

## PRELIMINARY

### Title and commencement

#### 1.1 (1) These Rules are the Constitutional Procedures Rules.

- [1.1.1] **History** The *Rules* (No 26 of 2003) were made under s.66(3), *Judicial Services and Courts* [Cap 270]. As to the rule-making power see CPR [1.1.3] *et seq* and r.1.2.
- [1.1.2] **Correct name of Rules** This is the only correct name of the *Rules*, a simple fact which is complicated by the inexplicable use of several other names. For example, the index to the official version refers to the "Constitutional Petitions Rules" and the PaCLII version refers first to the "Constitutional Applications Rules" and then to the "Constitutional Procedural Rules".
- [1.2.3] **Former rules** Rules governing various forms of constitutional litigation were formerly to be found in Ch.13 of the *Criminal Procedure Code* [Cap 136], a location described as "odd" by the Court of Appeal in *The Application by Ganke and Brinds Ltd* [1983] VUSC 1; [1980-1988] 1 Van LR 53 and echoed by Muria J in *In re the Constitution; Malifa v Attorney-General* [1999] VUSC 43; CC 66 of 1999. These were repealed on 4 August 2003 by the *Criminal Procedure Code (Amendment) Act* 2003.

#### (2) These Rules come into operation on 1 August 2003.

### Purpose

#### 1.2 The purpose of these Rules is to set out the procedures to be used in Constitutional proceedings brought in the Supreme Court under the Constitution of the Republic of Vanuatu.

- [1.2.1] **Purposive Interpretation** The *Rules* should, in addition to the interpretive requirements of r.1.4(1)(b), be interpreted consistently with their purpose. See further CPR [1.1.3] and s.8, *Interpretation* [Cap. 132]. As to the meaning of "Constitutional proceedings" see r.1.5(1).

EPR r1.3

### Application of the Civil Procedure Rules

#### 1.3 If these rules do not make provision for a matter relating to a constitutional proceeding, the Civil Procedure Rules apply to that matter.

EPR r1.4  
PaAR r1.4

### Overriding objective and case management

CPR r1.3

#### 1.4 (1) The Supreme Court must give effect to the overriding objective, as set out in the Civil Procedure Rules, when it:

- [1.4.1] See CPR r.1.2 as to the overriding objective

- (a) does any act under these Rules; or
- (b) interprets these Rules.

CPR r1.4(1)

#### (2) In particular, the Court must actively manage cases brought under these Rules, as set out in the Civil Procedure Rules.

- [1.4.2] See CPR r.1.4(2) as to active case management

## Interpretation

### 1.5 (1) Some words used in these Rules have a particular meaning. These are defined as follows:

CPR r20.1

**"applicant" means the person who makes an application.**

- [1.5.1] **Meaning of "applicant"** There is no definition of "applicant" or "application". The various uses of these words throughout the *Rules* suggest that an application may be an application within Constitutional proceedings *and* a Constitutional Application itself. The position does not seem very clear but little appears to turn on it.

**"Conference" means a conference held under Rule 2.8, 3.7, 4.8 or 5.4.**

**"Constitutional Application" means an Application under Article 6 or 53(1) of the Constitution.**

- [1.5.2] See Part 2.

**"Constitutional proceedings" means proceedings under Article 6, 16(4), 39(3), 53(1), 53(3) or 72 of the Constitution.**

- [1.5.3] **Meaning of "Constitutional proceedings"** Only proceedings brought under these articles are "Constitutional proceedings" within the meaning of the *Rules* with the result that other proceedings which may happen to touch on the Constitution do not. See further r.1.2.

EPR r1.5(1)

**"Court" means the Supreme Court.**

- [1.5.4] **Establishment of Supreme Court** The Supreme Court is established by art.49 of the *Constitution*. See further Part 4, *Judicial Services and Courts* [Cap 270].

**"Emergency Regulation Complaint" or "Complaint" means a complaint made under Article 72 of the Constitution.**

- [1.5.5] See Part 4.

**"Emergency Regulation" means a regulation made under Article 69 of the Constitution.**

- [1.5.6] See Part 4.

**"President's Referral" or "Referral" means the referral of a matter to the Court by the President under Article 16(4) or 39(3) of the Constitution.**

- [1.5.7] See Part 3.

**"Submission" means a submission of a question by a subordinate court under Article 53(3) of the Constitution (this is a case stated as mentioned in Rule 16.22(1)(a) of the Civil Procedure Rules).**

- [1.5.8] See Part 5.

**(2) The Notes in these Rules do not form part of the Rules and are for information only.**

[1.5.9] The notes are not reproduced in this publication.

EPR r1.6  
PaAR r1.6  
CPR r1.9

**Forms**

**1.6 A reference to a Form by number is a reference to the form identified by that number in the Schedule at the end of these Rules.**

[1.6.1] In this publication forms appear in the Chapter “Forms”. See further rr.2.6(3), 18.9, CPR and s.37, *Interpretation* [Cap 132] as to formal defects.

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## PROCEEDINGS UNDER ARTICLES 6 AND 53(1) INFRINGEMENT OF RIGHTS AND REDRESS

### Application of Part 2

#### 2.1 This Part deals with Constitutional Applications, under Articles 6 and 53(1) of the Constitution, about the infringement of individuals' rights and the redress of infringements of provisions of the Constitution.

##### [2.1.1] **Constitutional framework** Article 6 (Enforcement of Fundamental Rights) provides:

(1) *Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.*

(2) *The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right.*

Article 53 (Application to Supreme Court Regarding Infringements of Constitution) provides:

(1) *Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.*

(2) *The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.*

(3) *When a question concerning the interpretation of the Constitution arises before a subordinate court, and the court considers that the question concerns a fundamental point of law, the court shall submit the question to the Supreme Court for its determination.*

The brief statement of what arts.6 and 53(1) are "about" is surplusage and implies a slightly narrower view of the provisions than they may in fact bear: See for example *Vanuatu Copra and Cocoa Exporters Ltd v Republic of Vanuatu* [2006] VUSC 74; Const Cas 2 of 2006 (as to Constitutional rights of corporations under art.6). Of course, the rule is not an interpretive aid to the *Constitution*.

##### [2.1.2] **Duplication of proceedings permitted** The provision in art.6(1) that the remedy is "independent" of other remedies and in art.53(1) that the remedy is "without prejudice" to other remedies have been interpreted to permit multiple, even overlapping proceedings: *Naling v Public Prosecutor* [1983] VUCA 1; [1980-1994] Van LR 61; *In re the Constitution; Timakata v Attorney General* [1992] VUSC 9; [1980-1994] Van LR 691 ("co-existent, parallel and independent, of any other legal remedy."); *Tatwin v Attorney General* [1995] VUSC 5; CAC 25 of 1995; *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [8]. Where the general law offers adequate relief there is some conflict in the authorities which is difficult to reconcile. On the one hand, judges have refused to strike out applications which are effectively duplications of civil proceedings: *Willie v Public Service Commission* [1993] VUSC 4; [1980-1994] Van LR 634; *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [8]. On the other hand, the Court of Appeal has cautioned that a constitutional application should not become simply an alternative means of obtaining justice where under the general law good and sufficient processes are available: *Attorney-General v Timakata* [1993] VUCA 2; [1980-1994] Van LR 679; *Dinh van Than v. The Minister of Finance* [1997] VUCA 6; CAC 2 of 1997; *Vanuatu v Bohn* [2008] VUCA 6; CAC 3 of 2008. See also [2.3.1].

