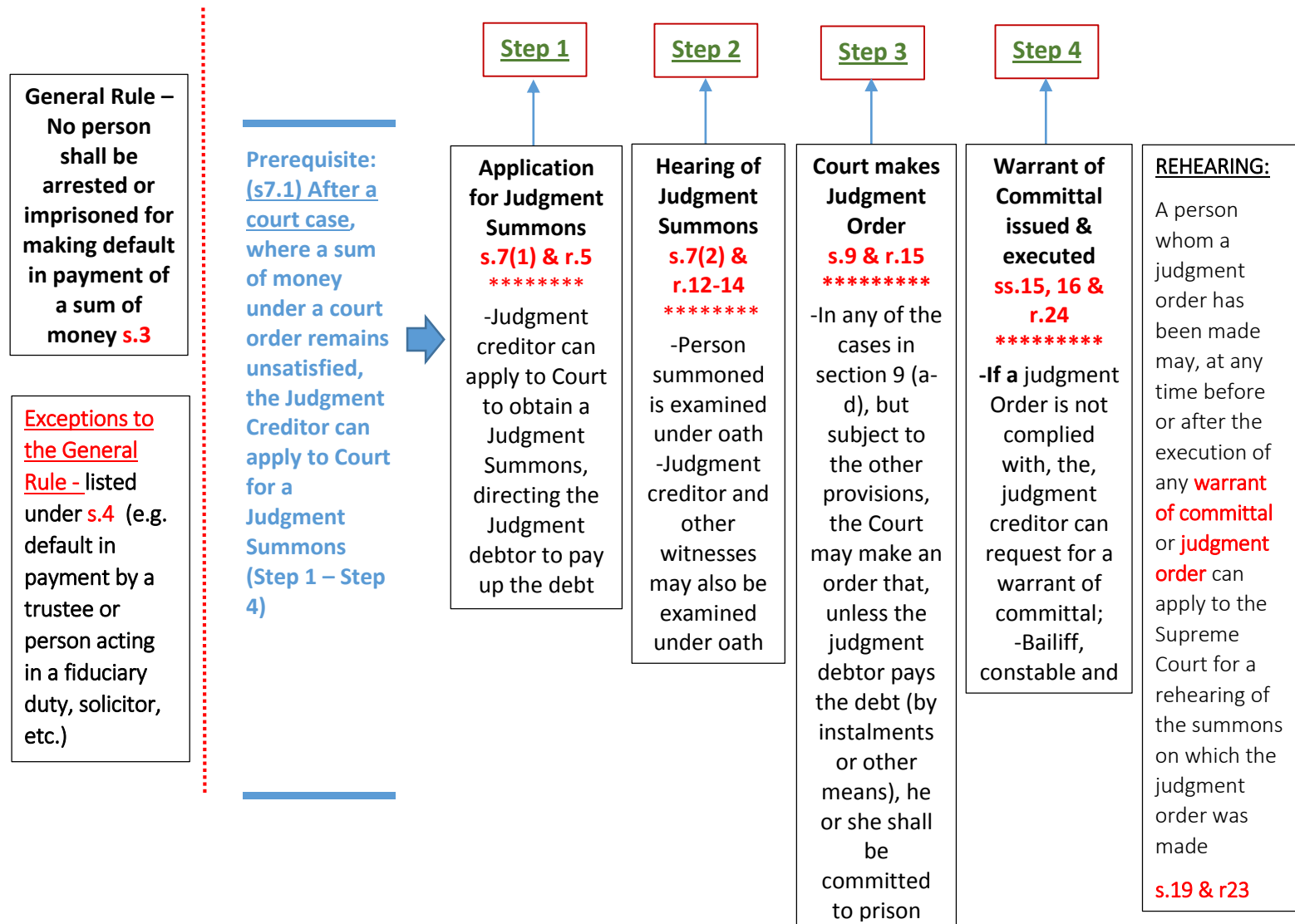
Rule 26: Payment before debtor lodged in prison	It provides for the provisions that shall apply once payment is made after an issuance of a warrant of committal and before the debtor is lodged in prison
Rule 27: Payment after debtor lodged in prison	It provides for the provisions that shall apply when payment is received after the debtor lodged in prison
Rule 28: Discharge of debtor on request of judgment creditor	It provides that the warden of prison shall send a certificate upon judgment creditor lodging with the registrar a written request for the discharge of judgment debtor from custody
Rule 29: Discharge on bankruptcy	The affidavit referred to in section 56 of the Bankruptcy Act 1908 (NZ) and may be in form No. 16
Rule 30: Court fees	It provides for Court fees as per second schedule of the rules
Rule 31: Costs	It provides for the costs applied
Rule 32: Costs of execution	This provides that all costs incurred by a judgment creditor to enforce a judgment or order shall be deemed to be due pursuant to such judgment or order under section 6 of the principal Act
Form 1	General form of title of proceedings
Form 2	Judgment summons book
Form 3	Application for a judgment summons and affidavit in support
Form 4	Supplementary affidavit for leave to issue judgment summons on judgment or order against a firm or person carrying on business in a name other than his own
Form 5	Judgment Summons
Form 6	Order on a judgment summons
Form 7	Order on a judgment summons for payment of debt by instalments
Form 8	Certificate of order on a judgment summons heard in a foreign court
Form 9	Application for rehearing, including affidavit in support

