THE COOK ISLANDS

JUSTICES BENCH BOOK

Second edition

2012

ACKNOWLEDGEMENTS

The second edition of the *Cook Islands Justices Bench Book* was developed by Christopher Roper, in a project conducted by the Pacific Judicial Development Programme. Significant contributions were made by the following people in the Cook Islands, particularly in a three day series of meetings in February 2012:

Mataira Ake JP
Claudine Henry-Anguna, Registrar of the High Court
Tekeu Framhein JP
Georgina Keenan-Williams JP
John Kenning JP
Teati Mokoroa, Deputy Registrar of the High Court
Kautai Ruaporo, Court Clerk
Tuingariki Short JP
Tauei Solomon JP
Tangi Taoro JP
Carmen Temata JP
Tinirau Tupa, Court Clerk
Taepae Tuteru JP

QUICK GUIDE TO FIND WHAT YOU NEED

CONTENTS

TABLE OF CONTENTS IN BRIEF

ABBREVIATIONS

CA	Crimes Act, 1969
CIA	Cook Islands Act, 1915
CJA	Criminal Justice Act, 1967
CPA	Criminal Procedure Act
JA	Judicature Act
PJCA	Prevention of Juvenile Crime Act 1968
VOA	Victims of Offences Act, 1999

GLOSSARY OF SOME SELECTED TERMS

Court of record	A court that has the power to fine or imprison.
Equity	The separate body of law, developed in the Court of Chancery, which supplements, corrects, and controls the rules of common law.
Ex gratia	Free, no cost.
Hearsay	Evidence which is 'second hand'; see Chapter 4, section 4.8.6.
In arrest of judgment	An application after conviction but before sentence to quash the conviction on the basis that there is an error of law on the face of the Information which has not been cured by amendment or by the verdict of the court.
Jurisdiction	The power and authority to hear or determine a particular matter.
Pro bono	For the public good. Legal work performed for the public good or in the public interest, or legal work performed free of charge.
Rules of equity	Rules which the Chancery Court has developed to enable it to grant equitable relief.

FOUNDATIONS

1 The Constitutional Context

1.1 The constitutional framework of the Cook Islands

1.1.1 The Cook Islands Constitution

The Cook Islands Constitution came into effect in 1965.

The Constitution details the basic elements of the Cook Islands system of government by defining:

- the roles, responsibilities and powers of the Executive, Parliament and the Judiciary
- the organization and structure of the legal system
- the requirements of citizenship and details related to finance, land and leadership.

The Constitution gives effect to the doctrine of the *Separation of Powers*.

1.1.2 The doctrine of the separation of powers

This doctrine states that there should be three distinct and separate branches of government:

1. the Executive: administrator and policy maker.
2. the Parliament (Legislature): law maker.
3. the Judiciary: interpreter of law.

Each branch of government checks the roles and functions of the other branches, so that the balance of power between the three branches is maintained. One purpose is that the Executive should not gain too much power.

The independence of the Judiciary is an important element of the doctrine of separation of powers and is vital for maintaining the balance of power.

1.1.3 The independence of the judiciary

Although Parliament makes laws and the Executive allocate funds, premises, supporting staff and services for the Judiciary, the Judiciary must be independent and free from all political or other influence in carrying out its duties and in making decisions.

The independence of the Judiciary is protected by:

- the Constitution
- the concept of the Rule of Law
- the process of appointment and removal of judicial officers, and conditions of their appointment; and
- the immunity of judges and justices from civil actions.

1.1.4 The rule of law

There are three principles which make up the doctrine of the rule of law:

- society should be free from arbitrary power
- all are equal before the law
- the Constitution is the supreme law of the land.

The rule of law provides checks and balances for the Executive and Legislative branches of government. A legal system with fair, transparent and effective judicial institutions is essential for the protection of citizens against the arbitrary use of state authority and for maintaining the rule of law.

1.2 The Branches of Government in the Cook Islands

1.2.1 Head of State

Article 2 Constitution

Her Majesty the Queen is the Head of State of the Cook Islands.

1.2.2 House of Arikis

Article 8(3) Constitution

The House of Arikis of the Cook Islands comprises the following members:

- four Arikis of the islands of Aitutaki and Manuae
- three Arikis of the island of Atiu
- one Ariki each from the islands of Mangaia, Manihiki, Rakahanga, Penrhyn
- three Arikis of the island of Mauke
- three Arikis of the island of Mitiaro
- the Ariki of the islands of Pukapuka and Nassau
- six Arikis of the island of Rarotonga. Article 8(2) Constitution as amended

The members of the House of Arikis are appointed by the Queen's Representative, subject to provisions in the Constitution.

The House of Arikis: House of Arikis Act 1966

- considers matters relating to the welfare of the people of the Cook Islands that are submitted to it by Parliament
- expresses its opinion and makes recommendations to Parliament on such matters
- performs other functions as prescribed by law.

1.2.3 The Executive

The role of the Executive is to formulate and implement government policy.

In the Cook Islands, the Executive effectively runs and controls the affairs of the country.

The Executive and Parliament are distinct even though there are people who are in both.

The Executive is comprised of:

- the Queen's Representative
- the Prime Minister
- the Cabinet of Ministers; and
- the Executive Council.

The Queen's Representative

Articles 5 &12(1) Constitution

The Executive authority of the Cook Islands is vested in the Queen.

The Executive authority of the Cook Islands is exercised on behalf of Her Majesty by the Queen's Representative, either directly or through subordinate officers.

The Queen's Representative is appointed by Her Majesty the Queen and holds office for a period of three years.

Except as provided in the Constitution, the Queen's Representative shall act on the advice of Cabinet, the Prime Minister or the appropriate Minister in the performance of all his/her functions.

Prime Minister

The Prime Minister is a Member of Parliament. He/she presides over Cabinet.

When Parliament is in session, the Prime Minister is appointed by the Queen's Representative on the basis that he/she commands the confidence of a majority of the members of Parliament.

If the appointment is made while Parliament is not in session, the Queen's Representative will appoint the member of Parliament who, in his or her opinion, is likely to command the confidence of a majority of the members of Parliament.

Cabinet

Constitution Amendment Act (No.4) 1999

The Cook Islands Cabinet is headed by the Prime Minister and consists of not more than six other Ministers.

The Cabinet has general direction and control of the Executive government of the Cook Islands.

Cabinet is collectively responsible to Parliament.

Five Ministers, other than the Prime Minister, shall be appointed by the Queen's Representative on the advice of the Prime Minister. A person shall not be appointed unless:

- he/she is a Member of Parliament; or
- if the appointment is made after the dissolution of Parliament but before a general election, he/she was a Member of Parliament immediately before dissolution; or

- if the appointment is made after the general election but before the first session of parliament, he/she was elected as a Member of Parliament in the election.

One Minister (other than the Prime Minister) may, in the discretion of the Prime Minister, be appointed by the Queen's Representative on the advice of the Prime Minister from persons other than those above. He/she must be qualified for election as a Member of Parliament on and for the duration of his/her appointment.

This Member of Parliament will be entitled to attend and address meetings of Parliament and any committee as if he/she were a member but shall not be entitled to vote on any question before Parliament.

The Prime Minister may give any Minister responsibility for any government department or subject. This includes the Minister that looks after the Justice Department and the Judiciary.

Executive Council

Article 22(1) Constitution

The Executive Council consists of the Queen's Representative and the members of Cabinet.

Attendance of the Queen's Representative and at least three Ministers of Cabinet are required for business to be transacted at the Executive Council.

A meeting of the Executive Council may be summoned to consider any decision recorded in the minutes of a Cabinet meeting.

1.2.4 Parliament

The Parliament of the Cook Islands is established under Article 27 of the Constitution.

Parliament:

- consists of 24 members elected by secret ballot under a system of universal suffrage by electors from the various islands within the Cook Islands
- is presided over by a Speaker, who is nominated by the Prime Minister
- shall be dissolved by the Queen's Representative every four years unless it has been dissolved earlier.

Every question before Parliament shall be decided by a majority of the votes of the members present, except where questions concern amendments to the Constitution.

No business shall be transacted at any sitting of Parliament if the number of members present, excluding the speaker if he/she is present, is less than 12.

Bills and Acts

Article 44 Constitution

Parliament has the power to "make laws (known as Acts) for the peace, order and good government of the Cook Islands, subject to the Constitution. It introduces and passes Bills in accordance with the Constitution and with the Standing Orders of the Parliament.

Bills become law once they have been passed by Parliament and been assented to by the Queen's Representative.

Any member of Parliament may introduce any Bill or propose any motion for debate in Parliament.

The Queen's Representative, acting on the advice of the Prime Minister, must declare that he/she assents to the Bill or that he/she refuses to assent.

The Queen's Representative may summon the Executive Council to consider amendments to a Bill when he/she proposes changes or refuses to assent to the Bill. This must be done within 14 days after the Bill is presented to the Queen's Representative.

If the Executive Council decides that the Bill should be returned to Parliament for consideration of proposed amendments or because the Queen's Representative refuses to assent to it, the Queen's Representative shall return the Bill to Parliament for reconsideration:

- if the Bill then is passed by Parliament after reconsideration, but with the proposed amendments, it shall go back to the Queen's Representative for his/her assent, and he/she shall assent to it.
- if the Bill is passed by Parliament after reconsideration, but is passed in its original form without amendments, the Queen's Representative will declare that he/she assents to the Bill.
- if the Bill is passed by Parliament after reconsideration, but other amendments are made to it other than those proposed, then it shall be presented to the Queen's Representative as if it had not been previously presented to him/her, and the above procedures will apply.

If the Executive Council decides that the Bill should not be returned to Parliament for consideration of amendments or that Queen's Representative should not refuse assent, the Queen's Representative shall assent to the Bill.

A Bill assented to by the Queen's Representative shall be known as an Act of Parliament.

Every Bill that is introduced into Parliament and every Act shall be in the language as spoken in the Cook Islands and also in English.

The Acts which are passed by the Cook Islands Parliament are the laws which the Courts apply and interpret when dealing with the charges, complaints and disputes that are brought before them.

Members of Parliament

Article 36 Constitution

The Constitution gives immunity to Members of Parliament from legal proceedings, when they are acting in their official capacity. No civil or criminal proceedings can be instituted against a Member of Parliament for:

- exercising their powers in conducting the business of government
- words spoken or any vote given by him/her in Parliament or in any committee of Parliament
- any publication of any report, paper, vote or proceeding by or under the authority of Parliament.

Members of Parliament can be sued and prosecuted in respect of acts by them outside their official capacity.

1.2.5 The Judiciary

The Judiciary is the third branch of government in the Cook Islands.

The Judiciary:

- is an independent body which is responsible for interpreting and applying the laws made by the Cook Islands Parliament
- develops and interprets case law
- solves disputes of fact and law between individuals, and between individuals and the State.

1.3 The Cook Islands court system

The court system, *ie.* the High Court of the Cook Islands, is an integral part of the constitutional framework for the Cook Islands. It is described in detail in Chapter 3, *Introduction to the High Court*.

2 The Law in the Cook Islands

2.1 Sources of law in the Cook Islands

The sources of Cook Islands law are:

- the *Constitution*
- *legislation*, including Acts, Ordinances and Regulations
- the *common law* (case law decided by the Courts)
- *custom*.

2.2 The Constitution

The Constitution is the **supreme law** of the Cook Islands and all Acts of Parliament must conform with it. Article 39 Constitution

Therefore, all other laws are to be interpreted and applied subject to the Constitution and, as far as practicable, in such a way as to conform with the Constitution.

It is judges who interpret or decide the meaning of the provisions in the Constitution, so the Constitution is affected by developments in the common law.

The Constitution can only be amended by the Cook Islands Parliament in accordance with the following requirements:

- at both the vote before the final vote and at the final vote of a Bill which repeals, amends, or modifies the *Constitution*, the Bill must receive affirmative votes of not less than two-thirds of the membership (including vacancies) of Parliament
- the vote on the final reading of the Bill must take place at least 90 days after the reading that preceded it
- no such Bill is to be presented to the Queen's Representative for assent unless it is accompanied by a certificate from the Speaker of Parliament to that effect. Article 41(1) Constitution

No Bill repealing, amending or modifying or extending any of the provisions of ss2 to 6 of the Cook Islands Constitution Act 1964 or Articles 2 and 41 of the

Constitution, or making any provisions inconsistent with them, shall be submitted to the Queen's Representative unless:

- it has been passed by Parliament according to Article 41(1) Constitution; and
- it has been submitted to a poll to persons who are entitled to vote as electors at a general election of Members of Parliament; and
- it has been supported by at least two-thirds of the valid votes cast in such a poll; and
- it is accompanied by a certificate from the Speaker of Parliament to that effect. Article 41(2) Constitution

2.3 Legislation

Legislation is law that is passed or authorised by the Legislature (the Parliament). If legislation is inconsistent with the *Constitution*, it can be declared void.

Legislation is interpreted by judges and may be affected by developments in the common law.

Legislation in the Cook Islands consists of:

- Acts (Statutes)
- subordinate legislation, such as Regulations and Rules.

Statutes

The Statutes that apply in the Cook Islands are:

- Acts passed by the Parliament of the Cook Islands according to Article 39 Constitution
- Acts of the Parliament of New Zealand that are declared to be applicable in the Cook Islands, by the Parliament of the Cook Islands according to Article 46 Constitution and the New Zealand Laws Act 1979.

Example
An example of an Act of the Parliament of New Zealand that applies in the Cook Islands is the Narcotics Act 1965.

Legislation can be found in the Consolidated Laws of the Cook Islands 1997, and in subsequent amendments. To see statutes online go to www.paclii.org/ck/legis/num_act/

Subordinate legislation

Regulations and rules are made by the Queen's Representative by Order of the Executive Council.

Understanding and applying legislation

As a Justice of the Peace, it is your job to apply legislation.

Generally, the meaning of certain words and phrases in a Statute are usually found in a section at the beginning of each Act. However if the word or phrase is not defined in the Statute, then it should be given its natural and ordinary meaning.

When interpreting a word or phrase, consider:

- definitions in the Act (if any)
- a legal dictionary
- how it has been used in the particular Act and section (*ie*. the context it has been used in)
- what purpose Parliament had in passing the law.

When an Act says the Court "**may**" do something, this means the power **may** or **may not** be exercised, at your discretion.

When an Act says the Court "**shall**" do something, this means you must. You have no choice.

You must always be aware of various amendments that have been made to the legislation. When an amendment comes into force, it will change particular sections in particular Acts. It may also affect the operation of other legislation.

2.4 Common Law

Common law is the law that is made and developed by higher courts. It is also called case law.

Section 616 Cook Islands Act 1915 requires that courts in the Cook Islands apply the rules of common law and *equity*.[1] Section 100 Judicature Act

[1] For a definition, see the Glossary.

provides that in all matters where there is a conflict between the common law and equity, the rules of equity[2] will prevail.

The higher Courts can make and develop case law:

- where no legislation exists to deal with matters in that case; or
- by interpreting existing legislation.

Judges will often uphold or reject certain provisions in existing legislation when determining a case.

The development of the common law does not mean that judges can make arbitrary decisions. They must follow the Doctrine of Precedent and give reasons for their decision.

The Doctrine of Precedent

Justices must follow decisions of higher courts, unless the material facts in the case are different. This means cases of similar type should be decided in the same way, which gives certainty to the law.

It is through this process of making decisions based on previous decisions that the body of common law has been built up.

Justices are bound to follow decisions of judges of the High Court and the Court of Appeal.

When there is no relevant Cook Islands decision, then cases from New Zealand, England or other common law jurisdictions may be considered as a guide.

2.5 Customary Law

Article 66A(3) Constitution

Until such time as another Act provides otherwise, custom and usage shall have effect as part of the law of the Cook Islands. However, this shall not apply in respect of any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision of the *Constitution* or any enactment.

Parliament may make laws recognising or giving effect to custom and usage, having regard to the customs, traditions, usages and values of the indigenous people of the Cook Islands.

---

[2] For a definition, see the Glossary.

The Cook Islands Act 1915 refers to situations where the Court is asked to investigate title to customary land (s421), and provides that the interests in customary land are to be determined by custom (s422).

Article 66A(4) of the Constitution states that the opinion or decision of the Aronga Mana of the island or vaka to which the custom, tradition, usage or value relates as to extent or application of custom shall be final and conclusive and shall not be questioned in any Court of law.

3 Introduction to the High Court

3.1 General characteristics and structure of the court system

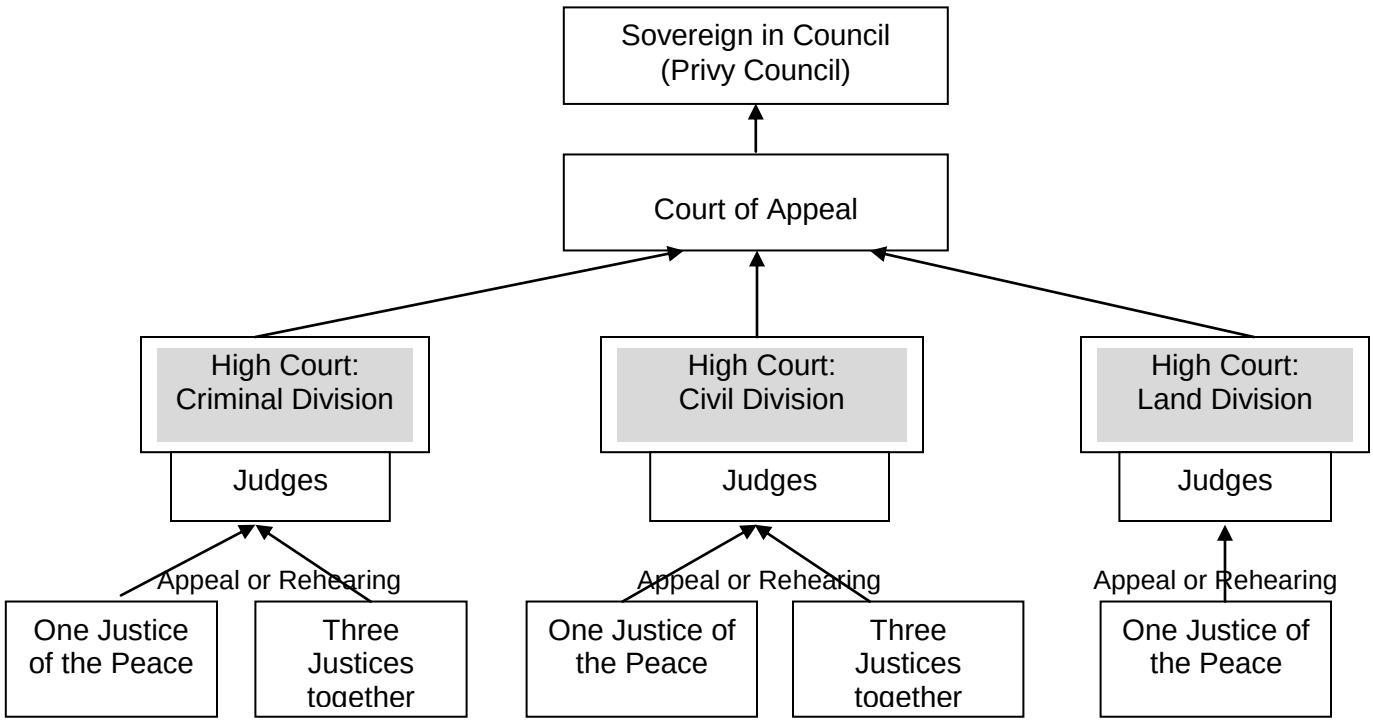
There are three levels of courts:

- the High Court
- the Court of Appeal
- the Sovereign in Council (the Privy Council in England).

The Court system is hierarchical:

- this hierarchy is essential to the Doctrine of Precedent (see below in this chapter)
- the hierarchy provides an appeal system, which allows decisions to be checked by more senior courts. This helps prevent inconsistency within the courts and provides a check and balance system for the fair administration of justice.

The courts are structured in the Cook Islands in this way:



3.2 A brief description of the courts

3.2.1 The Sovereign in Council (Privy Council)

Article 59(2) Constitution

There is a right of appeal from decisions of the Court of Appeal to Her Majesty the Queen in Council:

- with leave of the Court of Appeal; or
- with leave of Her Majesty the Queen in Council, if leave is refused by the Court of Appeal; and in such cases, subject to such conditions as are prescribed by the relevant Act.

The Sovereign in Council is the Queen of the United Kingdom, acting with, and on the advice of, the Judicial Committee of the Privy Council.

3.2.2 The Court of Appeal

The Court of Appeal sits as a panel of three judges. Appeals are decided by a majority vote of the panel. The judge who heard and determined the case in the High Court cannot sit on the panel of judges hearing the appeal as the Court of Appeal.

Most of the sittings of the Court of Appeal are in New Zealand.

The Judicature Act sets out the grounds for, and manner of, appeal to the Court of Appeal.

The Court of Appeal can hear and decide any appeal from a judgment of the High Court, subject to the provisions of the *Constitution.*

The provisions are that the Court of Appeal can hear appeals **as of right**:

- if the High Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of the *Constitution*
- from any conviction by the High Court in the exercise of its criminal jurisdiction where the appellant has been sentenced to imprisonment for life, imprisonment for a term exceeding 6 months, a fine of not less than $200 or any such sentence (not being a sentence fixed by law)
- when a civil matter in dispute on appeal is in respect of $400 or more
- from any judgment involving any question as to the interpretation or application or effect of any provision in Part IVA: Fundamental Human Rights and Freedoms of the Constitution.

Appeals can be heard **with the leave of the High Court** for any other case where the question involved is one of general or public importance, or because of the magnitude of interest affected or for any other reason.

3.2.3 The High Court

Article 47(1-2) Constitution

The High Court is the Court where most people come into contact with the country's judicial system. The High Court of the Cook Islands is a Court of Record[3] and has original jurisdiction to hear all criminal, civil and land matters as is necessary to administer the law in force in the Cook Islands.

Divisions

The High Court has four divisions:

- Criminal Division
- Civil Division
- Land Division
- Children's Court.

Judicial officers

There are two types of judicial officers that sit in the High Court:

- Judges
  The High Court consists of one or more judges. If only one judge is appointed, he/she shall be the Chief Justice of the Cook Islands. If more than one judge is appointed, then one will be chosen to be Chief Justice.
- Justices of the Peace
  Justices of the Peace are appointed by the Queen's Representative, acting on the advice of the Executive Council, which is given by the Minster of Justice.

Jurisdiction of judicial officers

Each of these judicial officers has different jurisdictions as set out in the Constitution and the Judicature Act.

A judge of the High Court may exercise any of the jurisdiction and powers of any Division of the High Court.

---

[3] See Glossary for a definition.

The Judicature Act sets out the jurisdiction and powers of Justices of the Peace appointed under the Constitution.

3.3 The High Court in detail

3.3.1 The Divisions

Article 48(1) Constitution

Each of the four divisions of the High Court hear and determine:

- proceedings that are, as prescribed by a statute, to be heard and determined by that Division
- such other proceedings that may be determined by the Chief Justice, either generally, in any particular proceedings or classes of proceedings.

3.3.2 Language of the Court

The Te Reo Maori Act 2003 specifies that there are two official languages of the Cook Islands: English and Maori.

Although no provision has been enacted which provides that Court proceedings must be conducted in English or Maori, the practice has been that the defendant may choose which language he/she would like the trial to be conducted in.

In addition, Article 65(1)(d) of the Constitution provides for the right not to be deprived of a fair hearing. In order for a fair hearing to take place, a defendant must understand the proceedings against him/her. This requires that the proceedings be conducted in a language that the defendant understands, or that an interpreter is supplied for the defendant.

3.3.3 Governing legislation

The *Constitution* establishes the High Court, and the Judicature Act 1980-81 is the main Act which governs the High Court. Justices should ensure that they know the relevant provisions of the Constitution and the Judicature Act.

Other legislation, including any subsequent amendments, which Justices should familiarise themselves with include:

Crimes Act 1969

Criminal Procedure Act 1981

Criminal Justice Act 1967

Evidence Act 1968

Transport Act 1966

Cook Islands Arms Ordinance 1954

Narcotics & Misuse of Drugs Act 2004

Cook Islands Act 1915

Prevention of Juvenile Crime Act 1968

Victims of Offences Act 1999.

3.4 Composition of the Court

The High Court is composed of the Chief Justice, Judges and Justices of the Peace.

3.4.1 Judges

The High Court shall consist of one or more judges.

If only one judge is appointed, he or she shall be the Chief Justice. If more than one judge is appointed, one of them shall be appointed as the Chief Justice of the Cook Islands. Article 49(2) Constitution

Appointment Article 52 Constitution

The Chief Justice of the High Court shall be appointed by the Queen's Representative, acting on the advice of the Executive Council tendered by the Prime Minister.

Other judges shall be appointed by the Queen's Representative, acting on the advice of the Executive Council tendered by the Chief Justice of the High Court and the Minister of Justice.

A person shall not be qualified for appointment as a judge of the High Court unless he/she:

- holds or has held office as a judge of the High Court of New Zealand, the Supreme Court of New Zealand or the Court of Appeal of New Zealand or any equivalent office in any other part of the Commonwealth or in a designated country; or
- has been in practice as a barrister in New Zealand, in any other part of the Commonwealth or in a designated country, or partly in New Zealand and

partly in any other part of the Commonwealth or in a designated country for a period of, periods amounting to not less than seven years.

Article 49(3) Constitution

Jurisdiction

A judge of the High Court may exercise any of the jurisdiction and powers of a judge of any Division of the Court.

A judge of the High Court or any two or more judges, may in any part of the Cook Islands and at any time and place, exercise all the powers of the High Court.[4]

Tenure of office Article 53 Constitution

A person of any age who does not reside in the Cook Islands and who is qualified for appointment may be appointed to hold office as the Chief Justice or other judge of the High Court for a term of not more than three years. He/she may be reappointed for one or more further terms, as long as each term is not more than three years.

No person who has attained the age of 70 years shall be appointed to or continue to hold office as the Chief Justice or as a judge of the High Court.[5]

The Chief Justice or any other judge of the High Court may resign his/her office in writing addressed to the Queen's Representative.

Removal

A Chief Justice or other judge of the High Court, unless he/she is a temporarily appointed under Article 51 Constitution, cannot be removed from office except by the Queen's Representative. If the matter of removal has been referred to a Tribunal, which has been appointed by the Queen's Representative, then the Tribunal will inquire into the matter and report to the Queen's Representative.

The only ground upon which the Chief Justice or a Judge can be removed from office is inability to discharge the functions of his/her office due to infirmity of mind, body or any other cause, or misbehaviour.

---

4 Subject to Articles 47(1)-(5) & of the Constitution.

5 Except in the case of an appointment made under Article 52(3) Constitution.

3.4.2 Justices of the Peace (Justices)

Appointment Article 62(1) Constitution

The Queen's Representative, acting on the advice of the Executive Council tendered to him/her by the Minister of Justice, may appoint Justices of the Peace for the Cook Islands, who shall hold office for such time as may be prescribed in warrants of appointment.

Every Justice of the Peace shall cease to act in a judicial capacity before becoming a candidate for election to Parliament, but ceasing to act shall not otherwise affect the person's status as a Justice of the Peace.
Article 62(2*)* Constitution Amendment (No. 17) 1994-95

Jurisdiction

The Judicature Act 1980-81 prescribes the jurisdiction and powers of Justices of the Peace appointed under Article 62 of the Constitution.

Removal

A Justice of the Peace shall not be removed from office except by the Queen's Representative, acting on the advice of the Chief Justice.

3.4.3 Other officers of the Court

Other officers of the Court include:

- the Registrar
- the Deputy Registrar
- Administrative Officers.

Registrar s4(3) Judicature Act

The Registrar of the High Court is appointed under the Public Service Act 1995-96. The Registrar:

- keeps the records of the Court
- performs administrative duties with respect to the Court that the Chief Justice shall direct
- is, in effect, the Sheriff of the Court.

In addition to the general duties above, the Criminal Procedure Act 1980-81 specifies that the Registrar may:

- issue arrest warrants
- issue appearance summonses for the defendant
- issue summonses or warrants for attendance of witnesses
- issue search warrants
- substantiate on oath of information
- give leave for an information to be withdrawn
- amend an information
- take pleas
- adjourn the hearing of a charge
- remand a defendant in custody
- grant bail
- prohibit the publication of names
- give leave for a warrant of attendance of a witness to be withdrawn
- take statements of dangerously ill witnesses
- accept guilty pleas made in writing
- accept bail bonds
- amend minute or judgment or other record of the Court.

The Registrar is a trained officer of the Court, and thus is able to provide valuable assistance and advice in regards to procedure and the law. You should make use of his/her advice when you have questions or concerns relating to procedural or legal matters.

Deputy Registrar s5 Judicature Act

Deputy Registrars of the High Court can also be appointed, as is necessary, under to the Public Service Act 1975.

A Deputy Registrar has the same powers and functions and duties as the Registrar. Every reference to the Registrar of the High Court, so far as applicable, extends and applies to a Deputy Registrar.

However, the Deputy Registrar does **not**, in practice, amend hearings, take pleas, adjourn the hearing of a charge under s79 CPA, remand a defendant in custody under s81 CPA, grant bail or prohibit the publication of names under s79B CPA.

Administrative Officers s6 Judicature Act

Administrative officers are sheriffs, bailiffs, clerks, interpreters, or other officers as may be necessary for the High Court. Court administrative officers perform administrative duties as assigned to them by the Registrar.

3.5 Jurisdiction of Justices of the Peace

3.5.1 Jurisdiction defined

"Jurisdiction" is the power and authority to hear or determine a particular matter.

Courts may only act within their jurisdiction, as defined by law.

If a Court hears a case or makes a decision that it has no authority or power to make, then it acts outside its jurisdiction. Consequently, the decision and any orders it makes are not lawful and therefore invalid. It is very important that the Court be satisfied that it has authority to hear any matter before it before it proceeds.

The Courts in the Cook Islands derive their jurisdiction or authority from the Constitution Act 1965.

Criminal jurisdiction

A crime is the commission of an act that is forbidden by Statute or the omission of an act that is required by Statute.

There are different categories of crime, and the category of crime determines which Court has jurisdiction to hear and determine the matter.

Criminal prosecutions are generally brought by the State, represented by the police, against a person(s) who is alleged to have committed an offence.

The Crimes Act 1969 *(*and associated amendments*)* is the main piece of legislation which sets out those acts or omissions that are criminal offences in the Cook Islands.

Other legislation in the Cook Islands also establishes criminal offences. For example:

- the Transport Act 1966
- the Narcotics & Misuse of Drugs Act 2004

- the Cook Islands Arms Ordinance 1954.

Civil jurisdiction

Civil matters cover disputes between individuals, and between individuals and the State that are not criminal matters. The amount claimed in a civil matter is what determines which level of Court may hear the matter.

3.5.2 Criminal jurisdiction

One Justice of the Peace s19(a) Judicature Act[6]

One Justice of the Peace has jurisdiction to hear, determine, and pass sentence in any criminal matter:

- for which the offence is punishable by fine only
- for an offence specified in Part I of Schedule 1 of the Judicature Act 1980-81
- for any offence other than those above, but only for the purpose of taking the defendant's plea
- in any case where an enactment creating the offence expressly provides that a Justice has jurisdiction to preside over the matter
- in any proceedings under the Transport Act 1966 for offences punishable by fine only or by a term of imprisonment not exceeding three years.

Three Justices sitting together s20(a) Judicature Act

Three Justices sitting together have jurisdiction to hear, determine, and pass sentence in any criminal matter:

- for an offence specified in Part II of Schedule 2 of the *Judicature Act 1980-81*
- in any case where an enactment creating the offence expressly provides that three Justices shall have jurisdiction to preside over the matter
- in any case where there has been an election or withdrawal of an election made under *s15A* Judicature Act 1980-81.

Election under s15A Judicature Act 1980-81

A defendant can elect to have a trial before three Justices sitting together or before a Judge:

---

6 As amended by s4(3) Judicature Act 1998.

- except in cases where *s14* Judicature Act applies, which specifically sets out those offences which **must** be tried by Judge and jury
- except in cases where *s15* Judicature Act applies, which sets out offences which must be tried by a Judge alone, a Justice alone, or three Justices together because the offence is punishable by fine only or by imprisonment of not more than six months, (a Justice has no jurisdiction to deal with cases where *s15A* applies); **and**
- as long as the matter to be tried is under any of: s15A(1) Judicature Act
  - Part X Crimes Act 1969 and the Information refers to a monetary value not exceeding $5000, and the offence is punishable by a sentence of 10 years or less
  - s250 Crimes Act 1969
  - conspiracies *and* attempts to commit, or accessories after the fact, to the offence set out above
  - the Ministry of Finance and Economic Management Act 1995-96
  - the Income Tax Act 1972
  - the Turnover Tax Act 1980
  - the Customs Act 1913 (NZ)
  - the Import Levy Act 1972.

3.5.3 Sentencing jurisdiction

One Justice of the Peace

Where a person is convicted of any offence by a Justice sitting alone, the Justice may **only** sentence him/her to:

- imprisonment for a term not exceeding two years
- a fine not exceeding $500; or
- both.

If an enactment specifically provides a maximum penalty of not less than two years or a fine not exceeding $500 or both, the maximum that a Justice may sentence is the maximum in the enactment. If an enactment provides a minimum penalty, a Justice must sentence the defendant to at least that minimum penalty. s21(1) Judicature Act

Three Justices Sitting Together

Where a person is convicted of any offence by three Justices sitting together, the three Justices may only sentence him/her to:

- imprisonment for a term not exceeding three years; or
- to a fine not exceeding $1000; or
- both.

If an enactment provides a minimum penalty, the Justices must sentence the defendant to at least that minimum penalty. s21(1) Judicature Act

The tables in Appendices A and C show the offences under the Crimes Act 1969 and the Transport Act 1966. They do not, however, provide a complete list of all criminal matters that may come before you under other Acts. In those situations, you should check the legislation to see whether you have jurisdiction to hear that matter.

3.5.4 Civil jurisdiction

One Justice of the Peace s19(b) Judicature Act

A single Justice of the Peace has the jurisdiction to hear and determine a civil action:

- for the recovery of any debt or damages not exceeding $1500
- for the recovery of chattels not exceeding in value of $1500
- where by any other enactment, civil jurisdiction is expressly given to a Justice.

Three Justices sitting together ss20(b)(i) & (e) Judicature Act

Three Justices have the jurisdiction to hear and determine a civil action:

- for the recovery of any debt or damages exceeding $1500 but not exceeding $3000
- for the recovery of chattels exceeding in value $1500 but not exceeding in value $3000
- where by any other enactment civil jurisdiction is expressly given to three Justices sitting together.

3.5.5 Other jurisdiction

One Justice s19 Judicature Act

One Justice also has jurisdiction:

- in any application for an order under s141 Cook Island Act 1915, referring to judgment summonses
- in proceeding under s589 Cook Islands Act 1915 relating to the custody of persons of unsound mind arrested under that section
- in proceeding under s10 Judicature Act relating to custody of a minor.

Under the March 30, 2000 (No. 3) Amendment to s19 of the Judicature Act, one Justice is given jurisdiction over proceedings under s10 of the Judicature Act.

Three Justices s20 Judicature Act

Three Justices also have jurisdiction:

- in proceedings under Part VIII of the Cook Islands Act 1915 relating to extradition
- in proceedings under the Fugitive Offenders Act 1969
  - to hear a case and commit a fugitive to prison to await his/her return in the manner prescribed in the Act.

3.6 Transfer of cases to a Judge

s24 Judicature Act

When proceedings are before three Justices,[7] or before one Justice,[8] the Justice(s) may:

- at any time before the defendant has been sentenced or otherwise dealt with, decline to deal any further with the matter
- require that it shall be dealt with by a Judge of the High Court
- endorse on the information a certificate stating the reasons for his/her or their decision to transfer the case.

If a defendant is being convicted or has pleaded guilty, the Justice(s) shall remand him/her for conviction or sentence or both by a Judge. If the defendant is so remanded, the Justice(s) will:

---

7 Pursuant to s15A or s20(a)(i) and Schedule 2, Part 2 Judicature Act.
8 Under s19(a)(ii) and Schedule 1, Part 1 Judicature Act.

- make an order to change the place of the hearing under the provisions of s87 Criminal Procedure Act 1980-81
- cause the information, a statement of the facts of the case, and the bail bond to be presented to the Judge as soon as is practical.

In all other cases the Judge shall deal with the information in all respects as a rehearing.

4 Dealing with Evidence

4.1 Introduction

Evidence is the information used to prove or disprove the facts in issue in a trial. In criminal trials, the prosecution generally bears the burden of proving or disproving the facts in issue, in order to establish the guilt of the defendant, unless an enactment specifically provides otherwise.

Evidence, and the rules related to it, is a complex area of law. This chapter provides a brief introduction to the subject of evidence and outlines some of the rules of evidence that you may encounter in a criminal trial.

The Evidence Act 1968 is the principal statute dealing with this area of law.

4.2 Classification of evidence

In order to properly apply the rules of evidence in a criminal trial, it is important to understand how evidence is classified.

Evidence is generally distinguished by reference to the form it takes or by reference to its content. You must take into account both the form of evidence and the content of the evidence in a criminal trial. For example, oral evidence (which is a form of evidence) given during a trial may be direct or circumstantial (which is the content of the evidence).

4.2.1 Classification by form

Classification by the form of the evidence refers to the way evidence is presented in Court and it is divided into three main categories.

1. Documentary evidence
    - this is information contained in written or visual documents.

2. Real evidence
    - this is usually some material object or thing (such as a weapon) that is produced in Court and the object's existence, condition or value is a fact in issue or is relevant to a fact in issue.

3. Oral evidence
   - this is the most important category of evidence in criminal cases and it consists of the statements, or representation of facts, given by witnesses.

4.2.2 Classification by content

Classification by content refers to the way the evidence is relevant to the facts in issue. This method of classification divides evidence into three categories:

1. Direct evidence
   - this is evidence which, if believed, directly establishes a fact in issue. Direct evidence is evidence given by a witness who claims to have personal knowledge of the facts in issue.

Example
Where the victim clearly saw the defendant carry out the offence and described what he/she directly saw to the Court when giving evidence.