##### [2.1.3] **Available remedies** Article 6 speaks of "enforcement" of rights and permits "such orders, issue such writs and give such directions, including the payment of compensation" as the courts thinks appropriate to "enforce" the right. Art. 53(1) refers to applying to the court for "redress" and art.53(2) expressly grants jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution. The range of available remedies is potentially very wide and efforts to circumscribe it, such as by reference to traditional forms of remedy, have been resisted: *Attorney General v Jimmy* [1996] VUCA 1; CAC 7 of 1996. On the other hand, regard may be had to common law rules: *Willie v Public Service Commission* [1993] VUSC 4; [1980-1994] Van LR 634 (availability of damages for acts *ultra vires* denied by analogy with general law). Once there is a determination of breach then the court will determine the most appropriate way, whether financial or otherwise, for the breach to be remedied: *Vanuatu v Picchi* [2001] VUCA 6; CAC 4 of 2000; *Vanuatu v Carcasses* [2009] VUCA 34; CAC 9 of 2009.

- [2.1.4] **Relationship between arts.6 and 53(1)** Articles 6 and 53(1) may overlap but are otherwise independent of each other in that art.53(1) provides a remedy for any kind of infringement, not just those relating to art.6: *In re the Constitution; Korman v Natapei* [1997] VUSC 46; CC 168 of 1997. Accordingly, the procedure provided by this Part ought to be adopted in all allegations of infringement not otherwise provided for in the *Rules*.
- [2.1.5] **Relationship to parliamentary proceedings** There is said to be a “sensitive” interface between the courts and parliament, however the court will enquire into an alleged breach of the constitution, even if the breach is a matter of parliamentary practice and procedure: *Vanuatu v Carcasses* [2009] VUCA 34; CAC 9 of 2009.

## Starting Proceedings

CPR r2.2, 2.3  
EPR r2.2(1)

### 2.2 (1) A proceeding under Article 6 or 53(1) is started by filing a Constitutional Application in the office of the Supreme Court anywhere in Vanuatu.

- [2.2.1] See CPR [2.3.1] for the location of offices.

#### (2) A Constitutional Application filed by the person seeking redress must as far as possible be in Form 1, but is valid no matter how informally made. A Constitutional Application filed by a legal practitioner must be in Form 1.

- [2.2.2] **Extent of permitted informality** The extent of permitted informality would seem to be very great (see for example the dicta of Muria J in *In re the Constitution; Malifa v Attorney-General* [1999] VUSC 43; CC 66 of 1999: “...if they should come by the hundreds or thousands, then let them come.”) unless filed by a “legal practitioner”, a term which is not defined and stands in contrast, perhaps unintentionally, to the use of the defined word “lawyer” in the *Civil Procedure Rules*. Of course, that does not prevent the court from moulding an informal or otherwise defective petition: *Vanuatu v Picchi* [2001] VUCA 6; CAC 4 of 2000 (“It should be in proper form and entitled in such a way which makes it clear that it is a constitutional petition”). A general law claim which is in substance a Constitutional Application should be struck out: *Tasale v Vanuatu* [2009] VUSC 33; CC162 of 2008.

#### (3) In a case of extreme urgency a Constitutional Application may be made orally, as long as it is put into writing, in accordance with Form 1, as soon as possible.

- [2.2.3] **Meaning of “extreme urgency”** There is no definition of “extreme urgency”, a term sometimes seen used in connection with *ex parte* applications for injunctions: See for example *Bates v Lord Hailsham* [1972] 1 WLR 1373; *LTE Scientific Ltd v Thomas* [2005] EWCA Civ 1177 at [9]. Mere urgency should not suffice, though perhaps a merely urgent oral application, made personally, might be saved by subr.(2).

## What a Constitutional Application must contain

### 2.3 (1) A written Constitutional Application must set out:

- (a) the rights that have been infringed, are being infringed or provisions for which redress is sought; and

- [2.3.1] **Reality** The Court of Appeal in *Picchi v Attorney-General* [2001] VUCA 12; CAC 20 of 2001 warned that such allegations must be “based on reality and not on some theoretical or assumed scenario”. The court approved of *Ferguson v Attorney-General of Trinidad and Tobago* [2001] UKPC 3 where the Privy Council said at [14]: “Counsel submitted that it follows as a matter of legal logic from the fact of the breach of the common law duty of disclosure that the appellant was deprived of his liberty otherwise than by “due process of law” and deprived of “the protection of the law” contrary to section 4(a) and (b) of the Constitution; and that he was deprived of his right to “a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations,” contrary to 5(2)(e). Their Lordships are unable to accept this proposition. It can readily be accepted that the constitutional guarantees of due process, protection of the law, and a fair hearing are of generous width: See *Minister of Home Affairs v*

*Fisher* [1980] AC 319, at 328H, *per* Lord Wilberforce. They are in principle capable of covering unfairness in the treatment of an accused at a preliminary enquiry. On the other hand, their Lordships are satisfied that the question whether there has been a breach of constitutional guarantees in respect of due process, protection of the law, and a fair hearing, must be approached in the light of the proceedings considered as a whole... the issue whether there has been a breach under any of these guarantees must be judged on a realistic assessment of the proceedings considered as a whole. This view does not undermine those guarantees. On the contrary, the cause of human rights is served by concentrating on matters of substance and approaching with scepticism technicalities and causally irrelevant breaches."

(b) the Article of the Constitution that confers those rights or sets out those provisions; and

(c) the person or body that infringed those rights or provisions; and

(d) the way those rights or provisions have been infringed; and

[2.3.2] **Striking out applications** An application which fails to disclose an infringement may be struck out in the inherent jurisdiction of the court: *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [3], [9] – [12]; *President v Speaker* [2009] VUSC 35; Const Cas 1 of 2009; *Bule v Esau* [2009] VUSC 115; Const Cas 5 of 2009. See further r.2.8(a).

(e) the facts on which the application is based; and

[2.3.3] **Brevity** It is suggested that, like a statement of the case under the *Civil Procedure Rules*, the facts should be stated as briefly as possible. A fuller exposition of the facts ought to be contained in the sworn statement described in subr.(2)(a).

(f) the remedies applied for by the applicant to enforce those rights or seek redress.

[2.3.4] **Availability and choice of remedies** See further [2.1.3].

## (2) The application must have with it:

(a) a sworn statement by the applicant in support of the Application, setting out details of the evidence the applicant relies on; and

(b) any other sworn statements that support the Application.

[2.3.5] **Prima facie case** It is suggested that the sworn statements filed with the application establish at least a *prima facie* case. Further sworn statements may, of course, be filed later.

[2.3.6] **Admissibility** See further *CPR* Part 11 and [2.10.2].

## (3) An oral application:

(a) must state the matters listed in subrule 2.3(1); and

(b) must be sworn to by the applicant.

[2.3.7] **Content of oral application** It is difficult to see how an oral application can be made to "state" the required matters or to be "sworn to" unless the applicant gives *viva voce* evidence. It might be thought that these are the subsequent requirements, however subr.(4) would seem to eliminate that possibility. It is suggested that the only conclusion is that an oral application cannot be made purely orally and that these are the *de minimis* documentary requirements.