Form 10	Notice of rehearing and for release of judgment debtor
Form 11	Direction for re arrest of judgment debtor
Form 12	Application for warrant of committal
Form 13	Warrant of committal
Form 14	Certificate as to payment by a judgment debtor
Form 15	Certificate directing discharge of judgment debtor at the request of judgment creditor
Form 16	Affidavit as to bankruptcy
Form 17	Certificate for Discharge of Judgment Debtor
Second Schedule	Court fees
Third schedule	Scale of solicitors fees

## Flow Chart

2.4 The following attempts to explain the JSA 1965 in a form of a flow chart:

### JSA & JSR (Flow-Chart)



## ANALYSIS

2.5 It must be emphasized at the outset that the JSA is only invoked and applies where a Court Order made by a Court is not complied with by a Judgment Debtor. This means substantive proceedings or a court trial has completed resulting in such court order. For the JSA 1965, it opens with the general rule in section 3. This provides that 'no person shall be imprisoned for non-payment of money'. The exceptions to this general rule only apply when there is default in payment in



circumstances stipulated in section 4, upon which the provisions of the JSA 1965 will apply. In reading together with the scenarios in which a JS Order may be made (s9), 'imprisonment' for non-payment of a debt is a last resort for those problem debtors who avoid and evade the payment of debts owed under a court judgment order (s7).

2.6 The operation of the JSA 1965 is explained in the following manner.: (following the Flowchart above):

- Step 1 – Where a debt or payment of money is not satisfied (following such Court judgment or order), the judgment creditor can apply to the Registrar of the Courts in Samoa to obtain a summons in the prescribed form, directed to the judgment debtor (section 7).
- Step 2- If the summons is obtained, the judgment debtor is to appear in Court for the hearing of the said summons. This is for the judgment debtor to explain why he or she has not paid the debt. The judgment creditor and witnesses may be examined (sections 7 and 8).
- Step 3- Following the hearing of the summons, the Court may make orders for the payment of unsatisfied money or debt. The Court must be satisfied that the Order to be made has taken into account, for example, the means and the ability of the judgment debtor to support himself or herself or his or her family. Thus, an order to pay the debt by way of installments may be made if appropriate, upon the application of any of the parties. The Court may vary or rescind such order for installments as it deems fit (sections 9 and 11).
- Step 4- If the Court order made (in Step 3) is not complied with by the judgment debtor, the Registrar upon the request in writing of the judgment creditor, shall issue a warrant of committal in the prescribed form.

2.7 Other provisions in the JSA 1965 worthy of note are as follows:

- When a judgment debtor is committed to prison (Step 4 above), it does not mean that the debt or money owed is discharged or extinguished. Once his or her sentence has been served, the law envisages that he or she must continue to find means to satisfy the debt (section 17).