2. Circumstantial evidence
   - is evidence from which the existence or non-existence of facts in issue may be inferred
   - is circumstantial because, even if the evidence is believed, the information or circumstances may be too weak to establish the facts in issue or to uphold a reasonable conviction
   - often works cumulatively in that there may be a set of circumstances that, individually, would not be enough to establish the facts in issue but taken as a whole would be enough to do so.

3. Corroborating or collateral evidence
   - is evidence which does not bear upon the facts in issue either directly or indirectly but is relevant for the credibility or admissibility of other evidence in the case (either the direct or circumstantial evidence)
   - should come from another independent source, *eg*, an analyst or medical report.

4.3 Documentary evidence

This is information that is contained in written documents. These documents may include:

- public documents (statutes, Parliamentary material, judicial documents of the Cook Islands and New Zealand)
- private and local acts
- plans, books, maps, drawings
- statements in documents produced by computers (note that certain rules may apply to this form of documentary evidence)
- tape recordings
- photographs.

Documentary evidence will generally consist of statements or representations which were made 'out of Court', and therefore the question of whether the document making the statement or representation is hearsay evidence will always arise. Often, documentary evidence will only be admissible under an exception to the hearsay rule, or it will be admissible under s22 Evidence Act.

Section 22(1)(a)(b) Evidence Act

In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document, which tends to establish a fact in issue, is admissible if:

- the original document is produced; and
- the person who made the statement in the document had personal knowledge of the matters in the statement; and
- the person who made the statement is a witness to the proceedings.

Exceptions to the rule in s22(1)(a) Evidence Act, requiring the maker of the statement to be called as a witness are:

- if the person has died
- if the person is unfit by reason of bodily or mental condition
- if he/she is beyond the seas
- it is not reasonable practicable to secure his/her attendance in the proceedings
- all reasonable efforts to find him/her have been made without success
- if the other party to the proceedings, who has a right to cross-examine the witness, does not require the person to be cross-examined.

Secondary documentary evidence

Secondary evidence refers to evidence that is not original. You are given the discretion to exclude secondary evidence, subject to s4 of the Evidence Act.

In any criminal proceedings, the High Court may order that a certified copy of original documentary evidence be approved, when admitted under s22(1) or s22(2)(b) Evidence Act.

Examples of secondary evidence include shorthand writing, photocopies and fax copies.

4.4 Real evidence

Real evidence usually refers to material objects or items which are produced at trial.

Documents can also be real evidence when:

- the contents of the document are merely being used to identify the document in question or to establish that it actually exists
- the document's contents do not matter, but the document itself bears fingerprints, is made of a certain substance, or bears a certain physical appearance.

The following may also, in some circumstances, be regarded as real evidence:

- a person's behaviour
- a person's physical appearance
- a person's demeanour or attitude, which may be relevant to his/her credibility as a witness, or whether he/she should be treated as a hostile witness.

Often little weight can be attached to real evidence, unless it is accompanied by testimony identifying the object and connecting it to the facts in issue.

4.5 Exhibits

When real or documentary evidence is introduced in court, it becomes an exhibit. When a party is tendering an exhibit in court, use the following checklist:

Checklist for exhibits

- Has the witness seen the item?
- Has the witness been able to identify the item to the Court?
- Has the party seeking to have the item become an exhibit formally asked to tender it to the Court?
- Has the other party been made aware of the exhibit before the trial or hearing has started?

Once an article has become an exhibit, the Court has a responsibility to preserve and retain it until the trial is concluded. Alternatively, the Court may mark and record the existence of the item, and entrust the object or document to the police or prosecution for safekeeping.

The Court must ensure that:

- proper care is taken to keep the exhibit safe from loss or damage
- if the prosecutor or the police are entrusted with the item, the defence is given reasonable access to it for inspection and examination.

4.6 Oral evidence

Oral testimony consists of statements or representations of fact. These statements may be 'in Court' statements or 'out of Court' statements.

'In Court' statements are defined as those made by a witness who is giving testimony. If a witness wants to mention in his/her testimony a statement which he/she, or somebody else, made outside of the Court, the witness is making an 'out of Court' statement.

The distinction between 'in Court' statements and 'out of Court' statements is very important in the law of evidence. If a witness wants to refer to 'out of Court' statements in his/her testimony, you must decide whether it should be classified as hearsay or original evidence.

If the purpose of the 'out of Court' statement is to **prove the truth of any facts** asserted, then the 'out of Court' statement is classified as hearsay evidence and will generally be ruled inadmissible, under the hearsay rule.

If the purpose of mentioning the 'out of Court' statement is simply to **prove that the 'out of Court' statement was made,** then it should be treated as original evidence and should generally be ruled admissible.

The value of oral evidence is that you can observe:

- the demeanour of the witness
- the delivery
- the tone of voice
- the body language
- the attitude towards the parties.

4.7 Evidentiary issues relating to witness testimony

There are a number of important issues that relate specifically to witness testimony during the course of a criminal trial.

These issues include:

- the competence and compellability of witnesses including spouses, children, the defendant and co-defendant
- examination of witnesses
- leading questions
- refreshing memory
- lies
- corroboration
- warnings to witnesses against self incrimination
- identification evidence by witnesses.

4.7.1 Competence and compellability of witnesses

A witness is **competent** to give evidence if he/she may lawfully be called to testify. The general rule is that any person is a competent witness in any proceedings unless they fall under one of the exceptions under statute or common law.

Compellability means that the Court can require or compel a witness to testify once they have been found competent. You may compel a witness to give material evidence in a criminal trial, subject to just exceptions. s77(2) CPA

Special statutory and common law rules have been developed regarding the competence and compellability of certain kinds of witnesses.

The defendant and co-defendant s6 Evidence Act

The general rule is the defendant is not a competent or compellable witness for the prosecution. This means that the defendant cannot be called by the prosecution to give evidence against him/herself, nor can the Court require the defendant to do so.

When a defendant refrains from giving evidence as a witness, this cannot be held against the defendant. s75(1) Evidence Act

A defendant is a competent witness for the defence but cannot be compelled to give evidence in his/her defence at trial. The defendant may give evidence in his/her defence upon his/her own application.

Where a defendant chooses to give evidence in his/her own defence, he/she is liable to cross-examination like any other witness, notwithstanding that it would tend to incriminate him/her to the offence charged.

A co-defendant can only be a competent and compellable witness for the prosecution, without the consent of the other person, or for the defence if:

- the proceedings against the co-defendant have been stayed, or
- the information for a summary conviction has been withdrawn or dismissed; or
- the co-defendant has been acquitted of the offence; or
- the co-defendant has pleaded guilty to the offence; or
- the co-defendant is being tried separately from the other defendant.

Spouses s6(2)(b) Evidence Act

A spouse is a competent and compellable witness for the defence provided that he/she shall not be called to give evidence except by defendant.

The spouse of the defendant shall be a competent but not compellable witness for the prosecution, without the consent of the defendant, in any case where:

- the defendant is charged with an offence against the spouse or affecting spouse, whether the marriage took place before or after the time of the alleged offence
- the defendant is charged with bigamy
- the defendant is charged and the law in force at the time specifically provides for a spouse to be called without the consent of the defendant
- the defendant is charged with an offence against s215 (cruelty to a child) Crimes Act 1969. s6(3) Evidence Act

Also, the wife of a defendant shall be a competent but not compellable witness for the prosecution, without the consent of the defendant, in a case where:

- the person who the offence is alleged to have been committed against is a woman or child under 21 years of age and is the daughter, granddaughter, son, grandson of the defendant or the wife of the defendant, whether the relationship is traced through lawful wedlock or not
- at the time of the alleged offence, the person was under the care and protection of the defendant or his wife

- the offence is an offence, or attempt to commit an offence, under ss 141-148, or ss153 -155 Crimes Act 1969. s6(4) Evidence Act

Section 7 of the Evidence Act states that a spouse will not be compellable in any proceeding to disclose any communication made to him/ her during the marriage.

Children

Every witness in any criminal matter is required to be examined upon oath: s332 Cook Islands Act 1915. However, the Court may take without oath the evidence of any person under the age of 12 years, but such a witness will be required to make a declaration as set out in s331 Cook Islands Act 1915.[9]

Declaration made by a child witness

"I promise to speak the truth, the whole truth, and nothing but the truth."

This provision provides for the possibility that children can be competent witnesses in a criminal trial, even in cases where they might not understand the implications of swearing an oath.

Regardless of whether a child shall be called to give sworn or unsworn evidence (*ie*. is competent), the child's evidence is given at your discretion and will depend upon the circumstances of the case and upon the child who is being asked to give evidence.

4.7.2 Examination of witnesses

General

Either the informant or the defendant may at any time obtain from any Justice or the Registrar a summons calling on any person to appear as a witness at a hearing. s23(1) Evidence Act

A person commits an offence who, having been previously served with a summons, refuses or neglects to appear in Court or bring the required evidence to Court, and is liable to a fine not exceeding $40. However, the witness may have a just excuse if he/ she establishes to your satisfaction that:

- there was no summons tendered to him/her
- he/she was without the means to travel to the Court

[9] Section 37 of the Prevention of Juvenile Crime Act 1968 states that the evidence of a child should not be taken on oath.

- he/she would not recover the cost of travelling and attending Court from the party calling him/her. s23(4) CPA

Examination-in-Chief

The object of examining a witness by the party calling him/her is to gain evidence from the witness that supports the party's case.

Examination-in-chief must be conducted in accordance with rules of general application such as those relating to hearsay, opinion and the character of the defendant.

There are also other rules that relate to examination-in-chief including:

- the rule requiring the prosecution to call all their evidence before the close of their case
- leading questions
- refreshing memory.

Cross-Examination

The object of cross-examination is:

- to gain evidence from the witness that supports the cross-examining party's version of the facts in issue
- to weaken or cast doubt upon the accuracy of the evidence given by the witness in examination-in-chief
- in appropriate circumstances, to draw questions as to the credibility of the witness.

4.7.3 Leading questions

A general rule is that leading questions may not be asked of a witness during examination-in-chief. A leading question is one which either:

- suggests to the witness the answer which should be given
- assumes the existence of facts which are in dispute.

Leading questions may be allowed in the following circumstances:

- in regard to formal or introductory matters, for example, the name, address and occupation of the witness
- with respect to facts which are not in dispute or introductory questions about facts which are in dispute

- for the purpose of identifying a witness or object in Court.

4.7.4 Refreshing memory

In the course of giving his/her evidence, a witness may refer to a document in order to refresh his/her memory. The basic rules are:

- A witness may refresh their memory from notes.
- The notes must have been made by the witness or under their supervision.
- The notes must have been made at the time of the incident or almost immediately after the incident occurred. Notes made a day or two after should not usually be used.
- The witness should not normally read from the notes, but should use them only to refresh their memory. However, if the notes are lengthy and complex, then the only sensible and practicable course is to allow the witness to actually read them.
- If the defendant or his/her legal representative wishes to see the notes, there is a right to inspect them.

4.7.5 Lies

If it is established that the defendant lied (*ie*. told a deliberate lie as opposed to making a genuine error), this is relevant to his/her credibility as a witness. It does not necessarily mean, however, that the defendant is guilty. Experience demonstrates that lies are told for a variety of reasons, and not necessarily for the avoidance of guilt.

As with a defendant, where a witness is shown to have lied, this is highly relevant to that witness' credibility.

4.7.6 Corroboration

Where corroboration is required, you must look for it in the prosecution's evidence. If, at the end of the hearing, you find that the complainant's evidence does not have support from another witness but you were nevertheless convinced that the complainant was telling the truth, you may still convict the defendant subject to the standard of proof.

You must make it clear on the record or in your judgment that you were aware of the danger of convicting on the uncorroborated evidence of the complainant alone, but were nevertheless satisfied beyond reasonable doubt that the defendant was guilty of the offence charged.

It is important to watch the witness as well as recording details of facts. You may want to:

- record how they give their evidence
- record any inconsistencies within their evidence, or with their evidence and another witness's evidence
- see whether they avoid giving straight answers in areas of importance.

4.7.7 The warning to a witness against self incrimination

You will need to be constantly vigilant about self-incriminatory statements by a witness. If a question is asked of a witness, the answer to which could be self-incriminatory, you should:

- warn the witness to pause before answering the question
- explain to the witness that they may refuse to answer the question
- explain that any evidence the witness gives in Court that is self-incriminating could be used to prosecute them for a crime.

You should note that nothing in the *Evidence Act* can take away or affect the privilege of any witness to refuse to answer any question which may incriminate him/her. s20 Evidence Act

The warning against self-incrimination does not apply to a question asked of a defendant, where the question relates to the offence being considered by the Court.

4.7.8 Identification evidence by witnesses

The visual identification of the defendant by witnesses needs to be treated with some caution. Honest and genuine witnesses have made mistakes regarding the identity of defendants.

The fundamental principle of identification evidence is that the weight to be assigned to such evidence is determined by the circumstances under which the identification was made.

The authority on the issue is the English case of *R v Turnbull and Others*[10] where the Court made the following guidelines for visual identification:

---

10 [1977] QB 224.

Guidelines for visual identification

- How long did the witness have the defendant under observation?
- At what distance?
- In what light?
- Was the observation impeded in any way, as, for example, by passing traffic or a press of people?
- Had the witness ever seen the defendant before?
- How often?
- If only occasionally, had they any special reason for remembering the defendant?
- How long elapsed before the original observation and the subsequent identification to the police?
- Was there any material discrepancy between the description of the defendant given to the police by the witness when first seen by them and his or her actual appearance?

In *Police v Ruaporo* [1985] High Court of the Cook Islands, Roper J adopted *R v Turnbull & Others* in his reasoning, thus making it applicable in the Cook Islands.

4.8 Rules of Evidence

4.8.1 Introduction

Rules of evidence have been established by both the common law and by statute. Rules relating to evidence can be found in the Evidence Act and the Criminal Procedure Act.

The rules of evidence are many and complicated. A brief overview of some of the important rules of evidence that will arise in defended criminal proceedings in the High Court follow.

4.8.2 Burden and standard of proof

There are two kinds of burden of proof: the legal burden and the evidential burden.

Legal burden

The legal burden is the burden imposed on a party to prove a fact or facts in issue. The standard of proof required to discharge the legal burden varies according to whether the burden is borne by the prosecution or the defendant. If the legal burden is on the prosecution, the standard of proof required is *beyond reasonable doubt*.

If the legal burden is on the defendant, the standard of proof required is *on the balance of probabilities*.

The term *balance of probabilities* means that the Justice deciding a case must find that it is more probable than not that a contested fact exists.

The general rule is that the prosecution bears the legal burden of proving all the elements in the offence necessary to establish guilt. The following two defences are the most common exceptions to the general rule.

> *Insanity*
> If the defendant raises this defence, he/she will bear the burden of proving it, on the balance of probabilities.
>
> *Express statutory exceptions*
> A statute may expressly cast on the defendant the burden of proving a particular issue or issues.

You must decide whether a party has discharged the legal burden borne by them at the end of the trial, after all the evidence has been presented.

Evidential burden

The evidential burden is the burden imposed on a party to introduce sufficient evidence on the fact or facts in issue to satisfy you that you should consider those facts in issue.

Generally, the party bearing the legal burden on a particular issue will also bear the evidential burden on that issue. Therefore, the general rule is that the prosecution bears both the legal and evidential burden in relation to all the elements in the offence necessary to establish the guilt of the defendant.

Where the defendant bears the legal burden of proving insanity or some other issue, by virtue of an express statutory exception, they will also bear the evidential burden. However, in relation to some common law and statutory defences, once the defendant discharges his/her evidential burden, then the legal burden of disproving the defence will be on the prosecution.

4.8.3 Judicial notice

The doctrine of *judicial notice* allows the Court to treat a fact as established in spite of the fact that no evidence has been introduced to establish it. The purpose of this rule is to save the time and expense of proving self-evident or well-established facts.

There are two forms of judicial notice that apply to the High Court.

Judicial notice without inquiry

If a fact is of such common knowledge that it requires no proof you may, without relying on other sources of information, take judicial notice of it and direct the Court to treat it as an established fact.

Judicial notice without inquiry pursuant to statute

Judicial notice of a fact may be required by statute. Section 24 Evidence Act requires that Justices shall take judicial notice of an impression the Public Seal of New Zealand, while s25 Evidence Act requires that Justices take judicial notice of impressions of official seals or stamps.

4.8.4 Admissibility of evidence

s3 Evidence Act

At any time during the course of the proceedings, there may be questions or objections as to the admissibility of evidence. You are given the discretion to admit and receive evidence that you think fit to accept, whether it is admissible or sufficient at common law.[11]

However, if there are objections to the admissibility of evidence, you should refer the matter to a Judge pursuant to s106 CPA*: Reservation by Justice of Question of Law for Determination by Judge*, as the submissions will likely deal with a question of law.

This is dealt with in Chapter 24.

Relevance

Relevant evidence means evidence which makes the matter which requires proof more or less probable. Relevance is a question of degree and will have to be determined by you, according to specific facts in the case at hand.

---

[11] Subject, of course, to the provisions of the *Evidence Act*.

The important rule regarding admissibility of evidence is that, subject to the exclusionary rules, all evidence that is sufficiently relevant to the facts in issue is admissible, and all evidence which is irrelevant or insufficiently relevant to the facts in issue should be excluded.

Weight

If you rule that a piece of evidence is admissible, you will then need to determine what weight (*ie*. the amount of importance) the evidence should be given.

In order to decide what weight to attach to statements rendered admissible, you must give regard to:

- all the circumstances from which any inference can reasonably be drawn as to the accuracy of the statement
- whether the statement was made at the same time as the occurrence of the facts stated in the statement
- whether the maker of the statement was given any incentive to conceal or misrepresent the facts. s23 Evidence Act

Discretion to exclude

Section 4 of the Evidence Act gives you the discretion, to refuse to receive any evidence, whether admissible or not at common law, if you consider the evidence to be:

- irrelevant or needless
- unsatisfactory as being hearsay or other secondary evidence.

The judicial discretion to exclude prosecution evidence has been most commonly used in cases where the police or prosecution unlawfully, improperly or unfairly obtained evidence.

4.8.5 The Best Evidence Rule

The Best Evidence Rule relates to the use of documents as evidence. The rule is that, if an original document is available and can be produced without any difficulty, it should be produced.

If the original has been lost or destroyed, or there is some other good explanation as to why the original cannot be produced, a copy may be produced as it is the best evidence that is now available.

4.8.6 The Hearsay Rule

The general rule is that an assertion made by a person, other than the one actually giving oral evidence in a court proceeding, is inadmissible as evidence to prove the truth of some fact that has been asserted.

Despite the general rule, in order to determine whether evidence is hearsay or not, you must:

- determine the purpose for which the evidence will be used before ruling it hearsay evidence
- ensure that the witness who gives the evidence has direct personal knowledge of the evidence contained in the statement, if the prosecution wants to rely on the evidence as being the truth of what is contained in the statement.

The reason for the hearsay rule is that the truthfulness and accuracy of the person whose words are spoken to another witness cannot be tested by cross-examination because that person is not or cannot be called as a witness.[12]

Although the rule against hearsay evidence is fundamental, it is qualified by common law and, in some cases, statutory exceptions. However, you are given discretion to exclude hearsay evidence, whether or not it is admissible or not at common law, if you consider it unsatisfactory as being hearsay.

Example

A statement made to a witness by a person who is not called to be a witness may or may not be hearsay.
It would be hearsay and inadmissible if the object of the evidence would be to establish the truth of what is contained in the statement
It would not be hearsay and would be admissible as evidence if, the statement is used to establish, not the truth of the statement itself, but the fact that it was made.

s32 *CPA*

Exceptions to the Hearsay Rule

Some of the exceptions to the hearsay rule which exist at common law are:

- confessions
- evidence of person about to leave the Cook Islands which is taken before a Judge or Justice
- dying declarations[13]

[12] See *Teper v R* [1952] 2 All ER 447 at 449.

[13] See s33(4) CPA, which sets out the statutory exception to the hearsay rule based on statements by those who are dying or dead.

- *res gestae* (certain statements made in the course of, or soon after, a transaction that is the subject of the Court's inquiry)
- telephone conversations.

4.8.7 Opinion evidence

The rule on opinion evidence is that witnesses may only give evidence of facts they personally observed and not evidence of their opinion. A statement of opinion is only an inference drawn from the facts.

Sometimes the line between fact and opinion is very narrow, and you must exercise ordinary commonsense in deciding whether or not the evidence is admissible, and if so, what weight you should give it.

There are two exceptions to the rule on opinion evidence.

- experts
- non-experts or lay persons.

By experts

Expert witnesses are allowed to give opinion evidence if:

- they are qualified to do so
- if the matter requires such expertise.

Example of expert opinion evidence

A registered medical practitioner giving an opinion whether a person was intoxicated.

In order to give opinion evidence, an expert witness must relate to the Court his/her background, qualifications and experience, to establish their credentials to speak as an expert in a specific field. Having done that, as a general rule they should be allowed to give their opinion on all relevant matters within their competency.

Expert opinion should only be admitted where the Court has been shown that an issue of fact requires the application of knowledge, experience and understanding that is beyond that of ordinary persons.

In the case of reports written by expert witnesses, it is the general rule that they are not admissible if the expert is not called as a witness.

By non-experts

Non-experts may give a statement of opinion on a matter in order to convey relevant facts personally perceived by him/her.

In order for a non-expert or layperson to give evidence of opinion, there must be a factual basis for their opinion.

The witness should be asked to describe the persons or circumstances prior to being asked for his/her opinion.

Examples of non-experts' opinion evidence

- the identity of an object
- the handwriting of which he/she was familiar
- a person's age
- the speed of a vehicle
- the weather
- whether relations between two persons appeared to be friendly or unfriendly.

4.8.8 Character evidence

Admissibility of evidence of bad character

The defendant

As a general rule, it is not open to the prosecution to introduce evidence of the bad character of the defendant in any form.

Therefore, any previous convictions of the defendant may not form part of the case against him/her, nor may his/her previous misconduct, his/her disposition towards wrongdoing or immorality, or his/her bad reputation in the community in which he/she lives.

The only way that evidence of bad character of the defendant can be introduced is by exceptions to the rule. Some of the exceptions to this rule at common law are:

- if evidence of other misconduct forming part of the same transaction of the offence charged is also be admissible at common law
- if the defendant puts his/her character in issue, evidence of bad character may be admitted at common law
- where the defendant gives evidence, he/she may in certain circumstances face cross-examination on his or her character.

Witnesses

A party producing a witness cannot discredit the witness by introduction of general evidence of bad character, but may contradict the witness by other evidence. s10 Evidence Act

You are given a discretion to decide whether or not a witness should be compelled to answer a question on cross-examination which is not relevant to the proceedings but does affect the witness's credit by injuring his/her character. s16(1) Evidence Act

In exercising your discretion you should consider that:

- such questions are proper if the truth of the charges conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he/she testifies
- such questions are improper if the charges they convey relates to matters so remote in time or are of such character that the truth of them would not effect, or only slightly affect, the opinion of the Court
- such questions are improper if there is great disproportion between the importance of the charges made against the witness's character and the importance of his/her evidence s16 Evidence Act

A witness may be questioned as to whether he/she has been convicted of any offence. The cross-examiner may call evidence to prove the conviction if the witness:

- denies having been so convicted
- does not admit a conviction; or
- refuses to answer. s13 Evidence Act

The proof of previous convictions of a witness can be by fingerprints under s14 Evidence Act or by certificate signed by the Registrar or officer of the Court where the person was convicted. When such a certificate is produced, and the identity of the person is established, it will be sufficient evidence of conviction without requiring the signature or official character of the person appearing who signed the certificate. s15(1) Evidence Act

Admissibility of evidence of good character

A defendant may introduce evidence to show that he/she is of good character. By doing so, however, they put their character in issue and the prosecutor may cross-examine witnesses or, in some cases, the defendant about their character and about any previous convictions.

The purpose of introducing evidence of good character is primarily to establish the credibility of a witness or the defendant, as well as to point to the improbability of guilt. Evidence of good character also becomes very important when sentencing the defendant upon conviction of an offence.

5 Criminal Law and Human Rights

5.1 Introduction

Part IVA of the Constitution of the Cook Islands sets out the fundamental rights and freedoms that are protected in the Cook Islands.

You should ensure that all fundamental rights are respected in the administration of justice.

The rights and freedoms set out in Article 64(1)(b) and Article 65 are particularly important for conducting criminal trials. These rights and freedoms are discussed below.

5.2 Right to a fair and public hearing by an independent and impartial court

Independent and impartial court

In *John Michael Collier & Anor v The Attorney-General*[14], the New Zealand Court of Appeal stated that individuals have the right to be tried by an impartial tribunal, and set out the test for determining whether judicial bias, or the appearance of bias, exists. Their reasoning is highly persuasive in the Cook Islands.

The Court stated, in paragraph 21 and 22 of the judgment:

> "It goes without saying that in the determination of rights and liabilities everyone is entitled to a fair hearing by an impartial tribunal. Where actual bias is shown or effectively presumed, the Judge is disqualified.
>
> Where the focus is on the appearance of bias, the test is whether there was a real danger of bias on the part of the Judicial Officer in question in the sense that the Judicial Officer might unfairly regard (or have unfairly have regarded) with favour or disfavour the case of a party to the issues under consideration by the judicial officer.
> (See the discussion in *Riverside Casino Ltd v Moxon)*[15]

14 [2001] NZCA 328 (13 November 2001).
15 *[2001] 2 NZLR 78* at paras *[26]-[31].*

> The test is objective, in this case viewed through the eyes of the reasonable observer aware of all the relevant circumstances. It is not the subjective perception of the particular litigant…."

5.3 Presumption of innocence

The principle in Section 65(e) of the Evidence Act is an extremely important principle in criminal law.

Section 65(e) *[extract]*

"no enactment shall be construed or applied so as to deprive any person charged with an offence of the right to a hearing by an independent and impartial tribunal."

You must ensure that:

- you do not base your finding of guilt on previous knowledge of the accused
- the prosecution bears the burden of proving the accused's guilt, beyond reasonable doubt.

In *Frances Neale v Cook Islands Police Department*[16] the judge stated the importance of presuming the accused innocent until proven guilty. He stated:

> "It is axiomatic that suspicion is not enough. The case had to be proved beyond reasonable doubt."

See also *Azzopardi v R* in the High Court of Australia.[17]

5.4 Right to freedom from cruel or degrading treatment

Article 65(1)(b) of the Constitution states:

> "No enactment shall be construed or applied so as to impose or authorise or effect the imposition on any person of cruel and unusual treatment or punishment."

In *Metuavaine Miri and Crimes Act 1969 & Criminal Justice Act 1967 (Sentencing)* [1995] High Court, Chief Justice Quillam stated that the punishment that had been inflicted upon the defendant was seriously in breach of the human rights provision of the Constitution and, in particular, against Article 65(1)(b) of the Constitution, the right to freedom from cruel or degrading treatment.

---

16 [1992] CR. NO 228/92 (High Court), Quillam J.
17 [2001] 4 LRC 385.

The defendant, who had escaped from prison several times and was up for sentencing after committing a number of offences while at large, had been previously confined for 14 months in a cell with no bedding and equipment, in solitary confinement and in total darkness except for half an hour a day.

The Chief Justice set out the conditions that the prisoner had to endure in his sentencing reasons:

> "in hope that never again in the Cook Islands, would such treatment be given to any prisoner."

5.5 Right to counsel

Article 65(1)(c)(ii) of the Constitution states:

> "…. no enactment shall be construed or applied so as to … deprive any person who is arrested or detained … of the right, wherever practicable, to retain and instruct a barrister or solicitor without delay."

In many cases, it will be important for a defendant to have legal representation, or at least the advice of a lawyer, in order to understand the charges against him/her and to be able to defend him/herself against those charges.

The Court should ensure that a defendant is given time to meet with a legal representative if he/she so chooses.

The right to retain and instruct a barrister or solicitor, as set out in Article 65(1)(c)(ii), was canvassed in *Police v Ngametua Tutakiau*.[18] In this case, defence counsel challenged the admissibility of a statement by the defendant, taken by the Police, on the grounds that the Police had not informed the defendant of his right to a lawyer before he made the statement. The Chief Justice ruled that:

> "[the defendant] was arrested but he was not informed of his right to a lawyer, but he was entitled to be informed of his right to a lawyer. It is too late to do it at the end of the interview and obtaining the full statement. In the circumstances, I rule that the written statement is inadmissible".

[18] [2001] Cook Islands Crim.

5.6 Right not to be found guilty of a criminal offence if, at the time, it does not constitute a breach of the law

Article 65(1)(g) of the Constitution states:

> "No enactment shall be construed or applied so as to authorise the conviction of any person of any offence except for the breach of a law in force at the time of the act or omission".

Upholding this right prevents a person from being tried for something that is not an offence in law at the time they committed an act or omission. If there is no law, there is no offence.

This right also prevents a person from being tried, for an act or omission they committed before the legislation making it unlawful came into existence.

Example
If a person commits an act in 2001, but no legislation exists regarding that offence until 2003, the person cannot then be tried for the act committed in 2001 using the 2003 legislation.

5.7 Freedom from unlawful and arbitrary detention

Article 65(1)(c)(iii) of the Constitution states:

> "No enactment shall be construed or applied so as to deprive any person who is arrested and detained of the right to apply, by himself, or by any other person on his behalf, for a writ of habeas corpus for the determination of the validity of his detention and to be released if his detention is not lawful."

Habeas Corpus

Habeas corpus is a Court petition which orders that a person, who is being detained, be brought before the Court for a hearing to decide whether the detention is lawful. A writ of habeas corpus ensures an individual's right against unlawful and arbitrary detention.

Section 11 of the Judicature Act reinforces the right to apply for a writ of habeas corpus. Section 11 states:

> "The High Court may, on the application of any person, make an order for the release of any person from unlawful imprisonment or detention, or for the production before the Court of any person alleged to be unlawfully imprisoned or detained, and every person who disobeys such order shall be guilty of contempt of the High Court."

6 Principles of Criminal Responsibility

6.1 Introduction

In the Cook Islands, no person can be prosecuted for any criminal offence at common law and thus, every criminal offence is created by a Statute, Regulation or By-law. s8 Crimes Act

The Crimes Act 1969 is the main statute that sets out those acts or omissions which should be regarded as a criminal offence in the Cook Islands.

This chapter will discuss the:

- important principles of the criminal law which govern criminal proceedings in the Cook Islands
- defences that can be raised which excuse a defendant from criminal responsibility
- party(s) which will be held criminally responsible for those acts or omissions.

6.2 Principles of criminal law

6.2.1 Innocent until proved guilty

One of the most important principles in criminal law is that the defendant is innocent until proved guilty.

Unless and until the prosecution proves beyond reasonable doubt that the defendant is guilty of all the elements of the offence, he/she is innocent in the eyes of the law. You must always follow this principle.

6.2.2 Double jeopardy

Another important principle is that a person cannot be prosecuted, and punished, for the same crime more than once.

6.2.3 Burden and standard of proof

Burden

The prosecution has the burden, or responsibility, of proving their case. They must prove **all** the elements of the offence, beyond reasonable doubt.

If, at the end of the prosecution case, the prosecution has not produced evidence of all the elements of the offence, then there is no case to answer and the prosecution has failed.

If the prosecution has succeeded at producing evidence of all the elements of the offence, then the defence has a chance to present their case and then you must decide whether the prosecution has proved their case beyond reasonable doubt, taking into account what the defence has shown.

Remember that the defence does not have to prove anything. It is for the prosecution to prove all the elements beyond reasonable doubt. If you have a **reasonable doubt** on any of the elements, after hearing the evidence of the defence (if any) or submissions without evidence, then the prosecution has failed and the defendant should be found not guilty.

Standard: beyond reasonable doubt

You o decide the guilt or innocence of the accused by reason and not by emotion; by your head and not by your heart. The standard of proof, on which the prosecution must satisfy you, is beyond reasonable doubt. The phrase has its ordinary meaning. Taking account of the prosecution evidence and the evidence (if any) of the defence and the submissions, you must be **sure** that the accused is guilty. If you have a reasonable doubt about that then you must acquit the accused.

6.2.4 What must be proved

All offences involve:

- *actus reus*; and
- *mens rea*.

Actus Reus: the physical act or omission

This is the physical action or conduct, or an omission:

- which is not allowed by law; or

- where the result is not allowed by law.

These acts or omissions are the physical elements of the offence, **all** of which must be proved by the prosecution.

An offence may consist of one act or omission or a series of acts or omissions. The failure by the prosecution to prove the act(s) or omission(s), and any accompanying conditions or circumstances means there can be no conviction.

Mens Rea: mental capacity

Most offences require the prosecution to prove the defendant had a particular state of mind in addition to the act and its consequences. The particular state of mind is called the *mens rea.*

They could be:

- intention: the defendant means to do something, or desires a certain result
- recklessness: although the defendant does not intend the consequences, the defendant foresees the possible, or probable, consequences of his/her actions and takes the risk
- knowledge: knowing the essential circumstances which constitute the offence
- belief: mistaken conception of the essential circumstances of the offence
- negligence: the failure of the defendant to foresee a consequence that a reasonable person would have foreseen and avoided.

Mens Rea as an essential element of every offence

Mens rea is presumed to be an element of every offence. This principle was settled in the English case of *Sherras v De Rutzen.*[19] Even if words normally associated with *mens rea*, such as "knowingly" are not used in an offence section, it is still presumed that some mental element must accompany the act to make it criminal.

The only exception is where there is specific language in the statute which clearly shows that this presumption does not operate and committing the *actus reus* alone will be enough.

[19] (1985) 1QB 918.

Individuals intend the natural consequences of their actions

It is the burden of the prosecution to prove every element of an offence through direct or circumstantial evidence. Nevertheless, you can presume that individuals intend the natural consequences of their actions.[20]

6.3 Criminal responsibility

Part III of the Crimes Act sets out the rules as to criminal responsibility. Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

Generally, a defendant's case will either be that:

- the prosecution has not proved all the elements beyond reasonable doubt; or
- he/she has a specific defence, specified in the actual offence (*eg*. "lawful excuse"); or
- he/she was not criminally responsible, relying on one of the sections under Part III of the Crimes Act or upon the common law.

In the case of a defence under Part III or under the common law, the defendant must point to some evidence to support such a defence. Then, it is the prosecution that bears the burden of proving that such evidence should be excluded and that the defendant was criminally responsible for his/her act(s) or omission(s).

The exception is insanity. In this case, it is for the defendant to prove, on the balance of probabilities, that they were insane at the time of the offence and therefore, did not have the required *mens rea* for the offence.

The rules in Part III of the Crimes Act can be divided into two categories:

1. Those rules that relate to a denial of the *mens rea* of the offence or to a denial that the defendant was acting voluntarily. These include:
    - ignorance of the law
    - negligence, involuntary actions and accidents
    - mistake of fact
    - intoxication

[20] See *R v Lemon* [1979] 1 All ER 898.

- insanity
- infancy.

2. Some of the rules that relate to excuses or circumstances which justify, in law, the conduct of the defendant are:
   - compulsion
   - defence of person
   - defence of property.

6.4 Rules relating to the mens rea of an offence and to involuntary acts

6.4.1 Ignorance of the law

The fact that an offender is ignorant of the law is not an excuse for any offence committed by him/her. s28 Crimes Act

The fact that a defendant did not know that his/her action or omission was against the law at the time of the offence is not a valid excuse to avoid criminal responsibility. Therefore, it cannot be raised as a defence by the defendant and the prosecution is not required to prove the defendant's knowledge of the law in order to prove its case.

The exception to this rule is where knowledge of the law is expressly set out in a statute as being an element of an offence, in which case:

- the defendant can raise evidence that he/she did not know that his/her actions or omissions were against the law at the time of the offence; and
- the prosecution is required to prove beyond reasonable doubt that the defendant had such knowledge of the law.

6.4.2 Negligence, involuntary acts and accidents

Subject to the express provisions of any enactment relating to negligent actions and omissions, a person is generally not criminally responsible for an action or omission which occurs independently of the exercise of his/her will or for an event which occurs by accident.

Negligent actions or omissions

Criminal negligence is where the defendant's action or omission, which constitutes the offence, fails to comply with the standards of the reasonable person. This is a different standard of fault than most criminal offences, which require proof of the defendant's state of mind.

Therefore, a person can be found criminally negligent for something, even if it is an accident, if a reasonable person would have been aware of the risks of that conduct in the same situation.

Involuntary actions

Most criminal offences require that the defendant's actions or omissions be 'willed' or 'voluntary'.

> **Example**
> Robert was thrown out of a shop window by his enemies and landed on a car window. Robert would not be criminally responsible for the damage to the car because it was not Robert's voluntary action that led to the damage of the car.

Involuntary actions

A defendant will not be criminally responsible for actions or omissions that are involuntary, not only because there is a lack of the required *mens rea* for the offence but also because involuntary movements cannot constitute the necessary *actus reus* of any offence.

Automatism

Automatism is a common law defence. It refers to when a defendant is not consciously in control of his/her own mind and body.

This defence is limited to cases where there is a total loss of voluntary control. Impaired or reduced control is not enough.

The defence of automatism may be invalid when the defendant is at fault for falling into the condition in the first place. The prosecution would have to prove the defendant was reckless as to what would happen if he/she fell into the condition for it not to be a defence.

The state of automatism can arise from:

- concussion
- sleep disorders
- acute stress
- some forms of epilepsy

- some forms of neurological and physical ailments.

The prosecution bears the legal burden of proving that the actions of the defendant were voluntary and that the defence of automatism does not apply. However, the defendant must give sufficient evidence to raise the defence that his or her actions were involuntary: *Bratty v Attorney-General for Northern Ireland.*[21] The evidence of the defendant will rarely be enough to raise the defence of automatism. Expert medical evidence is required.

Accidents

A person is generally not criminally responsible for an event that occurs by accident.

The event must not be intended by the defendant. An event is an accidental outcome of the willed act, which then leads to a result. The event must not have been able to be easily foreseen by the defendant under the circumstances.

You must ask:

> Would such an event have been easily foreseen by an ordinary person in the same circumstances?