## (4) When an oral application is put into writing it must also include:

**(a) any orders made by the Court on the Application; and**

[2.3.8] **General observations** This would seem to be useful only if the oral application was *ex parte*, as seems always likely from the requirement of extreme urgency in r.2.2(3). It may be that this paragraph is intended to circumvent any delay in the generation of sealed orders by the court. It is suggested that the court should nevertheless consider more comprehensive orders as to what material should be served on the other parties and when, with a view to dealing with as many matters as possible at the next return date.

**(b) if any part of the hearing has been held, a statement of what was said at the hearing.**

[2.3.9] **General observations** The paragraph does not explain whether it is intended to refer to “what was said at the hearing” by the applicant (in giving *viva voce* evidence) or “what was said at the hearing” by everybody, in lieu of transcript. The latter possibility seems a little curious, however the former could easily have been put more precisely if no more was intended.

**(5) A sworn statement must be in Form 2.**

**Parties to proceedings started by a Constitutional Application**

**2.4 (1) The parties to proceedings started by a Constitutional Application are:**

**(a) the applicant; and**

**(b) the Republic of Vanuatu, as the respondent.**

[2.4.1] **History** The former counterpart to this rule, s.218 of the *Criminal Procedure Code* [Cap 136], referred to “all those parties whose actions are complained of.” By implication, this allowed for the possibility that non-State actors such as private individuals could infringe the Constitutional rights of other individuals. The Court of Appeal determined, however, that the opening words of art.5(1) of the *Constitution* (“The Republic of Vanuatu recognises...”), precluded the creation of private rights: *Francois v Ozols* [1998] VUCA 5; CC 155 of 1996; see also *Attorney-General v Timakata* [1993] VUCA 2; (1993) 2 Van LR 679 at 682. Accordingly, Coventry J in *In re the Constitution, Picchi v Attorney-General* [2001] VUSC 106; CC 113 of 1997 considered the reference to “other parties” in s.218 was otiose. The Court of Appeal agreed: *Picchi v Attorney-General* [2001] VUCA 12; CAC 20 of 2001.

[2.4.2] **Whether other parties can be joined** The rule leaves open the question whether other parties may be joined, according to their interest.

**(2) A witness may at any time apply to the Court to be legally represented.**

**(3) The Court may at any time order that a person may be legally represented.**

[2.4.3] **Relevant “person”** Presumably the “person” contemplated by this subrule is in fact the “witness” contemplated by subr.(2) or a party whose interests may be affected.

**Filing**

**2.5 (1) A Constitutional Application is filed by lodging 4 copies of the Application and sworn statement with the Court.**

**(2) After the Application is filed and before returning sealed copies to the applicant, the Court must:**

[2.5.1] See *CPR* r.18.5 as to sealing.



- (a) fix a date for the first Conference in the matter; and
  - (b) write this date on the Application.
- (3) The Conference date must be between 14 and 21 days after the filing; date.
  - (4) The Court may by order reduce this period, either on application by a party or on its own initiative.

### Service

- 2.6 (1) A Constitutional Application must be served on the Attorney-General on behalf of the respondent to the proceedings within 7 days after the date of filing the application.**

[2.6.1] See *CPR* Part 5 as to service generally.

- (2) The Court may by order reduce or extend this period, either on application by a party or on its own initiative.
- (3) The applicant must file a sworn statement setting out details of the time and manner of service of the Application before the applicant takes any further action in the proceeding.

### Duty of court to enquire into Constitutional Application

- 2.7 The court is to enquire into the matters raised by the Constitutional Application.**

[2.7.1] **History** The former s.218(6) of the *Criminal Procedure Code* [Cap 132] was slightly different to this rule in that the former provided that the court should so enquire “at the hearing”. Nevertheless, in *In re the Constitution, Picchi v Attorney-General* [2001] VUSC 106; CC 113 of 1997 Coventry J considered this “special and original jurisdiction” in light of a submission by counsel that the “enquiry” was a separate process from the hearing and was “inquisitorial” in nature - and therefore the court should take upon itself the task of obtaining production of documents and the attendance of witnesses. Although the court was less than explicit and declined to limit the power of the court to act in other ways to obtain production, it is clear from the order that the Attorney-General produce documents that the court did not accept the above submission *per se*.

[2.7.2] **Extent of duty to enquire** The extent of this new rule-based duty has the potential for controversy and its precise scope is uncertain. It is an essential requirement of procedural fairness that judicial officers be impartial and be seen to be impartial: *Metropolitan Properties Co (FCG) Ltd v Lannon* [1969] 1 QB 577 at 599. There may be a fine line between conducting an enquiry under this rule and becoming an advocate so as to give the impression of bias. In Canada, for example, such proceedings are strictly adversarial in nature and the court will decide the case only upon the issues framed by the parties, even where the facts suggest alternative formulations: R Sharpe & K Roach, *The Charter of Rights and Freedoms* (3<sup>rd</sup> ed.), Irwin, Toronto, 2005 at 105-6. A very different course is taken in Vanuatu. In *Republic of Vanuatu v Bohn* [2008] VUCA 6; CAC 3 of 2008 the Court of Appeal reflected on the assistance given by the primary judge to frame the claimant’s application. The court approved of such activity as “vital” to case management. The court also noted that in the 21<sup>st</sup> Century (in Vanuatu) the common law adversarial system and the continental inquisitorial system were not separate systems, but rather, occupied points along a continuum. The Court of Appeal declined further to elaborate on the extent of the duty to enquire except to say that it did not consider dictionary definitions of “enquire” (and its difference to “inquire”) to be helpful.

[2.7.3] **Unrepresented litigants** The duty to enquire into applications by unrepresented persons may involve deeper enquiry and extends to assisting the unrepresented litigant to frame the case:

*Republic of Vanuatu v Bohn* [2008] VUCA 6; CAC 3 of 2008.

- [2.7.4] **No default judgment** The duty to enquire precludes the possibility of obtaining default judgments on Constitutional Applications: *Vanuatu v Picchi* [2001] VUCA 22; CAC 14 of 2000.

EPR r2.9

## Conference

### 2.8 At the first Conference the court may:

- (a) deal with any application to strike out the Constitutional Application; and

- [2.8.1] **Striking out applications** A Constitutional Application may be struck out in the inherent jurisdiction of the court: *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [3], [9] – [12]. For examples see *Malas v Vanuatu* [2007] VUSC 2; Const Cas 2 of 2005; *Tonge v Vanuatu* [2007] VUSC 5; Const Cas 5 of 2006.

- (b) order the respondent to file a response; and

- (c) issue a summons under Rule 2.9; and

- (d) order that a person may be legally represented; and

- [2.8.2] **General observations** It is doubtful whether the court could properly compel any person to be represented. This paragraph is probably intended to be mutually supportive of subr.2.4(3).

- (e) decide if the Constitutional Application needs to be served on anyone else, and state how it is to be served; and

- [2.8.3] **Other persons on whom an application might be served** In *In re the Constitution, Picchi v Attorney-General* [2001] VUSC 106; CC 113 of 1997 Coventry J suggested that any person whose conduct is complained of in a petition should be made aware of that fact. The Court of Appeal agreed, adding that the former s.218 of the *Criminal Procedure Code* [Cap 132] contemplated the involvement of those whose actions are complained of: *Picchi v Attorney-General* [2001] VUCA 12; CAC 20 of 2001. These comments probably continue to apply to the slightly different regime under the *Rules*. In general, it is suggested that the principle described by the majority in *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999 is also instructive: “A fundamental rule of procedure in the Supreme Court is that a person whose rights in respect of the subject matter of the action will be directly affected by any order which may be made in the action must be joined as a party”.