- A judgment debtor committed to prison can only be discharged upon satisfaction of several requirements. For example, payment of the money in which the person was imprisoned (section 18).
- The judgment debtor, at any time before or after the execution of any warrant issued, can apply for a re-hearing of the summons and the Court, if it thinks fit, may grant a rehearing. This is another avenue for the relevant parties to decide on the options for the repayment of debt before a warrant of committal is issued.
- Court officers, prison officers and all constables are required to aid and assist in the execution of a warrant (section 16).

## Preliminary consultations with MJCA

2.8 In a meeting on 2 April 2019, the Commission consulted with the administrative Ministry of this Act, the relevant Divisions of the Ministry of Justice and Courts Administration (MJCA) on the ‘realities’ and ‘practices’ of the JSA 1965. Currently, the Courts Division of MJCA (Warrant, Bailiff and Recovery Section) is the responsible division for enforcing a court order (for the payment of debts) through a judgment summons.

2.9 This excerpt is taken from consultations with the Ministry of Justice:

“On the issue with regards to the review of the JS Act 1965, we confirm that it is a very lengthy process where many chances are given to the Judgement Debtor (JD) before the issuance of a warrant of committal.

A demand letter is given to the JD for payment of the debt within 14 days. Filing of a Statement of claim and ordinary summons will take at least two months for the matter to be first mentioned in Court. If the JD still does not pay, then the Judgement Creditor (JC) is entitled to file a Judgment Summons application for Court Order which will take at least 2 months before first mention in Court. The Court usually orders the debt to be paid in installments. The order is then served on the JD with first payment to be made seven days after service of the order or a first payment on a date given by the Court. If the JD does not comply with the

Court Order, the JC will file an application for warrant of execution for enforcement of court order through issuing a warrant of committal.

The JCs usually make a lot of continuous follow ups before filing of an application for warrant of execution for payment of debt. It is a very lengthy process given also that judgements/decisions by the Court are usually not awarded on the first mentioned of matters, they can be adjourned or even enlarged if the Judgement Creditors fails to serve the judgement debtors. A lot of civil matters have also been referred to the Court Annexed unit for mediation and most JDs do not comply with agreements made through mediation.

Many chances are given to the JDs to pay before they are actually committed to prison. Also in many cases, the families of the Judgement Debtors plead to the Judgement Creditors to discharge the JD even if the debt has not been paid in full and they are usually discharged upon new arrangements made with the JC. Because of the many chances given to the JD, some cases may take more than two to three years before the JDs pay their debt in full.

Some JCs have actually given up after the JD is committed to prison more than 2 times and still does not pay. Filing a civil matter to court is very costly for the Judgement Creditors given that they have to pay court filing fees, subsequent costs and etc.”

In addition,

“When a claim is referred to Court Annexed Mediation Unit to schedule mediation and arrange for a mediator – there are cases whereby the agreement reached decreases the amount to be paid by the debtor instead of the actual amount in the ordinary summons (another chance given by the JC). Some of these mediated agreements is where the creditors agree to reduce his/her claim after mediating and still some JDs still fail to comply with the payments.”

## RELATIONSHIP BETWEEN JSA AND THE MAGISTRATE COURT RULES 1971 AND THE SUPREME COURT RULES 1980 (COURT RULES)

- 2.10 The Commission carried out research on the relationship between the JSA 1965 and the relevant Court Rules in Samoa, to consider any linkages amongst them and a possible consolidation of JSA procedures under these Court Rules, for consistency and uniformity. Both Court Rules regulate the civil procedures in the District Court and the Supreme Court in Samoa.
- 2.11 Following the Commission's preliminary research, it revealed that the JSA operates independently of the Court Rules. This is despite some case laws showing that the Courts rely interchangeably on some provisions of the JSA and the Court Rules e.g. Rule 140 of the SCR and section 19 of the JS Act and Rule 23 of the JS Rules (on rehearing). However, a reading of the JSA on its own shows that the JSA 1965 has its own unique features which seek to enforce a judgment or Order of the Court already made (for payment of a sum of money or debt) through a warrant of committal. Although there are rules under both the Magistrate and the Supreme Court Rules that are generally available to enforce a court order or judgment for the payment of a sum of money (eg writ of sale, charging order, garnishee proceedings), the JSA 1965 has its own set of procedures and it is one avenue that the judgment creditor **is entitled** to use, to enforce the payment of a sum of money or a judgment debt, following non-compliance of a decision of the Court by a Judgment Debtor.