The prosecution bears the burden of proving that the action or omission was not an accident, beyond a reasonable doubt. However, when the defence of accident is raised by the defendant, he/she must point to some evidence in support of the defence.

6.4.3 Mistake of fact

For the common law defence of mistake of fact to succeed:

- the defendant must have been under an honest, but mistaken, belief as to the existence of any state of things; and
- the offence must have been committed while holding that honest but mistaken belief.

Whether the defendant was under an honest but mistaken belief is a subjective test, that is, from the evidence presented, did the defendant **actually** have a genuine and honest belief as to the state of things, even though he/she was mistaken in that belief?

---

[21] [1961] 3 All ER 523.

The common law rules for an honest but mistaken belief are:

- the prosecution has the burden of proving the unlawfulness of the defendant's action
- if the defendant has been labouring under a mistake as to the facts, he/she must be judged according to his/her mistaken view of the facts
- if the defendant was or may have been mistaken as to the facts, it is immaterial that, on an objective view, the mistake was unreasonable.[22]

6.4.4 Intoxication

Intoxication itself is not a defence to a crime. Evidence of intoxication may be relevant as to whether it should be inferred that the accused acted with the intention or recklessness required to prove the charge.

6.4.5 Insanity

Presumption of sanity s26(1) Crimes Act

Every person is presumed to be sane at the time or doing or omitting any act until it is proven otherwise.

Proof of insanity s26(2) Crimes Act

A person will not be criminally responsible for an action or omission when, labouring under natural imbecility or through disease of the mind, they have been rendered incapable of:

- understanding the nature and quality of the act or omission; or
- knowing that the action or omission was morally wrong, having regard to the commonly accepted standards of right and wrong.

It is the defendant who bears the onus of proof for a defence of insanity, and the burden of proof is on the balance of probabilities.

Section 26 Crimes Act and the common law

There are two differences between s26 of the Crimes Act and the common law with regards to insanity:

---

22 *R v Williams (G.)* [1984] CrimLR. 163, CA.

- Section 26 Crimes Act refers to natural imbecility and disease of the mind
- Section 26 Crimes Act treats people as insane if they do not have the capacity to understand the nature and quality of the act or omission, or lack knowledge that the act was morally wrong.

Test for insanity

The first alternative is incapacity of understanding the nature and quality of the act or omission. This refers to the physical character of the conduct. So, for example, a person with a disease of the mind who thought that they were cutting bread or a pig's throat when attacking the victim would qualify as not being capable of understanding the nature and quality of the act. Likewise, if the person is not conscious of acting at all.

The second alternative is the incapacity of knowledge of the morality of the act or omission. A test for this alternative, is set out in the Solomon Islands case of *R v Ephrem Suraihou*[23] as:

- If, through a disease of the mind, a person could not reason about the matter with a moderate degree of sense and composure, he/she could not know that what he/she was doing was wrong.
  - Wrong is defined according to the everyday standards of reasonable people.
- If a disease so governs the mind of the defendant that it is impossible for him/her to reason with some moderate degree of calmness as to the moral quality of what he/she is doing, he/she does not have the capacity to know what he/she does is wrong.
- Even if the disease is shown to have affected the defendant's mind, it is not enough. He/she must show, on the balance of probabilities, that the disease **deprived** him/her of the **capacity to know** or the **capacity to understand**.

What is disease of the mind?

The meaning of disease of the mind is a legal question for a Judge or Justice to decide rather than a medical question, even though medical evidence may be required.

The mind refers to the mental faculties of reason, memory and understanding, in the ordinary sense.

---

23 Unrep. Criminal Case No. 33 of 1992.

The disease must so severely impair these mental faculties, and lead the defendant not to know the nature and quality of the act that he/she was doing, or that he/she did not know that what he/she was doing was wrong: See the McNaughten Rules from *McNaughten.*[24]

The term 'disease of the mind' has often been defined by what it is not. It is **not**:

- a temporary problem of the mind due to an external factor such as violence, drugs, or hypnotic influences
- a self-inflicted incapacity of the mind
- an incapacity that could have been reasonably foreseen as a result of doing or omitting to do something, such as taking alcohol with pills against medical advice.[25]

In these cases, the defendant **may not** be excused from criminal responsibility, although there are difficult borderline cases.

Expert evidence

In order to plead a defence of insanity, the defendant should have medical evidence which points to his/her mental incapacity. The defendant's evidence alone will rarely be enough to prove this defence.[26] The evidence from a psychologist with no medical qualification is not sufficient to raise the defence of insanity.[27]

6.4.6 Infancy

No person shall be convicted of an offence, by reason of any action or omission, when the person is under the age of 10. s24(1) Crimes Act

Evidence of age

In cases where the defence of "immature age" is raised, evidence as to the child's age should be given.

Capacity to know and understand for children between 10 and 14 years

From *R v Sheldon*[28]

---

24 (1843) 10 CL & F 200.
25 *R v Quick & Paddison* (1973) 57 CrAppR 722.
26 *Bratty v Attorney-General for Northern Ireland* [1963] AC 386.
27 *R v Mackenney & Pinfold* (1983) 76 CrAppR 271.
28 [1996] 2 CrAppR 50.

> "It is for the prosecution to prove, beyond reasonable doubt, that when committing the offence, the child knew that his or her act was seriously wrong or contrary to law. This is distinct from an act of mere naughtiness or childish mischief."

Clear positive evidence as to the child's capacity is required, not just evidence as to the offence itself.

The surrounding circumstances are relevant and what the defendant child said or did both before and after the action may go towards proving guilty knowledge. However, sometimes this behaviour may be consistent with naughtiness or mischief rather than wrongdoing.

Proof that the defendant was a normal child for his/her age will not necessarily prove that he/she knew his action was seriously wrong.

Capacity or understanding may be proven by:

- calling any person who knows the child and is able to show that the child did know that he/she ought not to commit the offence:
  - this can include teachers, parents, relatives;
- the investigating officer asking the following questions:
  - Did you know that what you did was seriously wrong?
  - Why did you know it was seriously wrong?
  - Would you have done what you did if a police officer, your parents, teachers, village elders or your pastor could see you?

6.5 Rules relating to excuses or special circumstances

6.5.1 Compulsion (or Duress)

s27(1) Crimes Act

A person who commits an offence will not be held criminally responsible for the offence if he/she:

- commits it under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed; and
- believes that the threats will be carried out; and

- is not party to any association or conspiracy whereby he/she is made subject to compulsion.

A defendant cannot use the excuse of compulsion to avoid criminal responsibility where the offence committed is:

- aiding or abetting rapes
- treason (s75) or communicating secrets (s80)
- sabotage(s81)
- piracy (s103)
- piratical acts (s104)
- murder (ss187-188)
- attempt to murder (s193)
- wounding with intent (s208)
- injuring with intent to cause grievous bodily harm (s209(1))
- abduction (s230)
- kidnapping (s231)
- robbery (s256)
- arson (s317).

The test for compulsion by threats

1. Were there two or more parties to the offence?

2. Was the defendant driven to act as he/she did because he/she had a belief, because of what the other party did or said, that if he/she did not act, the other party would kill or cause grievous bodily harm to him/her?

3. The treat must be immediate. It must be effective at the time of the offence though it might have been made at an earlier stage.

4. The person making the threat must be present when the offence is committed.

Type of threat

There must be threats of death or grievous bodily harm.

Serious psychological injury is not enough of a threat.[29]

Threats of death or grievous bodily harm made to third parties, especially close relatives, may be enough of a threat to give a defence.[30]

Compulsion by circumstances

Compulsion by circumstances is when a defendant does an action or omission in order to **escape** from the threats of the other person.

This defence is available only if, from an objective standpoint, the defendant was acting reasonably and proportionately in order to **avoid** a threat of death or grievous bodily harm.

Compulsion by spouse s27(3) Crimes Act

Where a married woman commits an offence, the fact that her husband was present at the commission of the offence shall not, in itself, raise the presumption of compulsion.

6.5.2 Defence of property

Defence of movable property against trespasser s54(1) Crimes Act

Everyone in peaceable possession of any movable thing, and anyone assisting him/her, is justified in using reasonable force to resist the trespasser from taking the thing or to regain the thing from the trespasser, as long as he/she does not strike or do bodily harm to the trespasser.

Defence of movable property with claim of right s55(1) Crimes Act

An honest claim of right is when a person honestly asserts what he/she believes to be a lawful claim relating to property, even though it may be unfounded in law or in fact.[31]

Everyone in peaceable possession of any movable thing under claim of right, and anyone acting under his/her authority, is protected from criminal responsibility if:

- he/she uses reasonable force to defend his/her possession, even against a person entitle by law to possession; and

29 *R v Baker and Wilkins* [1997] Crim LR, 497.
30 *R v Oritz* (1986) 83 Cr App R 173.
31 *R v Bernhard* (1938) 26 CrAppR 137.

- the defendant does not strike or do bodily harm to the other person.

If a person who is in peaceable possession of any movable thing cannot claim a right to the thing or is not acting under the authority of a person claiming any right to it, he/she cannot be justified or protected from criminal responsibility for defending his/her (or another person's) possession. s56 Crimes Act

Defence of dwelling house s57 Crimes Act

Everyone in peaceable possession of a dwelling house, and everyone lawfully assisting him/her or acting under his/her authority, is justified in using such force as is necessary to prevent a person who they believe, on reasonable and probable grounds, has no right to be breaking and entering into his/her dwelling house.

Force s64 Crimes Act

Everyone authorised by law to use force is criminally responsible for any excessive force, according to the nature and quality of the act that makes up the excessive force.

6.6 Parties

The law recognises that there can be more than one person connected to a criminal offence. This includes:

- those who actually commit the offence (principal offenders)
- those who somehow contribute to the commission of the offence through encouragement, advice or assistance (accessories)
- those who conspire to commit an offence
- those who aid an offender after the commission of the offence (accessories after the fact).

6.6.1 Principal offenders

A principal offender is the person(s) whose actual conduct satisfies the definition of the particular offence in question.

Section 68(1)(a) of the Crimes Act states that everyone is a party to and guilty of an offence who actually commits the offence.

Example
If a person punches another on the face causing injury, that person would be considered the principal offender for the offence of assault.

It must be proved that the defendant had both the *mens rea* and *actus reus* for the particular offence that they have been charged with to be a principal offender.[32]

In cases where there is only one person who is involved in the offence, he/she will be the principal offender.

6.6.2 Accessories

An accessory is a person who aids, abets, or counsels or procures the commission of an offence. Although an accessory is not a principal offender, they are charged and can be convicted of the actual offence as if they had been the principal offender.

An accessory may be found criminally responsible for all offences unless it is expressly excluded by Statute.

The *actus reus* of an accessory involves two concepts:

- aiding, abetting, counselling and procuring; and
- the offence.

The mental element (*mens rea*) for an accessory is generally narrower and more demanding than that required for a principal offender. The mental element for principal offenders includes less culpable states of mind such as recklessness or negligence, while the mental elements required for an accessory are:

- *knowledge*: he/she must know at least the essential matters which constitute the offence; and
- *intention*: he/she has an intention to aid, abet, enable, counsel or procure. This does not necessarily mean that he/she had the intention as to the principal offence that was committed. Note that a common intention is not required for procuring.

Aiding and abetting s68(1) Crimes Act

Every person is a party to and guilty of an offence who does or omits an act for the purpose of **aiding** any person to commit the offence.

Every person is a party to and guilty of an offence who **abets** any person in the commission of the offence.

---

32 See section 6.2.3 of this chapter.

The terms "aid" and "abet" generally mean to give assistance and encouragement at the time of the offence. To prove the offence of aiding and abetting to another person in the commission of an offence it must be established that he/she:

- is present (actual or constructive); and
- knows the facts necessary to constitute the offence; and
- is actively encouraging or in some way assisting the other person in the commission of the offence.

Actual knowledge of, or wilful blindness towards, the circumstances which constitute the offence is required. This does not mean the same mental state as that required by the principal party in the commission of the substantive offence. Rather, the secondary party must know of the principal's mental state and the facts which would make his/her purpose criminal.

In *Attorney-General Reference* (No. 1 of 1975)[33], it was found that some sort of mental link is required between the principal offender and the secondary party in order for there to be aiding and abetting. This requires that the principal offender and the secondary party were together at some stage discussing the plans made in relation to the alleged offence.

In *Wilcox v Jeffrey*[34], the Court held that mere presence alone is insufficient to act as an encouragement. There must, on behalf of the secondary party, be an intention to encourage, or actual encouragement, beyond an accidental presence at the scene of the crime.

In *R v Allan*[35], the Court held that, to be a principal in the second degree to an affray, there must be some evidence of encouraging those who participated. Courts cannot convict a man for his thoughts unaccompanied by any other physical act beyond his presence.[36]

The elements for aiding or abetting are:

1. An offence must have been committed by the principal.
2. The defendant was acting in concert with the principal offender (encouragement in one form or another is a minimal requirement).

---

33 [1975] 2 All ER 684.
34 [1951] 1 All ER 464.
35 [1965] 1 QB 130.
36 See also: *Johnson v Youden* [1950] 1 KB 554, per Lord Goddard; *Gillick v West Norfolk and Wisbeach Area Health Authority* [1986] 1 AC 112; *R v Clarkson* [1971] 3 All ER 344.

3. There was some sort of mental link or meeting of the mind between the secondary party and the principal offender regarding the offence.

Inciting, counselling or procuring

Every person is a party to and guilty of an offence who incites, counsels or procures any person to commit the offence.

A person may incite another person to do an act by pressure, persuasion or by threatening.

The term, "to counsel or procure", generally describes advice and assistance given at an earlier stage in the commission of the offence.

Example
If Tane counsels Moana to murder Aroha, but Moana only causes grievous bodily harm, Tane can be found guilty

You should note that every person who incites, counsels and procures another person to be a party to an offence is:

- a party to that offence, even if the offence was committed in a way that was different from what was incited, counselled, or suggested; or
- a party to **every** offence which the other commits as a consequence of the inciting, counselling and procuring and which the person inciting, counselling or procuring knew was likely to be committed as a consequence of the inciting, counselling or procuring s72 Crimes Act

Inciting

The legal meaning of "incite" is to persuade, pressure or threaten.[37] The elements for inciting are:

1. An offence must have been committed by the principal.
2. The defendant incited the principal to commit an offence.
3. The defendant intends or assumes that the person he/she incites will act with the mens rea required for that offence.

Counselling

The normal meaning of counsel is to incite, solicit, instruct or authorise.

Counselling does **not** require any causal link. As long as the advice or encouragement of the counsellor comes to the attention of the principal

[37] *Race Relations Board v Applin* [1973] QB 815.

offender, the person who counselled can be convicted of the offence. It does not matter that the principal offender would have committed the offence anyway, even without the encouragement of the counsellor.[38]

The defendant must counsel **before** the commission of the offence.

When a person counsels another to commit an offence and the offence is committed, it is immaterial whether:

- the offence actually committed is the same as the one that was counselled or a different one
- the offence is committed in the way counselled or in a different way.

Example
If Tane counsels Moana to murder Aroha by shooting, Tane can still be found guilty of murder if Moana

The one who counselled will be deemed to have counselled the offence actually committed by the principal offender, provided the facts constituting the offence actually committed are a **probable consequence** of the counselling.[39]

The elements for counselling are:

1. An offence must have been committed by the principal.
2. The defendant counselled the principal to commit an offence.
3. The principal acted within the scope of his/her authority.[40]

Procuring

To procure means to bring about or to cause something or to acquire, provide for, or obtain for another.

Procuring must occur prior to the commission of the offence.

Procuring was defined in *Attorney-General's Reference (No. 1 of 1975)*[41]

- Procure means to produce by endeavour.
- You procure a thing by setting out to see that it happens and taking appropriate steps to produce that happening.
- You cannot procure an offence unless there is a causal link between what you do and the commission of the offence.

---

38 *Attorney-General v Able* [1984] QB 795.
39 See *R v Calhaem* [1985] 2 All ER 226.
40 *R v Calhaem* [1985] 2 All ER 267.
41 [1975] 2 All ER 684.

- There does not have to be a common intention or purpose but there must be a causal link.

Any person who procures another to do or omit to do any act that, if he/she would have done the act or made the omission themselves and that act or omission would have constituted an offence on his/her part:

- is guilty of the offence of the same kind
- is liable to the same punishment as if he/she had done the act or made the omission
- may be charged with doing the act or the omission.

The elements for procuring are:

1. An offence must have been committed by the principal.
2. The defendant procured the principal to commit an offence.
3. There is a causal link between the procuring and the commission of the offence.

For other case law on parties see *John v R;*[42] *R v Clarkson*;[43] *Ferguson v Weaving*;[44] and *National Coal Board v Gamble*.[45]

Withdrawal

Sometimes there may be a period of time between the act of an accessory and the completion of the offence by the principal offender. An accessory may escape criminal responsibility for the offence if they change their mind about participating and take steps to withdraw their participation in the offence.

What is required for withdrawal varies from case to case but some of the common law rules set down are:[46]

- withdrawal should be made before the crime is committed
- withdrawal should be communicated by telling the one counselled that there has been a change of mind
    - this applies if the participation of counsellor is confined to advice and encouragement
- withdrawal should be communicated in a way that will serve unequivocal notice to the one being counselled that help is being withdrawn

42 (1980) 143 CLR 108.
43 (1971) 55 Cr App R 455.
44 (1951) 1KB 814
45 (1958) 3 All ER 203.
46 See *R v Becerra and Cooper* (1975) 62 Cr App R 212.

- withdrawal should give notice to the principal offender that, if he/she proceeds to carry out the unlawful action, he/she will be doing so without the aid and assistance of the one who withdrew.

6.6.3 Accessories after the fact

s73(1) Crimes Act

A person is said to be an accessory after the fact when he/she:

- has knowledge that a person is a party to an offence
- receives, comforts, or assists another, or tampers with or actively suppresses evidence against him/her, so that he/she is able to avoid arrest or conviction, or escape after arrest.

A married person does not become an accessory after the fact for the offence of the spouse if they:

- receive, comfort or assist the spouse, or suppress or tamper with evidence, in order to enable the spouse to avoid arrest or conviction or escape after arrest; or
- receive, comfort or assist the spouse **and any other person** who has been a party to the offence, or suppress or tamper with evidence, in order to enable the spouse and any other party to the offence to avoid arrest or conviction, or escape after arrest. s73(2) Crimes Act

The elements for accessories after the fact are:

1. The principal offender was guilty of an offence punishable by imprisonment.
2. The defendant knew that he/she was a party to the offence.
3. The defendant received or assisted or comforted the principal offender to the offence, or tampered with or suppressed evidence.
4. The defendant received or assisted the principal offender, or tampered with or suppressed evidence, in order to enable him/her to avoid arrest or conviction or escape after arrest.

Points to note

- The principal offender received or assisted must have been guilty of an offence punishable by imprisonment.
- The assistance must be given to the principal offender personally.
- The assistance must be given in order to prevent or hinder him/her from being apprehended or being punished.
  - Assistance given indirectly or for motives other than hindering arrest of the principal offender, such as avoiding arrest him/herself or to make

money for him/herself, would not make the person guilty as an accessory after the fact.[47]

- The Court must be satisfied that the defendant knew that an offence had been committed by the principal offender.

Proof that an offence has been committed is sufficient to prove a person guilty of being an accessory after the fact, even if there has not yet been a conviction of the principal offender.[48]

Everyone who is an accessory after the fact to any offence punishable by imprisonment, where no express provision is made in the Crimes Act or in some other enactment for punishment of being an accessory after the fact, is liable to:

- a term not exceeding seven years if the maximum punishment for the crime is life imprisonment; or
- a term not exceeding five if the maximum punishment is imprisonment for 10 years or more; or
- a term not more than half the maximum punishment he/she would have been liable to if he/she had committed the offence. s335 Crimes Act

6.6.4 Conspiracy

Every person who conspires with any other person to commit an offence, or to do or omit anything in any part of the world that would be an offence in the Cook Islands, is liable to:

- imprisonment for a term not exceeding seven years if the maximum punishment for that offence exceeds seven years imprisonment; or
- the same punishment as if he/she had committed that offence; or
- the punishment for conspiracy expressly set out in the *Crimes Act* or any other enactment. s333 Crimes Act

Husband and wife conspiring s68 Crimes Act

A man shall be capable of conspiring with his wife, or with his wife and any other person; and a woman shall be capable of conspiring with her husband, or with her husband and any other person.

---

47 *Sykes v Director of Public Prosecutions* (1961) 45 CrAppR 230.
48 *R v Anthony* (1965) 49 CrAppR.

Actus reus of conspiracy

Agreement is the essential element of conspiracy. It is the actus reus of conspiracy. There is no conspiracy if negotiations fail to result in a firm agreement between the parties.[49]

- The offence of conspiracy is committed at the moment of agreement.[50]
- An intention between two parties is not enough for a charge. What is required is an agreement between two or more to do an unlawful act by unlawful means.[51]

At least two persons must agree for there to be a conspiracy. However, a single defendant may be charged and convicted of conspiracy even if the identities of his/her other fellow conspirators remain unknown.

Mens rea of conspiracy

Conspiracy requires two or more people to agree to commit an unlawful act with the intention of carrying it out. It is the intention to **carry out the crime** that constitutes the necessary mens rea for conspiracy.[52]

Knowledge of the facts is only material, insofar as such knowledge throws light onto what was agreed to by the parties.[53]

Knowledge of the relevant law that makes the proposed conduct illegal need not be proved.[54]

The elements of conspiracy are:

1. There must be an agreement between at least two people.
2. There must be an intention to carry out an unlawful act.

---

49 *R v Walker* [1962] Crim LR 458.
50 *R v Simmonds & Others* (1967) 51 CrAppR 316.
51 *R v West, Northcott, Weitzman & White* (1948) 32 CrAppR 152.
52 *Yip Chieu-Chung v The Queen* [1995] 1 AC 111.
53 *Churchill v Walton* [1967] 2 AC 224.
54 *R v Broad* [1997] Crim LR 666.

7 Judicial Conduct

7.1 The judicial oath

As a Justice of the Peace of the High Court, you have sworn the following oath on appointment:

> "I swear by Almighty God that I will well and truly serve Her Majesty as the Head of State of the Cook Islands, Her heirs and successors, in accordance with the Constitution and the law, in the office of Justice of the Peace; and I will do right to all manner of people, without fear or favour, affection or ill will. So help me God."

The judicial role is a public one and your conduct will be under public scrutiny. The respect and confidence of the public in the justice system requires that Justices of the Peace respect and comply with the law, and conduct themselves in a manner which will not bring themselves or their office into disrepute.

The oath can be divided into parts to illustrate a number of well-established ethical principles of judicial conduct.

7.1.1 "Well and Truly Serve"

You should be **diligent** in the performance of your judicial duties.

This means you should:

- devote your professional activity to your judicial duties, which include not only presiding and sitting in Court and making decisions, but other judicial tasks essential to the Court's operation
- bring to each case a high level of competence and be sufficiently informed to provide adequate reasons for each decision
- take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for your role
- not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in colleagues.

Decisions should be delivered as quickly as circumstances permit. Always try to do this immediately. This means you must:

- be familiar with common offences, jurisdiction and procedure
- prepare before sitting in Court.

7.1.2 "In Accordance with the Constitution and the Law"

You should act **lawfully** within the authority of the law.

This means you should:

- not take into account irrelevant considerations when making your decisions - the exercise of judicial discretion should only be influenced by legally relevant considerations
- not abdicate your discretionary powers to another person – it is for **you** to decide
- defend the constitutionally guaranteed rights of the Cook Islands people.

7.1.3 "Do Right"

You should strive to conduct yourself with **integrity** so as to sustain and enhance public confidence in the Judiciary.

This means you should:

- make every effort to ensure that your conduct is above reproach in the view of reasonable, fair minded and informed persons
- encourage and support your judicial colleagues to observe this high standard.

7.1.4 "All Manner of People"

You should conduct yourself and proceedings before you so as to ensure **equality** according to the law.

This means you should:

- carry out your duties with appropriate consideration for all persons (for example, parties, witnesses, Court personnel and judicial colleagues) without discrimination

- strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background

- avoid membership in any organisation that you know currently practises any form of discrimination that contravenes the law

- in the course of proceedings before you, disassociate yourself from and disapprove of clearly irrelevant comments or conduct by Court staff, counsel, or any other person subject to your direction. Improper conduct can include sexist, racist, or discriminatory language or actions which are prohibited by law.

7.1.5 "Without Fear or Favour, Affection or Ill Will"

You should uphold and exemplify **judicial independence** in both the individual and institutional aspects of your work. An independent judiciary is essential to impartial justice under the law.

This means you must:

- exercise your judicial functions independently and free of irrelevant influence

- firmly reject any attempt to influence your decisions in any matter before the Court outside the proper process of the Court

- encourage and uphold arrangements and safeguards to maintain and enhance the independence of the judiciary

- exhibit and promote high standards of judicial conduct so as to reinforce public confidence, which is the cornerstone of judicial independence.

You must be, and should appear to be, **impartial** with respect to your decisions and decision making.

This means you should:

- strive to ensure that your conduct, both in and out of Court, maintains and enhances confidence in your impartiality and that of the judiciary

- not allow your decisions to be affected by:
  - bias or prejudice
  - personal or business relationships

- personal or financial interests

- as much as reasonably possible, conduct your personal and business affairs so as to minimise the occasions on which it will be necessary to be disqualified from hearing cases

- review all commercial, social and political groups of which you are a member, or have an interest in, and ask yourself, "Could this involvement compromise my position as a Justice of the Peace?".

You must not only be impartial, but you must be **seen to be impartial**. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair-minded and informed person.

This principle touches several different areas of your conduct.

a) Judicial demeanour

While acting decisively, maintaining firm control of the process and ensuring cases are dealt with quickly, you should treat everyone before the Court with appropriate courtesy.

b) Civic and charitable activity

You are free to participate in civic, charitable and religious activities, subject to the following considerations:

- Avoid any activity or association that could reflect adversely on your impartiality or interfere with the performance of your judicial duties.
- Do not solicit funds (except from judicial colleagues or for appropriate purposes) or lend the prestige of the judicial office to such solicitations.
- Avoid involvement in causes and organisations that are likely to be engaged in litigation.
- Do not give legal or investment advice.

c) Political activity

You should refrain from conduct which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in your impartiality with respect to issues that could come before the Courts.

All partisan political activity should cease upon appointment. You should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that you are engaged in political activity.

You should refrain from:

- membership in political parties and political fundraising
- attendance at political fundraising events
- contributing to political parties or campaigns
- publicly take part in controversial political discussions, except in respect of matters directly affecting the operation of the Courts, the independence of the Judiciary or fundamental aspects of the administration of justice
- signing petitions to influence a political decision.

Members of your family have every right to be politically active. Sometimes this may adversely affect the public perception of your impartiality. In any case before the Court where there could reasonably be such a perception, you should not sit.

d) Conflict of interest

You must disqualify yourself in any case in which you believe that you will be unable to judge impartially.

You should also disqualify yourself if a reasonable, fair minded and informed person would have suspicion of conflict between your personal interest (or that of your immediate family or close friends or associates) and your duty.

You should not preside over a case where the accused or witness:

- is a near relative
- is a close friend
- is an employer or employee
- has a close business relationship with you.

Do not preside over a case where you may have or appear to have preconceived or pronounced views relating to:

- issues
- witnesses
- parties.

Given that the Cook Islands is a relatively small jurisdiction, you should also be careful not to let personal or local knowledge of individuals before you affect

your judgment. You may know something about the facts of the case already, *eg.* because you are related to one of the parties. That also means you have a conflict of interest.

Disqualifying yourself from a case is **not** appropriate if:

- the matter giving rise to a possibility of conflict is insignificant or a reasonable and fair-minded person would not be able to make an argument in favour of disqualification
- no other Justices of the Peace are available to deal with the case
- because of urgent circumstances, failure to act could lead to a miscarriage of justice.

7.2 Conduct in Court

7.2.1 Preparing for a case

Ensure you have studied and understood the cases you will be dealing with. Make sure you have the relevant legislation at hand.

For criminal matters, make sure you know what elements of the offence must be proved.

For civil matters, study the file, affidavits, etc and identify the issues in dispute and the relief sought.

7.2.2 Conflict of interest

When the parties come before you, or beforehand if you have studied the cases in advance, you may realize that there could be a conflict of interest.

See section 7.1.5(d) for a discussion of what is a conflict of interest.

In these situations, you should either not hear the matter at all and have it allocated to another Justice, or adjourn the matter for hearing at another date before another Justice.

7.2.3 The principle that "affected parties have the right to be heard"

It is a well established principle, evolved from common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before a decision is made.

This principle focuses on the **procedural** steps implemented by the Court. The purpose of the principle is to ensure that you consider all relevant information before making a decision.

To give effect to this principle, you have to consider what has to be done to allow a person to be heard. This extends to allowing the person sufficient notice to prepare their submissions, to collect evidence to support their submissions and to rebut or contradict the other party's submissions.

Note that a person may be heard but the view they have expressed does not have to prevail. You are entitled to reject it for good reason. The relevance and weight of the information is to be determined by you.

There are three aspects to the principle:

1. Prior notice

- You should be satisfied that adequate notice has been given, as prescribed by law.
- If the defendant or respondent does not take any steps or appear at the hearing, you will need some evidence that the documents have been served before proceeding with the hearing.
- For criminal matters, you will need proof of service of the warrant or summons. For civil and family matters, you will need proof of service of the writ with particulars of the claim.
- Notice must be sufficient to allow the person to prepare his/her case. Where you are not satisfied that a party has been given sufficient notice for this, adjourn the matter to allow him or her time.

2. Fair hearing

- The way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.
- The general rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with a new and relevant issue.

- It always requires you to ensure you have all the relevant facts and materials before deciding.

3. Relevant material disclosed to parties

- Generally, all relevant material should be disclosed to the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you propose to take into account.

Before a hearing is concluded, you should ask yourself, "has each party had a fair opportunity to state his/her case?"

7.2.4 Courtroom conduct

You should exhibit a high standard of conduct in Court so as to reinforce public confidence in the judiciary. This can be done as follows:

- Be courteous and patient.
- Be dignified.
- Be humble - if a mistake is made you should apologise - there is no place on the bench for arrogance.
- Continually remind yourself that a party is not simply a name on a piece of paper.
  - The parties are looking to the Court to see justice is administered objectively, fairly, diligently, impartially, and with unquestionable integrity.
- Never make fun of a party or witness.
  - A matter which may seem minor to you, may be very important to a party or witness.
- Show appropriate concern for distressed parties and witnesses.
- Never state an opinion from the bench that criticises features of the law.
  - Your duty is to uphold and administer the law, not to criticise it.
- Never say anything or display conduct that would indicate you have already made your decision before all parties are heard.
- If sitting as a panel, do not discuss the case or any aspect of it outside of the panel. This includes other Justices who are not sitting on the case.

7.2.5 Maintaining the dignity of the court

Ensure that all people appearing before the Court treat it with respect by:

- keeping order in Court
- being polite and respectful and expecting the same from them.

Deal effectively with unruly defendants, parties, witnesses and spectators by:

- being decisive and firm
- dealing promptly with interruptions or rudeness
- clearing the Court or adjourning if necessary.

7.2.6 Communication in court

Speaking

- Use simple language without jargon.
- Make sure you know what to say before you say it.
- Avoid a patronising or unduly harsh tone.
- Generally, do not interrupt counsel or witnesses.
- Always express yourself simply, clearly and audibly. It is important that:
  - the party examined and every other party understands what is happening in the Court and why it is happening
  - the Court Clerk is able to hear what is being said for accurate note-taking
  - the public in the courtroom are able to hear what is being said.

Listening

- Be attentive and be seen to be attentive in Court.
- Make accurate notes.
- Maintain eye contact with the speaker.

Questioning

Criminal cases

- The criminal justice system is based on an adversarial procedure, which requires the prosecution to prove the case. Your role is not to conduct the case for them, but to listen and determine.
- Generally, you should not ask questions or speak while the prosecution or defence are presenting their case, examining or cross-examining witnesses.
- You may ask questions at the conclusion of cross-examination, but only to attempt to clarify any ambiguities arising from the evidence. If you do this,

you should offer both sides the chance to ask any further questions of the witness, limited to the topic you have raised.

- Never ask questions to plug a gap in the evidence.

Civil cases

- You may ask questions. If parties are unrepresented, you might do this to indicate what is needed to satisfy you and clarify what they are saying.
- Be careful to be neutral when asking questions. Your questions must not show bias to either side.
- Avoid interrupting during submissions. If possible, wait until the party has finished their submissions.

Dealing with parties who do not understand

You may frequently be confronted with unrepresented defendants and parties who do not appear to understand what the proceedings are about.

It is your responsibility to ensure that the defendant or party understands:

- the charge faced (criminal) or matters in issue (civil)
- the procedures of the Court.

Criminal cases

When dealing with an unrepresented defendant, you should explain to him/her:

- the nature of the charge
- the procedure and formalities of the Court
- the legal implications of the allegations.

At any stage in the proceedings, you may take the time to satisfy yourself that the defendant knows:

- why he/she is appearing in Court
- what his/her rights are
- what the Court is doing
- why the Court is following that course.

Civil cases

You will need to be attentive to an unrepresented party's needs. Take care to explain:

- the nature of the hearing and what will occur
- what is expected when the party comes to speak
- to an applicant, that they have to tell you what they want and why.

Dealing with language problems

Ideally, an interpreter should be obtained and sworn in when there is a language problem. Often, however, one is not available. In this case:

- explain the nature of the charge or issues as slowly, clearly and simply as possible
- if you are in any doubt about whether the defendant or a party properly understands what is happening, adjourn the hearing to enable an interpreter to be obtained.

7.3 Working as a panel

It is important for Justices on a panel to agree to a process for handling court hearings and out-of-court deliberations.

Since views from the Bench should be seen to be as one, the accepted practice is for the panel who is sitting together to decide who will be the Chair of the panel.

The Chair

The role of the Chair is to manage the proceedings. From the perspective of the public and those in the Court, he/she is in charge of the courtroom. This involves:

- handling all procedures
- issuing all summonses, warrants, orders, convictions and recognisances
- recording the evidence if the Court Clerk is not present
- announcing all decisions of the Court
- asking questions from the bench to witnesses
- ensuring all before the Court understand what is going on and are treated with respect
- structuring and guiding any panel discussions out of Court, ensuring the discussions are purposeful and relevant and all members of the bench have the opportunity to be heard.

The Chair should know the members' strengths and weaknesses and make the most of their strengths and expertise whenever possible. He/she should ask the opinions of each member, listen to them and treat each contribution as important.

The Chair may ask other members to undertake specific tasks, for example:

- note taking
- referring to legislation and this bench book
- ensuring observation of the rules of evidence.

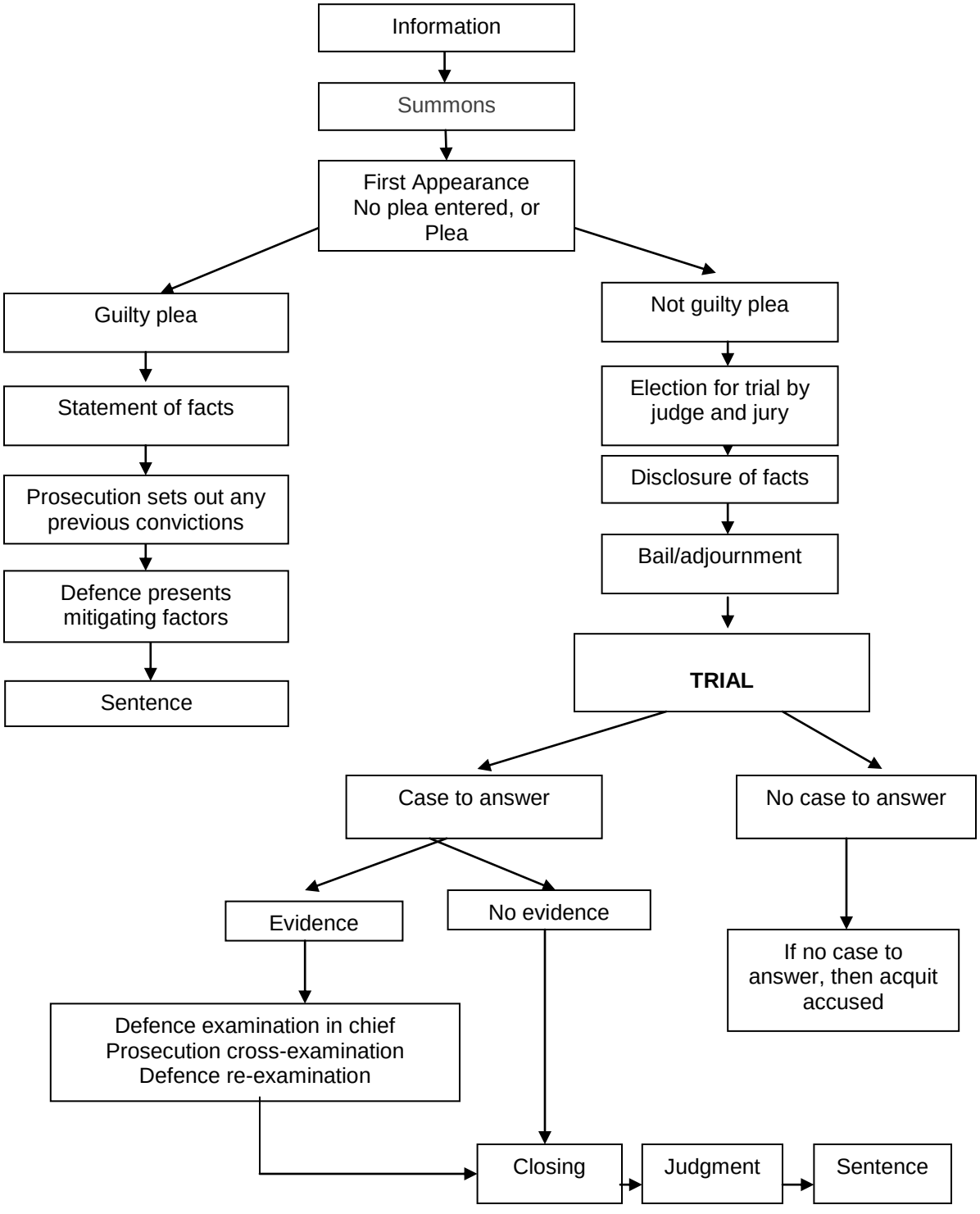
Other members

The role of the other members involves:

- listening attentively
- appropriately drawing the Chair's attention to particular matters of significance or procedure
- undertaking tasks as required by the Chair
- working in partnership with the Chair and other bench members to decide the case.