- (f) fix a date for another Conference, if one is necessary, or fix a hearing date; and

- (g) make orders about:

- (i) filing and serving a response; and

- (ii) filing and serving sworn statements by the parties, their witnesses and anyone else; and

- (iii) disclosure of information and documents, in accordance with Part 8 of the Civil Procedure Rules; and

- (iv) filing and serving written submissions and lists of authorities to be relied on; and

(v) giving notice to witnesses to attend the hearing; and

(vi) any other matter necessary to assist in furthering the enquiry into the application.

(2) A response:

(a) must not deny the applicant's claims generally but must deal with each paragraph of the Constitutional Application; and

[2.8.4] See further *CPR* r.4.5(3).

(b) must be in Form 3.

**Summons to disclose documents and information, produce documents and objects, etc**

**2.9 (1) The court may at any time order that:**

(a) a summons be issued requiring a person to attend court to give evidence and produce documents or objects; and

(b) a person allow the Court to inspect an object and visit a place.

(2) The order may be made:

(a) at the request of a party; or

(b) at the request of a person entitled to legal representation; or

(c) on the Court's initiative.

(3) A summons must be in Form 4.

## Hearing

**2.10 (1) The hearing of a Constitutional Application must be in open court.**

[2.10.1] See further *CPR* r.12.2.

(2) However, the Court may order the public to be excluded from a specific part of the hearing in exceptional circumstances if it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.

(3) Evidence in chief is to be given by sworn statement unless the Court orders otherwise.

[2.10.2] **Admissibility** Every issue must be proved by proper and admissible evidence: *Picchi v Attorney-General* [2001] VUCA 12; CAC 20 of 2001 (referring to "the most rank and irresponsible hearsay"). See further *CPR* r.11.3.

(4) The hearing is to be conducted as follows, unless the Court orders otherwise:

- (a) the applicant makes an address opening his or her case and, if evidence is to be given orally, brings evidence in support of his or her case;
  - (b) the respondent and anyone entitled to be legally represented cross-examine the applicant's witnesses;
  - (c) the applicant re-examines his or her witnesses;
  - (d) the respondent and anyone entitled to be legally represented make an address opening their case and, if evidence is to be given orally, bring evidence in support of their case;
  - (e) the applicant cross-examines the respondent's witnesses;
  - (f) the respondent and anyone entitled to be legally represented re-examine their witnesses;
  - (g) the applicant makes a closing address;
  - (h) the respondent and anyone entitled to be legally represented make their closing addresses.
- (5) At the hearing the Court may:
- (a) ask questions of the witnesses; and
  - (b) call witnesses on its own initiative; and
  - (c) inspect an object and visit a place; and
  - (d) take any other step necessary to further the enquiry into the Constitutional Application and help the Court make a decision on the Application.

[2.10.3] **Scope of para.(d)** Paragraph (d) may permit the court to call in an applicant and obtain information which may cure any deficiencies of form: *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999. This may be desirable when the applicant is unrepresented: *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [5]. The further scope of the paragraph is uncertain: See further [2.7.2].

## Judgment

**2.11 (1) After the hearing the Court must give judgment, as set out in this Rule.**

**(2) The judgment must be announced in open court.**

[2.11.1] See further *CPR* r.12.2.

**(3) The Court must state its reasons for making its decision.**

[2.11.2] See further *CPR* r.13.1(1).

- (4) Except as set out in subrule (5), the Court must ensure that copies of the judgment and reasons, are available to the public.
- (5) However, the Court may withhold from the public a part of the reasons for its decision in exceptional circumstances:
  - (a) out of respect for the rights and freedoms of a party or another person; or
  - (b) because it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.

#### Enforcement and costs

**2.12 (1) When the Court gives its judgment, or as soon as practicable after giving judgment, the Court:**

- (a) may make an enforcement order; and

[2.12.1] See further *CPR* Part 14 and subs.(3), below.

- (b) must decide the question of costs.

[2.12.2] See further *CPR* Part 15.

- (2) An enforcement order must set out how and when the Court's decision is to be enforced.

- (3) Part 14 of the Civil Procedure Code applies to the enforcement order.

[2.12.3] This should be a reference to the *Civil Procedure Rules*.

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## PROCEEDINGS UNDER ARTICLES 16(4) AND 39(3) REFERRALS BY THE PRESIDENT

### Application of Part 3

#### 3.1 This Part deals with Referrals by the President, under Articles 16(4) and 39(3) of the Constitution, of Bills and Regulations that the President considers are inconsistent with the Constitution.

##### [3.1.1] **Constitutional framework** Article 16 (Power to Make Laws) provides:

(1) *Parliament may make laws for the peace, order and good government of Vanuatu.*

(2) *Parliament shall make laws by passing bills introduced either by one or more members or by the Prime Minister or a Minister.*

(3) *When a bill has been passed by Parliament it shall be presented to the President of the Republic who shall assent to it within 2 weeks.*

(4) *If the President considers that the bill is inconsistent with a provision of the Constitution he shall refer it to the Supreme Court for its opinion. The bill shall not be promulgated if the Supreme Court considers it inconsistent with a provision of the Constitution.*

Article 39 (Executive Power) provides:

(1) *The executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and Council of Ministers and shall be exercised as provided by the Constitution or a law.*

(2) *The Prime Minister shall keep the President of the Republic fully informed concerning the general conduct of the government of the Republic.*

(3) *The President of the Republic may refer to the Supreme Court any regulation which he considers to be inconsistent with the Constitution.*

##### [3.1.2] **Meaning and effect of “peace, order and good government”** These words do not limit the power of the Parliament and therefore do not provide any basis for inconsistency between a Bill and the Constitution: *President v Speaker* [2009] VUSC 35; Const Cas 1 of 2009.

##### [3.1.3] **From Bill to Act** A Bill which is passed by Parliament continues to be called a Bill until it receives Presidential assent whereupon it becomes an Act: s.5(2), *Acts of Parliament Act* [Cap 116]. A Bill which has not yet been passed by Parliament is not a Bill to which art.16(4) refers and is not subject to Referral: *In re the President's Referral; President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000. If the President does not exercise the power of Referral and the Bill becomes an Act, that does not foreclose subsequent challenge to the validity of the Act in other ways, it is merely that Referral may save a citizen this trouble later: *In re the Constitution; Attorney General v Timakata* [1993] VUCA 2; [1980-1994] Van LR 679. See further art.2 and s.9, *Interpretation Act* [Cap 132].

##### [3.1.4] **Amendment of the Constitution** A difficult question raised by the wording of art.16(4) is whether it is intended to apply also to amendments to the *Constitution* itself. Provision for general amendment is made in art.85 which makes it clear that an amendment is also made by the passage of a Bill, the only difference being a two-thirds majority necessary for passage. In relation to certain matters provided by art.86 there is the additional requirement of a national referendum. Is it possible for an amendment of the *Constitution* to be disallowed by Referral? There would appear to be two broad possibilities. In the first, the amendment is inconsistent with some other provision therein, as in *Vohor v Attorney General* [2004] VUCA 22; CAC 24 of 2004 (when s.9, *Interpretation Act* [Cap 132] was applied and the amendment declared unconstitutional). In the second, the amendment is inconsistent with the basic structure or essential features of the Constitution, for example, because the amendments were inconsistent with democratic principles. The latter doctrine has been developed by the Supreme Court of India but has received at best a fairly lukewarm response elsewhere: See *Golak Nath v State of Punjab* AIR 1967 SC 1643. The fact that key provisions of the *Constitution* are selectively protected by the additional requirements of art.86 probably militates against this doctrine.