## PART 3: RESEARCH AND ANALYSIS

### CASE LAW – THE COURTS OF SAMOA

- 3.1 To understand how the Courts of Samoa have applied the JSA and the extent in which it is used in Court, the Commission carried out research on the available legal database 'Pacific Island Legal Information Institute (Paclii)', searching key words such as 'judgment', 'summons or summonses' or 'Judgment Summonses Act 1964'.

3.2 Preliminary research on Paclii revealed 19 cases in Samoa that have applied the JSA 1965, from the years 1929 to 2018. This number is of course inconclusive given that Paclii does not have all the cases including the unreported case law. Nonetheless, this cannot be the basis to restrict analysis from what is available to the Commission for this or any review.

3.3 The following Table highlights these 19 cases and their summaries:

<b>TABLE OF CASE LAW – JUDGMENTS BY THE COURTS OF SAMOA</b>	
<b>Case law</b>	<b>Summaries</b>
<p><b>1. <i>Meredith v Stewart</i></b>            [1929] WSLawRp 3;            [1921-1929] WSLR            57 (27 September            1929)</p>	<ul style="list-style-type: none"> <li>- The defendant was charged with contempt of court for failing to comply with a judgment of the (then) High Court</li> <li>- The defendant challenged the validity of the Rule, inter alia, on the ground that failure only to pay a sum of money due under judgment cannot amount to contempt of Court</li> <li>- the Court held that while as a matter of construction there is some doubt as to validity, Rule 83(5) has previously been considered and held by the High Court to be valid</li> </ul>
<p><b>2. <i>Pacific Commercial Bank Ltd Uria</i></b> [1990]            SamoaLawRp3;            [1980-1993] WSLR            331 (2 May 1990)</p>	<ul style="list-style-type: none"> <li>- An application for rehearing of a civil claim</li> <li>- The court ordered that the defendants pay costs of \$300 within 10 days and failure to do so, the defendant will not be allowed to defend the action, and a judgment summons already ordered will be restored.</li> </ul>
<p><b>3. <i>Eteuati v The Pacific Forum Line</i></b> [1998]            WSSC 29; CP 153-92            (31 July 1998)</p>	<ul style="list-style-type: none"> <li>- The applicants appealed to set aside the judgment and for the matter to be reheard</li> <li>- The applicants opposed the 8% interest accrued in the debt owing by them to the plaintiff.</li> </ul>

	<ul style="list-style-type: none"> <li>- Court held that the interest is authorised and provided by law under the Supreme Court (Civil Procedure) Rules 1980. Application to set aside the judgment summons orders denied.</li> </ul>
<p><b>4. <i>Telecom Samoa Cellular Ltd v Sauaga</i></b> [2003] WSDC 4 (15 April 2003)</p>	<ul style="list-style-type: none"> <li>- The judgment debtor filed an application to stay the issuing of a warrant of committal for non-payment of the sum owed and to review the judgment summons order that had been made</li> <li>- The court dismissed the application.</li> </ul>
<p><b>5. <i>Blue Pacific v Banse</i></b> [2003] WSSC 25 (2 December 2003)</p>	<ul style="list-style-type: none"> <li>- Vehicle accident (Car Hire Agreement)</li> <li>- Defendant sought to stay the execution of the warrant of committal and to set aside a judgment entered against her</li> <li>- A Judgment summons application and a Judgment Summons order was made against the defendant</li> <li>- It was only after the warrant of committal was issued (and the possibility of going to prison) that the defendant decided to go to Court and apply for various orders</li> </ul>
<p><b>6. <i>Samoa National Provident Fund Board v Lauano</i></b> [2008] WSSC 70 (28 August 2008)</p>	<ul style="list-style-type: none"> <li>- Defendant filed an application to set aside a judgment by default</li> <li>- Defendant raised grounds of defence which the Court considered be of no merit (in applying rules 140 &amp; 141 of the Supreme Court (Civil Procedure) Rules 1980)</li> <li>- Therefore the application was declined</li> </ul>
<p><b>7. <i>Congregational Christian Church of Samoa v Lamositele</i></b> [2009] WSSC 108 (28 September 2009)</p>	<ul style="list-style-type: none"> <li>- Plaintiff filed a claim against the defendant demanding a refund of costs of order (works delayed)</li> <li>- Judgment summons was served to the defendant and a judgment by default was made</li> </ul>