IN THE COURT ROOM

8 Outline of the criminal process



9 Bringing an accused person to court for trial

This chapter describes how a case comes before the Court and the steps that take place **before** an accused person makes his/her first appearance in court before you.

As a Justice, you are not involved in most of these steps, and the material in this chapter is mainly for background information.

9.1 After the arrest

s 9(5)CPA

Every person who is arrested on a charge of any offence shall be brought before the Court as soon as possible, but in any case no later than 48 hours after his/her arrest.

The Police prepare a document known as an Information. Wherever possible, this should be presented in advance to the Clerk, and the Clerk will open a file and register the case in the Court record.

9.2 Commencing criminal proceedings by Information

s10 CPA

Criminal proceedings are usually commenced by the "laying of an Information in writing". Occasionally they are commenced by a charge sheet – where the person has been arrested without a warrant and no Information has been laid.

There are a number of things to know about Informations at various stages of a criminal matter.

Therefore, Informations are dealt with separately in Chapter 10.

9.3 Processes to compel the appearance of the defendant

The defendant can be compelled to appear by summons or by a warrant of arrest.

9.3.1 Summons

s 22 CPA

When an Information is laid, a Justice, the Registrar or the Deputy Registrar then issues a summons to the defendant to appear.[55] Usually it is the Registrar.

Every summons shall be served on the defendant by:[56]

ss 25, 26, 29 & 30 CPA

- being delivered to the defendant personally; or
- being brought to the defendant's notice if the defendant refuses to accept the summons.

Where a person to be served documents is living or serving on board any vessel, it is sufficient service that the document is delivered to the person who is in charge of the vessel at the time of the service.

Where a person to be served is an inmate of any prison, it is sufficient service that the document is delivered to the Superintendent or officer in charge of the prison.

Every summons, and every other document, which is served on the defendant may be served by:

- a constable; or
- an officer of the Court; or
- any other person or member of class of persons authorised by a Judge or the Registrar.

Proof of service may be made by:

- affidavit by the person who served the document, showing the fact, time and mode of service; or
- the person giving evidence on oath at the hearing; or
- endorsement, signed by the person who served the document, on the copy of the document, showing the fact, time and mode of service by an officer of the Court or a constable.[57]

---

55 The summons for a defendant is in the form of Form 4 in the First Schedule of the Criminal Procedure Act.

56 And every other document which is required to be served on a defendant.

57 If a person wilfully endorses any false statement of the fact, time or mode of service on a copy of any document commits an offence, he or she is liable to imprisonment for a term not exceeding two years or to a fine of $400 or both.

9.3.2 Warrant of arrest

ss 6, 8 & 9(2) CPA

Where an Information has been laid, and whether or not a summons has been issued or served, a Justice, Registrar or Deputy Registrar may issue a warrant to arrest the defendant if the defendant is liable on conviction to imprisonment and in the opinion of the Justice:

- a warrant is necessary to compel the attendance of the accused; or
- a warrant is desirable, having regard to the gravity of the alleged offence and the circumstances of the case.

Every warrant to arrest a defendant shall be directed to a specific constable by name or to every constable generally. A warrant that is directed to constables generally may be executed by any constable.

It is the duty of every arresting officer to:

- inform the person who is arrested of the grounds of his/her arrest
- inform the person arrested of the charges against him/her
- allow the arrested person to consult a legal practitioner of his/her own choice without delay.

Any warrant to arrest a defendant may be withdrawn by the person who issued it at any time before it is executed, *ie.* served on the defendant.

For a description of the rights of arrested or detained persons, see Article 65 of the Constitution.

9.3.3 Arrest without a warrant

s 4 CPA

No one shall be arrested without a warrant, except where the Criminal Procedure Act or some other statute expressly gives power to arrest without a warrant.

Any person may arrest without a warrant any person whom he/she finds committing any offence punishable by imprisonment for three years or more.[58]

The Criminal Procedure Act provides that any constable, and those whom he/she calls to assist, may arrest and take into custody without a warrant any person who:

---

[58] Section 4, Criminal Procedure Act.

- is found committing, or who the constable suspects of committing, any offence punishable by imprisonment for life or for three years or more; or
- within the view of the constable, commits or commences to commit an offence against the Transport Act 1966 and either:
  - fails to give his/her name and address on demand; or
  - after being warned to stop persists in committing the offence
- the constable finds committing, or has good cause to suspect has committed, a breach of the peace and has good cause to believe that the person may harm others or him/herself as a result of the breach of the peace; or
- the constable finds drunk in a public and has good cause to believe that the person may harm others or him/herself as a result of the drunkenness.

10 The Information

10.1 What is an Information

An Information is a sworn statement that the person making it has reasonable cause to suspect, of does suspect, that a specified criminal offence has been committed.[59]

Any person who has reasonable cause to suspect an offence has been committed may lay an Information for that offence.[60] In almost all criminal cases this is a police officer. Informations are also laid by probation officers, and sometimes by government officials under other statutes where there are criminal penalties, such as tax, customs, narcotics and animal trespass.

Once an Information has been laid, the accused person is referred to as "the defendant".

10.2 Time by which an Information must be laid

s12 CPA

An Information must be laid within 12 months from the time the matter arose, *ie.* when the offence occurred, where:[61]

- the maximum punishment for the offence does not exceed three months imprisonment; or
- the maximum punishment for the offence does not exceed a $50 fine; or
- both.

If the penalty is higher than this, then there is no time limit.

---

59 The Information is in the form of Form 3 in the First Schedule of the Criminal Procedure Act.

60 The exception is where otherwise expressly provided by enactment. A member of the public is entitled to lay a private Information.

61 Except where expressly provided for by an enactment.

10.3 Particulars on an Information

s16 CPA

Every Information must contain such particulars as will inform the defendant of the substance of the offence that he/she is charged with. The Information must include:

- the nature of the alleged offence, using the words of the enactment creating the offence as much as possible
- the time and place of the alleged offence
- the person or thing against whom the alleged offence was committed.

10.4 Filing an Information

s19 CPA

As soon as practicable after an Information is laid, it must be filed by the informant in the office of the Court closest to where the offence was alleged to have been committed or where the informant believes that the defendant may be found.[62]

10.5 Charges in the alternative in an Information

s 15 CPA

Every Information shall be for one offence only.[63]

However, an Information may charge in the alternative several different matters, acts or omissions, *as long as* they are provided as alternatives in the enactment under which the charge is brought.

The defendant at any time can apply to amend or divide the Information on certain grounds. This is dealt with later in this chapter.

10.6 Deciding an objection to an Information

s 18 CPA

The prosecutor or defendant can object to an Information. The objection would be that the Information does not state, in substance, a criminal offence. If you are asked to decided on such an objection:

- the prosecutor or defendant may ask you to amend the Information; or
- the defendant may ask you to quash it or in arrest of judgment.[64]

---

62 The failure to file the Information will not operate to invalidate the proceedings.
63 There may be an exception to this in the particular statute, but this is unlikely.
64 The term 'in arrest of judgment' is defined in the Glossary.

A useful way to deal with this is to refer to:

- Appendix B for common criminal offences
- Appendix D for common traffic offences
- Appendix E for common drug offences.

There you will find set out a description of the offence which will help you decide if the information sets out, in substance, the offence.

If you are deciding this before the defendant pleads, you should either quash the Information or amend it. If you quash it the effect is that the criminal prosecution no longer proceeds on the matter dealt with in that Information.

Before ruling upon the sufficiency of any Information, you may want to order that further particulars be given by the informant or the prosecutor in writing, if the you determine that further particulars are necessary for a fair trial.

10.7 Deciding whether the information can be relied upon

You may also be called upon to consider whether the Information can be relied upon. This could arise at the first appearance stage, or at a later date, even during a defended hearing. The matters to consider are –

- Is the actual section of the relevant Act stated?
- Is the name of the defendant correctly stated?
- Is the place and date of the offence stated?
- Is the offence stated correctly and one recognized by law (see above at 10.6)?
- Is the Information sworn?

If the Information cannot be relied upon, either the defendant can apply for it to be dismissed, or the prosecution can apply for it to be amended, or possibly dismissed (if the prosecution recognises that it does not have a case).

10.8 Deciding an application to divide an Information

s 15(2) CPA

Any number of Informations may be tried together.[65] But if a Justice thinks it is desirable or expedient in the interests of justice to do so, the Justice is able to try one or more of the Informations separately.

---

65 Except for murder, where the information must tried alone – but as a justice you would not try a murder.

An order to try Informations separately may be made either before or during the course of the trial. If such an order is made during the trial, you are not required to give a verdict on that Information for which the trial is not to proceed. Then, the Informations which have not been yet tried should be proceeded upon as if they had been presented separately.[66]

The defendant may, at any time during the hearing of any Information where alternative charges are set out, apply to you to amend or divide the Information on the grounds that the Information is framed to embarrass him/her in his/her defence.

If you are satisfied that the defendant would be embarrassed in his/her defence, you may direct that the Information be divided into two or more charges, in which case the hearing shall proceed as if a separate Information had been laid for each charge.

You may adjourn the trial if the defendant requests an adjournment and you are of the opinion that the defendant would be embarrassed in his/her defence because of the substitution.

If you decide to direct the Informant to *elect* between the alternatives charged in the Information, the Information will be amended and the hearing shall proceed on the amended Information – see below.

10.9 Deciding an application to amend an Information

s47 CPA

The Court may amend the Information in any way at any time during a trial.

The Court has the option to amend the Information by substituting one charge for another.

Where a charge is amended or substituted on the Information the following must apply:

- before the trial is continued, the amended or substituted charge must be stated to the defendant and the defendant must be asked how he/she pleads
- the trial shall proceed as if the defendant had originally been charged with the amended or substituted offence

---

66 See Chapter 15, *Sentencing*, for a discussion on sentencing where there is more than one Information.

- any evidence already given shall be deemed to have been given in and for the purpose of the amended or substituted charge but both parties shall have the right to recall, examine, cross-examine or re-examine any witness whose evidence was given with respect to the original charge.

The proposed amendment must be stated with clarity. If the defendant is unrepresented, explain the difference between the essential ingredients of the former charge and the amended charge.

As mentioned above, the Court may adjourn the trial if the defendant requests an adjournment and it is of the opinion that the defendant would be embarrassed in his/her defence because of the amendment of the Information.

Record the amendment on the Criminal Decision Sheet and endorse

- "Amended as above during the hearing"; or
- "Amended in Court – amendment read to defendant"

and write down your reasons in brief.

Then:

- announce that the amended charge replaces the original charge
- put the amended charge to the defendant and take his/her plea.

10.10 Deciding an application to withdraw an Information

s46 CPA

With leave of the Court, any Information may be withdrawn by the informant at any time:

- before the defendant has been convicted
- before the Information has been dismissed
- where the defendant has pleaded guilty, before he/she has been sentenced or otherwise dealt with.

Where an Information is withdrawn, you may award the defendant such costs as you think reasonable. The costs awarded may be recovered as if the costs were awarded on a conviction.[67]

The withdrawal of an Information shall not operate to bar any further or other proceedings against the same defendant with respect to the same offence.

---

67 See Chapter 15: *Sentencing*.

The prosecutor may withdraw a complaint, with the consent of the Court, before a final order is passed.

Where the withdrawal is made before the defence case, you may discharge the defendant.

11 First appearances, taking pleas and callovers

This and the following chapters discuss the more usual matters you will deal with in the court room. Some less usual matters are dealt with in later chapters.

When an accused person first comes before you on a charge in your Court, the matters that you will need to deal with are:

1. Appearances, or non-appearance, by the parties, and legal representation.

2. Whether you have jurisdiction to hear the matter.

3. Identification of the defendant.

4. Putting the charge to the defendant.

5. Taking a plea of guilty or not guilty – although the matter may be adjourned to a later date for taking of a plea.

6. An application for bail and, if appropriate, setting bail conditions, or remanding in custody. Dealt with in Chapter 13

7. Adjourning the matter. Where the defendant has pleaded guilty you would not normally sentence immediately, but adjourn the matter to a fixed date. Where the defendant pleads not guilty, the matter would also be adjourned. Dealt with in Chapter 12

You may possibly also deal with:

8. Issues related to the Information. Dealt with in Chapter 10

9. An application for name suppression. Dealt with in Chapter 14

10. An application for an election for the matter to be heard by a Judge and jury. Dealt with in this chapter at 11.9

Finally:

11. When the adjourned matter is next heard, at what is called a callover, there are several things for you to do. This could include an application for a summons to a witness to appear.

At an early stage of a matter there may (although rarely) also be a preliminary inquiry before a Justice to determine if there is sufficient evidence to support a charge proceeding.

These inquiries, sometimes called depositon hearings, are dealt with in Chapter 22.

11.1 Appearances by the parties

11.1.1 By the defendant

Basic principle
Under the Criminal Procedure Act every defendant shall be entitled to be present in Court during the whole of his/her trial, unless the defendant misconducts himself or herself, thus making his/her attendance impracticable.

The first step is that the Court Clerk calls the defendant's name. What you do depends on whether the defendant appears or not.

The defendant should be present either:

- after arrest and in police custody; or
- after arrest and on police bail or notice; or
- on summons.

If the defendant appears by an advocate, then continue as if the defendant was present.

Where the defendant insists on representing him/herself, be careful that you comply with Article 65 of the Constitution. This outlines the rights of persons charged with criminal offences.[68] It is your duty to see that the hearing is fair.

If you consider there might be a "conflict of interest" because you are related to the defendant or in some other relationship which could mean that you might be biased, **or** could create the appearance of bias, you should not hear the case.

See Chapter 7, section 7.1.5(d) for further discussion of conflict of interest.

If the defendant has been duly summoned and does **not** appear in Court, you have two options:

---

[68] For more information see Chapter 5, *Criminal Law and Human Rights*.

1. dispense with the attendance of the defendant in the case of a fine; or
2. issue a bench warrant for the arrest of the defendant.

Option 1: Dispensing with the defendant's appearance s56 CPA

You can only try and, if found guilty, sentence a defendant for an offence, in his/her absence, where the punishment is a fine only – and, of course, where the defendant has been duly summoned to appear.

Option 2: Issuing a warrant of arrest for the defendant's arrest s54 CPA

Things you should consider, in deciding whether to issue the warrant for the defendant's arrest, are:

- What effort has the prosecution made to serve the defendant?
- Does the offence with which the defendant is charged carry a term of imprisonment?
- How long after the alleged offence was the summons issued?

The order, which is called a bench warrant, should follow this wording –

Order to make for arrest of the defendant
"A warrant of arrest of ..... is ordered."

The court support staff will, in court, prepare the warrant of arrest and hand it up to you for signature, before you move on to the next matter.

Record your order on the Criminal Decision Sheet (using the stamp or writing it).

If a person is arrested under bench warrant for non-appearance and the Court is not in session for the trial of criminal cases, the defendant shall be brought before a Justice and you may:

- remand the defendant in custody so that he/she may attend the Court at its next sitting; or
- grant the defendant bail.

See below in regard to both these options.

11.1.2 By the prosecution/informant

s55 CPA

If the defendant appears but the prosecution or informant (in non-criminal cases) does not, you can either:

- adjourn the trial to a time and place you think fit – if the informant has not been given adequate notice of the trial or in any other case;[69] or
- dismiss the Information for want of prosecution, and award the defendant any costs you think reasonable.

Adjournments are dealt with in Chapter 12.

11.1.3 Where neither party appears

s57 CPA

Where neither the informant nor the defendant appears, you may:

- adjourn the matter to such time and place, and on such conditions, as you think fit; or
- dismiss the Information for want of prosecution.[70]

11.2 Determining whether you have jurisdiction to hear the matter

You should check that you have jurisdiction to hear the matter before you. You may have done this when you looked over the Informations before coming into court. Often you will have heard such matters before and the answer will be clear.

However, if you are not certain, and the matter is:

- a **criminal matter**, check in Appendix A under the heading *Jurisdiction* to see if the matter is heard by a single Justice, three Justices or a Judge with a jury.
- a **traffic matter**, check in Appendix C under the heading *Jurisdiction* to see if the matter is heard by a single Justice or a Judge with a jury. Most offences can be heard by a single Justice.

---

69 Section 58 of the CPA provides that dismissal of an Information for want of prosecution shall not operate as a bar to any further proceedings for the same matter.

70 A dismissal of an Information for want of prosecution pursuant to s57 CPA does not operate as a bar to any further proceedings for the same matter.

11.3 Identification of the defendant

The defendant has been called by name and has been brought before you. You must first ascertain who the defendant is (of course, you may already know the person). The Court Clerk will ask the defendant for his/her:

- full name
- occupation
- age.

You may also ask these or other questions in order to identify that the person before you is the defendant in the Information.

More than one person may share the same name and so the other details are important. If the defendant gives an age which indicates he/she is a juvenile, you will need to transfer the matter to the Children's Court.

see Chapter 18, *Sitting in the Children's Court.*

11.4 Putting the charge to the defendant

There are several things that must be done –

1 The charge is read to the defendant

The Court Clerk reads the charge to the defendant.

2 Check for understanding by the defendant

You must ensure that the defendant understands the charge against him/her. Never take for granted that the defendant might have understood your explanation without his/her confirmation. Ask the defendant if he/she understands the charge. In some courts, this question is asked by the Court Clerk.

3 Explain the charge to the defendant s61 CPA

If you have any doubt that the defendant truly understands the charge, you should clearly explain the nature of the offence to the defendant. This involves explaining the elements.

Unless the defendant clearly understands the nature of the offence with which he/she is charged, the defendant will not be able to work out if he/she has a defence. This will affect the defendant's ability to enter a plea.

When you are satisfied that the defendant understands the charge, the defendant shall be asked how he/she pleads to the charge (see next section).

11.5 Taking pleas of guilty and not guilty

11.5.1 Some background information about pleas

Generally s61 CPA

A defendant may plead either guilty or not guilty, or, in a few limited cases, enter a "special plea".

The defendant may change a not guilty plea to a guilty plea at any time.

A plea of guilty may, with the leave of the Court, be withdrawn any time before the defendant has been sentenced or otherwise dealt with. s68 CPA

Plead guilty in writing s60 CPA

A defendant may, in writing to the Registrar, give notice that he/she pleads guilty to an offence. After receiving such a notice, the Registrar gives notice to the prosecution.

A defendant may only plead guilty in writing for an offence where he/she is not liable to imprisonment.

If a person pleads guilty in writing, you have the power to deal with the person as if he/she had appeared before you and pleaded guilty.

Pleading guilty in writing does not prevent you from ordering a warrant of arrest for the defendant, if you see fit to do so.

Registrar taking a plea s61(1A),(3) & (4A) CPA

The defendant may be called before the Registrar and the charge read to the defendant. When the Registrar is satisfied that the defendant understands the charge, the defendant is asked how he/she pleads.

If the defendant wilfully refuses to plea or will not answer directly, the Registrar will enter a plea of not guilty.

Where a plea of guilty is entered by the Registrar and the Registrar is satisfied that the defendant understands the nature and consequences of his/her plea, the Registrar shall adjourn the charge to another date for the Court to deal with him/her. The Registrar can remand for eight days.

In practice, this procedure is confined to minor matters.

Fitness to plead

You will need to be conscious in particular cases of whether the defendant is fit to plead. A defendant is under a disability if he/she cannot[71] –

- plead
- understand the nature of proceedings; or
- instruct counsel.

In these situations, it is better to ascertain the nature of the problem first than to allow proceedings to continue. Relevant reports may have to be ordered, if necessary, and the matter may have to be adjourned to another date.

A finding of disability can result in:

- the defendant's detention in a hospital or psychiatric facility; or
- the defendant's immediate release.

11.5.2 Taking the plea

Once you are confident that the defendant understands the charge you ask –

> ➢ "Do you wish to enter a plea?

If the answer is "yes", then ask –

> ➢ "How do you plead, guilty or not guilty?"

If the defendant wilfully refuses to plead or will not answer directly, the Court may enter a plea of not guilty. s61(3) CPA

71 See the Cook Islands Act, s 590.

If the defendant admits the truth of the charge, but makes some remarks or comments, listen carefully because sometimes those remarks or comments indicate a possible defence. You need to be particularly alert to this.

Example
On a charge of drunk and disorderly, one of the elements is the behaviour must be in a public place. If the defendant admits to being drunk and disorderly, but says it was in a friend's backyard, that is relevant and you should enter a plea of not guilty for the defendant. It is then up to the prosecution to prove he was in a public place.

If the defendant admits the charge:

- ask the prosecution to read a brief summary of the facts
- tell the defendant to listen very carefully to the summary of facts
  - explain that he/she will be asked at the end whether he/she agrees with the summary of facts
- ask the defendant whether he/she agrees with the summary of facts presented by the prosecution.

If the defendant disputes any of the facts read out by the prosecution, consider whether the disputed facts are relevant to the elements of the offence. Note that a plea of guilty is a plea to the elements of the charge, not necessarily acceptance of the police summary of facts. If the facts in dispute are not relevant to the elements, enter a plea of guilty.

If the disputed facts are relevant to any of the elements, or where any remarks or comments made by the defendant may amount to a defence, you must enter a plea of not guilty for the defendant.

11.5.3 Guilty plea

s61(4) CPA

If the defendant pleads guilty, and you are satisfied that the defendant understands the nature and consequences of his/her plea, the Court may:

- convict the defendant, *ie.* find the person guilty; or
- deal with the defendant in any other manner authorised by law.

Usually, the matter is adjourned to a later date, and you may order that a report be prepared. You would not normally convict immediately.

11.5.4 Not guilty plea

If the defendant denies the charge, *ie*. pleads not guilty, or if you enter a plea of not guilty for him/her, then you can either:

- have an immediate hearing, if:
  - you are able to do so
  - all parties and witnesses are ready
  - the matter can be dealt with quickly.

or, as is more likely –

- have a hearing at a later date – in which case:
  - ascertain the number of witness the parties intended to call at the trial so as to know the probable duration of the trial, and set a date for the trial
  - deal with bail/remand in custody, and summonses for witnesses if necessary
  - adjourn the matter.

11.5.5 Special pleas

s 63 CPA

There are three special pleas which may be pleaded by the defendant. These are:

- plea of previous acquittal
- plea of previous conviction
- plea of pardon.

As these are very unusual, they are dealt with under *Other Matters* in chapter 23.

11.6 Adjournments

If there is a plea of not guilty then you need to adjourn the matter so that it can be heard as a defended hearing at a later date.

As you will need to consider adjournments at various stages of a criminal matter, this topic is dealt with separately in chapter 12.

11.7 Considering issues about the Information

At a first appearance, or later including during a contested hearing, you may have to consider –

- whether the Information can be relied upon
- an objection to the Information
- an application to amend or divide the Information.

These matters are considered in Chapter 10.

11.8 Applications for name suppression

An application for name suppression is likely to arise, if at all, at this stage, although such applications can be made at any stage of the matter.

They are dealt with separately at Chapter 14.

11.9 Election for trial by a Judge and jury

s15A CPA

For certain offences, a defendant can elect to have a trial by three Justices or a trial by Judge alone.

The election should be put to the defendant as early as possible and preferably on the first appearance. However, at times an unrepresented defendant may seek to defer election until he/she has had legal advice. In these situations, it would be better to allow the application and await the presence of counsel before putting the election to the defendant.

On the other hand, if counsel does not appear after the second consecutive adjournment, then you should explain the right of election to the defendant and allow the proceedings to move forward. In doing this, it is advisable to take accurate notes of the proceedings.

11.10 Callovers

At the first appearance, the matter will almost certainly be adjourned. The adjournment will be to a fixed date. The adjourned hearing is usually called a callover.

11.10.1 What normally happens at a callover

At the callover, the following normally occurs –

- The defendant is called to the dock.
- If counsel is engaged, they identify that they are representing the defendant.
- If no plea has been entered, the defendant should be asked if he/she is in a position to enter a plea at this stage, and if the defendant is not in that position, he/she should advise the Court why.
- If a plea of "not guilty" has been entered and election is required, but has not been made, then election can be made. see section 11.9
- If a guilty plea has been entered, a date can be set for sentencing and a probation report ordered.
- If a not guilty plea has been entered, then every effort should be made to set a date for trial, taking into account the availability of the Court, witnesses, etc.
- Bail must be revisited, similarly with any interim suppression, or similar, orders (each order expires on the following appearance date).
- The date for the next appearance should be set, be it for callover, sentencing or trial.

11.10.2 Summons for a witness to appear

s23(2) CPA

Either party may obtain from any Justice or the Registrar a summons calling on any person to appear as a witness at a hearing. You may be called upon to do this but usually it is done by the Registrar. It may be raised in court, during a callover, where a party is having difficulty in getting a witness to court.

12 Adjournments

12.1 Background information

The basic principle is that a trial, after it has started, should proceed continuously, subject to the power of the Court to adjourn it.[72] s79 CPA

The most common reasons for adjourning a case are:

- the person making the charge does not appear
- the witnesses of one of the parties do not appear
- legal representation is being sought
- a new issue has been raised and a party needs time to prepare a response.

You must exercise your power to adjourn judicially, by weighing several competing considerations, which include:

- the interests of the defendant to a fair trial
- the interests of the public in ensuring efficient prosecutions
- the reasons for the adjournment
- any fault causing the delay.

Once you have adjourned a matter you need either to:

- remand the defendant; or
- release the defendant on bail on the condition that he/she attends trial at the date and time scheduled.

Remanding in custody and bail are dealt with in Chapter 13.

12.2 Parties asking for adjournment

You may initiate an adjournment yourself, or be asked for an adjournment by either the prosecution or the defendant, if they are unable to proceed with the

[72] The Registrar may also, upon application, adjourn the hearing of any charge to a time and place appointed, **but only** where:
- the defendant has been granted bail; **and**
- the application is made before the start of the hearing.: s79A CPA Amendment 1998 (No.8).

case. In this case, one party may dispute the other's request for an adjournment.

The party seeking an adjournment should show "good cause" before an application for adjournment is considered. Good cause includes, but is not limited to, the reasonably excusable absence of a party or witness. However, adjournment should not be allowed due to a lack of preparation by one of the parties.

Unnecessary adjournments should be avoided as they waste the time and resources of the Court and other people in the case, and in some cases lead to a long delay in the case. This could amount to a denial of the principle that the defendant should be tried within a reasonable time.

However, a defendant must be given a reasonable opportunity to prepare a defence and if no adjournment would mean that the defendant would not have a fair trial, then grant the adjournment.

Every adjournment must be made for a specific time and date. It cannot be left open for the Court or the Registrar to set at a later date.

12.3 Adjournment where parties fail to appear

ss57 & 59 CPA

Where neither the informant nor the defendant appears at the trial for any charge, you may adjourn the trial to such time and place and on such conditions as you think fit (or dismiss the information for want of prosecution).

But if the defendant is not personally present, (*ie*. the defendant is represented by counsel but is not present personally), you may, if you think fit, adjourn the trial to enable him/her to be present (or you can issue a warrant for his/her arrest).

12.4 Adjournment for lack of jurisdiction

s79(2) CPA

You may adjourn a hearing if you have no jurisdiction to hear a particular case. The case will be adjourned to a time and place appointed.

12.5 Adjournments once a matter has commenced

Usually hearing dates are fixed in consultation with the parties and well in advance. Therefore, you should grant adjournments on part-heard applications only when necessary.

Adjourning a case has a useful role if used properly. It allows parties to prepare themselves to present their best case and recognises that delays do sometimes happen. But adjourning a case should not be used merely as a delaying tactic so that parties are not diligent in their preparation.

12.6 Adjournment for witnesses

You may adjourn a hearing in cases where: s101(1) CPA

- you are of the opinion that the defendant is taken by surprise by the production of a witness by the prosecution because:
  - the witness has not made any written statement and the defendant has not had sufficient notice; or
  - the witness has made a written statement, but the statement has not been made available to the defendant in sufficient time
- the production of that witness is likely to be prejudicial to the defendant's defence; and
- the defendant makes an application for adjournment.

If you are of the opinion that any witness who has not been called by the prosecution should be called, you may: s101(2) CPA

- require the prosecutor to call him/her
- make an order for his/her attendance if the witness is not in attendance
- adjourn the hearing to the time when that witness attends.

12.7 Adjournment for evidence

At times there will be applications to have the case heard but then adjourned because all the evidence needed for the case is not available on the date of hearing. It is advisable for you to hear the application in full and ask for the other party to respond before ruling. Some counsel may deliberately make this application in order to prolong or delay matters. Remember that the discretion to grant or not to grant the adjournment rests with you.

12.8 Adjournment for re-trial on question of law

s105 CPA

If a question of law arises in a trial presided over by a Justice(s) for any offence, the Court may refuse to continue with the trial and adjourn it for retrial before a Judge, either at its own volition or by application of the prosecutor or defendant.

The Information or charge of the trial shall remain valid, but every other step taken, document filed or direction or determination given in the trial shall be void except by order of the Justice(s) that it remains valid.

The retrial of the person for the offence shall commence and proceed before a Judge as if no steps had been taken, except those steps saved by order of Justice(s).

12.9 The procedure to follow when ordering an adjournment

s189 CPA

During the hearing of any case you may adjourn the hearing to a certain time and place.

Before fixing the date:

- inform the defendant of his/her right to legal counsel (if unrepresented)
- advise the defendant to prepare for hearing the case
- set a date after considering the time the parties need to prepare their cases and the Court diary.

You may then:

- allow the defendant to go at large
- commit the defendant to prison; or
- release the defendant upon a recognisance with or without sureties, conditioned on his/her reappearance at the adjourned time and place.

If the defendant has been committed to prison, the adjournment must be for no longer than 15 days and in all other cases 30 days (the day after the adjournment being counted as the first day).

Record all the above on the Criminal Decision Sheet (using the stamp or writing it).

12.10 Non appearance after adjournment

s56 CPA

If the defendant does not reappear at the adjourned time and place:

- you may proceed to hear the case if a guilty verdict would result in a fine only

- if you decide to not hear the case in the absence of the defendant, you must issue a warrant for the apprehension of the defendant to be brought before the Court.

If the complainant does not reappear at the adjourned time and place, you may dismiss the case with or without costs.

13 Bail applications and remanding in custody

When dealing with bail applications, you need to comply with sections 83 to 95 of the Criminal Procedure Act which sets out the rules as to how bail applications are dealt with.

13.1 Background information in regard to bail

13.1.1 The right to be released on bail

s83 CPA

The starting point in considering an application for bail is that basically everyone has a right to bail. Article 65(f) of the Constitution provides that no enactment shall be construed or applied so as to deprive any person charged with an offence of the right to reasonable bail, except for just cause.

The two main situations in which a defendant has the right to be released on bail are:

- where the defendant is charged with an offence not punishable by a sentence of imprisonment
- where the defendant is charged with an offence for which the maximum punishment is less than two years imprisonment.

As well, a defendant has the right to be released on bail where he/she is charged with an offence against the following provisions of the Crimes Act 1969:

- s122 (false statements or declarations)
- ss172-173 (duty to provide the necessaries)
- s174 (abandoning a child under six years)
- s205 (female procuring her own miscarriage)
- s210 (injuring by unlawful act)
- s224 (setting traps, etc.)
- s272 (acknowledging instrument in false name)
- s285 (taking reward for recovery of stolen goods)

- s303 (imitating authorised marks)
- s304 (imitating customary marks).

However, this entitlement to bail is lost if:

- the defendant has been previously convicted of an offence punishable by imprisonment; **and**
- he/she is now charged with an offence punishable by imprisonment.

13.1.2 Extension of bail

Bail expires each time a defendant is brought back to court. So, if a defendant who has been granted bail is now before you (usually on a callover), you will need to consider whether the person's bail is to be extended or revoked.

Your decision should be recorded on the Criminal Decision Sheet.

13.1.3 The right to apply for bail after being remanded

s86 CPA

A defendant can be remanded into custody and the defendant may then choose not to make an application for bail at the time of remand. But, if the defendant later so requests it, he/she should be brought before a Court to apply for bail.

If you decide to grant bail after an application is made pursuant to s86 CPA, you must certify, in writing, that bail has been granted in the form of a Bail Bond.  The procedure is set out at section 13.2.2 below.

The Bail Bond is forwarded to the Superintendent of the institution where the defendant is detained.

Any defendant who has been remanded in custody on any charge and not been released on bail may be brought before the Court at any time to deal with that charge, notwithstanding that the period of his/her remand has not expired.

s94 CPA

13.1.4 Young offenders

s84 CPA

You must grant bail, subject to such conditions as you think fit, where you remand a person for a period of adjournment, and the person appears to be **under 21**.

If the defendant appears to be **under 18**, you may remand him/her in the custody of a Probation Officer or any reputable adult.

If a young person is charged with an offence for which they would not be bailable, except that they are a young person, you may direct that the young person be detained in prison if, having regard to all the circumstances of the case, you decide that no other option is desirable.

13.1.5 Drug offenders

You should be aware of section 73 of the Narcotics and Misuse of Drugs Act 2004 which provides that "No person who is charged with or convicted of a drug dealing offence shall be granted bail, except by order of a Judge".

13.1.6 Police bail

Under section 95 of the Criminal Procedure Act the police can grant bail in certain circumstances, as set out in that section.

13.1.7 The Justice's discretion in regard to bail

You have a discretion to grant bail to a person even if they are not bailable as of right. s83(5) CPA

In cases where you are given discretion whether to grant bail, you should consider three things:

1. the likelihood of the defendant surrendering to custody and appearing in Court
2. the interests of the defendant; and
3. the public interest and the protection of the community.

1 Likelihood of the accused person appearing in court

The **primary** consideration in deciding whether to grant bail to a defendant should be the likelihood of the defendant appearing in Court to answer the charges laid against him/her.

Consider:

- the defendant's background and community ties, including residence, employment, family situation and previous criminal history
- any previous failure by the defendant to surrender to custody or to observe bail conditions
- the circumstances, nature and seriousness of the offence

- the severity of the likely penalty if the defendant is found guilty
- any specific indications, such as that the accused voluntarily surrendered to the police at the time of arrest or, on the contrary, was arrested trying to flee the country.

2 The interests of the defendant

Consider:

- the length of time the defendant is likely to have to remain in custody before the case is heard
- the need for the defendant to obtain legal advice and to prepare a defence
- the need for the defendant to be at liberty for other lawful purposes, such as employment, education, care for dependants.

3 The public interest and the protection of the community

Consider:

- any previous failure by the defendant to surrender to custody or to observe bail conditions
- the likelihood of the defendant interfering with evidence, witnesses or assessors or any specially affected person, including the alleged victim
- the likelihood of the defendant committing an offence while on bail.

13.2 Dealing with applications for bail

13.2.1 Considering an application for bail

At a defendant's first appearance, the matter will usually be adjourned to a fixed date. The question then arises as to whether the defendant is to be kept in custody or released on bail. Usually the option of bail will be adopted.

The prosecutor will suggest what conditions should be imposed on the bail. The purposes of the condition/s are that the defendant – s 87(3) CPA

- appears in court on the date to which he/she has been remanded
- does not interfere with any witnesses or any evidence
- does not commit any offence whilst on bail.

Possible conditions are set out in section 87 of the Criminal Procedure Act. Usually one condition to be imposed is that the defendant surrenders his/her passport to the Court. Other conditions will depend on the nature of the offence, *eg.* if the offence was a night burglary, the condition may be a curfew, or if the offence was an assault, the condition may be that the defendant stay away from a specified person.

In addition to these conditions, a defendant must "enter into" a bail bond, with or without surety for such sum as you fix. s 87(5) CPA

13.2.2 Granting bail

When granting bail you need to indicate what conditions apply. This will include the amount of the Bail Bond, and whether it is with our without sureties.

The Bail Bond is printed by the Court staff immediately, and given to you, in court, for signature; or it is signed by the Registrar.

The order to give is –

> The matter is adjourned to ……. and bail is granted with the following conditions:
> ……
> ……
> ……

You should record these conditions on the Criminal Decision Sheet attached to the Information.

13.2.3 Form of Bail Bond and Notice

s89(2)-(3) CPA

When granting bail, the bond that is to be taken is in the form of Form 10 in the First Schedule to the Criminal Procedure Act. It is entered into by any of

the parties to it before the Registrar or before the Superintendent of the prison where defendant is detained.

13.2.4 Release of the defendant on bail

s89(2)-(3) CPA

The defendant shall be released when:

- all the parties have entered into the bond; and
- notice has been given by the Registrar or the Superintendent; and
- the Justice/s granting bail endorse on the remand warrant a certificate that all the parties to the bond have entered into it and the defendant is to be released.

13.2.5 Variation of conditions of bail

s88 CPA

If a defendant is granted bail, he/she may later make an application to vary the conditions of the bail order.

If you receive such an application, you may make an order:

- varying the terms on which bail has been granted; or
- varying the conditions of any bail bond entered into:
  - if sureties are required for the bail bond, they shall continue in force and the order varying the conditions of bail bond will not take effect until consented to in writing or a new bail bond is entered into; or
- revoking any conditions of bail.

Any orders you make should be recorded on the Criminal Decision Sheet attached to the Information.

13.2.6 Refusal of bail

s85(1) CPA

If you do not grant bail to a defendant who is remanded in custody, you should issue a warrant in Form 9 for his/her detention in custody for the period of the adjournment.

You should record your reasons for refusing bail on the Criminal Decision Sheet attached to the Information, bearing in mind that it may only be refused in certain circumstances and for just cause, and because

an order refusing bail is subject to review/re-trial by a Judge of the High Court under s102(1) CPA.

13.2.7 Where bail is breached

ss90-92 CPA

The Registrar may issue a warrant of arrest for a defendant released on bail where the Registrar is satisfied that the defendant:

- has absconded or is about to abscond for the purpose of evading justice
- has breached a condition of bail that he/she report to Police as required; or
- has not personally attended the hearing at the time and place specified in the bond.