##### [3.1.5] **Meaning of “provision”** Dicta from several decisions of the Supreme Court suggest a narrow reading of the meaning of “provision” in art.16(4). In *In re the President's Referral, President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000 it was said:

*It is fundamentally important to understand that the duty of the Court is to control the constitutional validity of a bill or a provision of a bill in the light of an express provision of the Constitution and not otherwise.*

In *Virelala v Ombudsman* [1997] VUSC 35; CC 4 of 1997 the Chief Justice left the door (only slightly) ajar in relation to implied “provisions”

*I must say that there is a role for implication in constitutional interpretation. But, this role is a limited one, and the only implications, which could be made were those that must be necessarily implied from the actual terms of the instrument [Constitution].*

*Therefore, in my judgment, I am of the opinion that the Court is not free to limit the language of a legislative power contained in the Constitution or the Court is not free to invent implied prohibitions upon the exercise of Legislative power.*

Accordingly, in *President v Speaker* [2009] VUSC 35; Const Cas 1 of 2009, the Chief Justice declined to accept that there was an implied obligation to consult before a Bill was passed.

In *President v Speaker* [2008] VUSC 77; Const Cas6 of 2008 the Chief Justice concluded that the preamble was not a provision within the meaning of art.16(4) such as could give rise to any relevant inconsistency.

[3.1.6] **Meaning of “regulation”** The Constitution does not contain any definition of “Regulation” which is but one type of delegated legislation described collectively as “statutory orders” by ss.10(2) and 12, *Interpretation* [Cap 132]. It is difficult to describe with precision what might amount to a “Regulation” within the meaning of the article. On the one hand, it seems incongruous that a power of referral should have been given in respect of one form of delegated legislation but not in relation to others. This might prompt an expansive reading of “Regulations” to include all forms of delegated legislation. On the other hand, it is inescapable that to use the expression “delegated legislation” (or to list all the types of delegated legislation) would have been an exceedingly easy matter for the drafters. Furthermore, there are traces of a distinction (albeit a rather informal one) between “regulations” and other forms of delegated legislation. The term “regulation” is usually invoked for delegated legislation of general application to everyone or to all members of a particular class: *A-G for Alberta Huggard Assets Ltd* [1953] AC 420 at 447. By contrast, “rules” usually contain procedural formalities and “orders” are of more limited application than either rules or regulations. The title of the instrument in question may not be a reliable guide and there is likely to be a significant and growing body of instruments containing multiple characteristics.

[3.1.7] **Alternative methods of invalidating laws** The mechanism provided by art.16(4) is not the only method by which the court may be required to consider the validity of a law by reason of alleged inconsistency. A party seeking to invalidate a law may commence a constitutional petition under art.53(1) or may seek a declaration in general litigation. See for example *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999, cf *Groupe Nairobi v Vanuatu* [2009] VUCA 35; CAC 11 of 2009.

## Starting Proceedings

### 3.2 (1) A proceeding under Article 16(4) or 39(3) is started by the President filing a Referral in the office of the Supreme Court anywhere in Vanuatu.

[3.2.1] **Manner in which President informed of Bill** The President becomes informed of the passage of a Bill by the provision of an authenticated copy by the Clerk of Parliament in accordance with s.4(2)(d), *Acts of Parliament Act* [Cap 116]. Though there is no time limit expressed in the *Rules*, art.16(3) of the *Constitution* provides that the President shall assent within two weeks or shall commence a Referral.

[3.2.2] **Model of the *Conseil Constitutionnel*** The former Chief Justice speculated in *In re the Constitution, Timakata v Attorney-General* [1992] VUSC 9; [1980-1994] Van LR 691 that the constitutional arrangement whereby the court might be called upon to consider the validity of a Bill might be influenced by the French model of the *Conseil Constitutionnel*. The Conseil, however, only has the power to challenge a law before it is promulgated and there is no power in the French courts otherwise to challenge laws made by Parliament: See generally D. Tallon, “The Constitution and the Courts in France” (1979) 27 Am J Comp L 567. That is not the position in Vanuatu.



- [3.2.3] **Parliamentary consideration of issue** There is no formal Parliamentary procedure specifically for determination of constitutional questions which might, and frequently do, arise. Advice on such issues may have been given or available from several sources but is not always taken or sought. Interpretation of the *Constitution* has been said to be a matter for the court, not for Parliament: *In re the Constitution; Korman v Natapei* [1997] VUSC 46; CC 168 of 1997.
- [3.2.4] **Manner in which President informed of Regulation** The President becomes informed of the passage of a Regulation by its publication in the Gazette in accordance with s.13, *Interpretation Act* [Cap 132]. The absence of a time limit means that Regulations may be referred at any time, even, presumably, after they have been revoked.
- [3.2.5] See CPR [2.3.1] for the location of offices.

## (2) A Referral must be in Form 5.

### What a Referral must contain

#### 3.3 A Referral must set out:

- (a) **the name of the Bill or Regulation and the provisions that are being referred to the Court; and**
- [3.3.1] **Short title** It is conventional to refer to the short title of the Bill in accordance with s.2(3), *Acts of Parliament Act* [Cap 116].
- (b) **the Articles of the Constitution with which the President considers those provisions are inconsistent; and**
- [3.3.2] See further [3.1.3], [3.1.4].
- (c) **a statement of the reasons why the President considers those provisions to be inconsistent with the Constitution; and**
  - (d) **a statement whether the President considers those provisions of the Bill or Regulation are severable; and**
  - (e) **if the President considers the provisions are severable, which provisions of the Bill or Regulation may remain.**

### Parties to a proceeding started by a Referral

#### 3.4 The parties to a proceeding started by a Referral are:

- (a) **the President; and.**
- [3.4.1] **Description of the President** The President should be referred to as the "Referral Authority": *In re the President's Referral; President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000.
- (b) **as the respondent:**
    - (i) **for a Referral under Article 16(4), the Speaker of Parliament; and**
    - (ii) **for a Referral under Article 39(3), the person or body that made the Regulation.**

- [3.4.2] **Origin of para.(b)** Paragraph (b) appears to modify and subsume what was said in *In re the President's Referral; President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000.

## Filing

### 3.5 (1) A Referral is filed by lodging 4 copies of the Referral with the Court.

#### (2) After the Referral is filed and before returning sealed copies to the President, the Court must:

- [3.5.1] See *CPR* r.18.5 as to sealing.

- (a) fix a date for the first Conference in the matter; and
- (b) write this date on the Referral.

#### (3) The Conference date must be between 14 and 21 days after the filing date.

## Service

### 3.6 (1) A Referral must be served on the Attorney-General within 7 days after the filing date.

#### (2) The Court may by order reduce or extend this period, either on application by a party or on its own initiative.

#### (3) A sworn statement, in Form 2, setting out details of the time and manner of service of the Referral must be filed before the President can take any further action in the proceeding.