	<ul style="list-style-type: none"> <li>- Application by the defendant to set aside judgment by default and to grant a re-hearing, dismissed</li> </ul>
<p><b>8. <i>Lauano v Samoa National Provident Fund Board</i></b> [2009] WSCA 3; CA 11 of 2008 (1 May 2009)</p>	<ul style="list-style-type: none"> <li>- NPF sought proceedings to claim shortfall/balance of loan owing by the appellant after loan default</li> <li>- Judgment summons application was made to enforce judgment against the appellant (no hearing or order made)</li> </ul>
<p><b>9. <i>Samoa National Provident Fund Board v Ridling</i></b> [2009] WSSC 91 (21 September 2009)</p>	<ul style="list-style-type: none"> <li>- Rent agreement between the Plaintiff and defendant</li> <li>- Defendant fell into arrears in rent and a judgment summons was moved to enforce judgment against the defendant</li> <li>- An application by the defendant to set aside and re-hear was granted, on certain conditions imposed by the Court</li> </ul>
<p><b>10. <i>Samoa Commercial Bank Ltd v Palm Island Traders</i></b> [2010] WSSC 56 (11 June 2010)</p>	<ul style="list-style-type: none"> <li>- SCB Bank sought the leave of the Court to recover loan money in default despite an order of bankruptcy by the Respondent</li> <li>- Court held that the law precludes enforcement by means of a judgment summons</li> <li>- Ordered SCB to proceed with recovery action against judgment debtor other than by means of a judgment summons.</li> </ul>
<p><b>11. <i>Tuitama v Westpac Bank Samoa</i></b> [2010] WSSC 154 (24 September 2010)</p>	<ul style="list-style-type: none"> <li>- Westpac Bank issued proceedings against the applicant in relation to a default loan</li> <li>- Judgment summons was issued to enforce judgment.</li> <li>- Application by the applicant to re-hear the judgment was dismissed</li> <li>- Fresh judgment summons application to be made</li> </ul>
<p><b>12. <i>Ulugia v Curry</i></b> [2010] WSSC 59 (30 June 2010)</p>	<ul style="list-style-type: none"> <li>- Vehicle accident and the insurer exercising its power of subrogation</li> </ul>

	<ul style="list-style-type: none"> <li>- Judgment summon issued by the insurer to recover the amount claimed. Instalment payments made but irregular</li> <li>- Applicant sought to set aside judgment</li> <li>- Application was dismissed by the Court (Court ruled that application had no merit)</li> </ul>
<p><b>13. <i>National Bank of Samoa Ltd v Thompsen</i></b> [2011] WSSC 21 (18 February 2011)</p>	<ul style="list-style-type: none"> <li>- Repossession of chattel mortgages due to a loan default</li> <li>- Judgment summons was served on the defendants seeking to enforce judgment</li> <li>- Application to set aside judgment and to rehear dismissed.</li> </ul>
<p><b>14. <i>Afoa v Parker</i></b> [2015] WSSC 163 (9 September 2015)</p>	<ul style="list-style-type: none"> <li>- Plaintiff filed a claim against the defendants for unpaid services rendered</li> <li>- Claim against the second defendant was struck out and application for costs was ordered to be made</li> <li>- Judgment summons application made to recover the unpaid costs</li> </ul>
<p><b>15. <i>Faumuina v Atoa</i></b> [2016] WSSC 133 (22 July 2016)</p>	<ul style="list-style-type: none"> <li>- Application to set aside judgment pursuant to rules 140 and 141 of the SC (Civil) Procedure Rules 1980</li> <li>- Damages were awarded against the defendants (Tanugamanono Village Fono)</li> <li>- Judgment summons were obtained and heard in Court</li> <li>- The Court made an order for the defendant to make monthly payments</li> <li>- However, the defendant then sought orders to set aside the Court's judgment and to grant a rehearing (140 and 141 of the SC (Civil) Procedure Rules 1980)</li> </ul>