After the person is arrested, he/she is brought before you and if you are satisfied that the defendant had absconded or was about to abscond, you may remand the defendant into custody or you may grant bail at your discretion.

13.2.8 Forfeiture of a bail bond

s93 CPA

Where you are satisfied that a condition of bail has not been performed, a time and place shall be set to consider estreating the bail bond, *ie.* enforcing the forfeiture of the bail bond.

You need to certify this on the back of the Bail Bond.

Then, not less than seven days before the set time, the Registrar serves a notice on the defendant, if he/she can be found, and on any surety(ies), that the bond will be estreated unless any person bound by the bond can prove that it should not be estreated.

At the hearing, if no sufficient cause is shown as to why a condition of bail has not been performed, you may make an order to estreat the bond, *ie.* that it be forfeited, to such an amount as you think fit.[73]

If the defendant cannot be found, you may estreat the bond against the defendant, notwithstanding that notice has not been served on him/her.

---

[73] Any penalty payable upon such order shall be treated as if it were a fine.

13.2.9 Bail pending an appeal

A person who appeals, *ie.* an appellant, may be released on bail pending an appeal. s76(4) JA

However, you may issue a warrant of arrest and have an appellant appear before a Justice or Judge where he/she has been released on bail pending an appeal and a person has testified on oath that the appellant has absconded or is about to abscond for the purpose of evading justice. s128 CPA

Upon arrest and appearance, if you are satisfied that the appellant has absconded or was about to abscond, you can order the appellant to be imprisoned until the hearing of his/her appeal.

An appellant released on bail pending the hearing of the appeal may also surrender him/herself and apply to a Justice for the discharge of his/her bail bond. s129 CPA

If such an order is made it should be recorded on the Criminal Decision Sheet attached to the Information.

Upon such an application by the appellant, you may issue a warrant of arrest of the appellant and for his/her imprisonment for the unexpired term of the original sentence.

13.3 Remanding into custody

s81 CPA

Where a defendant has been arrested and brought before the Court and the hearing is adjourned, you may remand the defendant in custody (subject to his/her right to apply for bail) or allow the defendant to go at large.[74]

A remand in custody places a defendant under the control of the Court and:

- ensures his/her attendance at the hearing
- removes the defendant from the community in the case of a serious offence.

---

[74] Under the 2000 (No.7) Amendment to s81 CPA, the Registrar is also given power to remand the defendant in custody but:
- a single period of remand shall not exceed eight days
- not more than two consecutive periods of remand (which are no more than eight days) may be imposed
- the defendant shall be brought before a Judge, Justice, or three Justices sitting together at the earliest opportunity after the period of remand expires. At this time the Judge, Justice or Justices shall determine whether to remand the defendant into custody, allow him or her to go at large or to award bail.

In the interests of justice, long remands in custody should be avoided as much as possible. If a long remand in custody is requested, it may be preferable to remand the defendant to appear as soon as possible before a Judge and let the judge decide.

Section 81(1) of the Criminal Procedure Act provides that the defendant has the right to apply for bail.

13.4 Allowing the defendant to go at large

s 81(1) CPA

You have the discretion to allow the defendant to go free from the courtroom and remain without restriction until the date of the adjourned hearing.

In making this order, you should consider:

- the seriousness of the offence
- whether the defendant is a first time or repeat offender
- whether the defendant is a reliable person
- the circumstances of the case.

14 Name suppression orders

14.1 The power to clear the court

The Court may order that persons be excluded from Court for the whole or any part of the proceedings where the Court is of the opinion that:

- it is in the interests of justice or public morality; or
- it is in the interests of the reputation of any victim of an alleged sexual offence; or
- it is in the interests of the reputation of any victim of any alleged offence of extortion.

The power to clear the Court does not give you power to exclude:

- the prosecutor or defendant
- the defendant's agent
- any barrister or solicitor
- any accredited news media reporter.

In a case where the Court may give such an order, and whether or not it does so, the Court may make an order forbidding the publication of any report, or an account of the whole or any part of the evidence presented in court.

14.2 The power to suppress names

s25 CJA

The Court may, in its discretion, prohibit the publication of the name of the person accused or convicted of the offence, or the name of any other person connected with the proceedings. This does not apply if the person has previously been convicted of any offence punishable by imprisonment. Publication of the name is prohibited as well as any name or particulars likely to lead to the identification of the person. s76 CPA

A breach of such an order, or any evasion or attempted evasion of it, may be dealt with as contempt of Court.

There has been some doubt as to whether Justices have the jurisdiction to make an order for suppression of a defendant's name. An opinion from the Crown Law Office advises that, although the legislation should be amended to expressly grant this power to Justices, "until such time as there is an

amendment, ….. and on an interim basis only …. the making of an order is nevertheless lawful".[75]

14.3 Principles impacting name suppression

Two important principles which you should consider, which will impact upon your decision to order name suppression, are:

1. The Court should be open to the public and open to publication in the media.
2. Justice is to be seen to be done, which is more likely to occur when the Court is open to the public.

There are exceptions to the principle that the Court should be open to the public and, in these cases, name suppression may be appropriate. However, you must remember that:

- the onus is on the person seeking suppression to satisfy the Court that it is in the proper interests of justice in the particular case that name suppression be granted; and
- suppression will be the exception, not the rule.

14.4 Name suppression of the defendant

R v O'Conner[76] sets out those considerations which you should take into account in ordering name suppression. It states:

> "The use of the provision would appear appropriate where, in the particular case, the possible harm to the defendant or offender or to those persons connected with him or her from publicity outweighs the advantages to the public which accrue from publicity in the majority of cases."

You should consider the following factors **against** name suppression when making your decision:

- Would name suppression cast suspicion on others?
- Would name suppression in this case prevent the discovery or volunteering of evidence about the alleged offender?
- Would name suppression in this case provide an opportunity for further offending by the defendant?

---

75 Advice from Kim Saunders, Special Counsel, Crown Law Office, to John Kenning, Justice of the Peace (cc. Chief Justice David Williams) dated 25th May 2009.

76 [1992] 1 NZLR 87.

You should then consider the following factors in **support** of name suppression when making your decision:

- Should the defendant be given an opportunity to notify his/her family before the matter appears in the media, if he/she has not already done so?
- What would be the social, financial and professional consequences to the defendant, his/ her family, or his/her connections?
  - Would there be consequences of ill health?
  - Would sensitive business or professional status be irrecoverably damaged by publicity, where the defendant still may be convicted or acquitted at trial?

Points to note

You should also have regard to the following points when considering granting name suppression to a defendant:

- A permanent order for suppression would be very unusual and almost unheard of on first or second appearance.
- An order for name suppression does not necessarily follow an acquittal, as the public is entitled to know who is acquitted just as much as they are entitled to know who is convicted.
- On conviction, an order for suppression would be very unusual and likely inappropriate.
- A temporary order pending advice to family, until a plea is taken, or until the next appearance after the first is more commonly acceptable.
- It is appropriate to consider the position of the victim in dealing with an application for name suppression of the defendant.
- If the defendant is a relative of the complainant in a sexual case, it may be necessary to suppress the name to protect the identity of the complainant.
- The more serious the crime, the less likely it is to be appropriate to grant name suppression to the defendant.

14.5 Name suppression for persons other than the defendant

Section 25 of the Criminal Justice Act provides for the suppression of the names of other persons connected with the case. This can include a complainant and other witnesses, or any other person connected to the case but who is not taking part in the actual proceedings.

Ask yourself:

- Is it likely that the possible harm to the person from publishing their name outweighs the requirement that justice to be open to the public in all respects?

15 Sentencing

15.1 Background information about sentencing

15.1.1 Jurisdiction to sentence

If you have heard such cases many times before, then you will know whether you have jurisdiction or not. But sometimes it may be necessary to check if you have the power to impose a sentence for the particular offence/s.

If it is a criminal matter, refer to Appendix A under the heading *Sentence* (5th column) for guidance. If it is a traffic matter, refer to Appendix C under the heading *Jurisd.* (4th column) for guidance.

One Justice

A Justice has jurisdiction to pass sentence:

- to a term of imprisonment not exceeding two years; or
- to a fine not exceeding $500; or
- both.

If a statute specifically provides a maximum penalty which is less than two years or a fine which is less than $500 or both, the maximum that you may sentence is the maximum in that statute. If the statute provides a minimum penalty, you must sentence the defendant to not less than that minimum penalty. s21(1) JA

Three Justices sitting together

Three Justices sitting together have jurisdiction to pass sentence:

- to a term of imprisonment not exceeding three years; or
- to a fine not exceeding $1000; or
- both.

If a statute specifically provides a maximum penalty which is less than three years or a fine which is less than $1000, or both, the maximum that three Justices may sentence is the maximum in that statute. If the statute provides

a minimum penalty, three Justices must sentence the defendant to not less than that minimum penalty. s21(1) JA

If the trial is held following an election made pursuant to s15A of the Judicature Act, the maximum three Justices may impose is the sentence provided for in the enactment. s21(2) JA

15.1.2 What sentencing is meant to achieve

There are five basic purposes of sentencing to be considered by the Court:

Punishment

The sentence is to punish the offender for their criminal behaviour.

Deterrence

The sentence is designed to deter the offender from breaking the law again and be a warning to others not to do the same.

Prevention

The sentence is to prevent the offender from doing the same thing again.

Rehabilitation

The sentence is to assist an offender to reform and not offend again.

Restoration

The sentence serves to restore or repair the damage done to others.

When considering the appropriate sentence, you will have one or more of these purposes in mind. Ask yourself which of the sentencing purposes apply in each particular case.

15.1.3 Sentencing discretion

The level of sentence in each case is a matter for you to decide, up to the maximum limit for the offence and within your sentencing jurisdiction. The sentence in each case must be just and correct in principle and requires the application of your judicial discretion.

Bear in mind that a person charged and found guilty of an offence has the right not to be sentenced to a more severe punishment than would have been imposed under the law in force at the time of the commission of the offence.

Article 65(h) Constitution

In your discretion you need you to balance:

- the gravity or seriousness of the offence
- the needs of society
- an expedient and just disposal of the case

as well as any aggravating or mitigating factors.

15.1.4 Aggravating and mitigating factors influencing sentence

Some factors will cause you to deal with the offender more harshly – these are called aggravating factors. Some factors will cause you to deal with the offender more lightly – these are called mitigating factors. You need to take all the factors into account when passing sentence.

Aggravating factors include:

- the use of violence
- persistent offending
- amount of damage to person or property
- age and vulnerability of the victim
- value of property stolen
- whether the acts were premeditated
- danger to the public
- prevalence of this offence in the community.

Mitigating factors include:

- the defendant's guilty plea (but note that the Court cannot penalise an offender for exercising his/her right to plead not guilty)
- genuine remorse
- reparation
- reconciliation
- young offender
- first offender

- provocation
- no harm or minimal harm to person or property.

There are also a number of factors that float between these two categories, depending on the circumstances. In these cases, you need to evaluate the weight to be given to each of them in terms of the appropriate sentence to be considered by you. These include the following:

- previous good character
- victim acquiescence
- family ties
- custom ties
- political instability
- the defendant's responsible position.

15.1.5 Consistency

One of the most common criticisms of courts is that sentences are inconsistent. Failure to achieve consistency leads to individual injustice. It is most important that you are consistent when sentencing. You must:

- treat similar cases in the same way
- treat serious cases more seriously than less serious cases
- treat minor cases less seriously than serious cases.

A means of ensuring consistency is to seek continuity in the approach to sentencing, both as an individual and with other judicial officers presiding over the matter with you.

See *Tekura Bishop v The Crown*[77] for a good example of how to consider a variety of factors when deciding upon a sentence.

15.2 What to do when sentencing

15.2.1 At the end of the trial, when convicting

At the end of a trial, if you have found the defendant guilty, *ie.* you have convicted him/her, you must then sentence the offender to an appropriate

[77] [1995] C.A. No. 7/25 (Court of Appeal Cook Islands).

sentence. You should never sentence a person without convicting him/her first.

The usual practice is to adjourn for two weeks so that appropriate reports can be obtained. These will give further background information and are useful in assessing the sentence to be given. It is usual to obtain a probation report, a victim impact statement and a medical report, where the victim has been injured by the defendant. Other reports may be from village elders or clergy and these, and any agency reports, should be considered, including medical reports, as well as reports from supervisors if previously on probation/community service.

If you are adjourning, you will need to consider bail or remand in custody until the next hearing.

15.2.2 At the sentencing hearing

At the sentencing hearing the procedure to follow is:

1. **Submission**: The prosecution will make a submission. This will include producing, where appropriate, a victim impact statement, a medical report (in case of injury to a person), information in regard to reparation, or other material.

2. **Previous convictions**: The prosecution will outline to the court any previous convictions that the defendant has. This is intended to guide you in setting the sentence by helping you to assess the previous character and the likelihood of the defendant re-offending.

   The list of convictions must be shown to the offender. If the offender accepts these are correct, then you can proceed to consider them. If the offender disputes them, the prosecution will need to obtain the court records to support the conviction/s. You will probably need to adjourn to allow this to happen. It is the duty of the prosecution to establish the previous convictions – a court can only pass sentence on the strength of the evidence produced. It cannot rely on information that has not been proved by evidence or accepted by the offender.

   In assessing previous convictions, you have to be aware of the result and effect of a previous sentence. If, for example, a person is before you having been convicted of being drunk and disorderly, and has a similar offence from 1986, the earlier offence should not be taken into consideration as it has been so many years since then and the conviction appeared to act as a deterrence.

If that person was convicted of a similar offence earlier in the same year, then the Court may deal with him/her more harshly.

3. **Plea of mitigation**: Ask the offender if he/she has anything to say on his/her own behalf, or counsel as the case may be. This is known as a plea in mitigation. This is where mitigating factors are outlined to you.

   When a person is convicted or has pleaded guilty to an offence, it is the duty of the Registrar to ask the defendant whether he/she has anything to say as to why the sentence should not passed upon him/her according to the law. Since the Registrar is not usually present during the proceedings, you should ensure that either the Clerk or yourself asks the defendant if he/she has anything to say. s109(1) CPA

4. **Pronounce sentence:** Your sentence will include not only the penalty but also orders in regard to costs and possibly compensation. Your approach to sentencing, and how you do this for various types of offences is outlined below.

5 **Appeal:** Defence counsel may indicate that the defendant intends to appeal against your sentence. You can note the intention of a party to appeal; however they have a number of days in which to lay a formal documented appeal.

15.3 A structured approach to sentencing

It is best to have a systematic method of working through each sentence. The format on the following page is a useful guide for you to use in court when you pass sentence.

Sentencing Format

The offence/s

- State what the offender has been convicted of.

The relevant facts

- If there was a defended hearing, outline briefly the evidence called.

OR

- If there was a plea of guilty, refer to the Summary of Facts.

The law in regard to sentence

- State the maximum sentence for the offence/s, and any mandatory requirements, such as mandatory disqualification.

Starting point

- State what your starting point is in regard to sentence, *eg.* six months imprisonment.

Aggravating factors

- Outline any aggravating factors which the prosecution has put forward and you think are relevant, including anything relevant in any reports produced.
- Indicate how much you would increase your sentence, from your starting point, because of those factors.

Mitigating factors

- Address any arguments that the accused or their lawyer has put forward and you think are relevant, including anything relevant in any reports produced.
- Indicate how much you would decrease the sentence from what you had indicated after taking into account aggravating factors.

Example

"The maximum penalty for this offence is 3 months imprisonment. Because of the aggravating factors I've mentioned, I would add 2 months to that sentence, making it 5 months. But I take into account the mitigating factors put to me by counsel and reduce the sentence by 2 months to take them into account. The sentence therefore is 4 months imprisonment."

Pronounce sentence

- Pronounce the sentence.
- Make sure you explain the sentence so the offender understands.

Record the sentence

Record your sentence on the Criminal Decision Sheet, using the stamp provided, or in writing.

15.4 Where the defendant is convicted of more than one offence

When an offender is sentenced for more than one offence at the same time, or if the offender is sentenced for one offence while still serving a sentence that was previously imposed, you may direct that the sentences shall take effect:

- one after the other (cumulatively); or
- at the same time/in parallel (concurrently). s77 Cook Islands Act 1915

Where an act or omission constitutes an offence under two or more provisions of the Crimes Act 1969 or any other Act, the offender may be punished under any one of those provisions. s9(3) Crimes Act

No one is liable, on conviction, to be punished twice in respect of the same offence. s9(4) Crimes Act

Where an information is framed in the alternative and the defendant is convicted, you may limit the conviction to one of the alternative charges, and should do so if requested to do so by the defendant.

15.5 Types of sentences

There are various types of sentence you can impose, depending in part on the relevant statute – imprisonment, probation, fine, compensation, community service order, restitution or costs.

15.5.1 Imprisonment

The following principles apply to a sentence of imprisonment:

- A Court must impose a definite term of imprisonment, which must not be more than the maximum term provided for in the statute which creates the offence and not more than the maximum you are empowered to pass.
- Everyone liable to imprisonment may be sentenced to imprisonment

Example

"X, on the charge of ……., a conviction is entered, and you are hereby sentenced to a term of imprisonment of ….. months."

If there are other charges

"And on the additional charge of ….., you are similarly sentenced to a term of imprisonment of ….. months to be served concurrently [or cumulatively] with the other charge of ….."

for any shorter term.[78] s108(1) CPA

Ideally, imprisonment should only be considered when no other sentence is appropriate. Ask yourself:

- Is it necessary to impose a custodial sentence?
- Is there a viable sentencing alternative available?
- Can a shorter sentence be imposed?

In imposing any sentence of imprisonment, you may direct that the sentence shall start on the expiry of another specified sentence/s. s114 CPA

15.5.2 Probation

s6(1) CJA

Where a person is convicted of any offence punishable by imprisonment, you may, instead of sentencing him/her to imprisonment, release him/her on probation for a period of not less than one year or more than three years.

You will have before you a Probation Report which, among other things, will include suggested conditions of the probation.

When considering whether probation is suitable, you should consider:

- the nature of the offence
- the character of the offender
- the offender's home surroundings
- the expedient disposal of the case.

In addition to probation, you may also impose other conditions upon the offender, including that the offender:

- returns to his/her island or origin and remains there for the period of time set out in the order
- pays the costs of the prosecution
- pays, by way of damages, for injury or compensation for loss suffered by any person through or by means of the offence
- applies for a prohibition order and keeps it renewed while on probation
- abstains from the use of intoxicating liquor or drugs
- does not, either alone or jointly with another person, own or have in his/her possession any specified article, or articles of any specified class

[78] Except where expressly provided by statute.

- does not associate with any specified person or person specified in any class
- undergoes any specified course of education or training
- complies with such conditions placed upon his/her residence, employment or earnings, as you think fit
- complies with any other conditions that you think are necessary for ensuring the good conduct or preventing the commission of an offence by the offender. s8 CJA

As part of the Probation Order, the Court will also name the probation officer that is to supervise the offender's probation programme.

Once a Probation Order is issued, you must fully explain the order to the offender and tell him/her that any breach of the order entitles the Court to deal with him/her in any manner which the offender could have been dealt with if the offence had been committed anew.

Record the Probation Order on the Criminal Decision Sheet (using the stamp or by writing it) and include the conditions. If the conditions were set out in the Probation Report, they can be referred to as "the conditions in the Probation Report" rather than list them all.

15.5.3 Fine

When you release any person on probation you may also sentence that person to pay any fine authorised by law. s6(2) CJA

Where any person may be sentenced to imprisonment, or sentenced to imprisonment or a fine, you may sentence the person to pay a fine in addition to or instead of a sentence of imprisonment provided that:[79]

- no person shall be sentenced to pay a fine exceeding the maximum fine prescribed by the statute which creates the offence
- where no fine is prescribed by statute, the person shall not be sentenced to pay a fine exceeding the amount which you as a Justice may impose under your jurisdiction. s108(2) CPA

If a corporation is convicted of an offence punishable only by imprisonment, the corporation may be sentenced to pay a fine, but as a Justice you cannot impose a fine beyond your jurisdiction under the Judicature Act. s108(3) CPA

When imposing a fine, you must consider the means of the offender to pay the fine. s108(4) CPA

[79] Except where expressly provided by statute.

Where an offender has been sentenced to pay a fine, you may:

- allow time for payment, in which case you may impose a period of imprisonment for failure to pay the fine by the end of the prescribed time period
- direct payment to be made in instalments, in which case you may order that the payment of instalments be supervised by a Probation Officer
- direct payment to be made to such person/s and in such a place/s as you specify. s117(3) CPA
- direct that the offender pay the fine immediately if you are of the opinion
  - that the offender has the means to pay the sum; or
  - that the offender has no fixed place of residence; or
  - for any other reason, having reference to the gravity of the offence, the character of the offender, and any special circumstances. s117(5) CPA

If an offender fails to pay a fine, as ordered, you may direct:

- that a warrant to seize property be issued; or s117A CPA
- an attachment order be made (an attachment order allows the fine to be paid out of an offender's wages); or s117 CPA
- that a warrant of commitment to imprisonment be made for a period of one day for every 50 cents not paid, or a period not exceeding 180 days, or for the maximum allowed upon conviction of the offence. s5A CPA

Record the fine on the Criminal Decision Sheet (using the stamp or by writing it).

15.5.4 Compensation

Compensation for loss of property s415 Crimes Act

You may order the offender to pay such sum as you think fit as compensation for "any loss or damage to property" suffered by the person against whom the offence was committed. It is not clear whether the term "think fit" is limited by Justices' civil jurisdiction, *ie.* to $1500 for a single Justice, and $3000 for three Justices sitting together.

Where the defendant was arrested and money was taken from him/her, you may order the whole or any part of the money to be applied to the payment of compensation.

Compensation under s415 of the Crimes Act is to be enforced in the same manner as a fine.

Any order under s415 of the Crimes Act shall not affect the right of any person to recover any sum, in excess of the amount recovered under the Compensation Order, by way of civil proceedings.

Part of a fine as compensation to party injured by assault s217 Crimes Act

You may award to a person who has been assaulted, by way of compensation, any portion of a fine, as long as it does not exceed half, if:

- a defendant is convicted of any assault; and
- you are satisfied that the assault was wanton and unprovoked; and
- you are satisfied that the assault caused bodily injury, injury to clothes, or injury to property of the person assaulted.

An award of any portion of a fine under this section shall not affect the right of the person assaulted, or of any other person, to recover by civil proceedings any damages in excess of the amount awarded.

Record the Compensation Order on the Criminal Decision Sheet (using the stamp or by writing it).

15.5.5 Community Service Orders

s8(1*)* CJA

Where a person who is not less than 13 years of age is convicted of an offence punishable by imprisonment, you may order him/her to serve in a Community Service Group.[80] This is referred to as a Community Service Order.

Section 13 CJA Amendment 1976 states that you may *not* issue a Community Service Order until you have considered a report issued by a probation officer outlining:

- the offender's character
- the offender's personal history
- other relevant circumstances of the case.

A Community Service Order cannot exceed 12 months.

In ordering a person to serve in a Community Service Group, you must specify:

---

80 This is subject to s13 CJA Amendment 1976.

- the number of occasions in a week the offender is required to report or order that the offender will report according to the number of times set out by the Controller of the Community Service Groups
- the day and time in which the offender is required to report for the first time after the order is made
- the duration of each period of custody in a Community Service Group, which cannot exceed more than 12 hours in each period.

s14 CJA Amend.1976

Record the Community Service Order on the Criminal Decision Sheet (using the stamp or by writing it) and include the conditions. If the conditions were set out in the Probation Report, they can be referred to as "the conditions in the Probation Report" rather than list them all.

15.5.6 Restitution

s416 Crimes Act

Where a person is convicted of any offence and any property is found in his/her possession, or in the possession of another person for him/her, you may order that the property be delivered to the person entitled to it.

Where it appears that a purchaser has bought the property in good faith and without knowledge that it was dishonestly obtained, you may also order that the offender pay the purchaser of the property a sum not exceeding the amount paid by the purchaser.

If a person is convicted of having stolen or dishonestly obtained any property, and it appears that the property has been pawned to a pawnbroker, you may order the pawnbroker, with or without payment, to deliver the property to the person entitled to it. If a delivery by a pawnbroker is ordered *without* payment, you must give the pawnbroker a chance to be heard.

Record the Restitution Order on the Criminal Decision Sheet (using the stamp or by writing it) and include any conditions.

15.5.7 Costs

You may make an order as to costs for any proceedings or by any party to proceedings. Such costs shall be in the discretion of the Court. s92 JA

Where any person is convicted of any offence, you may order the offender to pay a sum that you think just and reasonable towards the costs of the prosecution. Costs can include the cost of obtaining a blood alcohol report.

s414 Crimes Act

Where the person was arrested and money was taken from him/her, you may order the whole or any part of the money to be applied to the payment of costs of the prosecution.

Likewise, where any person is acquitted, you have discretion to order costs against the prosecution.

Any order of costs under s414 of the Crimes Act shall have the effect of judgment.

Record your order in regard to costs on the Criminal Decision Sheet (using the stamp or by writing it).

15.5.8 Order to "come up for sentence"

s113 CPA

Upon convicting the offender, you may decide, having regard to the circumstances, not to pass sentence but rather order the offender to appear for sentence when called upon later to do so and on such conditions as you think fit.

In ordering an offender to come up for sentence, you must have regard to:

- the circumstances of the case
- the nature of the offence
- the character of the offender.

An offender who is ordered to come up for sentence at a later date may be ordered to appear:

- for any period specified by the Court, as long as it does not exceed three years from the date of conviction; or
- within one year from the date of conviction if no period is specified within the order.

Where an offender is brought up for sentence, you may sentence or otherwise deal with the offender in a manner that is specified for that offence, once you have taken into consideration the circumstances of the case and the conduct of the offender since the order was made.

Ordering an offender to come up for sentence does not limit or affect your power to make any order for the payment of costs, damages, compensation, or for the restitution of any property, as long as a statute dealing with the offence provides for such orders.

Record your Order on the Criminal Decision Sheet (using the stamp or by writing it).

15.5.9 Absolute and conditional discharges

s112 CPA

You may discharge the offender without convicting him/her, *unless* there is a minimum penalty that must be given as expressly provided for by statute.

A discharge under s112 CPA shall be deemed to be an acquittal. But the Court also has power to convict and then discharge any person.

If you discharge any person under s112 CPA, after being satisfied that the charge is proved against him/her, you may make an order for the payment of costs, damages or compensation, or the restitution of property, if such an order could have been made for the offence if the person was convicted and sentenced. s112(3) CPA

Record your Order on the Criminal Decision Sheet (using the stamp or by writing it) and include any order in regard to costs, compensation, etc.

15.5.10 Security for keeping the peace

You may make an order for a bond of keeping the peace, with or without sureties:

- where a person is charged with an offence
- when evidence establishes one of the grounds which would justify the making such an order
- regardless of whether or not the defendant is convicted of the offence or whether or not any penalty is imposed on him/her in respect of the offence. s124 CPA

To justify an order for a bond of keeping the peace, the evidence presented must establish one of the following grounds:

- that the applicant has cause to fear that the defendant will:
  - do the applicant, his/her spouse or child or other member of his/her household, bodily harm; or
  - destroy or damage the applicant's house; or
  - procure any other person to do any such injury

and

- that the defendant has, for the purposes of annoyance and provocation of the applicant or other members of the public:
  - used provoking or insulting language; or
  - exhibited any offensive writing or object; or
  - done any offensive act

or

- that the defendant has threatened, or procured another person, to do any act which, if done, would constitute an offence under:
  - s317 Crimes Act 1969 (relating to arson); or
  - s321 Crimes Act 1969 (relating to wilful damage). s121 CPA

You may order that no sureties are needed if you are satisfied that the defendant is unable to obtain the sureties. s123(4) CPA

Record your Order on the Criminal Decision Sheet (using the stamp or by writing it) and include the conditions.

16 Hearing a defended matter

This chapter includes criminal trials and trials for offences under other statutes, such as the Transport Act.

16.1 An outline of the trial

The trial will have the following elements –

1. The prosecution[81] and the defendant appear and, if the defendant is represented, the defendant's counsel announces his/her appearance.

2. The defendant is cautioned, if unrepresented.

3. The prosecution may make an opening address, which will include stating who will be called as witnesses.

4. The prosecution presents its case – by examination-in-chief, with the defendant cross-examining where it decides to do so. The prosecution may re-examine on matters raised during cross-examination which were not raised in examination-in-chief.

5. The defendant's counsel may make a 'no case to answer' submission.

6. The defendant may make an opening address.

7. The defendant may present his/her case – again by examination-in-chief, with the prosecution cross-examining, and followed by re-examination if appropriate.

8. Final addresses may be given – the prosecution first and then the defendant.

9. A decision is made as to guilt or otherwise. This decision may be reserved, and a report or reports may be sought in the meantime. The case is adjourned to a fixed date.

This is dealt with in Chapter 15: *Sentencing.*

[81] The term 'prosecution' is used in this chapter, but the trial may be brought under an Act other than the Crimes Act, in which case the person prosecuting the case will be called the Informant.

10. A conviction is recorded (or not), and if applicable a sentence is pronounced.

Each of these elements of the defended hearing is now discussed. During the trial the defendant might seek to change his/her plea; this is dealt with at the end of the chapter.

The procedure for conduct of the trial is governed by ss 69 – 82 of the Criminal Procedure Act.

16.2 Appearances

Usually you cannot proceed unless the defendant and the informant are present in Court.

Appearances are discussed in detail in Chapter 11, section 11.1. Refer to that section for more information.

If you consider there might be a "conflict of interest" because you are related to the defendant or in some other relationship which could mean that you might be biased, **or** could create the appearance of bias, you should not hear the case.

See Chapter 7, section 7.2.2 for further discussion of conflict of interest.

16.3 Cautioning an unrepresented defendant

See section 16.9 below where there is further discussion in regard to how an unrepresented defendant should be dealt with in a defended hearing.

Before the prosecution case is heard, you must give an unrepresented defendant the following directive: s71 CPA

> "When the evidence against you has been heard, you will be asked whether you wish to give evidence yourself or to call witnesses. You are not obliged to give or call evidence, and, if you do not, that fact will not be allowed to be the subject of any comment; but if you do, the evidence given may be used against you."

You must ensure that the defendant fully understands the choices open to him/her before electing the one that he/she prefers.

Once the defendant has indicated his/her preference, record it on the Criminal Decision Sheet.

If the defendant does decide to give evidence you may then ask the defendant to give you his/her version of the events. It may be helpful to lead the defendant through the preliminary matters to help provide confidence for him/her to give their own account of the crucial event.

After the examination of witnesses by the prosecution is complete, ask the defendant:

> "Do you wish to give or call evidence?"

16.4 Opening addresses

The prosecutor may open his/her case with an address before calling his/her witnesses.

At the end of the case for the prosecution, the defendant or his/her counsel may give an opening address before calling evidence.

16.5 The prosecution's case

The Court first hears the evidence of the prosecution and then the evidence of the defence.

Evidence can be given –

- by witnesses in court (this is discussed further in section 15.10 below)

or

- in the form of documents (this is discussed further in section 15.11 below).

See Chapter 4: *Dealing with Evidence* to refresh your memory as to various matters related to evidence, such as the standard of proof, hearsay evidence, and so on.

There can be three stages in the presentation of evidence –

- Evidence-in-chief is presented.

- Each witness can be cross-examined by the other side.
- A witness can be re-examined by the prosecution, after he/she has been cross-examined, where something was raised in cross-examination that was not dealt with in examination-in-chief.

Before a witness can give evidence, he/she must swear an oath or make an affirmation. This is done by the Court Clerk but you should follow the process closely.

The witness stands in the witness box, holds the Bible in his/her hand, and faces you.[82] The Court Clerk asks:

> "Do you swear by Almighty God that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth?"

The witness replies:

> "I do."

If the witness chooses, he/she can make an affirmation, in which case the question from the Court Clerk begins:

> "Do you solemnly, sincerely and truly declare and affirm that ……".

16.6 A 'no case to answer' submission

At the closing of the prosecution case, defence counsel may make a 'no case to answer' application. If no such application is made, you should proceed to hear the defendant's evidence.

The defence counsel presents an argument as to why the prosecution has not presented a case which needs to be answered.

You can properly make a decision that there is no case to answer:

- when there has been no evidence to prove an essential element in the alleged offence
- when the evidence given by the prosecution has been so discredited as a result of cross examination or is so unreliable that no reasonable Court could safely convict on it

[82] There are no facilities in the High Court for the swearing of oaths by those other than Christians and Jews. In the case of Jews, they should hold the Bible open at a page in the Old Testament.

If a reasonable Court might convict on the evidence given thus far before it, there *is* a case to answer.

After a submission that there is no case to answer, you should give the prosecution the opportunity to reply.

If you decide that there is a case to answer you need to announce:

> "I find that there is a case to answer".

If you find that there is no case to answer, you should give a ruling detailing why, dismiss the Information and acquit the defendant.

Record your decision that there is no case to answer on the Criminal Decision Sheet and include your reasons.

16.7 The defendant's case

The same procedure as used for the prosecution's evidence is followed – evidence-in-chief, cross-examination, and (possibly) re-examination.

The defendant may or may not be called as a witness for the defence.

If the defendant admits any fact alleged against him/her during the trial, there is no need for the prosecution to prove that fact.

The Court may also hear evidence given by the prosecution in rebuttal of evidence given by the defence if:

- in your opinion, the defence evidence which the prosecution seeks to rebut contains fresh matters which the prosecution could not reasonably have foreseen; and
- the evidence in rebuttal, or any part of it, is not merely used to confirm the prosecution case.

16.8 Closing addresses

The Criminal Procedure Act provides that, except with leave of the Court, neither the prosecution nor the defence may sum up or address the court on

the evidence.[83] In fact, leave is usually granted and closing addresses are given by the prosecution and the defence. s74(3) CPA

The prosecution addresses first, followed by the defence.

When the defendant addresses, if he/she wishes to make comments on the facts of the case, the defendant should go into the witness box. The final address should be confined to the law.

16.9 Unrepresented defendants at a defended hearing

The following outline applies where the defendant is unrepresented. With necessary modifications, however, it also applies when the defendant is represented.

Checklist

- Confirm the defendant's plea and ensure this is recorded on the Criminal Decision Sheet.
- Ask the witnesses to leave the courtroom.
- Ask the defendant whether he/she prefers to have the proceedings interpreted and arrange for an interpreter for him/her if needed.
- Provide the defendant with a brief explanation of:
  - the procedure to be followed
  - the right to give and call evidence
  - the right to cross-examine
  - the obligation to put his/her case to any witness.
- After each witness has given evidence, excuse the witness from further attendance and warn the witness not to discuss the evidence with other witnesses who have yet to give evidence.
- If you ask any questions of a witness after re-examination has concluded, ask the prosecutor and the defendant if there are any further matters raised by your questions, which they wish to put to the witness.

[83] This is because trials heard before Justices are without a jury (s74(3) CPA).

16.10 Witnesses

See Chapter 4: *Dealing with Evidence*, for further explanations. The following are some general comments.

16.10.1 Self-incrimination by a witness

You need to be vigilant about self incriminatory statements by a witness. If a question is asked, which could be self incriminatory for the witness, you should:

- warn the witness to pause before answering the question
- explain that any evidence the witness gives in Court that is self-incriminating could be used to prosecute them for a crime
- explain that the witness may refuse to answer the question.

In most cases, it would be wise to stand the witness down so they have the opportunity to see a lawyer to explain the consequences.

16.10.2 Adverse comment

s75 CPA

Where the defendant refrains from giving evidence as a witness, no adverse comment can be made by the prosecution or the Court upon the fact that the defendant does not given evidence.

You must remember that it is the right of the defendant not to give evidence in his/her own defence. This does not mean he/she is guilty, and should not be considered in determining the innocence or guilt of the defendant.

Where the defendant refrains from calling his/her spouse as a witness, no adverse comment about that can be made.

16.10.3 Witness refusing to give evidence

Any person present in Court at the hearing of any charge, whether or not he/she has been summoned to give evidence, may be required to give evidence.

If the person, without offering any just excuse, refuses to give evidence, or refuses to be sworn, or having been sworn refuses to answer questions concerning the charge, the Court may:

- order that unless the person consents to give evidence or be sworn or answer questions, he/she may be detained in custody for a period not exceeding seven days
- issue a warrant for his/her arrest and detention in accordance with the order. s77(2) CPA

When the person is brought forward at the adjourned hearing, after being in custody for seven days, and still refuses to give evidence, or be sworn, or answer questions, the Court may direct the person to be detained in custody again for seven days, and again after that, until such time as the person consents to give evidence, or be sworn, or answer questions put to him/her.

This does not limit or affect the power of the Court to commit the person for contempt of Court.[84]

16.10.4 Excluding a witness

s78(1) CPA

At the request of any party or where it thinks fit, the Court may order all or any witnesses other than the one giving evidence, to:

- leave the Courtroom; and
- remain out of the hearing of the Court but be within the call of the Court until they are required to give evidence.

A witness who has given evidence shall not leave the Courtroom unless given permission of the Court.

16.11 Documentary evidence (exhibits)

16.11.1 Production of exhibits

Though it is the Clerk's function to mark the exhibits, you may have to intervene to ensure that each exhibit (especially with a set of photos) is:

- distinctively marked
- recorded in your notes in the Evidence Sheet in a manner that leaves no doubt what the exhibit mark refers to.

Generally, prosecution exhibits are numbered 1, 2, 3, etc. and defence exhibits are letters A, B, C, etc. An exhibit produced by a prosecution witness in the course of cross-examination is a defence exhibit.

---

84 See Chapter 19: Managing the court and record keeping.

16.11.2 Marking of exhibits by witness

Often parties pass exhibits, such as plans and photos, to witnesses quite indiscriminately and invite them to mark some point, *eg*. the impact point in a collision. If such a situation occurs, care must be exercised to ensure clarity.

Ensure that the witness marks all photos (or plans, or maps) with ideally, a differently coloured pen and your notes should clearly describe it.

If, however, by marking a plan or photograph, it is possible that a later witness may be influenced by such marking, it may be preferable to have a copy of the exhibit marked and produced as a separate exhibit with the original being kept in an unmarked state.