## Conference

### 3.7 (1) At the first Conference, the Court may:

- (a) order that another person be served and may be legally represented; and

- [3.7.1] **General observations** See further rr.2.4(3) and 2.8(d). It is difficult to envisage circumstances under which this would be necessary in a Referral. Elsewhere in the Commonwealth courts may sometimes grant leave to a limited class of interested persons to appear and make submissions.

- (b) recommend to the Attorney-General that he or she act under section 22 of the State Law Office Act (No. 4 of 1998) to appoint an independent lawyer for a person, if the Court considers this is necessary in the interests of justice; and

- [3.7.2] **General observations** Further to para.(a), it is difficult to envisage circumstances under which this would be necessary in a Referral or generally appropriate. Strictly speaking, there is in fact no such power of appointment in the Act; subs.(2) merely permits the Attorney General to allow the Government to seek private legal representation and subs.(3) permits the "engagement"

of a private practitioner to work “on behalf of the Office.” In the case of such an engagement, the private lawyer works for the State Law Office and could not go beyond the remit provided by s.6, ie. to represent the Government.

- (c) fix a date for another Conference, if one is necessary; and**
- (d) fix a hearing date; and**
- (e) make orders about:**
  - (i) filing and serving written submissions and lists of authorities to be relied on; and**
  - (ii) any other matter necessary to assist in managing the hearing of the Referral.**
  - (iii) for a Referral under Article 39(3), the person or body that made the Regulation.**

## Hearing

**3.8 (1) The hearing of the Referral must take place as soon as practicable, and in open court.**

[3.8.1] See further *CPR* r.12.2.

**(2) However, the Court may order the public to be excluded from a specific part of the hearing in exceptional circumstances if it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.**

**(3) The hearing is to be conducted in the following order:**

- (a) the President’s counsel makes an address opening his or her case and states the reasons why the Bill or Regulation has been referred to the Court; and**
- (b) the respondent and anyone entitled to legal representation make an address opening their case and state their arguments; and**
- (c) the President's counsel replies.**

[3.8.2] **Reception of evidence** It should be noted that, unlike corresponding hearing rules in Parts 2, 4 and 5, no provision is made here for the reception of evidence. The scope for evidence does seem very narrow, however, it is possible that certain legislative and extrinsic material might be relevant. The evidence of legal experts is unlikely to be admissible.

## Judgment

**3.9 (1) After the hearing the Court must give judgment, as set out in this Rule.**

**(2) The judgment must be announced in open court.**

[3.9.1] See further *CPR* r.12.2.

**(3) The judgment must:**

- (a) set out the Court's opinion; and**
- (b) state the Court's reasons for reaching its opinion.**

[3.9.2] **Meaning of “opinion”** See further *CPR* r.13.1(1). The reference to “judgment” is slightly misleading and superfluous as the Court’s mandate under art.16(4) is only to provide its “opinion”. Article 39(3) does not explicitly limit the Court to the provision of an opinion, however it would be anomalous if the provision were to be read otherwise. The reference to “opinion” in art.16(4) probably derives from the French influence suggested by the former Chief Justice in *In re the Constitution, Timakata v Attorney-General* [1992] VUSC 9; [1980-1994] Van LR 691 – the *Conseil Constitutionnel* provides strong, but not binding, decisions on the validity of legislation. In France, the executive is bound by general principle of law to withdraw illegal measures consequent upon a decision of the *Conseil* against validity: J. Bell, *French Constitutional Law*, Clarendon, Oxford, 1992 at 33, n.56. In Vanuatu, the consequences of an opinion of invalidity are similarly automatic from art.16(4). This probably explains why there is no provision for enforcement in this part. It is suggested that the Court’s opinion should be expressed accordingly.

**(4) The opinion must state:**

- (a) whether or not the provisions of the Bill or Regulation are constitutional; and**
- (b) if the provisions are unconstitutional, whether or not they can be severed; and**
- (c) if they can be severed, to what extent any remaining provisions of the Bill or Regulation are consistent with the Constitution after severance.**

[3.9.3] **Extent of additional consideration** This paragraph seems, contrary to expectation, to require the court to consider whether every other part of the Bill or Regulation is consistent with the Constitution. In any event, the question whether the court may advise the President to assent to the remainder of the Bill after excising the offending parts was left open in *In re the Constitution; Attorney-General v Timakata* [1993] VUCA 2; [1980-1994] Van LR 679 and probably cannot be answered by rules of procedure.

**(5) Except as set out in subrule (6), the Court must ensure that copies of the judgment and reasons are available to the public.**

[3.9.4] **Meaning of “judgment”** As explained in [3.9.2], the reference to “judgment” and “reasons” are apt to mislead – the Court’s mandate is to provide an “opinion” – no more and no less.

**(6) However, the Court may withhold from the public a part of the reasons for its decision in exceptional circumstances:**

[3.9.5] **Meaning of “reasons for decision”** As discussed in [3.9.2] and [3.9.4], the reference to “decision” and “reasons” generate some confusion about the Court’s mandate.

- (a) out of respect for the rights and freedoms of a party or another person; or**
- (b) because it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.**

## Costs

### 3.10 When the Court gives its judgment, or as soon as practicable after giving judgment, the Court must decide the question of costs.

[3.10.1] See further *CPR* Part 15.

[3.10.2] **Usual costs order** It is difficult to find a common thread among the costs orders. If a Bill or Regulation is set aside, the Government will usually be ordered to pay the costs: *In re the Constitution*; *Attorney-General v Timakata* [1993] VUCA 2; [1980] Van LR 679; *In re the President's Referral*; *President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000. When the Bill or Regulation is upheld, costs may be borne by the President: *In re the President's Referral*; *President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000; *Contra: President v Speaker* [2009] VUSC 35; Const Cas 1 of 2009; *President v Speaker* [2008] VUSC 77; Const Cas 6 of 2008.

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## PROCEEDINGS UNDER ARTICLE 72

### COMPLAINTS ABOUT EMERGENCY REGULATION

#### Application of Part 4

#### 4.1 This Part deals with Complaints, under Article 72 of the Constitution, about emergency Regulations.

##### [4.1.1] **Constitutional Framework** Article 72 (Complaints to Supreme Court Concerning Emergency Regulations) provides:

*Any citizen aggrieved by reason of regulations made by the Council of Ministers in accordance with Article 69 may complain to the Supreme Court which shall have jurisdiction to determine the validity of all or any of such regulations.*

Article 69 (Emergency Regulations) permits the making of emergency regulations when at war or under a state of emergency declared by the President on the advice of the Council of Ministers.

Limitations on such Regulations are to be found in art.71 which provides:

*(1) Subject to subarticle (2) regulations made by the Council of Ministers in accordance with Article 69 shall have effect notwithstanding the provisions of Chapter 2, Part I except that no regulation shall-*

*(a) derogate from the right to life and the freedom from inhuman treatment and forced labour; and*

*(b) make provision for the detention of a person without trial for more than 1 month unless such person is an enemy alien.*

*(2) Regulations made by the Council of Ministers in accordance with Article 69 shall be such as are reasonably necessary in the circumstances of the emergency to which they relate and are justifiable in a democratic society.*

#### Starting Proceedings

#### 4.2 (1) A proceeding under Article 72 is started by filing a Complaint in the office of the Supreme Court anywhere in Vanuatu.

[4.2.1] See CPR [2.3.1] for the location of offices.