	<ul style="list-style-type: none"> <li>- Application by the defendant to set aside judgment and grant a rehearing was refused</li> </ul>
<p><b>16. <i>Police v Bourne</i></b> [2016] WSDC 39 (27 September 2016)</p>	<ul style="list-style-type: none"> <li>- Theft (Obtaining by deception)</li> <li>- Defendant has made monthly payments to the victim pursuant to a Court Order on judgment summons</li> </ul>
<p><b>17. <i>Asian Taste Company Ltd v Ah Sam</i></b> [2017] WSDC 8 (14 June 2017)</p>	<ul style="list-style-type: none"> <li>- Application to set aside judgment (vehicle repairs and refusal to pay by debtor)</li> <li>- The matter was called for first mention before Judge Roma where the judgment debtor did not appear and judgment by default was granted in favour of the Plaintiff</li> <li>- However, Judge Papali'i ruled that it was in the overall justice of the matter that the judgment by default granted by Judge Roma be set aside (judgment debtor met the three limb test in the case of <i>Lauano v Samoa National Provident Fund</i>)</li> </ul>
<p><b>18. <i>Taioalo v Chadwick</i></b> [2017] WSDC 17 (15 August 2017)</p>	<ul style="list-style-type: none"> <li>- Claim in negligence (vehicle accident) for damages</li> <li>- Judgment summons order granted when the judgment debtor failed to appear</li> <li>- Plaintiff's claim successful</li> </ul>
<p><b>19. <i>CCK Trading Ltd v Salu</i></b> [2018] WSSC 96 (14 September 2018)</p>	<ul style="list-style-type: none"> <li>- Vehicle accident and claim for insurance</li> <li>- Application for hearing pursuant to rule 141 of SC (Civil) Procedure Rules 1980</li> <li>- Judgment summon was issued against the defendant to recover cost of vehicle paid by the insurance company to the Plaintiff</li> <li>- Application for re-hearing dismissed</li> </ul>

## ANALYSIS

### 3.4 The above 19 cases allow some findings:

- a) The JSA 1965 was widely used by the Plaintiffs (judgment creditors) to enforce a judgment on the payment of a sum of money or debt.
- b) It confirms that the procedures under the JSA 1965 has its own set of procedures and unique features, independent of the Court Rules, by the way they are treated in the course of proceedings (post judgment or order). Up to 2018 (last year), the JSA was still an active law relied upon by Judgment Creditors, and the courts of Samoa.
- c) Of the 19 cases, 3 specifically cite the JSA 1965 (together with other relevant laws), as the laws relied upon, evident in the judgments. The other 16 cases cite and discuss the JSA 1965 in the content of their decisions. This analysis suggests that the courts perhaps have conveniently applied both the JSA 1965 and the Court Rules (Supreme Court Rules and the Magistrate Court Rules) where it serves their (court proceedings) purposes in particular cases.
- d) The nature of the proceedings where the JSA 1965 has been applied arise from different scenarios. For example, vehicle accidents and claim for damages, criminal offences (e.g theft) and claim for compensation, insurance subrogation claim and default loan repayment. In these claims, as in the nature of the application of the JSA, the Court has already made a judgment or order but the defendant has not complied with it.
- e) There is an understanding amongst the legal profession (and the judges) that a judgment creditor is entitled to apply for a judgment summons under the JSA 1965 to enforce a judgment or order on the payment of a sum of money or debt. This is a fast and effective avenue to enforce a judgment, forcing the judgment debtor to cooperate and comply with a court judgment or order.
- f) The effectiveness or the relevance of the procedures under the JSA 1965 has never been questioned in these 19 cases. In one of the cases (Blue Pacific v Banse [2003], the Court held that a warrant of committal (section 15 JSA 1965) issued against the defendant prompted her to cooperate with the summons order and go to Court. Thus, the usefulness of the JSA 1965 is still

acknowledged and applied and available to be taken advantage of. If debtors do not pay their debts, business are sure to fall aground.

- 3.5 All in all, the above case law analysis show that the JSA 1965 is still applied and heavily relied upon by judgment creditors, lawyers and the judiciary in the pursuance of debts owed.