16.12 Application for change of plea

s68 CPA

The defendant may change a not guilty plea to a guilty plea at any time.

A plea of guilty may, with the leave of the Court, be withdrawn any time before the defendant has been sentenced or otherwise dealt with.

Credible grounds for such application must be provided.

The plea must be equivocal and the right of the defendant to change his plea exists until sentence.

17 Hearing a Civil Matter

There is a *Code of Civil Procedure 1980-81*.

17.1 Jurisdiction of Justices

Justices have a limited jurisdiction in regard to civil matters - $1500 for a Justice sitting alone and $3000 for three Justices sitting together.

For more on Justices' jurisdiction, see Chapter 3, section 3.4.

17.2 Standard of proof

In civil matters, the standard of proof is "on the balance of probabilities". This is not as high as standard as that required in civil matters, where the standard is "beyond reasonable doubt".

See Chapter 4 for further information on the standard of proof of evidence.

17.3 Where the defendant does not appear

If the defendant does not appear, the situation is somewhat different to a criminal matter. It may be possible to proceed without the defendant. Judgment can be entered in favour of the plaintiff and this is called 'default judgment".

17.4 The conduct of a defended hearing

A defended hearing is conducted in the same way as a defended criminal hearing, with appropriate changes, *eg.* it is not necessary to warn an unrepresented defendant.

See chapter 16 for a more detailed discussion of how a trial is conducted.

Often a civil matter will be for money owing, a debt. The evidence you will hear, in such a case, will be –

- to establish the debt is owed, *eg.* the loan agreement will be put into evidence

- to show that the obligation to repay the debt has not been met, *eg.* a bank officer may produce bank records (which need to be made exhibits) and will confirm that moneys have not been paid as were required under the loan agreement.

17.5 Documentary evidence

There is more likely to be documentary evidence used in civil matters. You need to ensure that it is properly brought in as evidence.

Counsel for one of the parties will say that they wish to tender the particular document. Counsel will show/share the document with counsel for the other party so that he/she can also see it and to the Court Clerk, who will hand it to you. It is then for you to label it, using A, B, C etc, as an exhibit and state, *eg.* "the loan agreement is exhibit A.". You either retain the exhibit, because you want to refer to it during the hearing, or you give it to the Court Clerk for safe keeping. It should not be removed from the court room.

17.6 Entering judgment

When you enter judgment, you have to decide, of course, whether it is in favour of the plaintiff or the defendant. If the case is about moneys owing, you need to consider interest. An example of a decision which deals with interest is this

> "Judgment is in favour of the plaintiff for the sum of $....., together with interest at .....% up to today (as provided in the contract), and interest at .....%[85] until the judgment is satisfied."

17.7 Subsequent action after judgment

After judgment, there are procedures for the plaintiff to recover the money, or otherwise enforce the decision. As a Justice you are not normally involved in these procedures.

---

85 The interest rate is specified in the Judicature Act.

18 Sitting in the Children's Court

18.1 Background information

The Children's Court is a division of the High Court. It deals with all criminal offences committed by children except for murder or manslaughter, and matters relating primarily to children.[86]

Children are defined as a boy or girl **under** the age of 16 years.[87] If the child committed the offence whilst under 16 years but has since turned 16 years, the matter is still dealt with in the Children's Court.

The legislation in regard to children, and the Children's Court in particular, is the Prevention of Juvenile Crime Act 1968.

Part III of that Act, ss19 – 38, deals with the Children's Courts.

The main things that a Justice needs to know about the Children's Court are in the following sections.

18.2 Sitting as a Justice in the Children's Court

s20 PJCA

A Justice can only sit in the Children's Court if he/she is appointed to do so. But a Justice may exercise jurisdiction for the purpose of doing all necessary acts preliminary to the hearing, including the adjournment of the hearing, remanding the defendant, or releasing him on bail.

18.3 How matters come to the Children's Court

Children may come to the Children's Court in two situations:

- they are a "child in need"
  or
- they have committed a crime.

---

86 But a criminal offence **against** a child by an adult is heard in the Criminal Division of the High Court, not the Children's Court.

87 But also, under s26 of the Prevention of Juvenile Crime Act, a person in his/her 16th year can be referred to the Children's Court.

Both types of matters in regard to children go initially to the Juvenile Crime Prevention Committee, established under section 4 of the Prevention of Juvenile Crime Act (PJCA). That Committee has extensive powers and most matters in regard to children are finalised before that Committee.

18.4 The powers of the Children's Court

s26 PJCA

Criminal offence

The Children's Court does not have power to convict a child of an offence and sentence him/her. Rather, when a charge against a child is proven, the Court may (without proceeding to conviction) after taking into consideration the parentage of the child, his/her environment, history, education, mentality, disposition, and any other relevant matters, place the child under the supervision of a community youth officer.

When dealing with such a child, and whether or not a supervision order is made, the Court may order his/her parents or guardians to pay any costs or damages incurred by or through the offence.

Where the child is charged with any offence, at any time before a final decision thereon has been given, having regard to the gravity of the offence and the public interest, the Court may decline to deal with the offence, and in that case, adjourn the information for hearing by the High Court sitting in its criminal jurisdiction.

Child in need

When a complaint is laid that a child is neglected etc, if satisfied as to the truth of the complaint, the Court may place the child under the supervision of a community youth officer.

18.5 Conducting the Children's Court

18.5.1 Generally

You need to run the court in a way that is sensitive to the situation of the child. If the child has committed an offence, he/she is placed in the dock.

You should insist on the parents or guardians being present. If the parents are not there, ask why, and if the reason given is not sufficient, *eg.* that the parent is at work or has not bothered to attend, you should adjourn and require the attendance of the parents, or guardian.

18.5.2 Separation of proceedings from other court proceedings

s21 PJCA

So far as is practicable, persons attending any sittings of the Children's Court should not be brought into contact with persons in attendance at any other Court. The sittings of the Children's Court should not, except where no other suitable room is available, be held in any room in which any other Court ordinarily exercises jurisdiction. In addition, a sitting of the Children's Court, if held in the same premises as any other Court, should not be held at a time when such other Court is sitting, if other arrangements can reasonably be made.

18.5.3 Proceedings not open to the public

s24 PJCA

No one should be present at any hearing in the Children's Court, except any officer or member of the Court, the persons immediately concerned with the proceedings, the parents or guardians, or any other person whom the Court admits as the personal representative of the child, any community youth officer, any person representing a social welfare agency engaged in work for the benefit of children, and any other person specially permitted or required by the Court to be present.

Unless you consent, no one can publish a report of any proceedings taken before a Children's Court; and it is not lawful to publish the name of any child, or any other name or particulars likely to lead to the identification of the child.

18.6 Child in need

s22 PJCA

Normally a child in need is dealt with by the Juvenile Crime Prevention Committee. But there is also a power to bring the child immediately before the Children's Court. Where:

- a complaint is made in the Court by a constable or a community youth officer that a child is neglected, indigent, or delinquent, or is not under proper control or is living in an environment detrimental to his/her physical or moral well-being

or

- an information is laid against a child in respect of any offence

a Justice may issue a summons addressed to any parent or guardian or custodian of the child requiring him/her to appear before the Children's Court with the child at a time to be named in the summons.

Any parent, guardian or custodian or other person who is summoned to appear in the Children's Court may at the hearing be examined in respect of the upbringing and control of the child.

18.7 Removal of child

s22(2) PJCA

If it appears to the Justice. to whom such a complaint is made, that the child is living in a place of ill-repute, or is likely to be ill-treated or neglected, or that for any other reason the child should forthwith be removed from his/her surroundings, the Justice may issue a warrant authorising any constable or community youth officer, or other person named in the warrant, to take possession of the child.

Such a warrant may authorise any person named therein to receive and hold such child until the complaint has been disposed of, or to make other satisfactory provision for the temporary maintenance and care of the child.

18.8 Community Youth Worker's Report

s23 PJCA

No judicial proceedings shall be heard or determined in the Children's Court unless and until a community youth officer has had an opportunity to investigate the circumstances of the case and to report thereon to the Court.

18.9 Trivial offences

s25 PJCA

A Justice can decide, after considering the community youth officer's report, that the matter is trivial and dismiss the Information.

18.10 Supervision orders

s27 PJCA

A supervision order shall be for a term not exceeding three years and it may impose such conditions to be complied with by the child during his supervision as the Court thinks necessary for ensuring his/her good conduct or for preventing the commission by him/her of any offence and/or for the payment of any costs or damages incurred by the child.

s28 PJCA

If a child fails to follow any instructions of the community youth officer or any condition imposed upon him by that officer or the Court, or if the community youth officer is not satisfied with the conduct of the child or with the conditions under which he is living, he/she can bring the child before the Children's Court and, the Court may, as appropriate, direct that the child be sentenced by the High Court for the offence for which he/she was placed under the order for

supervision or may make such further order for the maintenance, care and control of the child as may be necessary in the circumstances.

s29 PJCA

The community youth officer, or the child's parents, guardian or others supervising the child, can come to the Court to have the supervision order reviewed.

18.11 Probation

ss30 & 31 PJCA

When making a supervision order, the Court has power to order that the supervision be replaced by probation when the child reaches 17 years, for a period of one to two years. The community youth officer can also later apply for such substitution. A Justice can make such an order having regard to the behaviour of the child whilst under supervision and any other circumstances.

s32 PJCA

A person under probation must comply with the conditions in section 7 of the Criminal Justice Act 1967, namely:[88]

> (b) He shall give to the probation officer reasonable notice of his intention to move from his address; and if he moves to any place within the district of another probation officer he shall, within forty-eight hours after his arrival in that district, notify that other probation officer of his arrival, his address, and the nature and place of his employment;
> (c) He shall not reside at an address that is not approved by the probation officer;
> (d) He shall not continue in any employment, or continue to engage in any occupation, that is not approved by the probation officer;
> (e) He shall not associate with any specified person, or with persons of any specified class, with whom the probation officer has, in writing, warned him not to associate;
> (f) He shall be of good behaviour and commit no offence against the law.

and, in addition, the person shall report to a probation officer in the district in which the person resides within 48 hours after commencement of his/her term of probation.

18.12 Evidence given by a child

s37 PJCA

Children in the Children's Court should not be required to give evidence on oath. The declaration made by a child is:

> "I promise to speak the truth, the whole truth, and nothing but the truth."

[88] Except paragraph (a) of that section.

See Chapter 4, section 4.7.1 for a further discussion.

JUDICIAL SKILLS

19 Managing the Court and Record Keeping

19.1 Preparation for court

On the day before you are sitting:

- Come to the Court House to read the Informations for the matters you will be dealing with. Apart from familiarising yourself with them, you may want to verify that you have jurisdiction to hear the matters and, if necessary, read the relevant legislation.

On the day you are sitting:

- Meet the Court Clerk in your chambers.
- Don't enter the court room unless the Court Clerk is present to lead you in.
- There should be a police orderly in your Court.

When you go into Court:

- start proceedings on time and rise at the expected time.

  This is not only for your benefit but also for, and a courtesy to, the defendant, the prosecutors and Court staff.
- The Court Clerk will formally commence proceedings.

19.2 The Criminal Decision Sheet

There is a Criminal Decision Sheet attached to each Information. This Sheet will have the reference number of the case.

Remember that those who follow you need to know what you have done. You should write on each Criminal Decision Sheet:

- the action you have taken in Court, with reasons for the decision if appropriate
- your signature, at the conclusion of the proceedings.

Do all of the above in Court if that is possible. Neatness, precision and full information are essential. You will be assisting by using the stamps provided

for various decisions. Even so, you still must fill in the blanks as stamped on the Criminal Decision Sheet.

An example of a Criminal Decision Sheet is as follows:[89]

CRIMINAL DECISION SHEET		
Date	**Plea**	**CR:**
[insert date]	[guilty or not guilty]	Prosecutor: [insert name] Defendant: [insert name]

19.3 Taking notes

s107(7) CPA

The Criminal Procedure Act requires that you, as a Justice presiding at a trial, shall take notes of all proceedings before the Court. It is not entirely clear what this means: whether it extends beyond the Criminal Decision Sheet. In any

89 The information in the third column would, of course, be handwritten.

event, it is good practice to keep reasonably detailed notes including what evidence is being presented, especially in a defended hearing.

This is in addition to the endorsement/s you should put on the Criminal Decision Sheet.

A suggestion is to note each element of the charge on a separate sheet of paper. As the evidence is given, record notes on it as they relate to each of these elements. This method can provide a helpful framework for your decision.
Also refer to the material in Appendices B, D and E for common offences, as they contain the elements of those common offences.

19.4 Maintaining proper conduct and dress code in court

It is important that there should be proper respect for the Court. This will partly be achieved by ensuring that people conduct themselves appropriately and are dressed in an appropriate way. The Court Clerk will usually ensure proper conduct in court, but it is your court and you should ultimately take responsibility for how your court is conducted.

The following are some suggestions:

- the defendant and witnesses should stand upright and not lean on the dock or witness box
- counsel also should stand upright and speak to you respectfully
- when you speak to the defendant or a witness, they should face you and be standing
- defendants or witnesses should dress properly, and in the case of males this usually means they should not wear singlets/tank tops, and for women they should not wear flowers in their hair
- mobile phones should be turned off and certainly calls should not be made or taken in court.

19.5 Dealing with parties or witnesses with special considerations

19.5.1 The mentally ill defendant

The procedure in cases where the defendant is of unsound mind or otherwise incapacitated is provided for under ss590-593 Cook Islands Act 1915.

If any person, on being charged with an offence before the High Court, is found to be of unsound mind so that he/she cannot understand the nature of the proceedings, he/she shall not be tried, and the Court shall order him/her to be detained in prison or some other place of security until the Queen's Representative is advised. s590 CIA

In order to determine whether a defendant is of unsound mind, the Court should seek expert medical evidence.

See Chapter 4 on *Dealing with Evidence*.

If any person on trial for an offence before the High Court is found to have been insane **at the time of the commission of an offence**, he/she shall be found not guilty on the ground of insanity, and the Court shall order him/her to be detained in prison, or in some other place of security, until the Queen's Representative is advised. s591 CIA

The question of whether a person is insane at the time of the commission of an offence, and therefore not criminally responsible for the offence, is a question of both law and of fact. You should refer the matter to a Judge of the High Court pursuant to either ss105 or 106 of the Criminal Procedure Act.

See Chapter 24 on *Appeals. Retrials and Reservations of Questions of Law*).

Except in a case of murder or manslaughter, a person shall not be detained under such an order for longer than one month. The Queen's Representative may discharge him/her at any time. s582 CIA

19.5.2 Victims of crime

Victims of crime are usually the main witnesses for the prosecution. The legislation dealing with victims is the Victims of Offences Act 1999 (VOA).

In the VOA, a victim is defined as a person who, through or by means of a criminal offence (whether or not any person is convicted of that offence):

- suffers physical or emotional harm; or

- suffers loss of or damage to property; or

- where an offence results in death, is a member of the immediate family of the deceased.

Checklist

1. Identify the victim(s).
2. At all times treat the victim(s) with courtesy and compassion.
3. At all times respect the victim's privacy and dignity.
4. If the victim and offender both want a meeting, encourage that to occur.
5. Take into account the victim's views on a bail application.
6. Before sentencing, consider:
   - the impact on the victim
   - receiving the victim impact

A

Treatment of victims

Members of the police, prosecutors, judicial officers, counsel and other persons dealing with victims should treat them with courtesy, compassion, and respect for their personal dignity and privacy.

A victim's residential address should not be disclosed in court unless it would be contrary to the interests of justice to exclude it. s9 VOA

Early information

Members of the police, officers of the Court and health and social services personnel should inform victims at the earliest practicable opportunity of the services and remedies available to victims. s5 VOA

This includes information about available protection against unlawful intimidation.

Information of proceedings s6 VOA

The prosecuting authority or officers of the Court should make available to the victim:

- information about the progress of the investigation of the offence
- the charges laid
- the role of the victim as a witness in the prosecution of the offence
- the date and place of the hearing of the proceedings
- the outcome of the proceedings, including any appeals.

Victim Impact Statements s8 VOA

Although section 8 states that 'a Judge **may**…', it is good practice for Justices to receive Victim Impact Statements.

Appropriate administrative arrangements should be made to ensure a sentencing Justice is informed about any physical or emotional harm, any loss of or damage to property, or other effects suffered by the victim through or by means of an offence.

Any information should be conveyed to the Justice either by the prosecutor orally or by means of a written statement about the victim.

As the sentencing Justice, you may direct the prosecutor to provide you with such information from any victim.

Judicial language and comment

Ensure that you acknowledge the Victim Impact Statement in your sentencing remarks. A brief summary is appropriate.

Be careful about "blaming" the victim, unless the victim's actions are clearly relevant to mitigate the offence and you are certain about the facts.

19.5.3 Victims of sexual offences

Three factors that make sexual offence trials particularly distressing for victims are:

- the nature of the crime
- the role of consent, with its focus on the credibility of the victim
- the likelihood that the defendant and victim knew each other before the alleged offence took place.

Nature of the crime

The crime experienced by sexual offence victims is more than an assault. Due to the sexual nature of the acts and the physical invasion of the person, victims often experience feelings that are not present in other types of crimes.

The trial process adds to the difficulty that sexual offence victims experience because:

- they must face the defendant in open Court
- they are usually required to recount the offence against them in explicit detail in order to establish the elements of the offence
- they may be subject to cross-examination by the defendant if there is no defence counsel, which can be a very traumatic experience.

Relationship between the victim and defendant

Unlike some other types of crimes, it is often the case that the victim and defendant knew each other before the offence occurred. This can increase the distress and difficulty experienced by the victim because they have been betrayed by someone they trusted, and because there may be on-going contact between the defendant and the victim, due to family obligations or relationships.

Dealing with victims of sexual offences

In order to minimise the distress of victims of sexual offences, you should:

- conduct the inquiry, and control the demeanour of those in the courtroom, in a manner that reflects the serious nature of the crime
- ensure the safety of the victim in the courtroom
- ensure that court staff understands the danger and trauma the victim may feel
- consider allowing a support person to sit with the victim during the preliminary inquiry to provide support.

19.5.4 Child witnesses

Child witnesses may be intimidated by the courtroom, as they may not understand the proceedings and be fearful of giving evidence in front of other people. It is therefore important to consider the following when dealing with child witnesses:

- In cases of indecency, the courtroom should be closed.
- A screen should be used to screen the child witness from the defendant. The prosecution can be ordered to provide a screen.

If a screen is not available, you can ask the child to face you and not to look anywhere else during evidence-in-chief and cross-examination.

When cross-examination of the child is conducted, you are expected to be sensitive to the child's special vulnerability in deciding whether or not you should allow the questions to be asked. Under the *Convention of the Rights of the Child*, the judiciary must give primary consideration to the interests of children.

19.5.5 Unrepresented defendants

See Chapter 16, section 13.9 in regard to unrepresented defendants in court. There are special obligations on you as a Justice in regard to unrepresented defendants.

19.6 Contempt of court: disruption and misbehaviour in court

People who do not behave in Court will usually respond to polite but firm requests to stop. Failure to respond to your request should be followed by a warning and then you may want to consider contempt of court charges.

A person is guilty of contempt of Court who: s36 JA

- disobeys any judgment or order of the Court, or any Judge or Justice[90]
- uses any abusive, insulting, offensive or threatening words or behaviour in the presence or hearing of the Court
- assaults, resists, obstructs a constable or officer of the Court in serving any process in the Court
- uses words or behaviour to obstruct the proper and orderly administration of justice in the Court
- does anything which is declared to be contempt of Court in the *CPA* or any other enactment
- aids, abets, counsels, procures or incites any other person to commit contempt of Court.

The penalty for contempt is imprisonment for a term not exceeding six months or a fine not exceeding $100. s37 CPA

If the contempt of court is committed in the presence or hearing of the Court, you may direct then and there, without any warrant or order, any constable, officer of the Court, or other person, to arrest the person and bring him/her before the Court. s39 CPA

Upon such an arrest, you shall give the person an opportunity to be heard in his/her defence and either order him/her to pay a fine not exceeding $100 or commit him/her to prison for up to six months. s39 CPA

---

[90] Other than defaulting in the payment of a sum of money payable under such judgment or order.

You should only use contempt of Court in very serious cases. Some guidelines are:

- unless the action or conduct is deliberate or intentional, no contempt has been committed
- sometimes it may be more prudent not to hear an involuntary remark
- in many situations, a calm but firm attitude will prevent behaviour developing where an order of contempt is needed.

19.7 Dealing with counsel

You must always remember that you are the Court and that you should never be intimidated by either the prosecution or defence counsel.

You should not discuss any aspect of the case with counsel without the other counsel being present. You may discuss procedural matters with counsel in chambers.

The following are some of the rules of conduct that you should expect to be observed by counsel.

19.7.1 Prosecutors

Prosecutors are essential for the administration of justice. They should at all times maintain the honour and dignity of their profession.

The office of the prosecutor must be strictly separated from judicial functions. This means that judicial officers should not attempt to seek the advice of prosecutors as to how to conduct legal proceedings or how to run the Court.

Prosecutors should perform their duties fairly, consistently and according to the law. In conducting the proceedings, they should respect and protect human dignity and uphold human rights, to ensure a fair and smooth functioning of the criminal justice system.

In order to ensure the fairness and effectiveness of the prosecution, prosecutors should strive to co-operate with other police force members, the Courts, the legal profession and other government agencies or institutions.

You should expect the prosecutor to be prepared when he/she appears before you in Court. Prosecutors should:

- know the elements of the offence and have evidence to prove each element

- have a complete set of facts, so that you do not have to ask too many questions:
  - if you must ask a lot of questions to establish the prosecutor's case, it could appear that you are conducting the case for the prosecution, giving the appearance of bias
- have their witnesses ready or have a good explanation for why they are not
- have an understanding of Court procedure and be prepared to deal with issues that commonly arise
- have, at sentencing, any previous convictions of the defendant and any other reports or statements of aggravating and mitigating factors.[91]

19.7.2 Defence counsel

The defendant has the right to retain and instruct a lawyer for his/her defence.

Defence counsel are also officers of the Court and should act with competence, skill, honesty and loyalty. They should preserve their own integrity and that of the legal profession as a whole.

Counsel shall treat professional colleagues, officers and staff of the Court and Justices with courtesy and fairness at all times.

Counsel should not knowingly make an incorrect statement of material fact or law to the Court or offer evidence that they know to be incorrect.

Counsel should represent a client diligently and promptly in order to protect the client's best interests.

At trial, defence counsel are entitled to put forward any and all defences. Defence counsel must cross-examine witnesses to test their truthfulness, their recollection and their accuracy, however they should not attempt to embarrass, delay, or burden victims or witnesses when there is no substantive purpose for doing so.

You should expect defence counsel to be prepared when they appear before you in Court. Counsel should:

- know the elements of the offence and have evidence to prove each element; and

---

91 These are taken from *Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.*

- have their witnesses ready or have a good explanation for why they are not; and
- have an understanding of Court procedure and be prepared to deal with issues that commonly arise.

19.7.3 Dealing with counsel in proceedings

It is the job of the prosecution and defence counsel to ask questions of witnesses. However, you may ask questions when:

- counsel has finished
- counsel is not clear or does not get to the point
- a point of clarification is required from the witnesses.

You must not ask leading questions of any witnesses.

You may interject in the proceedings:

- to rule on any objection raised by either the defence or prosecution
- to disallow a question which you consider improper, whether or not an objection has been made by counsel
- to maintain the proper order in the courtroom
- ensure the proper conduct of the proceedings.

19.8 Making a decision

Decision making is a process of applying particular facts to the relevant law.

There are three tasks involved:

1. To be clear with what the Court is being asked to do.

In criminal cases, this is what the defendant is charged with and all the essential elements of the offence. For the defendant to be found guilty, every element of the offence must be proved beyond reasonable doubt.

2. To determine what the facts of the case are – what happened; what did not happen.

In criminal cases, the defendant is presumed to be innocent and the prosecution must prove that he or she is guilty. This is done by producing evidence.

To determine the facts, you will need to assess the credibility of the witnesses and the reliability of their evidence.

Credibility: "Is the evidence believable?" "Can it be believed?" "Is the witness being honest?"

Reliability: "Should I believe the witness?" "Is the evidence accurate?" "Could the witness be mistaken?" "How good is their memory of what happened?"

When considering oral evidence, take into account not only what has been said but also how it has been said. How you assess the demeanour of a witness can be a valuable aid in judging his or her credibility and reliability.

You may accept parts of the evidence of a witness and reject other parts.

A witness may be cross-examined for the sake of disproving their credibility.

Note that in a criminal case, if you accept the prosecution evidence, you must also reject the defence evidence on that matter. If there is a reasonable possibility that the defence evidence is true, and it relates to an essential element, there is reasonable doubt and the defendant must be found not guilty.

3. To make your decision, according to the law.

This is done by applying the facts to the law.

20 Writing Judgments: an Issue-Driven Approach

20.1 Introduction

On its face, the final overall logic of a judgment can be diagrammed like this:

These facts	[describe them],
⇩	
viewed in the light of this law	[cite the relevant law],
⇩	
lead to this conclusion	[finding of fact or conclusion of law that leads to the judgment]

Experienced judges and advocates know that beneath this apparently simple logic there may have been any number of smaller arguments that had to be resolved one by one, before the big question could be answered.

The "spring" in a judgment—the source of its energy—is a conflict resulting from events that took place before anyone set foot in court. It is this conflict that gives a judgment its initial energy, just as an unresolved conflict gives narrative energy to novels, plays, and films.

Once the conflict gets into court, it almost always erupts into a series of smaller arguments or constituent questions—like whether the victim had provoked the attack, or whether the testator was mentally competent, or whether the complainant had consented to sexual touching, or whether your court has jurisdiction. The issues lurk beneath the BIG questions—like whether the accused is guilty or whether the respondent owes compensation to the plaintiff. They are the smaller questions that must be resolved one by one, until at last the big question is resolved.

An issue is not just anything about which the parties disagree; they may disagree about all sorts of things. An issue is disagreement about something

that could affect the outcome of the case, a conflict for which the law has a remedy.

Issues may not arise in an orderly sequence in a trial or hearing. They may not be clearly articulated by the parties. The parties may not even agree about what the issues are.

It is, ultimately, your job, as a judge, to determine what the viable issues are, to arrange them in a sequence that makes sense, to resolve them one by one, and then to decree whatever order, remedy, or verdict your analysis requires.

In short, the purpose of a judgment is to construct a logical and orderly resolution to a conflict that began outside of court and then turned into what is likely to have been a rambling or even chaotic exchange of arguments and allegations in the courtroom.

An issue-driven judgment identifies the viable issues and the basis on which the court resolved them. It reveals the workings of the judge's mind, like a watch with a transparent face, letting you see the complex but orderly springs and gears behind the relatively simple information conveyed on the face.

The method described below explains how to write an issue-driven judgment in five steps:

I. Identify the issues.
II. Arrange them in a sequence that makes sense.
III. Write a beginning, providing the factual context from which the issues arise.
IV. Analyze each issue.
V. Write a conclusion.

You do not necessarily have to perform these tasks in this order. Sometimes you will be inclined to write the beginning first. Sometimes you will start by writing your conclusion. Sometimes you will begin by analyzing the issues. But no matter which sequence you follow, you cannot write a complete judgment unless you perform each of these tasks.

The order in which these tasks are described below is logical, but it is not the *only* order. In fact, the writing process is generally recursive; you may have to move back and forth among these steps, revising each in the context of the others.

20.2 Five Steps

1. Identify the Issues

Where Do You Find the Issues?

In theory, every element in an indictment, a statement of claim, or a motion is an issue, in the sense that the moving party has to prove it.

In practice, the responding party is likely to concede one or more of those elements. The issues, then, are those elements that are *not* conceded.

At trial, issues can be questions of law raised in preliminary or interlocutory motions, challenging jurisdiction, for example, or the admissibility of evidence, or the validity of a warrant, or the interpretation of a statute, or the applicability of a precedent.

Issues can also be questions of fact. They are can be argued in written submissions or orally. They include challenges to the reliability, sufficiency, or relevance of documents, witness statements, exhibits, or forensic evidence.

On appeal, the issues are usually questions of law or due process—errors that the appellant alleges occurred in the trial or hearing below. Questions of fact are normally presumed to have been determined at first instance, unless the record clearly fails to support the trial judge's findings. It is the appellant's responsibility to identify the issues (i.e., the grounds of appeal).

When Do You Find the Issues?

Look for the issues before the trial or hearing begins, as soon as you see the indictment or pleadings.

Enlist the aid of the parties in identifying the issues. Ask the responding party why he or she believes the moving party is *not* entitled to the relief or verdict sought. Asking the question in this way, without legal terminology, can sometimes produce surprising results. Parties may abandon issues for which there is insufficient evidence or no legal remedy. Sometimes the entire case will be settled when the issues are identified and sorted.

Assure the parties that issues identified in a pre-trial conference are not set in stone unless the rules of the court provide otherwise. New issues may arise as the hearing proceeds; others will need to be modified or abandoned as the evidence is presented.

Identifying a list of issues before or at the beginning of the trial or hearing can help you keep the parties focused on relevant evidence and arguments. It can also help you take efficient notes. You might find it helpful to keep separate stacks of note cards, or separate sheets of paper, or separate notebooks for each issue. As you conduct the trial, summarize the evidence according to the issue to which it is relevant. In this way when the trial ends, you will already have the essential structure of an issue-driven judgment, instead of a chronological narrative of the trial or hearing.

In criminal cases, do not be surprised if defence counsel refuses to identify the issues before the trial begins. Defence counsel is likely to challenge absolutely everything at first. They prefer to wait until the prosecution has presented its evidence so they can frame specific issues according to weaknesses they perceive in the prosecution's case. For clues to what these specific issues are likely to be, pay attention to the questions the defence asks in cross-examination.

When parties or their counsel are unable or unwilling to agree on issues, it becomes your task to identify them.

How Do You Phrase the Issues?

At the beginning of a judgment, after brief exposition of the facts from which the suit arises, the issues can be expressed in several ways.

- As questions:

> This case raises the following questions:
>
> 1. Was the defendant driving on a public road when he was stopped by police?
> 2. Was the defendant driving without proper care and caution?
> 3. Was the breath analyzer properly calibrated?

- As "whether" statements:

> The issues to be determined are:
>
> 1. Whether the defendant was driving on a public road when he was stopped by police?
> 2. Whether the defendant was driving without proper care and caution?
> 3. Whether the breath analyzer was properly calibrated?

- As arguments raised by the responding party (or on appeal, by the appellant):

> The defendant contends that:
>
> 1. He was not driving on a public road when he was stopped by police.
> 2. He was not driving without proper care and caution.
> 3. The breath analyzer was not properly calibrated.

You can also imply the issues by putting the result with reasons at the beginning of the judgment:

> The charges are dismissed because the defendant was not driving on a public road when he was stopped by police.

(In this case, the other issues could become moot if the defendant was not driving on a public road.)

Judges disagree about whether they should put the result at the beginning. In most written judgments it makes no practical difference. When the result is not at the beginning, readers are likely to skip to the end. In oral judgments, many judges prefer to put the result at the end so no one leaves the courtroom before hearing the reasons as well as the results.

In long or complex cases—cases with multiple parties, or multiple issues, or multiple charges—putting the result near the beginning can be very helpful to your readers. Knowing in advance what the result will be makes it easier for them to follow the analysis.

Phrase the issues in parallel form. If the first issue in your list is a question, state them all as questions. If you begin the first issue with "whether" or "that," begin all the others in the same way. Keep your issue statements brief enough to be easily converted into questions that can serve as headings, dividing your judgment into logical units.

State the issues in language that the litigants themselves can understand, even litigants who are not legally trained.

Instead of this:

> The issue is whether the State's reinstallation of safety features is excluded from liability as a discretionary act under section 106 of the Tort Claims Act.

Consider this:

> The issue is whether the state can be liable for accidents that occur as a result of the removal of stop signs by vandals.

It is common knowledge that any group of attorneys will find different issues in the same set of facts and law. These differences can determine the outcome of a case. Sometimes the most fundamental issue can be just that: what *are* the issues?

For example, if an alleged victim of sexual assault was unconscious at the time, and if she is unavailable or unwilling to testify at trial, is the prosecution still obliged to prove an absence of consent, or can that absence be inferred from the fact that she was unconscious, and therefore incapable of consenting?

If the issue is stated like this . . .

> Can an unconscious person consent to sexual touching?

. . . the obvious answer is "no," and a conviction is likely.

But if the issue is stated like this . . .

> Has the prosecution proved an *absence of prior consent* merely by showing that the alleged victim had fallen asleep?

. . . the probable answer is "no," and an acquittal is likely.

Which statement is "correct"?

Both are plausible.

Judges will disagree about which version would produce a just result given the facts of the case. They will also disagree about which version could set an undesirable precedent.

2. Arranging the Issues

Sometimes issues are completely independent of one another and could be treated in virtually any sequence:

- Whether failure to promote the plaintiff constituted constructive dismissal.

- Whether the employer failed to meet minimum safety standards in the work area.

- Whether the employer's instructions to the plaintiff constituted harassment.

- Whether the employer's insistence that the plaintiff wear the company uniform was unreasonable.

Depending on the circumstances, you might want to begin with those issues on which the plaintiff fails, followed by those on which the plaintiff succeeds (or vice versa); but there is no *necessary* sequence.

In other cases, once you have identified the issues, it will be apparent that one or several of them are "threshold" issues that have to be considered before reaching the others.

- Whether the prosecution has proved beyond a reasonable doubt that the five accused were present at the scene of the crime.

- Whether the prosecution has proved beyond a reasonable doubt that the five accused participated in setting fire to the house.

- Whether the attack was provoked.

If the prosecution has not proved that the accused were at the scene of the crime (an issue likely to arise if a defence of *alibi* has been raised), there is no point considering the other issues. Nor would there be any point considering whether an attack had been provoked unless you have first determined that the defendants had in fact attacked the complainant or the complainant's property.

Issues may arise in a random order during a hearing, but in a judgment they need to be arranged in a sequence that makes sense.

3. Writing a Beginning

Two complementary principles that determine what constitutes a good beginning:

1) Facts have no meaning out of the context of issues;
2) Issues have no significance out of the context of facts.

A good beginning provides a concise statement of facts and issues almost simultaneously: a brief overview of who is arguing about what, or who (allegedly) did what to whom; and a succinct statement of the issue or issues that arise from those facts—the questions of fact or law that the court must settle in resolving the fundamental conflict.

You may have read judgments or submissions that begin with pages and pages of facts that seem tedious precisely because you have no idea what the issues are. On the other hand, a mere statement of the issues begs for a factual context to give them meaning.

Here, for example, are some issues out of context:

- Whether the owner of the company should have known that the gates were malfunctioning.
- Whether the owner was in control of the gates.
- Whether the accident was caused by design defects rather than the owner's negligence.

These issues are clear enough—but you would understand them much better if they had been preceded them a brief story providing the facts from which they arise. Like this:

> When Katherine Allison Jones arrived at her job as a security guard on October 12, 2005, she used her key to open a pair of automatic steel gates, and started to walk away. She did not know that the gates had been malfunctioning the night before. Instead of parting in opposite directions as they should have, one gate pulled the other off its tracks. It fell on Ms. Jones, crushing her to death.
>
> There are three issues to be decided in this case:
>
> - Whether the owner of the company should have known that the gates were malfunctioning.
> - Whether the owner was in control of the gates.
> - Whether the accident was caused by design defects rather than the owner's negligence.

Usually you can construct the essential story from the uncontested facts. Limit the story to one page, even a half a page if possible.

Don't tell the wrong story: don't narrate the procedural history of the case unless for some reason it is relevant to the issues now before you. Don't narrate the procedure itself in chronological order, as if you were a court reporter rather than a judge. Tell your readers what happened—or allegedly happened—*before anyone set foot in court.* After the story, list the issues in the

order in which you intend to analyze them. Then turn that list into questions that will serve as headings.

Another way to begin is to state the issues first, and then tell the story. The principle is this: readers need a summary of facts *and* a statement of the issues as soon as possible so they can make sense of the case. Either sequence will work. If you state the issues first, follow them immediately with the story from which the issues arise.

In the following example the issues are presented first, succinctly. They whet your appetite for a summary of the relevant facts, which follows immediately.

> The issues to be resolved in this case are:
>
> - whether the limitation period has expired;
> - whether the defendant was driving without proper care and caution; and
> - whether the defendant was aware that the accident had occurred when he left the scene.
>
> Twelve years ago Kamu Tomalu was driving his pickup truck through an intense rainstorm on a rural road near Titikaveka, Rarotonga. Puavasa Isala was driving ahead of him in the same direction. As Mr. Tomalu attempted to pass, a third vehicle suddenly appeared in front of him from around a curve. Mr. Tomalu swerved to his left, straddling the centerline of the road to avoid a head-on collision with the third vehicle.
>
> None of the vehicles made contact with either of the others. But to make room for Mr. Tomalu's sudden change of direction, Mr. Isala slammed on his brakes, lost control of his car, and skidded across the road for some ten meters before overturning in a shallow ditch. Mr. Tomalu left the scene without stopping.
>
> Mr. Isala's neck was broken in the accident, resulting in a hospital stay of six weeks followed by three months of physical therapy.
>
> It was only two months ago that Mr. Tomalu was identified as the driver of the truck. He has now been charged with dangerous driving causing injury with fleeing the scene of an accident.

After a beginning of this sort all that remains is for you to convert the issue statements in to questions, use them as headings, and then analyze the arguments and evidence under each heading.

Has the limitation period has expired*?*

[*Analyze this issue here.*]

Was Mr. Tomalu driving without proper care and caution?

[*Analyze this issue here.*]

Was Mr. Tomalu aware that the accident had occurred when he left the scene?

[*Analyze this issue here.*]

This sequence—issues first—can be particularly helpful if the facts are complicated or if you are almost certain that the case will be appealed.

Notice there is nothing "fancy" about this beginning. No legalistic terms, no citation of the statutes regarding dangerous driving causing injury and fleeing the scene of an accident. Citations of law are rarely necessary in an opening paragraph (though they may be necessary in the analysis section where the law is cited). The story is told in plain language, the language you might use if you were explaining the case to a friend or neighbour.