#### (2) A Complaint filed by the person seeking redress must as far as possible be in Form 6, but is valid no matter how informally made. A Complaint filed by a legal practitioner must be in Form 6.

[4.2.2] **Extent of permitted informality** The extent of permitted informality would seem to be very great (see for example the dicta of Muria J in *In re the Constitution; Malifa v Attorney-General* [1999] VUSC 43; CC 66 of 1999: "...if they should come by the hundreds or thousands, then let them come.") unless filed by a "legal practitioner", a term which is not defined and stands in contrast, perhaps unintentionally, to the use of the defined word "lawyer" in the *Civil Procedure Rules*.

#### (3) However, in a case of extreme urgency a Complaint may be made orally, as long as it is put into writing, in accordance with Form 6, as soon as possible.

[4.2.3] **Meaning of "extreme urgency"** There is no definition of "extreme urgency", a term sometimes seen used in connection with *ex parte* applications for injunctions: See for example *LTE Scientific Ltd v Thomas* [2005] EWCA Civ 1177 at [9]. Mere urgency should not suffice, though perhaps a merely urgent oral complaint, made personally, might be saved by subr.(2).

## What a Complaint must contain

### 4.3 (1) A written Complaint must set out:

- (a) the name of the Regulation complained of, and the provisions complained of; and
- (b) the Articles of the Constitution which the complainant considers make the Regulation invalid; and
- (c) any defects in procedure which the complainant considers make the Regulation invalid; and
- (d) a statement of the reasons why the Regulation is invalid; and
- (e) if only a part of the Regulation is considered invalid, a statement whether that part is severable and the remaining provisions of the Regulation are valid.

### (2) The Complaint must have with it:

- (a) a sworn statement in Form 2 by the complainant in support of the application; and
  - (i) stating that the complainant is a citizen of Vanuatu; and

[4.3.1] **Only available to citizens** Article 72 is confined to use by “citizens” as to which see generally Ch.3.

- (ii) setting out details of how the complainant is aggrieved by the Regulations; and

[4.3.2] **Meaning of “aggrieved”** The extent to which a complainant must be aggrieved is not specified. According to the usual principles of constitutional interpretation it may be expected that this will not be a high threshold. There may, however, be situations in which the grievance in question is either illusory, pretended or so insubstantial that the court may be unwilling to entertain it. Accordingly, care ought to be taken in the setting out of such details.

- (iii) setting out the evidence the complainant relies on; and

[4.3.3] **Scope of evidence** It is difficult to envisage relevant evidence beyond the manner in which the complainant is aggrieved because the power conferred by art.72 is to determine the validity of the Regulations by reference to the limitations contained elsewhere. There is no general mandate to inquire into their subsequent application or any other matters.

- (b) any other sworn statements that support the application.

[4.3.4] See further [4.3.3].

### (3) An oral application:

[4.3.5] **Meaning of “application”** The reference to an “application” was probably the result of copying from r.2.3(3) and should probably have been “Complaint”.

- (a) must state the matters listed in subrule 4.3(1); and



**(b) must be sworn to by the complainant.**

- [4.3.6] **Content of oral application** It is difficult to see how an oral Complaint/application can be made to “state” the required matters or to be “sworn to” unless, as to the latter, the applicant gives *viva voce* evidence. It might be thought that these are the subsequent requirements, however subr.(4) would seem to eliminate that possibility. It is suggested that the only conclusion is that an oral application cannot be made purely orally and that these are the *de minimis* documentary requirements.

**(4) When an oral Complaint is put into writing, it must also include:**

**(a) any orders made by the Court on the Complaint; and**

- [4.3.7] **General observations** This would seem to be useful only if the oral Complaint was *ex parte*, as seems always likely from the requirement of extreme urgency in r.4.2(3). It may be that this paragraph is intended to circumvent any delay in the generation of sealed orders by the court. It is suggested that the court should nevertheless consider more comprehensive orders as to what material should be served on the other parties and when, with a view to dealing with as many matters as possible at the next return date.

**(b) if any part of the hearing has been held, a statement of what was said at the hearing.**

- [4.3.8] **General observations** The paragraph does not explain whether it is intended to refer to “what was said at the hearing” by the applicant (in giving *viva voce* evidence) or “what was said at the hearing” by everybody, in lieu of transcript. The latter possibility seems a little curious, however the former could easily have been put more precisely if no more was intended.

**Parties to a proceeding started by a Complaint**

**4.4 (1) The parties to proceedings started by a Complaint are:**

**(a) the complainant; and.**

**(b) the Attorney-General of Vanuatu, on behalf of the Council of Ministers of the Government of Vanuatu, as the respondent:**

- [4.4.1] **No restriction on necessary parties** It is suggested that there is nothing in this rule which affects the requirement that any person whose rights may be affected by the proceedings must be joined as a necessary party: *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999.

**(2) A witness may at any time apply to the Court to be legally represented.**

**(3) The Court may at any time order that a person may be legally represented.**

- [4.4.2] **Relevant “person”** Presumably the “person” contemplated by this subrule is in fact the “witness” contemplated by subr.(2) or a party whose interests may be affected.

**Filing**

**4.5 (1) A Complaint is filed by lodging 4 copies of the Complaint with the Court.**

**(2) After the Complaint is filed and before returning sealed copies to the complainant, the Court must:**

- [4.5.1] See *CPR* r.18.5 as to sealing.

- (a) fix a date for the first Conference in the matter; and
  - (b) write this date on the Complaint.
- (3) The Conference date must be between 14 and 21 days after the filing date.
- (4) The Court may by order reduce this period, either on application by a party or on its own initiative.

#### Service

- 4.6 (1) A Complaint must be served on the Attorney-General within 7 days after the filing date.
- (2) The Court may by order reduce or extend this period, either on application by a party or on its own initiative.
- (3) The complainant must file a sworn statement, in Form 2, setting out details of the time and manner of service of the Complaint before the complainant takes any further action in the proceeding.

#### Duty of Court to inquire into Complaint

- 4.7 The Court is to inquire into the matters raised by the Complainant.

[4.7.1] See [2.7.1] – [2.7.3].

#### Conference

- 4.8 (1) At the first Conference, the Court may deal with any applications to strike out the Complaint; and

[4.8.1] **Striking out complaints** A Complaint may be struck out in the inherent jurisdiction of the court: *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [3], [9] – [12].

- (a) order the respondent to file a response; and
- (b) issue a summons under Rule 2.9; and
- (c) order that a person may be legally represented; and

[4.8.2] **General observations** It is doubtful whether the court could compel any person to be represented. This paragraph is probably intended to be mutually supportive of subr.4.4(3).

- (d) decide if the Complaint needs to be served on anyone else, and state how it is to be served; and
- (e) fix a date for another Conference, if one is necessary; or fix a hearing date; and
- (f) make orders about:

- (i) filing and serving a response; and
- (ii) filing and serving sworn statements by the parties, their witnesses and anyone else; and
- (iii) disclosure of information and documents, in accordance with Part 8 of the Civil Procedure Rules; and
- (iv) filing and serving written submissions and lists of authorities to be relied on; and
- (v) giving notice to witnesses to attend the hearing; and
- (vi) any other matter necessary to assist in furthering the enquiry into the Complaint.

**(2) A response:**

- (a) must not deny the complainant's claims generally but must deal with each paragraph of the Complaint; and

[4.8.3] See further *CPR* r.4.5(3).