## PART 4: OTHER JURISDICTIONS

Other jurisdictions have similar laws to the JSA 1965. This is discussed below.

### Fiji

- 4.1 The *Debtors Act [Cap 32]* has 9 sections, 1 Schedule (Rules) and a Form. Its long title provides that it is 'An Act relating to imprisonment for debt'. Section 3 (Imprisonment for debt restricted) is similar to the general rule and exceptions in the Samoa JSA (sections 3 and 4). Section 4 (Court may commit to prison defaulting judgment debtor) is similar to section 6 of Samoa's JSA. Section 5 (Imprisonment not to operate as extinguishment of debt) is similar to section 17 of Samoa's JSA. Although Fiji's Debtors Act is significantly fewer in provisions than Samoa's JSA, the key features such as the general rule and exceptions, warrant of committal for defaulting judgment debtor and imprisonment not to extinguish a debt, are substantially the same.

### New Zealand

- 4.2 The *Imprisonment for Debt Limitation Act 1908* is an Act to consolidate certain enactments of the Parliament of New Zealand (NZ) relating to the limitation of imprisonment for debt. This Act repealed all sections of the old Imprisonment for Debt Limitation Act 1874 of NZ except for section 1 (Short Title) and section 3 (Limitation of imprisonment for non-payment of money). Section 3 of the NZ Act is similar to sections 3 and 4 of Samoa's JSA. It is important to note that the arrangement in the provisions of Samoa's JSA is substantially similar to the arrangement in the repealed Imprisonment for Debt Limitation Act 1874 of NZ.

## South Australia

- 4.3 The *Debtors Act 1936* has 3 provisions (sections 1, 3 and 4) and it is an Act relating to debtors. Section 3 provides that no person shall be arrested or imprisoned for making default in payment of a sum of money, except in the cases provided in subsection (a) and (b). These provisions are similar to sections 3 and 4 of Samoa's JSA (general rule and exceptions). The remaining section 4 provides for the penalty for debtor absconding or attempting to abscond.

## Tasmania

- 4.4 The *Debtors Act 1870* is an Act to make better provision for the abolition of imprisonment for debt. It has 4 Parts, 27 sections and a Schedule. Similar to sections 3 and 4 of the Samoa JSA, the Act provides for the general rule that a person shall not be arrested or imprisoned for making default in payment, with exceptions provided in section 3(a) to (g). Other similar provisions found in Samoa's JSA include section 7 (no imprisonment shall satisfy or extinguish a debt) and section 8 (discharge of person upon satisfaction of a debt).

## Victoria

- 4.5 Victoria has taken a slightly different approach with the enactment of the *Judgment Debt Recovery Act 1984*. It is an Act to provide for the recovery of judgment debts by instalments and to amend other legislation provided in its long title. It contains 6 Parts and 26 sections. The Act places much emphasis on payment by instalment arrangements, between the judgment creditor and the judgment debtor. There are also examination provisions which allow for the assessment of the judgment debtor as to his or her financial status. The procedures of instalments order appear quite flexible in the sense that it can be varied to suit the financial status of the judgment debtor from time to time.
- 4.6 However, if a judgment debtor who has the means to pay the instalments under an instalment order, persistently and willfully and without an honest and reasonable excuse, defaults in the payment of the instalments, he or she shall be liable to be imprisoned by order of the Court for not more than 40 days (section 19). Although imprisonment is still available under the Victorian legislation, it only applies when there is a 'persistent willful default' on the judgment debtor's part. This is slightly

the opposite in other legislation where there are no substantive provisions on payment by installments, and ‘imprisonment’ appears to be the ultimate goal for non-payment of debt.