4. Analysing the Issues

In general issues can be divided into questions of fact, questions of law, and questions of judicial discretion.

To determine the nature of the issue, ask yourself "what are the parties arguing about?"

If they are arguing about what happened, or where it happened, or when it happened, or who did it, or about the intention of one of the parties, or about how a reasonable person would have behaved in the circumstance, it is a question of fact. You do not need a knowledge of law to decide questions of fact; this is why questions of fact can be submitted to juries comprised of non-lawyers once the rules of evidence have been explained to them.

If the parties disagree about the law—about which law applies, or about what the applicable law means, or about the rules of procedure, or about the admissibility of certain evidence, then it is a question of law. Questions of law require legal knowledge, acquired either through formal study or by experience; this why jurors—non-lawyers—are *not* asked to determine questions of law.

Sometimes the parties disagree about both facts and law with respect to the same issue.

QUESTIONS OF FACT

Your job is not just to find facts when they are contested, but to explain *how* you found them. This can be one of the most difficult parts of judgment writing, but there are some simple patterns that may help you.

To settle a question of fact, your analysis can follow a simple pattern:

> **P1 alleges . . .**
> **P2 alleges . . .**
> **The court finds . . . because . . .**

P1 and P2 stand for the opposing parties. You can put either party's position first—the moving party or the responding party, the winning party or the losing party. Summarize the expert evidence or the witness statements of one party, then the other, and then say which evidence you believe *and why you believe it*.

The last part of the analysis—the reason for your finding—is very important. You want to make sure the losing party, and if necessary, the court above yours, understands the basis of your findings of fact. Failure to provide that basis can lead to an appeal; the losing party can claim that your decision was not supported by the evidence.

Make sure your basis is solid. You may consider the witness's demeanor in determining who is telling the truth, but demeanor has been shown to be an unreliable indicator of truthfulness. Even if you rely partially on demeanour, be sure to justify your finding by relying on additional evidence—for example, finger prints, DNA samples, blood samples, canceled checks, telephone records, e-mail records, audio or video recordings, corroborating witnesses, or inconsistent testimony.

Eyewitness identification has also been shown to be unreliable, particularly if the defendant was not already well known to the witness. Offences often occur in stressful, hurried, and poorly illuminated circumstances. Eyewitness identification becomes reliable when it is bolstered by other evidence.

In criminal matters, be careful not to make your analysis a mere "credibility contest." In criminal law, the burden of proof is always (with a few exceptions) on the prosecution. Be careful not to reverse the burden of proof. It is never correct to find a defendant guilty just because you do not believe his or her version of events. You cannot find him or her guilty unless the *prosecution's*

evidence, in the context of all the evidence, persuades you *beyond a reasonable doubt*.

If after hearing all the evidence you are just not sure whom to believe, then the verdict has to be "not guilty." If you are "not sure," you have not been persuaded beyond a reasonable doubt.

QUESTIONS OF LAW

For questions of law, your analysis can follow a LOPP/FLOPP pattern.

LOPP
FLOPP
Conclusion

LOPP stands for the losing party's position. FLOPP stands for the flaw in the losing party's position.

Once you have made your decision, put the losing party's position first and then point out the flaw in that position. Be sure to express the losing party's position in its best possible light—as if you were representing that party. If you can do that, and then indicate the flaw in that position, you can be confident that your decision is justified. In addition, by expressing the losing party's position in fair and impartial language, you can satisfy the losing party that he or she has been heard, which is one of the most important objectives of a judgment.

For questions of law, you need not express the winning party's position because it is likely to be, essentially, the same as your own.

MIXED QUESTIONS OF FACT AND LAW

Sometimes parties disagree about both fact and law with respect to the same issue. In this situation, a handy pattern to follow is "IRAC" (Issue, Rule, Application, Conclusion).

Put the issue in the heading. Then settle the question of law (LOPP/FLOPP/Conclusion), then the question of fact (P1/P2/Conclusion). After determining the law and the facts, you are in a position to rule on the overall issue.

The analysis of a mixed question of fact and law can be diagrammed as shown on the following page:

ISSUE:	Does this suit qualify as a class action? (Heading)
RULE:	The guidelines for certifying class action are disputed. LOPP: . . . FLOPP: . . . Conclusion: . . . (Controlling Law)
APPLICATION:	The parties disagree about the relevant facts. P1 alleges . . . P2 alleges . . . The court finds . . . because . . . (finding of fact)
CONCLUSION:	Therefore this suit qualifies (does not qualify) for class action certification.

QUESTIONS OF JUDICIAL DISCRETION

Some questions (*eg*, questions related to bail, custody and visitation, or sentencing) rely almost entirely on your discretion. For questions of this sort, you can sometimes find help in guidelines established by statute or precedent that tell you what factors to consider. These guidelines can be useful, but ultimately it will be up to you to make a just and reasonable decision based upon your understanding of the facts and the likely consequences of deciding one way or another.

Questions of judicial discretion are often resolved by weighing facts favoring one party against those favoring the other party. The traditional symbol for justice—a blindfolded figure holding balancing scale—is the perfect emblem for questions of this sort. Sometimes the evidence on one side or the other will tip the scale so decisively that you will find it easy to reach a decision. At other times, the evidence on each side will be virtually equal, but you still have to decide one way or the other.

Unfortunately, there is no mathematical formula for making decisions in this situation—no sure-fire way to get it "right." These are decisions that must

come from your wisdom, your life experience, your understanding of human nature, your instincts about whom to trust, your best guesses about the likelihood of future events.

In deciding whether to release a defendant on bail, sometimes the facts will suggest leniency (e.g., the accused may be a first offender and the sole support of his or her family). On other occasions the facts will suggest rigor (e.g., a prior criminal record, no connections to the community that make fleeing unlikely).

In determining an appropriate sentence, the evidence can include aggravating and mitigating circumstances, victim impact statements, a desire for retribution, a psychological assessment of the defendant, the need to deter other potential offenders and to prevent further offences by the same person.

In determining the best interest of children, some facts will favor the mother, others will favor the father, and sometimes the evidence will impel you to award custody to someone other than the natural parents.

In writing judgments on issues of this sort, the best strategy is to reveal all the evidence and factors that you considered in arriving at your conclusion. Be sure to include the evidence and factors that might be favorable to the losing party, as well as those that tip the scale in the other direction. Full disclosure in this regard will not necessarily make the result unassailable or infallible, but it can help you make a reasonable decision, free from bias or prejudice, and persuasive to impartial readers.

5. Writing an Ending

THE SIMPLE ENDING

The goal of an ending is to indicate which party prevails, what remedies or penalties (if any) you have decided to order, and who is to pay the costs.

This information can be introduced with a simple formula "For the reasons above, the court finds that . . . and orders that. . . ."

Use language that the parties, not just their counsel, will understand. "Costs to the plaintiff," for example, does not mean a thing to non-lawyers. Is the plaintiff to pay the costs? Is the plaintiff to receive costs from the respondent? The answer is clear to people experienced in the law, but sheer guesswork for litigants who are likely to be in court for the first and only time in their lives. It would be easy enough to say who is to pay what costs in plain language.

SUMMARIZING THE REASONS

Many of your readers are likely to skip from the beginning of your judgment to the end, reading your results without your analysis of the issues. For this reason, it is sometimes a good strategy to summarize your analysis just before delivering your decision. This is particularly true in complex or controversial cases; and it is especially true if you think the press might report your results without your reasons.

Here is an example of a conclusion with a summary in a judgment by the Ontario Court of Appeal. The major issue was whether a professor, who was suffering from a bi-polar affective disorder, could be required to take medication. The Ontario Review Board had ordered that he be required to take his medication because without it he was delusional and sometimes violent, a danger to himself and others around him. In his more stable moments, however, Professor Starson was a brilliant physicist. He asserted his right to refuse medication that, essentially, deprived him of his ability to conduct his research. The following conclusion includes reasons as well as results.

> Putting aside any paternalistic instincts—and we think that neither the Board nor the appellants have done so—we conclude that Professor Starson understood, through the screen of his mental illness, all aspects of the decision whether to be treated. He understands the information relevant to that decision and its reasonably foreseeable consequences. He has made a decision that may cost him his freedom and accelerate his illness. Many would agree with the Board that it is a decision that is against his best interests. But for Professor Starson, it is a rational decision, and not one that reflects a lack of capacity. And therefore it is a decision that the statute and s. 7 of the *Canadian Charter of Rights and Freedoms* permit him to make.
>
> The appeal is dismissed**.**

The concluding section of a judgment is extremely valuable because it is one of two places your readers are unlikely to skip (the other being the beginning). In *Starson*, summarizing the reasons just ahead of the final disposition increases the chances that readers will give them some attention.

ADDING ARGUMENTS FROM CONSEQUENCE

The final section of a judgment is also a good place to add arguments from consequence, i.e., to tell your readers what bad consequences are to be avoided because of your decision, or conversely, what good consequences might ensue. In Palau, for example, an unrepresented plaintiff sued for title to land that he alleged belonged by tradition to his family.

Many readers would be sympathetic to the applicant; he may, in fact, have been in the right. Unfortunately, he did not support his claim with records or with other sorts of evidence recognized by customary law. So after denying the claim, the judge added a few lines to indicate that if he had ruled in favor of the plaintiff, the consequences would have been totally impractical.

> If the Court allows this Plaintiff to prosecute this action based on its single unsupported claim to "ownership," it would invite scores of similar suits against the Republic. Individuals and clans will see that they can bypass the established mechanisms for the return of public lands, or get a second bite at the apple, simply by filing an action to quiet title based solely on some unsupported claim of "ownership." The amount of resources the Republic would have to expend to defend these cases– including the discovery necessary to try to divine the bases for such unsupported claims of "ownership" – and the burden on the courts in shepherding this litigation, would be unfathomable.

This is not a "legal" argument; it is a practical consideration. Sometimes practical considerations—i.e., arguments from consequence—can make a "legal" argument more persuasive.

RULINGS ON PRELIMINARY OR INTERLOCUTORY MOTIONS

Because rulings on preliminary or interlocutory motions may be appealed independently, you should follow the same format as the judgment as a whole: begin with the factual context and the issue(s) briefly stated; analyze the issue(s); write a conclusion. Should your ruling be appealed, this format will provide the reviewing court with the fullness of your deliberations. The factual context will reveal what is at stake in the motion—the gravity of the matter and the likely consequences of ruling in favor of one party or another. Your analysis of the losing party's position will reveal your reasoning. It is a mistake to think of issues of this sort as "purely legal" questions that can be considered without a factual context. There are no purely legal questions in litigation; every decision has factual consequences for the parties. And facts are as important as logical analysis in the art of persuasion.

ORAL JUDGMENTS OR DECISIONS

In many situations, judges render judgments orally rather than in writing: when the matter is urgent, or when the case is simple, or when ruling on a motion and you are quite certain about your decision, or when the parties cannot read.

In these situations, take a few minutes to yourself to outline your judgment. Follow the same format: describe that facts that lead to the issue(s); list the issue(s) briefly; then use the issues as "oral headings"—reminding your readers of each issue as you analyze and resolve it. You can think more clearly, and

make your thinking clear to you audience, if you follow the same structure and process that you would follow in a written judgment. An oral judgment can be appealed; when this happens, it is likely to be presented as a written judgment, extracted from the record.

20.3 Conclusion

Writing a judgment is an art, not a science. It is the art of using language, logic, intuition, and common sense to restore order to the lives of the litigants or harmony to the community in which a crime is alleged to have occurred.

The questions that come before your court are much more subtle and elusive than those that mathematicians and scientists and computer programmers are equipped to address.

If the arguments in your court could be settled by a mathematical formula, scientific data, or a computer program, you would, of course, rely on those methods, and there would be no reason for a trial or a hearing.

In theory, your authority to practice this art is provided by the state. In practice, every judgment you write either confirms or undermines your authority, either enhances or detracts from the community's respect for the judiciary, by the quality of your writing. It is an art you could spend a lifetime perfecting.

OTHER MATTERS

21 Land Cases

Land cases involve a number of complex issues. They are only heard by a few Justices. They are not dealt with in this bench book.

The relevant legislation is the Cook Islands Act 1915, Parts XII and XIII.

Section 421 Cook Islands Act 1915 refers to situations where the Court is asked to investigate title to customary land and s422 provides that the interests in customary land are to be determined by custom.

A book on land law in the Cook Islands is *Land Tenure in the Cook Islands* by Professor Ron Crocomb.

22 Preliminary Inquiries

There is a slight chance that you may have to preside over a preliminary inquiry. A preliminary inquiry will only take place if it is requested by the defence, and the offence is one to be tried before a Judge or a Judge and jury.

A preliminary inquiry will be held where a trial of any person is to be heard by a Judge sitting with or without a jury under ss14, 15A, 16 or 17 of the Judicature Act 1980-81.

22.1 Purpose of a preliminary inquiry

ss99 & 100 CPA

The purpose of a preliminary inquiry is for a Justice to determine whether there is a sufficient case, evidence or grounds, to put the defendant at his/her trial before a Judge, or Judge and jury.

Justices act as gatekeepers and prevent prosecutions which have insufficient evidence from proceeding to a judge of the High Court.

22.2 Role of the Justice

In a preliminary hearing, it is **not** the function of a Justice to:

- determine, or even comment on, the guilt or innocence of the defendant
- believe or disbelieve any of the witnesses
- disallow any evidence.

The only question to be answered by the Justice is:

> "Would a Judge or a Judge and jury, at the trial, convict the defendant on the evidence placed before me, if that evidence was not contradicted?"

A preliminary inquiry protects the defendant from baseless charges because the Justice must discharge the defendant in cases where there is not sufficient evidence to commit him/her to trial by a Judge or judge and jury of the High Court.

22.3 The process leading up to a Preliminary Inquiry

22.3.1 Tendering written statements

Written statements of each witness that will be called by the prosecutor at the trial shall be given to the Court and the defendant, or his/her counsel or solicitor.

If no written statement has been obtained from a witness, the prosecutor shall give:

- a summary in writing of the evidence to be adduced (given) by the witness at trial
- a statement setting out the reasons why no written statement from the witness has been obtained.

Any written statement given for a preliminary inquiry must be signed by the person who made the statement and contain a declaration made pursuant to s653 Cook Islands Act 1915 that it is true to the best of his/her knowledge and belief.[92]

Time

Written statements shall be given to the parties as required not later than 28 days before the date fixed for trial.

Written statements by a person under 21

Where a person under 21 makes a written statement, he/she shall give his/her age.

Written statement by a person who cannot read

Where a person who cannot read makes a written statement, it shall be read to him/her before he/she signs it and be accompanied by a declaration by the person who read the statement that it was in fact read to the person.

Written statements referring to exhibits

If a written statement refers to any other document as an exhibit, it shall:

- be accompanied by a copy of that document; or

---

92 Such a declaration is considered a statutory declaration when voluntarily given to a Senior Clerk Registrar of the High Court or any Judge of the High Court.

- accompanied by such information that will enable the party who it is given to, to inspect the document or a copy of the document.

Language of the statement

Where a witness is a Cook Islander, the written statement given shall be given in both the English and Maori languages.

22.3.2 Notice of Preliminary Inquiry

Defendant represented by counsel

If a defendant is represented by counsel, counsel may, not later than 14 days before the date of the trial, notify the Registrar that he/she requires the written statements to be considered by a Justice at a preliminary inquiry.

If no such notice is given, the defendant shall be deemed to have consented to his/her committal for trial and he/she shall be so committed.

Defendant not represented by counsel

Where a defendant is not represented by counsel, the defendant shall be brought before a Justice not later than 14 days before the date of the trial.

22.4 Hearing of the Preliminary Inquiry

s99(1)(h) JA

The Justice should conduct a hearing in accordance with the provisions of s99(1)(h) of the Criminal Procedure Act, namely the Justice shall:

- consider all written statements which will be given at the trial
- consider any submissions made by either party
- decide whether the defendant should be committed for trial.

The following provides guidance as to how to conduct a preliminary inquiry. It should not be considered a replacement for any legislative provisions in the Criminal Procedure Act relating to preliminary inquiries.

Guidelines for conducting a preliminary enquiry

1 The charge

You should read over the charge and explain to the accused:

- the charge
- the purpose of the proceedings
- that he/she, or his/her counsel, will have the opportunity later on in the inquiry to make a statement if he/she chooses to.

2 Statements of witnesses and exhibits

The prosecution should:

- tender the statement of any witness whom they intend to call in proof at the trial
- tender any exhibit which they intend to produce at trial
- read every statement of witnesses to the accused's counsel, or if unrepresented, to the accused. (Counsel or the accused if unrepresented, has the right to waive the reading of this statement.)

3 Submissions by the accused

When you have read or heard the written statements of witnesses and summaries of evidence tendered by the prosecution and before deciding whether to commit or not, you must ensure the accused understands the charge and ask the prosecution and the accused or his/her counsel if he/she wishes to make any submissions on the matter.

4 Make an order on the retention of exhibits

See Chapter 4 *Dealing with Evidence*, for how to deal with exhibits.

5 Make your decision

You must decide whether there is enough evidence to commit the defendant for trial or whether he/she should be discharged.

22.5 Whether or not there is a case to answer

A submission that there is no case to answer may be successfully made where:

- no evidence has been presented to support an essential element of the offence; or

- the evidence presented is insufficient for a reasonable jury to find beyond a reasonable doubt that the defendant committed the offence.

Note that a finding that there is a case to answer is not an indication that the defendant is likely to be guilty of the offence.

See also Chapter 16, section 16.6.

22.6 The decision

22.6.1 Committal for trial

If you decide that the defendant should be committed for trial, you should record on the Information that the defendant is committed to stand trial.

22.6.2 Discharging the defendant

If you decide the defendant should not be committed for trial, you should discharge him/her. This should be recorded on the Information.

By discharging the accused, you do not bar any subsequent proceedings for the same matter.

22.6.3 Evidence of a witness not called at a Preliminary Inquiry

A Justice may make an order that the evidence of a witness be taken at a time and place fixed by the Justice where:

- the defendant has been committed for trial
- the witness is able to give evidence of matters at trial
- the witness was not called to give evidence at the preliminary inquiry
- it is in the interests of justice that the witness gives such evidence.

23 Special pleas

There are three special pleas which may be pleaded by the defendant. These are: s63 CPA

- plea of previous acquittal
- plea of previous conviction
- plea of pardon.

All other grounds of defence may be relied on under the plea of not guilty.

The three special pleas may be pleaded together and should be disposed of by the Court before the defendant is called on to plead further. If every special plea is disposed of against the defendant, he/she shall still be allowed to plead not guilty.

In order for the defendant to make a plea of previous acquittal or previous conviction, it is enough for the defendant to state that he/she has been lawfully acquitted or convicted of the offence or offences to which he/she is pleading.

On the trial of an issue of previous acquittal or conviction, the following shall be admissible as evidence to prove or disprove the identity of the charge:

- a copy of the entry in the Criminal Record Book
- a copy of the information
- a copy of any notes made by the Judge or Justice presiding over at the former trial, certified by the Registrar.

A trial on the issue of previous acquittal or previous conviction will need to take place following such a plea by the defendant.

Upon such trial, the Court shall:

- give judgment that the defendant be discharged from the information if it appears to the Court that:
  - the matter on which the defendant was formerly charged is the same in whole or in part to that which he/she is now charged; and
  - the defendant might have been convicted of all the offences had all proper amendments been made or might have been made to the previous Information

or

- direct that the defendant not be convicted of any offence which he/she might have been convicted at a former trial but that he/she plead as to any other offence charged if it appears to the Court that the defendant might have been convicted at a previous trial of any of the offences in the information but that there may be some offences for which he/she could not have been convicted of at a former trial. s65 CPA

24 Appeals, Retrials and Reservations of Questions of Law

The material in this chapter which is about **appeals** and **retrials** is for your information as it relates to how an appeal from your decision is dealt with in the High Court. There is nothing that you need to do except that if in court, after your decision, counsel for one of the parties indicate they intend to appeal, you should grant a stay of execution of the judgment.

However, the material in regard to:

- **reserving questions of law and stating a case** (section 24.3.1)
- **removing a trial on a question of law** (section 24.4)

does deal with what you may need to do as a Justice.

See also Chapter 3, section 3.5 *Transfer of cases to a Judge.*

24.1 Appeals from Justices of the Peace

24.1.1 Introduction

The Judicature Act and the Criminal Procedure Act provide that appeals may lie from Justices of the Peace to a Judge of the High Court in criminal, civil and land cases.

24.1.2 Appeal to a Judge under s76 Judicature Act

Any party who is not satisfied with a decision made by a Justice sitting alone or Justices sitting together, in any civil or criminal proceedings, may appeal from that decision to a Judge.[93]

The issue of the right to appeal under s76 Judicature Act was canvassed in *Cook Islands Police v Laurence Ngau.*[94] In this case, the Police appealed against the unanimous acquittal of Laurence Ngau by three Justices. The Judge considered whether the right or entitlement to appeal under s76 Judicature Act should override the longstanding common law principle of double jeopardy.

Double jeopardy is the common law principle that no person shall be charged (tried) twice for one and the same offence.

---

93 Except as expressly provided in any Statute.

94 [1992] CR. Nos. 727-730/91, 757/91.

Dillon J, set out three important points regarding the right to appeal under s76 Judicature Act. They are:

1. Section 76 of the Judicature Act cannot override the fundamental principle of the common law of double jeopardy, unless there was a clear intention in the *Judicature Act* to do so, which there is not.

2. Appeals to a Judge under s76 of the Judicature Act which are based on the same evidence, facts, and charges as the original proceedings are not satisfactory as there needs to be evidence that the Justices improperly applied the law or some new evidence or facts should be given.

3. Simply stating that one is "not satisfied with the decision of Justice of the Peace" is not enough for leave to appeal under s76 of the Judicature Act. There must be evidence as to **why** the appellant is not satisfied.

24.1.3 Procedure for appeal under s76 of the Judicature Act

The following procedure shall apply to an appeal under s76 of the Judicature Act*:*

1. Notice of Appeal must be filed in the Court within 21 days after the decision by the Justice(s) is given and copies of that notice must be served on all parties affected by the decision.

2. In the case of a conviction, no appeal can be brought against the conviction or sentence or both until the person has been sentenced or otherwise dealt with.

3. Upon filing of the notice of appeal, the Justice(s) shall grant a stay of execution of the judgment, unless a Judge makes an order to the contrary.

4. If the appellant is in custody, he/she may be released on bail, pending the determination of the appeal:

   - if a person is released on such bail, he/she may, at any time and for any reason a Judge thinks sufficient, be arrested and committed to prison to undergo his/her sentence.

5. The Justice(s) shall forward all notes from the hearing to the Registrar once a notice of appeal has been filed including notes of evidence, summary of facts by the informant in case of guilty plea, any judgment delivered and all the documents and exhibits produced at the hearing.

6. Once the Registrar receives the notice of appeal, he/she shall set the appeal down for hearing on the first practical sitting day available and

shall notify all the parties to the appeal of the time and place of the hearing.

All appeals under s76 Judicature Act shall be by way of rehearing. s78(1) JA

Where any question of fact is involved in the appeal, the evidence taken by the Justice(s) shall be brought before the Court in the following manner:

1. Oral evidence shall be by production of a copy of any note made by the Justice(s) or any other material the Judge deems expedient.

2. Evidence by affidavit and exhibits shall be by production of the affidavits and any exhibits that have been forward to the Registrar and by any exhibits in the custody of the parties to the appeal.

3. Any evidence which is taken by a witness at a distance or by a person about to leave the Cook Islands, or by a person seriously ill, which has been admitted by the Justice(s), shall be by production of a copy of that evidence or statement. s78(2) JA

The Judge may in his/her discretion, rehear the whole or any part of the evidence, and shall rehear the evidence of any witness if he/she believes that any note made by the Justice(s) is incomplete.

24.1.4 Powers of Judge on appeal from Justices under s76 Judicature Act

General powers s80(1) JA

On any appeal from a determination of a Justice(s), a Judge may:

- affirm the judgment
- reverse judgment
- vary the judgment
- order a retrial
- make an order with respect to the appeal, at his/her discretion
- award costs against any party to the appeal.

Specific powers s80(2) JA

On any appeal against any **conviction**, the Judge may:

- quash the conviction and substitute a conviction where it is justified upon the facts; and

- pass a sentence to reflect the substituted conviction.

On appeal against **sentence**, if the Judge thinks that a different sentence should have been passed, he/she shall:

- quash the sentence and pass another sentence allowed in law; or

- vary the sentence, or any part of it, or any condition imposed upon it, within the limits allowed by law; or

- dismiss the appeal.

24.1.5 Abandonment of appeal

s82 JA

An appellant in an appeal from a Justice or Justices may abandon his/her appeal at any time.

In order to abandon an appeal, the appellant must give notice to the Registrar. Upon such notice, the appeal shall be deemed dismissed, subject to the right of the respondent to apply for costs.

24.1.6 Non-prosecution of appeal

s83 JA

If the appellant does not prosecute his/her appeal with due diligence, or observe any of the conditions imposed by a Judge pursuant to *s79* Judicature Act, the Judge may dismiss the appeal.

Any costs of the appeal, and any security entered into by the appellant shall be dealt with in such manner as the Judge directs.

24.2 Retrials

s102 CPA

The prosecutor or the defendant may apply **in writing** to a Judge for a retrial where any person is tried by a Justice(s) for any offence and has been acquitted or convicted, or had an order made against him/her.

24.2.1 Procedure under s102 of the Criminal Procedure Act

The retrial application must be made within 14 days of the acquittal, conviction or the making of the order and must state:

- the grounds of the retrial application
- whether a complete retrial is sought or whether a limited retrial is sought.

The Judge may allow a further period for a retrial application if he/she is satisfied that the application could not have been made sooner.

The applicant must serve a copy of the retrial application on the other party as soon as reasonably possible after making the application.

Where a defendant was sentenced to a term of **imprisonment** on conviction by the Justice(s), the Court ordering the retrial shall remand the defendant in custody, subject to provisions relating to bail, until the dated fixed for the retrial if:

- the term of imprisonment has not expired
- the retrial cannot be held immediately. s104(a) CPA

In other cases, the acquittal, conviction, sentence or order made at the original trial shall cease to have effect.

If the applicant does not appear at the time and place appointed for the retrial, the Court of retrial may order that the original acquittal, conviction, sentence or order be confirmed without holding a retrial. s104(d) CPA

24.2.2 Powers of Judge on application for retrial from Justices under s102 of the Criminal Procedure Act

s102(5) CPA

On the hearing of any such application, the Judge may:

- refuse a retrial; or
- order a complete retrial by the Court who originally heard the offence or by a different Court; or
- order a retrial with specific limitations and on terms the Judge thinks fit, either by the Court who originally heard the offence or by a different Court.

The Court of retrial shall have the same powers and follow the same procedure as the Court that held the trial.

24.3 Reservation of question of law for a Judge (Case Stated)

24.3.1 Justice reserving question of law

s106 JA

A Justice sitting alone or Justices sitting together may reserve a question of law for a Judge where such a question arises:

- on the trial of any person for any offence; or
- in any of the proceedings preliminary, subsequent, or incidental to such a trial.

If the Justice(s) decide to reserve a question, they shall **state a case** for the determination of a Judge.

24.3.2 Application to reserve question of law by prosecutor or defendant

Either the prosecutor or the defendant may, during the trial, apply to the Justice(s) presiding at the trial to reserve a question of law to a Judge.

If a Justice(s) refuse to reserve a question of law for a Judge, they must take note of the application.

If a Justice(s) decide to reserve a question pursuant to an application made by the prosecution or defence, the applicant must:

- submit a draft of the case stated, within 21 days after being notified of the decision or within any further time allowed by a Justice(s), at their discretion
- submit a draft of the case stated to the Justice(s), through the Registrar
- deliver or post a copy of the draft to the other party or his/her solicitor.

When such a question is reserved, the Judge shall have the power to consider and determine that question.

APPENDICES

A Criminal offences – jurisdiction and sentences

The following table lists the name and section of major offences set out in the *Crimes Act 1969*, and provides the maximum sentence that may be imposed and who has jurisdiction to hear the offence and pass sentence.

Use this table as a quick reference guide to determine if you have jurisdiction to hear a particular offence under the *Crimes Act 1969*. The table follows the order of the sections in the *Crimes Act*.

The offences shown below in **bold** are also dealt with, in more detail, in Appendix B.

Offence	Section of *CA*	Maximum penalty	Jurisdiction	Sentence	Establishment of jurisdiction
Crimes against Public Order					
Treason	*s75(a)-(e)*	Life imprisonment	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Conspires to commit treason	*s75(f)*	14 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Attempts to commit treason	*s76(3)*	14 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Accessory after the fact to treason and failure to inform of treason	*s78*	7 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Inciting mutiny	*s79*	10 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Communicating secrets	*s80*	14 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Sabotage	*s81*	10 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Oath to commit offence	*s82*	5 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Seditious conspiracy	*s84*	2 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Seditious statements	*s85*	2 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Publication of seditious statements	*s86*	2 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Use of apparatus for making seditious documents/ statements	*s87*	2 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Unlawful	*s88*	1 year	1 Justice	Justice	*s19(a)(ii)* & *Part*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
assembly				imposes sentence	*I(2) Sch. 2 JA*
Riot	*s89*	2 years	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part I(2) Sch. 2 JA*
Group of 12 or more continue to riot after proclamation made	*s90*	5 years	Elect Judge alone or Judge with jury	Judge imposes sentence	*s16(1) JA*
Riotous destruction of buildings	*s92*	7 years	Elect Judge alone or Judge with jury	Judge imposes sentence	*s16(1) JA*
Forcible entry and retainer	*s93*	1 year	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part I(1) Sch 2 JA*
Carrying offensive weapon in public place without lawful excuse	*s94*	1 year or $100 fine	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part I(1) Sch 2 JA*
Riotous behaviour in a public place	*s95*	$100 fine	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part I(1) Sch 2 JA*
Fighting in a public place	*s96*	3 months or $100 fine	1 Justice	Justice imposes sentence	*. 19(a)(ii)* & *Part I(1) Sch 2 JA*
Throwing/ leaving bottles or glass in public place	*s97*	$50 fine	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part I(1) Sch 2 JA*
Obstructing public place	*s98*	$20 fine	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part I(1) Sch 2 JA*
Profane, indecent or obscene language	*s99*	6 months or $50 fine	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part I(1) Sch 2 JA*
Disturbing public worship	*s100*	$20 fine	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part I(1) Sch 2 JA*
Drunkenness	*s101*	1 month or $20 fine	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part I(1) Sch 2 JA*
Wilful trespass after warning to leave	*s102*	3 months or $100 fine	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part I(1) Sch 2 JA*
Piracy with murder, attempt to murder or endangering life	*s103(1) (a)*	Life imprisonment	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Piracy	*s103(1) (b)*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
Piratical acts with murder, attempt to murder or endangering life	*ss104* & *105(a)*	Life imprisonment	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Piratical acts	*ss104* & *105(b)*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Attempt to commit piracy	*s106*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Conspiracy to commit piracy	*s107*	10 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Accessory after the fact to piracy	*s108*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Dealing in persons	*s109*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Participating in organised criminal group	*s109A*	5 years	Must be by Judge and jury.	Judge imposes sentence	*s14* & *Sch. 1 JA*
People smuggling and trafficking					
Smuggling migrants	*s109C*	14 years or $300 000 fine or both	Must be by Judge and jury. To prosecute requires consent of Attorney-General	Judge imposes sentence	*s14* & *Sch. 1 JA*
Trafficking in people by means of coercion/ deception	*s109D*	20 years or $500 000 fine or both	Must be by Judge and jury. To prosecute requires consent of Attorney-General	Judge imposes sentence	*s14* & *Sch. 1 JA*
Failure to comply with direction of boarding officer	*s109G(7)*	14 years or $300 000 fine or both	Must be by Judge and jury.		
Trafficking in persons	*s109H*	20 years or $500 000 fine or both	Must be by Judge and jury. To prosecute requires consent of Attorney-General	Judge imposes sentence	*s14* & *Sch. 1 JA*
Trafficking in children	*s109I*	30 years or $800 000 fine	Must be by Judge and	Judge imposes sentence	*s14* & *Sch. 1 JA*

Offence	Section of *CA*	Maximum penalty	Jurisdiction	Sentence	Establishment of jurisdiction
		or both	jury. To prosecute requires consent of Attorney-General		
Exploitation of people not legally entitled to work	*s109M*	5 years or $50 000 fine or both	Must be by Judge and jury. To prosecute requires consent of Attorney-General	Judge imposes sentence	*s14* & *Sch. 1 JA*
Fraudulent travel or identity documents	*s109N*	5 years or $50 000 fine or both	Must be by Judge and jury. To prosecute requires consent of Attorney-General	Judge imposes sentence	*s14* & *Sch. 1 JA*
Obligation on commercial carriers	*s109O*	$500 000 fine	Must be by Judge and jury. To prosecute requires consent of Attorney-General	Judge imposes sentence	*s14* & *Sch. 1 JA*
Crimes affecting the administration of law and justice					
Judicial officer who corruptly accepts/obtains bribe in his/her judicial capacity	*s111(1)*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Judicial officer/ Registrar/ Deputy Registrar who corruptly accepts/ obtains bribe in official capacity	*s111(2)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Bribing of judicial officer with intent to influence in judicial capacity	*s112(1)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Offering bribe to judicial officer/ Registrar/ Deputy Registrar with intent to influence in	*s112(2)*	5 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
official capacity					
Minister of Crown/ member of Executive Council accepting bribes	*s113(1)*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Offering bribe to Minister of Crown/ member of Executive Council.	*s113(2)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Member of Legislative Assembly corruptly accepting bribe	*s114(1)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Offering bribe to member of Legislative Assembly	*s114(2)*	3 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Law enforcement officer corruptly accepting bribe	*s115(1)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Offering bribe to law enforcement officer	*s115(2)*	3 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Official of Cook Islands corruptly accepting bribe	*s116(1)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Offering bribe to an Official of Cook Islands	*s116(2)*	3 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Corrupt use of official information	*s116A*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Use or discharge of personal information	*s116B*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Contravention of statute	*s118*	1 year	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(2) Sch 2 JA*
Perjury	*ss119* & *120(1)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Perjury in order to procure conviction of person for crime punishable by between 3 & 14 years imprisonment	*ss119* & *120(2)*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
False oaths	*s121*	5 years	Elect Judge alone or Judge	Judge imposes sentence	*s16(1) JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
			with jury		
False statements or declarations	*s122*	3 years	1 Justice	Justice may only impose sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Fabricating evidence	*s124*	7 years	Elect Judge alone or Judge with jury	Judge imposes sentence	*s16(1) JA*
Use of purported affidavit or declaration	*s125*	3 years	1 Justice	Justice may only impose sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Conspiring to bring false accusation in case where person could be sentenced to death or to 3 or more years imprisonment	*s126(a)*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Conspiring to bring false accusation where person could be sentenced to less than 3 years	*s126(b)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Conspiring to defeat justice	*s127*	7 years	Must be Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Corrupting juries and witnesses	*s128*	7 years	Must be Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Assisting escape of prisoners of war or internees	*s129*	7 years	3 Justices of the Peace	3 Justices may only impose sentence of 3 years	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Breaking prison	*s130*	7 years	3 Justices of the Peace	3 Justices may only impose sentence of 3 years	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Escape from lawful custody	*s131*	5 years	3 Justices of the Peace	3 Justices may only impose sentence of 3 years	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Assisting escape from lawful custody	*s132 (1-2)*	7 years	3 Justices of the Peace	3 Justices may only impose sentence of 3 years	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Assisting escape from lawful custody by failing to perform legal duty	*s132(3)*	1 year	3 Justices of the Peace	3 Justices impose sentence	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Assisting escape	*s133*	5 years	3 Justices of	3 Justices may	*s20(a)(i)* & *Part*

Offence	Section of *CA*	Maximum penalty	Jurisdiction	Sentence	Establishment of jurisdiction
of mentally defective person under detention for offence			the Peace	only impose sentence of 3 years	*2 Sch. 2 JA*
Crimes against religion, morality, and public welfare					
Blasphemous libel	*s134*	1 year	3 Justices of the Peace. Prosecution requires the leave of Minister for Justice.	3 Justices impose sentence	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Distribution or exhibition of indecent matter	*s135*	2 years	Elect Judge alone or Judge with jury. Prosecution requires the leave of the Minister for Justice.	Judge imposes sentence	*s16(1) JA*
Indecent act in a public place	*s136*	2 years	3 Justices of the Peace	3 Justices impose sentence	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Indecent act with intent to insult or offend	*s137*	2 years	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Exposure of person or grossly indecent acts	*s137A*	1 year	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Indecent documents	*s138(2)*	$100 fine	1 Justice	Justice imposes sentence	*s19(a)(i) JA*
Indecent documents by individual with wilful intention	*s138(3)* & *(4)(a)*	3 months or $200	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Indecent documents by corporate body with wilful intention	*s138(3)* &*(4)(b)*	$600	1 Justice	Justice imposes sentence	*s19(a)(i) JA*
Rape	*s141*	14 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Attempt to commit rape	*s142*	10 years	Must be Judge with jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Incest	*s143*	10 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Sexual intercourse with girl under care or protection	*s144*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Sexual	*s145(1)*	14 years	Elect trial by	Judge imposes	*s16(1) JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
intercourse with girl under 12			Judge with jury or Judge alone	sentence	
Attempted sexual intercourse with girl under 12	*s145(2)*	10 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Indecency with girls under 12	*s146*	10 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Sexual intercourse or indecency with girl between 12 & 16	*s147*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Indecent assault on a woman or girl	*s148*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Conspiracy to induce sexual intercourse	*s149*	5 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Inducing sexual intercourse under pretence of marriage	*s150*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Sexual intercourse with idiot or imbecile woman or girl	*s151*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Indecent act between woman and girl	*s152*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Indecency between a man and boy	*s153*	10 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Indecency between males	*s154*	5 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Sodomy on a female	*s155(1)(a)*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Sodomy on a male under 15 where defendant over 21	*s155(1)(b)*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Sodomy in other cases	*s155(1)(c)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
Bestiality	*s156*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Indecency with animal	*s157*	3 years	1 Justice	Justice may only impose max. sentence of 2 years	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Sexual conduct with children outside Cook Islands	*s157A*	The same as if the offences had been committed in the Cook Islands	In some cases must be with Judge or jury or, in some cases elect Judge alone or Judge with jury. To prosecute requires consent of Attorney General.	Judge imposes sentence	*s14* & *Sch. 1 JA or s16(1) JA*
Criminal Nuisance	*s158*	1 year	3 Justices	3 Justices impose sentence	*s20(a)(i)* & *Part 1(1) Sch. 2 JA*
Keeping place of resort for homosexual acts	*s159*	10 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Brothel keeping	*s160*	5 years	3 Justices	3 Justices may only impose sentence of 3 years	*s20(a)(i)* & *Part 1(1) Sch. 2 JA*
Living on earnings of prostitution	*s161*	5 years	3 Justices	3 Justices may only impose sentence of 3 years	*s20(a)(i)* & *Part 1(1) Sch. 2 JA*
Procuring sexual intercourse	*s162*	5 years	3 Justices	3 Justices may only impose sentence of 3 years	*s20(a)(i)* & *Part 1(1) Sch. 2 JA*
Prostitution	*s163*	1 month or $20	1 Justice	Justice may impose sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Misconduct in respect of human remains	*s164*	2 years	1 Justice	Justice may impose sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Witchcraft	*s165*	6 months	1 Justice	Justice may impose sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Laying poison	*s166*	2 years or $1000	1 Justice	Justice may impose imprisonment or a maximum fine of $500	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*