- (b) must be in Form 3.

**Summons to disclose documents and information, produce documents and objects, etc**

**4.9 (1) The Court may at any time order that:**

- (a) a summons be issued requiring a person to attend court to give evidence and produce documents or objects; and
- (a) a person allow the Court to inspect an object and visit a place

**(2) The order may be made at a party's request or on the Court's initiative.**

**(3) A summons must be in Form 4**

**Hearing**

**4.10 (1) The hearing of the Complaint must be in open court.**

[4.10.1] See further *CPR* r.12.2.

**(2) However, the Court may order the public to be excluded from a specific part of the hearing in exceptional circumstances if it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.**

**(3) Evidence in chief is to be given by sworn statement unless the Court orders otherwise.**

[4.10.2] See further *CPR* r.11.3.

**(4) The hearing is to be conducted as follows, unless the Court orders otherwise:**

- (a) the complainant makes an address opening his or her case and, if evidence is to be given orally, brings evidence in support of his or her case;**
- (b) the respondent and anyone entitled to be legal represented cross-examine the complainant's witnesses;**
- (c) the complainant re-examines his or her witnesses;**
- (d) the respondent and anyone entitled to be legal represented make an address opening their case and, if evidence is to be given orally, bring evidence in support of their case;**
- (e) the complainant cross-examines the respondent's witnesses;**
- (f) the respondent and anyone entitled to be legal represented re-examine their witnesses;**
- (g) the complainant makes a closing address;**
- (h) the respondent and anyone entitled to be legal represented make their closing addresses.**

**(5) At the hearing the Court may:**

- (a) ask questions of the witnesses; and**
- (b) call witnesses on its own initiative; and**
- (c) inspect an object and visit a place; and**
- (d) take any other step necessary to help the Court make a decision on the Complaint.**

[4.10.3] **Scope of para.(d)** Paragraph (d) may permit the court to call in a complainant and obtain information which may cure any deficiencies of form: *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999. This may be desirable when the complainant is unrepresented: *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [5].

## **Judgment**

**4.12 (1) After the hearing the Court must give judgment, as set out in this Rule.**

**(2) The judgment must be announced in open court.**

[4.12.1] **Meaning of “judgment”** See further *CPR* r.12.2. Article 72 refers to determination as do subparas (3) and (4) and it is suggested that the reference in subparas (1) and (2) to judgment may have been unintentional as it leads to confusion.

**(3) The Court must state its reasons for making its determination.**

**(4) The determination must state:**

- (a) whether or not the provisions of the Regulations are valid; and**
- (b) if the provisions are invalid, whether or not they can be severed; and**
- (c) if they can be severed, to what extent any remaining provisions of the Regulations are valid after severance.**

[4.12.2] **Scope of additional consideration** This paragraph seems, contrary to expectation, to require the court to consider whether every other part of the Regulations is valid.

**(5) Except as set out in subrule (6), the Court must ensure that copies of the judgment and reasons are available to the public.**

**(6) However, the Court may withhold from the public a part of the reasons for its determination in exceptional circumstances:**

- (a) out of respect for the rights and freedoms of a party or another person; or**
- (b) because it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.**

#### **Enforcement and costs**

**4.13 (1) When the Court gives judgment, or as soon as practicable after giving judgment, the Court:**

- (a) may make an enforcement order; and**

[4.13.1] See further *CPR* Part 14 and subs.(3), below.

- (b) must decide the question of costs.**

[4.13.2] See further *CPR* Part 15.

**(2) An enforcement order must set out how and when the Court's determination is to be enforced.**

**(3) Part 14 of the Civil Procedure Code applies to the enforcement order.**

[4.13.3] This should be a reference to the *Civil Procedure Rules*.

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## **PROCEEDINGS UNDER ARTICLE 53(3)**

### **SUBMISSION OF QUESTIONS BY SUBORDINATE COURTS**

#### **Application of Part 5**

**5.1 (1) This Part deals with submissions to the Supreme Court by a subordinate court under Article 53(3) of the Constitution, of questions concerning the interpretation of the Constitution that concern a fundamental point of law.**

[5.1.1] See further Part 4, *Government Proceedings Act* No.9 of 2007.

**(2) This part is in addition to Rule 16.22 of the Civil Procedure Rules.**

#### **Starting Proceedings**

**5.2 (1) A proceeding under Article 53(3) is started by sending a Submission to the office of the Supreme Court anywhere in Vanuatu.**

[5.2.1] See CPR [2.3.1] for the location of offices.

**(2) The Submission must:**

- (a) state the question to be decided; and**
- (b) state concisely the facts necessary to enable the Court to decide the question.**

**(3) After the Submission is received the Court must fix a date for the first Conference in the matter.**

**(4) The Conference date must be between 14 and 21 days after the filing date.**

#### **Parties**

**5.3 The Court may order that the Attorney-General is to be a party to the proceedings, representing the Republic.**

[5.3.1] See further Part 4, *Government Proceedings Act* No.9 of 2007.

#### **Conference**

**5.4 (1) At the first Conference, the Court may:**

- (a) order that the Attorney-General or another person become a party; and**
- (b) make orders about clarifying the Submission and the issues it raises; and**
- (c) refer the matter back to the subordinate court for better identifying any questions of law and fact; and**

- (d) fix a date for another Conference, if one is necessary; and
- (e) fix a hearing date; and
- (f) make orders about:
  - (i) filing and serving sworn statements to clarify the facts of the case; and
  - (ii) filing and serving written submissions and lists of authorities to be relied on; and
  - (iii) any other matter necessary to assist in managing the hearing of the Submission.

### Hearing

**5.5 (1) The hearing of the Submission must take place as soon as practicable and in open court.**

[5.5.1] See further *CPR* r.12.2.

**(2) However, the Court may order the public to be excluded from a specific part of the hearing in exceptional circumstances if it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.**

**(3) The Court must decide the order of events at the hearing.**

### Judgment

**5.6 (1) After the hearing the Court must give judgment, as set out in this Rule.**

**(2) The judgment must be announced in open court.**

[5.6.1] See further *CPR* r.12.2.

**(3) The judgment must:**

- (a) set out the Court's determination of the question submitted to it; and
- (b) state the Court's reasons for its determination.

[5.6.2] See further *CPR* r.13.1(1).

**(4) The determination must state:**

- (a) the Court's interpretation of the provision of the Constitution; and
- (b) whether or not an activity, or a provision of any Act or regulation, is unconstitutional as a result of that interpretation;



and

- (c) if a provision is unconstitutional, whether or not it can be severed; and
  - (d) if it can be severed, to what extent any remaining provisions of the Act or Regulation are valid after severance.
- (5) The Court must send a sealed copy of its determination to the subordinate court as soon as practicable.
- (6) Except as set out in subrule (7), the Court must ensure that copies of the judgment and reasons are available to the public.
- (7) However, the Court may withhold from the public a part of the reasons for its determination in exceptional circumstances:
- (a) out of respect for the rights and freedoms of a party or another person; or
  - (b) because it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.

#### **Enforcement and costs**

- 5.7 The Court may decide the question of costs of the Submission hearing or send the question to the subordinate court.**

[5.7.1] **Error in title of rule** It appears that the title was copied from corresponding provisions in rr.2.12 and 4.13. It should, like r.3.10, have been titled simply "Costs" as it does not deal with enforcement and no such issues arise in the case of Submissions under this Part.

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