## Analysis

- 4.7 The above discussions on the laws enacted by countries in the region show that judgment summons provisions under JSA 1965 are not unique to Samoa. Fiji has similar provisions to Samoa’s JSA as discussed, as well as South Australia and Tasmania. Common in all jurisdictions discussed (except for Victoria) are the provisions on the general rule and exceptions, also found in sections 3 and 4 of Samoa’s JSA. This general rule provides that no person shall be imprisoned for a non-payment of debt except in certain circumstances prescribed in the laws discussed. NZ has repealed all other provisions in its Act except for section 1 and section 3 (Limitation of imprisonment for non-payment of money).
- 4.8 As briefly stated, Victoria has taken a different approach, placing much emphasis on installment payments arrangements between the judgment creditor and the judgment debtor, for the payment of debt. The procedures seem to allow flexibility on the judgment debtor to be assessed on his or her financial status to ensure he or she can afford to pay instalments the money owed or debt. The exception is where there is a persistent willful default by the judgment debtor following which he or she will be committed to prison for not more than 40 days. Although the imprisonment is still available in the Victorian law, it only applies where there is a persistent failure on the judgment debtor to pay the debt and upon exhaustion of all payment installment options.

## PART 5: SUMMARY

- 5.1 The JSA 1965 was enacted to provide for limitation of imprisonment for debt. Its general rule states that no person shall be imprisoned for non-payment of money. It is not the intention of the Act to outright imprison any person for non-payment of money; rather, the provisions on imprisonment are only invoked where there is, like Victoria, a persistent willful default to comply with a Court order, and pay up a

debt as ordered. Preliminary discussions with MJCA revealed a lengthy process involved in following up the judgment debtor to comply with the court order, before a warrant of committal issued. This lengthy process involves a letter of demand in the first instance to be followed by Statement of Claim and Ordinary Summons. If the judgment debtor still does not comply, then the provisions of the JSA 1965 is invoked. The Commission also notes the various opportunities given to the judgment debtor, for example mediation, to cooperate and comply with the court order.

- 5.2 Its procedures operate independent of the Court Rules and it mainly seeks to enforce a judgement or order of the Court already made, through a warrant of committal. It is one (effective) avenue available to any person (judgment creditor) who seeks to enforce a debt or the payment of a sum of money.
- 5.3 The 19 cases that have used and applied the JSA confirms the view earlier stated. The Court emphasised in one of the cases that a judgment creditor is entitled to apply for a judgment summons to enforce a judgment to pay a sum of money. It is deemed an effective avenue to push the judgment debtor to comply with a Court Order previously made, by the issuance of a Judgment Summons and a Warrant of Committal to follow where there is still non-compliance. This depicts the many opportunities offered to a debtor, and compliance with the general rule of non-imprisonment for non-payment of a debt. Unfortunately there will be many debtors (as can be seen in case law) who will choose not to honour their responsibilities the reason of the Court Judgment against them in the first place, even before the JSA is invoked.
- 5.4 Similar judgment summons laws are found in other countries such as Fiji, New Zealand and some states of Australia. Common in all of these countries (except Victoria) are the provisions on the general rule and exceptions, also found in sections 3 and 4 of JSA 1965. This shows that the laws on judgment summons are still active and useful today. The Victorian legislation places much emphasis on continuing arrangements between the judgment creditor and the judgment debtor, to pay the debt by instalments. Imprisonment is only applied when the judgment

debtor persistently and wilfully defaults in payment of his or her debt. This makes an imprisonment order a very last resort, the same spirit as that in the Samoa's JSA.

## **PART 6: DISCUSSION QUESTIONS**

The following questions are to stimulate discussions and invite submissions on the Discussion paper. The Commission looks forward to your submissions to inform any proposed legislative changes to respond to this review:

1. The Judgment Summons Act 1965 applies to those who persistently are unwilling to pay their debts. What is the appropriate penalty in Samoa for persistent unwillingness towards payment of a debt? Please explain your answer
2. Should the 'warrant of committal' to commit someone in prison for non-payment of a debt, after numerous efforts to have a court order enforced, be retained in the JSA 1965? Please explain your answer.
3. The JS Act requires 'the bailiff of the Court, the constable and the officer-in-charge of the prison to whom the warrant is directed shall respectively execute and obey the warrant, and all constables shall aid and assist in the execution of the warrant.' Should this requirement stay?
4. The JS Act provides that 'no imprisonment under this Act operates as a satisfaction or cancellation of any debt, or deprives any person of any right to issue execution against the lands, goods, or chattels of the Judgment Debtor.' What are your views on this?
5. Please comment on any issues you would like to raise on this review.