Offence	Section of *CA*	Maximum penalty	Jurisdiction	Sentence	Establishment of jurisdiction
Polluting water	*s167*	6 months or $100	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Sale of unwholesome provisions	*s168*	1 month or $40	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Insanitary premises	*s189*	$20	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Cruelty to animals	*s170*	1 month or $20	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Crimes against the person					
Duty to provide the necessaries of life	*s171*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Duty of parent or guardian to provide necessaries	*s172*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Duty of employers to provide necessaries	*s173*	5 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Abandoning child under six	*s174*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Murder	*s192*	Life imprisonment	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Attempted murder	*s193*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Counselling or attempting to procure murder	*s194*	10 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Conspiracy to murder	*s195*	10 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Accessory after the fact to murder	*s196*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Manslaughter	*s197*	Life imprisonment	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Infanticide	*s198*	3 years	3 Justices	Justices impose sentence	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Aiding and abetting suicide	*s199*	14 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
Suicide pact	*s200*	Life imprisonment if one person in the pact kills another or up to 5 years if a survivor of such a pact	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Concealing dead body of a child	*s201*	2 years	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Killing unborn child	*s202*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Procuring abortion by drug or instrument	*s203*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Procuring abortion by other means	*s204*	5 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Female procuring her own miscarriage	*s205*	3 years	1 Justice	Justice may only impose max. sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Supplying means of procuring abortion	*s206*	3 years	1 Justice	Justice may only impose max. sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Wounding with intent to cause grievous bodily harm	*s208(1)*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Wounding with intent to injure or reckless disregard for safety of others	*s208(b)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Injuring with intent to cause grievous bodily harm	*s209(1)*	10 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Injuring with intent to injure or with reckless disregard for safety of others	*s209(2)*	5 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Injuring by unlawful act	*s210*	3 years	1 Justice	Justice may only impose max. sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Aggravated wounding	*s211(1)*	14 years	Must be by Judge and	Judge imposes sentence	*s14* & *Sch. 1 JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
			jury		
Aggravated injury	*s211(2)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Aggravated assault	*s212(1)*	3 years	1 Justice	Justice may only impose max. sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Aggravated assault on a constable	*s212(2)*	3 years	1 Justice	Justice may only impose max. sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Assault with intent to injure	***s213***	**3 years**	**1 Justice**	**Justice may only impose max. sentence of 2 years**	***s19(a)(ii)* & *Part 1(1) Sch. 2 JA***
Assault on a child or by a male on a female	***s214***	**2 years**	**1 Justice**	**Justice may only impose max. sentence of 2 years**	***s19(a)(ii)* & *Part 1(1) Sch. 2 JA***
Cruelty to a child	*s215*	5 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Common assault	***s216***	**1 year**	**1 Justice**	**Justice imposes sentence**	***s19(a)(ii)* & *Part 1(1) Sch. 2 JA***
Assaulting or resisting constables or those in aid of constables	*s218*	6 months or $100	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Disabling	*s219*	5 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Discharging firearm or doing dangerous act with intent to do grievous bodily harm	*s220(1)*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Discharging firearm or doing dangerous act with intent to injure or reckless disregard for safety of others	*s220(2)*	7 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Acid throwing	*s221*	14 years	Must be by Judge and jury	Judge imposes sentence	*s14* & *Sch. 1 JA*
Poisoning with intent to cause	*s222(1)*	14 years	Elect trial by Judge with	Judge imposes sentence	*s16(1) JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
grievous bodily harm			jury or Judge alone		
Poisoning with intent to cause inconvenience or annoyance	*s222(2)*	3 years	1 Justice	Justice may only impose max. sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Infecting with disease	*s223*	14 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Setting traps with intent to injure or reckless disregard for safety of others	*s224(1)*	5 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Where person knowingly and wilfully leaves trap in a place they occupy and where it likely to injure people	*s224(2)*	3 years	1 Justice	Justice may only impose max sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Possession of offensive weapon or disabling substance	*s224A*	2 years	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Endangering transport with intent to injure or endanger safety	*s225(1)*	14 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Endangering transport intentionally or in manner likely to injure or endanger safety	*s225(2)*	5 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Impeding rescue	*s226*	10 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Bigamy	*s228*	7 years (or 2 years if satisfied that person offender married knew that marriage was void)	3 Justices	Justices may only impose max. sentence of 3 years	*s20(a)(i)* & *Part 2 Sch. 2*
Feigned marriage	*s229*	7 years (or 2 years if satisfied that person	3 Justices	Justices may only impose max. sentence of 3 years	*s20(a)(i)* & *Part 2 Sch. 2*

Offence	Section of *CA*	Maximum penalty	Jurisdiction	Sentence	Establishment of jurisdiction
		offender married knew that marriage was void)			
Abduction of woman or girl	*s230*	14 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Kidnapping	*s231*	14 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Abduction of child under 16	*s232*	7 years	Elect trial by Judge with jury or Judge alone	Judge imposes sentence	*s16(1) JA*
Crimes against reputation					
Publishing criminal libel	*s237(1)*	1 year	1 Justice. Prosecution requires leave of Judge: *s235(1) CA.*	Justice imposes sentence	*s20(a)(ii)* & *Part 1(2) Sch. 2 JA*
Publishes criminal libel knowing it to be false	*s237(2)*	2 years	1 Justice. Prosecution requires leave of Judge*: s235(1) CA.*	Justice imposes sentence	*s20(a)(ii)* & *Part 1(2) Sch. 2 JA*
Criminal slander	*ss238(1)*	1 year	1 Justice	Justice imposes sentence	*s20(a)(ii)* & *Part 1(2) Sch. 2 JA*
Criminal slander knowing it to be false	*ss238(2)*	2 years	1 Justice	Justice imposes sentence	*s20(a)(ii)* & *Part 1(2) Sch. 2 JA*
Crimes against rights of property					
Theft by person required to account	*ss244* & *249(a)*	5 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	Judge imposes sentence	*s16(1) JA*
Theft by attorney	*ss245* & *249(a)*	5 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Theft by misappropriation	*ss246* & *249(a)*	5 years	Elect trial by 3 Justices	3 Justices or Judge impose	*s15A(a) JA*

Offence	Section of *CA*	Maximum penalty	Jurisdiction	Sentence	Establishment of jurisdiction
			together or Judge alone; or if over $5000 by Judge alone or Judge and jury	sentence	
Theft of testamentary instrument	***s249(b) (i)***	**5 years**	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Theft by clerk or servant from employer	***s249(b) (ii)***	**5 years**	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Theft of anything in possession of clerk, servant or officer of Govt./Island Council or a constable	***s249(b) (iii)***	**5 years**	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Theft of anything stolen from the person of another	***s249(b) (iv)***	**5 years**	3 Justices	Justices may only impose max. sentence of 3 years	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Theft of anything stolen from a dwelling house	***s249(b) (v)***	**5 years**	3 Justices	Justices may only impose max. sentence of 3 years	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Theft of anything stolen from a locked or secured separate receptacle	***s249(b) (vi)***	**5 years**	3 Justices	Justices may only impose max. sentence of 3 years	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Theft of anything exceeding in value of $40	***s249(b) (viii)***	**5 years**	3 Justices	Justices may only impose max. sentence of 3 years	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Theft of anything for which no	***s249(c)***	**1 year**	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*

Offence	Section of *CA*	Maximum penalty	Jurisdiction	Sentence	Establishment of jurisdiction
punishment is prescribed by Crimes Act & over $10					
Theft of anything for which no punishment is prescribed by Crimes Act & under $10	***s249(d)***	**1 year**	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Conversion of motorcar, etc.	***s250(1)***	**5 years and may order compensation for damage**	3 Justices	3 Justices or Judge impose sentence	*s20(a)(i)* & *Part 2 Sch. 2 JA or s15A(a) JA*
Attempted conversion of motorcar	*s250(2)*	2 years and may order compensation for damage	3 Justices	Justices impose sentence	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Being in possession of instrument for conversion	*s251*	1 year	1 Justice	Justice may impose sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Taking or dealing with certain documents with intent to defraud	*s251A*	5 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Criminal breach of trust	*s252*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury		*s15A(a) JA*
Dishonestly destroying documents	*s253*	Same as if stolen document or max of 3 years, whichever is greater	1 Justice	Justice may only impose max. sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Dishonest concealment	*s254*	2 years	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Bringing into the Cook Islands things stolen	*s255*	3 years	1 Justice	Justice may only impose max. sentence of 2 years	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
Robbery	*s256*	10 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	Judge or Justice may impose max. sentence	*s15A(a) JA*
Aggravated robbery	*s257*	14 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Compelling execution of documents by force	*s258*	14 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Assault with intent to rob	*s259*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Extortion by certain threats	*s260(1) (a-e)*	14 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Extortion by certain threats to do any act against his or her will, not to do any lawful act	*s260(3)*	7 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Demanding with intent to steal	*s261*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	Refer to CJ for opinion.	*s15A(a) JA*
Burglary	*s263*	10 years	Elect trial by Judge alone or by Judge and jury as no monetary value attached. 3 Justices if not over $5,000.	Judge imposes sentence	*s16(1) JA* s15(A) JA

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
Entering with intent	*s264*	5 years	Elect trial by Judge alone or by Judge and jury as no monetary value attached	Judge imposes sentence	*s16(1) JA*
Being armed with intent to break or enter	*s265*	5 years	Elect trial by Judge alone or by Judge and jury as no monetary value attached	Judge imposes sentence	*s16(1) JA*
Being disguised or in possession of instruments for burglary	*s266*	3 years	1 Justice	Justice may only impose sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Being found on property without lawful excuse but under circumstances disclosing criminal intent	***s267***	**3 months or $40**	**1 Justice**	**Justice imposes sentence**	***s19(a)(ii)* & *Part 1(2) Sch. 2 JA***
Obtaining by false pretence valuable security	*s269(1)*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Obtaining by false pretence where thing obtained exceeds $40	*s269(2)(a)*	5 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Obtaining by false pretence where thing obtained exceeds $10 but less than $40	*s269(2)(b)*	1 year	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Obtaining by false pretence where thing obtained is under $10	*s269(2)(c)*	3 months	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Obtaining credits fraudulently	*s270*	1 year	1 Justice	Justice imposes	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*

Offence	Section of *CA*	Maximum penalty	Jurisdiction	Sentence	Establishment of jurisdiction
				sentence	
Personation	*s271*	7 years	Elect trial by Judge alone or by Judge and jury as no monetary value attached	Judge imposes sentence	*s16(1) JA*
Acknowledging instrument in false name	*s272*	7 years	Elect trial by Judge alone or by Judge and jury: as no monetary value attached	Judge imposes sentence	*s16(1) JA*
False statement by promoter where information	*s273*	10 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Falsifying accounts where information	*s274*	10 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
False accounting by officer or member of body corporate	*s275*	7 years	Elect trial by Judge alone or by Judge and jury as no monetary value attached	Judge imposes sentence	*s16(1) JA*
False accounting by employee	*s276*	7 years	Elect trial by Judge alone or by Judge and jury as no monetary value attached	Judge imposes sentence	*s16(1) JA*
False statements by public officer	*s277*	2 years	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Issuing false dividend warrants where information	*s278*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
Concealing deeds and encumbrances where information	*s279*	5 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Conspiracy to defraud	*s280*	5 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Money laundering	*s280A*	5 years or $50 000 fine or both	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Prejudicing investigation by disclosing information as to money laundering	*s280B*	5 years or $50 000 fine or both	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Receiving property over $40 and dishonestly obtained	*s281(1)(a)*	5 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a) JA*
Receiving property over $10 and under $40 dishonestly obtained	*s281(1)(b)*	1 year	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Receiving property under $10 dishonestly obtained	*s281(1)(c)*	3 months	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Taking reward for recovery of stolen goods	*s285*	3 years	Elect trial by 3 Justices or by Judge alone	Justices or Judge impose sentence	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Forgery	*ss287* & *288*	10 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Altering or	*s289A*	10 years	Elect trial by	Judge imposes	*s16(1) JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
reproducing document with intent to defraud			Judge alone or by Judge and jury	sentence	
Using altered or reproduced documents with intent to defraud	*s289B*	10 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Counterfeiting public seals	*s290*	10 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Counterfeiting corporate seals	*s291*	5 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Sending false telegram	*s292*	5 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Procuring execution of document by fraud	*s293*	10 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Possessing forged bank notes	*s294*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a)*
Drawing document without authority	*s295*	10 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Using probate obtained by forgery or perjury	*s296*	10 years	Elect trial by Judge alone or by Judge and jury	3 Justices or Judge impose sentence	*s16(1) JA*
Paper or implements for forgery	*s297*	10 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Counterfeiting stamps	*s298*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	Waiting for CJ's opinion	*s15A(a)*
Falsifying	*s299*	10 years	Elect trial by	Judge imposes	*s16(1) JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
registers			Judge alone or by Judge and jury	sentence	
Falsifying extracts from registers	*s300*	7 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Uttering false certificates	*s301*	7 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Forging certificates	*s302*	7 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Imitating authorised marks	*s303*	5 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Imitating customary marks	*s304*	5 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Preparations for coining	*s306(1)* & *(2)*	10 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Counterfeiting coin	*s307*	10 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a)*
Altering coin	*s308*	10 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a)*
Impairing coin	*s309(1)*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	Judge imposes sentence	*s16(1) JA*

Offence	**Section of *CA***	**Maximum penalty**	**Jurisdiction**	**Sentence**	**Establishment of jurisdiction**
Possession of leftover materials from impairing coin	*s309(2)*	5 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	Refer to CJ for opinion	*s15A(a)*
Defacing coin	*s310*	1 year	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Melting coin	*s311*	1 year	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Possessing counterfeit coin	*s312*	1 year	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Uttering counterfeit coin	*s313*	3 years	3 Justices	Justices impose sentence	*s20(a)(i)* & *Part 2 Sch. 2 JA*
Buying and selling counterfeit coin	*s314*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a)*
Importing and exporting counterfeit coin	*s315*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a)*
Arson	*s317*	14 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Attempted arson	*s318*	10 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Damage to other property by fire or explosive	*s319*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or	3 Justices or Judge impose sentence	*s15A(a)*

Offence	Section of *CA*	Maximum penalty	Jurisdiction	Sentence	Establishment of jurisdiction
			Judge and jury		
Attempt to damage property by fire or explosive	*s320*	5 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a)*
Wilful damage where danger to life, to road, railway, bridge, power station, gas works, etc.	*s321(1)*	14 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Wilful damage to stopbank, wall, dam, pumping station, etc	*s321(2)*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a)*
Wilful damage to rare or irreplaceable book, original painting, etc	*s321(3)*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a)*
Wilful damage to other property not mentioned in s321 where damage less than $50	*s321(4) (a)*	1 year	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Wilful damage to other property not mentioned in s321 where damage more than $50	*s321(4) (b)*	3 years	1 Justice	Justice may only impose sentence of 2 years	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Wilful waste or diversion of water, gas or electricity	*s322*	5 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and	3 Justices or Judge impose sentence	*s15A(a)*

Offence	Section of *CA*	Maximum penalty	Jurisdiction	Sentence	Establishment of jurisdiction
			jury		
Interfering with means of transport with intent to cause damage to property	*s323(1)*	7 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a)*
Interfering with transport intentionally and in manner likely to cause danger to property	*s323(2)*	5 years	Elect trial by 3 Justices together or Judge alone; or if over $5000 by Judge alone or Judge and jury	3 Justices or Judge impose sentence	*s15A(a)*
Wrecking	*s324*	14 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Attempting to wreck	*s325*	10 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Interfering with signals	*s326*	7 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Interfering with mines	*s327*	7 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Providing explosive to commit crime	*s328*	7 years	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Possession of unauthorised material for passports	*s328B*	2 years or $1000 fine or both	1 Justice	Justice may only impose a max. fine of $500	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Misusing passport	*s328C*	2 years or $1000 fine or both	1 Justice	Justice may only impose a max. fine of $500	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
False representation as to passports	*s328D*	2 years or $1000 fine or both	1 Justice	Justice may only impose a max. fine of $500	*s19(a)(ii)* & *Part 1(2) Sch. 2 JA*
Threatening, Conspiring, and Attempting to Commit Offences					
Threatening to kill or do	*s329*	7 years	Elect trial by Judge alone or	Judge imposes sentence	*s16(1) JA*

Offence	Section of *CA*	Maximum penalty	Jurisdiction	Sentence	Establishment of jurisdiction
grievous bodily harm			by Judge and jury		
Threatening to destroy property	*s330*	3 years	1 Justice	Justice may only impose sentence of 2 years	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Threatening acts	*s331*	3 years	1 Justice	Justice may only impose sentence of 2 years	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Conspiring to prevent collection of rates or taxes	*s332*	2 years	1 Justice	Justice imposes sentence	*s19(a)(ii)* & *Part 1(1) Sch. 2 JA*
Market Trading Offences					
Prohibited conduct by person in possession of inside information	*ss337* & *342*	$50 000 fine or 2 years if an individual $250 000 fine if body corporate	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
Market manipulation	*ss339* & *342*	$50 000 fine or 2 years if an individual $250 000 fine if body corporate	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
False trading and market rigging	*ss340* & *342*	$50 000 fine or 2 years if an individual $250 000 fine if body corporate	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*
False or misleading statements	*ss341* & *342*	$50 000 fine or 2 years if an individual $250 000 fine if body corporate	Elect trial by Judge alone or by Judge and jury	Judge imposes sentence	*s16(1) JA*

B Common Criminal Offences

Assault with Intent to Injure

Section *s213 Crimes Act 1969*

Description A person is guilty of an offence who, with intent to injure any one, assaults any person.

Elements **Every element (i.e. numbers 1-6) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a public place where the offence was alleged to have been committed.

Specific

4. The accused intended to injure another.

5. The accused used physical force on another person.

6. There was no legal excuse or reason for using physical force on the person.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was *the* ***accused*** who committed the offence, i.e. it was ***the accused*** who assaulted with intent to injure.

Physical force
Actual physical force must be used. This could be with their body or something else.

Intent
The prosecution needs to prove that the accused intended to injure.

Definition of assault
Section 2 of the *Crimes Act 1969* defines "assault" as the act of intentionally applying, or attempting to apply, force to the other person, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that he or she has the ability to effect his or her purpose.

The context is very important and you will need to give careful consideration to:

- What the situation was?
- Where did the alleged assault occur?

To injure
"To injure" means cause actual bodily harm.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum penalty: 3 years imprisonment.

Assault on a Child, or by a Male on a Female

Section s214 Crimes Act 1969

Description A person is guilty of an offence who:

- assaults any child under the age of 14 years; ***or***
- being a male, assaults a female.

Elements **Every element (i.e. numbers 1-3 and 4 or 5-6 below) must be proved by the prosecution**.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a place where the offence was alleged to have been committed.

Specific

4. The accused assaulted a child under the age of 14 years.

OR

5. The accused is a male.

6. The accused assaulted a female.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** either assaulted the child or female.

Identity of offender and victim

Although it may be obvious as to the gender of the offender and/or victim when he or she appears in Court, but if the offender and/or victim does not appear in court, the

prosecution will need to provide evidence that the child was under the age of 14 at the time of the offence, or evidence of the gender of the offender and victim in the case of an assault by a male on a female.

Assault
Section 2 of the *Crimes Act 1969* defines "assault" as the act of intentionally applying, or attempting to apply, force to the other person, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that he or she has the ability to effect his or her purpose.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum penalty: 2 years imprisonment.

Common Assault

Section s216 Crimes Act 1969

Description A person is guilty of an offence who assaults another person.

Elements

Every element (i.e. numbers 1-6 below) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the common assault is alleged to have taken place.

3. There must be a place where the common assault was alleged to have been committed.

Specific

4. The accused either intentionally applied, attempted to apply, or threatened or gestured to apply, force to another person.

5. The person to whom the threat, attempt or application of force was addressed, believed on reasonable grounds that the accused person had the ability to effect his or her purpose.

6. There was no legal excuse for the force being used.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who used physical force.

Definition of assault

Section 2 of the *Crimes Act 1969* defines "assault" as the act of intentionally applying, or attempting to apply, force to the other person, directly or indirectly, or threatening by any act

or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that he or she has the ability to effect his or her purpose.

The context in which the alleged assault occurred is very important and you will need to give careful consideration to:

- What the situation was?
- Where did the alleged assault occur?

If the person assaulted is injured, then a more serious assault charge might be more appropriate.

Legal onus
The prosecution must prove that there was no lawful reason for the assault.

If the defence provides a reason for the assault, (i.e. self defence) you will need to consider if it has any merit.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum penalty: 1 year imprisonment.

Theft

Section

ss242 & 249 Crimes Act 1969

Description

Theft or stealing is the act of intentionally and dishonestly taking or converting for use, anything capable of being stolen, with an intent at the time of taking to permanently deprive the owner of the thing.

Elements

Every element (i.e. numbers 1-7 below) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a place where the offence was alleged to have been committed.

Specific

4. The accused took or carried away something capable of being stolen.

5. The accused did this without the consent of the owner.

6. The accused, at the time of such taking, intended to permanently deprive the owner of the thing taken.

7. The accused did not have a claim of right in the property taken.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who stole the property.

Ownership
Whether the owner is named or not, ownership must be proved by the prosecution as an essential element of the offence.

Without claim of right made in good faith
An accused may have a valid defence if he or she has an honest belief that he or she had a legal right to take the goods in question.

Intent at the time of taking to permanently deprive
There must be a coincidence of *actus reus* and *mens rea* for this element to stand, although issues of continuing trespass against the owner's property may arise.

The requirement of permanent deprivation disqualifies situations of borrowing or temporary possession: See *Lloyd's Case* [1985] 3 WLR 30.

Fraudulently
The intent to defraud may consist of an intention to steal but not always so.

A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. For instance, the defence may raise a belief of honest claim of right, which the prosecution must then rebut.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

The length of sentence is based on the value of the property stolen.

Maximum penalty: 5 years imprisonment for any property which is stolen:

- by an employee from his or her employer; *or*
- from another person; *or*
- from a dwelling house; *or*
- from a receptacle; *or*

- that exceeds the value of $40; *or*
- that is a testamentary instrument.

Maximum penalty: 1 year imprisonment if the theft is one for which there is no other punishment prescribed by the Crimes Act, or if the object stolen ***exceeds*** $10 in value.

Maximum penalty: 3 months imprisonment if the theft is one for which there is no other punishment prescribed by the Crimes Act, or if the object stolen ***does not exceed*** $10 in value.

Conversion or Attempted Conversion of Motorcars or Other Vehicles

Section

s250(1)(a) Crimes Act 1969

Description

A person is guilty of an offence who, intentionally and dishonestly (but not so as to be guilty of theft), takes or converts a motor car or any vehicle, for his, her or any other person's use.

Elements

Every element (i.e. numbers 1-7) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a public place where the offence was alleged to have been committed.

Specific

4. The accused took or converted a motorcar or vehicle of any description without the owner's permission.

5. The accused took the vehicle intentionally and dishonestly, but not so as to be guilty of theft.

6. The accused used or intended to use the vehicle, or intended or allowed another person to use the vehicle.

7. The accused did not have bona-fide claim of right to the vehicle.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was

the accused who committed the offence, i.e. it was ***the accused*** who took or converted the vehicle.

Intentionally and dishonestly takes or converts
An express part of the offence is that the accused must take or convert the vehicle intentionally and dishonestly.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. For instance, the defence may raise a belief of honest claim of right, which the prosecution must rebut.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum penalty: Imprisonment not exceeding 5 years.

Unlawfully Found on Property

Section s267 Crimes Act 1969

Description A person is guilty of an offence who is found on any property without lawful excuse (the proof of which shall be on him/her), but in circumstances that do not disclose the commission of, or an intention to commit, any other offence.

Elements **Every element (i.e. numbers 1-5) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a public place where the offence was alleged to have been committed.

Specific

4. The accused was found on property.

5. There is no evidence that the accused committed or intended to commit another offence.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Onus on accused to provide lawful excuse

It is up to the accused to provide evidence that he/she was on the property lawfully and the prosecution is not required to provide evidence that the accused was unlawfully on the property.

The accused will have to prove his/her lawful excuse to your satisfaction and on the balance of probabilities (i.e. more likely than not).

Identification

In Court, the prosecution should identify the person charged

by clearly pointing out that person in Court.

The prosecution must provide evidence to prove it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who was found on a property unlawfully.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum penalty: Imprisonment for a term not exceeding 3 months or a fine not exceeding $40.

Breach of Condition of Probation

Section *s10(1) Criminal Justice Act 1967*

Description A person who contravenes or fails to comply with any condition of his/her probation commits an offence.

Elements **Every element (i.e. numbers 1-5 below) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a place where the offence was alleged to have been committed.

Specific

4. The accused was on probation.

5. The accused contravened or did not comply with one or more conditions of his/her probation.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who breached his or her probationary license.

Conditions

The prosecution must prove that the accused was on probation and provide evidence of the conditions of probation. The prosecution must then show that the accused breached one or more of those conditions.

Sentence Maximum penalty: Imprisonment for a term not exceeding 3

months or a fine not exceeding $40.

Where a person is found guilty of this offence, the Court may do all or any of the following:

- extend the term of probation to any period but no longer than 3 years from when the probation began; ***or***
- vary any condition of the probation; ***or***
- impose any other additional condition.

C Traffic offences – jurisdiction and sentences

This table sets out the jurisdiction over traffic offences under the Transport Act 1966 and its subsequent amendments. The offences are set out in the order of the sections in the Act. The table includes the name and section of the offence under the Transport Act, as well as the maximum penalty, the jurisdiction of the High Court, who imposes sentence and whether there is endorsement and disqualification.

Offence	Sec. of Transport Act	Max. penalty	Jurisd.	Establish-ment of jurisd.	Disqual-fication	Endorse-ment
Using unregistered vehicle	*s5(2)*	$20 fine	1 Justice	*s19(c) JA*	N/A	N/A
No number plates	*ss8* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
No annual licence	*ss10(4)* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Unauthorised, deceptive, or obscured registration plates or unauthorised licences	*ss11* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Notification of change of ownership of motor vehicle	*s13*	$40 plus $10 for each day vehicle is used while failing to comply with provisions	1 Justice	*s19(c) JA*	N/A	N/A
Giving false particulars on cancellation of registration on destruction or permanent removal of motor vehicle	*ss14(3)* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Failure to notify Deputy Registrar of motor vehicle transfer from 1 island to another	*ss14(4-5)* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Driving without an authorised licence	*ss17, 22* & *Sch. 4 (1995(3)*	$40	1 Justice	*s19(c) JA*	N/A	N/A

Offence	Sec. of Transport Act	Max. penalty	Jurisd.	Establish-ment of jurisd.	Disqual-ification	Endorse-ment
	Amdt.)					
Failure to produce driver's licence	*ss18, 22 & Sch. 4 (1995(3) Amdt.)*	$40	1 Justice	*s19(c) JA*	N/A	N/A
Failing to comply with conditions of licenses	*ss19, 22 & Sch. 4 (1995(3) Amdt.)*	$40	1 Justice	*s19(c) JA*	N/A	N/A
Failing to comply with age restrictions	*ss20, 22 & Sch. 4 (1995(3) Amdt.)*	$40	1 Justice	*s19(c) JA*	N/A	N/A
Learner drivers being underage	*ss21, 22 & Sch. 4 (1995(3) Amdt.)*	$40	1 Justice	*s19(c) JA*	N/A	N/A
Offences in relation to driver's licences	*ss24 & Sch. 4 (1995(3) Amdt.)*	$40	1 Justice	*s19(c) JA*	N/A	N/A
Causing bodily injury or death through reckless/ dangerous driving	*ss25(1)* and *31(1)*	10 years or $10,000	Elect Judge alone or Judge with jury	*s16(1) JA*	Must disqualify license for term not exceeding 3 years for first offence/ not exceeding 5 years for second offence	Yes and forward license to Registrar until disqualifica-tion expired.
Causing bodily injury or death by driving under the influence of drink or drug	*ss25(2)* and *31(1)*	10 years or $10,000	Elect Judge alone or Judge with jury	*s16(1) JA*	Must disqualify license for term not exceeding 3 years for first offence/ not exceeding 5 years for second offence	Yes and forward license to Registrar until disqualifica-tion expired.
Causing bodily injury or death through careless use of a motor vehicle	*ss26(1)* and *31(2)*	5 years or $5,000	3 Justices	*s19(c) JA*	May disqualify license for term not exceeding 3 years	Yes and forward license to Registrar until disqualifica-tion expired.
Reckless or dangerous driving	*ss27* and *31(2)*	12 months or $1,000	1 Justice	*s19(c) JA*	May disqualify license for	Yes and forward license to

Offence	Sec. of Transport Act	Max. penalty	Jurisd.	Establish-ment of jurisd.	Disqual-ification	Endorse-ment
					term not exceeding 3 years	Registrar until disqualifica-tion expired.
Driving while under the influence of alcohol and drugs	*ss28* and *31(1)*	12 months or $1,000 or both	1 Justice	*s19(c) JA*	Must disqualify license for term not exceeding 3 years for first offence/ not exceeding 5 years for second offence	Yes and forward license to Registrar until disqualifica-tion expired.
Driving with excessive breath or blood-alcohol concentration	*s28A*	12 months or $1,000 or both, and cancellation of licence (mandatory)	1 Justice	*s19(c) JA*		
Refusing to undergo a breathalyser test	S28B(4)	12 months or $1,000 or both, plus community work	1 Justice	*s19(c) JA*	Yes, for minimum of 12 months	
Refuse to go to or remain at hospital or police station	*s28C*	12 months or $1,000 or both, plus community work, and cancellation of licence (mandatory)				
Being in charge of a vehicle while under the influence of drink or drugs	*ss29* & *124*	$100	1 Justice	*s19(c) JA*	May disqualify license for term not exceeding 3 years	Yes and forward license to Registrar until disqualifica-tion expired.
Careless or inconsiderate use of a motor vehicle	ss*30* and *31(1)* and *124*	$100	1 Justice	*s19(c) JA*	May disqualify license for term not exceeding 3 years	Yes and forward license to Registrar until disqualifica-tion expired.
Failure to produce license to Court/ Registrar upon disqualification	*s32(1)*	$40	1 Justice	*s19(c) JA*	N/A	N/A
Driving while	*ss32(2)*	1 year or	1 Justice	*s19(c) JA*	May	Yes and

Offence	Sec. of Transport Act	Max. penalty	Jurisd.	Establish-ment of jurisd.	Disqual-fication	Endorse-ment
disqualified	and *31(2)*	$200			disqualify license for term not exceeding 3 years	forward license to Registrar until disqualifica-tion expired.
Failure to comply when constable forbids driving	*ss36(2)* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Failure to perform duties of motor drivers in cases of accident where person injured	*ss37(1)* & *(4)* and *31(1)*	5 years or $1000	Elect trial by Judge alone or by Judge and jury	*s16(1) JA*	Must disqualify license for term not exceeding 3 years for first offence/ not exceeding 5 years for second offence	Yes and forward license to Registrar until disqualifica-tion expired.
Failure to perform duties of motor drivers in cases of accident where **no** person injured	*ss37(1)* & *(5)* and *31(1)*	3 months or $200	1 Justice	*s19(c) JA*	Must disqualify license for term not exceeding 3 years for first offence/ not exceeding 5 years for second offence	Yes and forward license to Registrar until disqualifica-tion expired.
Failure to give name, address, vehicle registration to constable or any person	*ss37(2* & *6)* & *124*	$100	1 Justice	*s19(c) JA*	Must disqualify license for term not exceeding 3 years for first offence/ not exceeding 5 years for second offence	Yes and forward license to Registrar until disqualificati on expired.
Failure to report accident where person injured	*ss37(3)* & *(6)* & 124	$100	1 Justice	*s19(c) JA*	Must disqualify license for term not exceeding 3 years for first	Yes and forward license to Registrar until disqualifica-tion expired.

Offence	Sec. of Transport Act	Max. penalty	Jurisd.	Establish-ment of jurisd.	Disqual-ification	Endorse-ment
					offence/ not exceeding 5 years for second offence	
Failure to stop or refuse to give name & address at request of constable	*ss38 &124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Failure to keep left of roadway	*ss39* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Overtaking vehicles generally	*ss40* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Overtaking at bends, intersections	*ss41* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Overtaking at other places	*ss42* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failure to follow route of driving at intersection	*ss43* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failure to follow right-hand rule at intersection	*ss44* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failure to stop at stop-sign	*ss45* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failure to follow intersection where give-way signs erected	*ss46* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failure to stop at pedestrian crossing	*ss47* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failure to use drivers' signals	*ss49* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failure to comply with restrictions on stopping or parking vehicles	*ss50* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failure to report damage to other vehicles or property	*ss51* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failure to report glass, slippery substance on roads	*ss52* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Operating unsafe vehicles	*ss53* & *Sch. 4 (1995(3) Amdt.)*	$40	1 Justice	*s19(c) JA*	N/A	N/A

Offence	Sec. of Transport Act	Max. penalty	Jurisd.	Establish-ment of jurisd.	Disqual-ification	Endorse-ment
Dangerous riding on vehicle	*ss54* & *55(2)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failure to pay fine on minor offence notice	*s55C(1)*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Failure to comply with direction given by constable to give particulars in relation to parking offences	*ss55D* & *Sch. 4 (1995(3) Amdt.)*	$10	1 Justice	*s19(c) JA*	N/A	N/A
Parking offences	*ss55E* & *Sch. 4 (1995(3) Amdt.)*	$10	1 Justice	*s19(c) JA*	N/A	N/A
Exceeding the speed limit	*ss56* & *Sch. 4 (1995(3) Amdt.)*	$40	1 Justice	*s19(c) JA*	N/A	N/A
Stopping of vehicles within half length of clear roadway	*ss57* & *Sch. 4 (1995(3) Amdt.)*	$40	1 Justice	*s19(c) JA*	N/A	N/A
Speeding in reduced speed zones	*ss58* & *Sch. 4 (1995(3) Amdt.)*	$40	1 Justice	*s19(c) JA*	N/A	N/A
Exceeding speed limit while towing trailer	*ss61* & *Sch. 4 (1995(3) Amdt.)*	$40	1 Justice	*s19(c) JA*	N/A	N/A
Exceeding temporary speed limits	*s63(4)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Passing school bus	*ss64* & *Sch. 4 (1995(3) Amdt.)*	$40	1 Justice	*s19(c) JA*	N/A	N/A
Failure to comply with lighting requirements	*ss65* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Driving without proper headlamps	*ss66* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failing to dip lights	*ss67* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Driving without proper rear lamp	*ss68* & *Sch. 4*	$20	1 Justice	*s19(c) JA*	N/A	N/A

Offence	Sec. of Transport Act	Max. penalty	Jurisd.	Establish-ment of jurisd.	Disqual-ification	Endorse-ment
	(1995(3) Amdt.)					
Driving without rear reflector	*ss69* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Driving without proper brakes	*ss70* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Driving without warning device	*ss71* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Driving without proper steering	*ss72* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Driving with defective tyres	*ss73* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Driving without proper windscreen wipers	*ss74* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Driving without rear-vision mirror	*ss75* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Means of entry and exit	*ss77* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Operating with dangerous fittings	*ss78* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Operating without proper warrant of fitness	*ss79* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Using vehicle contrary to notice of inspection after accident	*ss80* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Exceeding loading dimensions	*ss81 to 83* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Infringing towing requirements	*ss84 & 85* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Failure to have a	*ss86* and	$100	1 Justice	*s19(c) JA*	N/A	N/A

Offence	Sec. of Transport Act	Max. penalty	Jurisd.	Establish-ment of jurisd.	Disqual-ification	Endorse-ment
headlamp on a motorcycle	*124*					
Failure to wear safety helmet while riding motorcycle	*s86A(4)*	$50	1 Justice	*s19(c) JA*	N/A	N/A
Travelling abreast	*s86 (?)*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Infringing provisions relating to motorcycles	*ss87 to 93* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Infringing provisions relating to power bicycles	*ss94 to 95* & *Sch. 4 (1995(3) Amdt.)*	$10	1 Justice	*s19(c) JA*	N/A	N/A
Infringing provisions relating to bicycles	*ss96 to 98* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Infringing provisions relating to pedestrians	*ss99* & *Sch. 4 (1995(3) Amdt)*	$10	1 Justice	*s19(c) JA*	N/A	N/A
Infringing provisions relating to horse traffic	*ss102 to 107* & *Sch. 4 (1995(3) Amdt.)*	$20	1 Justice	*s19(c) JA*	N/A	N/A
Infringing provisions relating to heavy traffic	*ss108* & *Sch. 4 (1995(3) Amdt)*	$10	1 Justice	*s19(c) JA*	N/A	N/A
Infringing provisions relating to hire vehicles	*ss109* & *Sch. 4 (1995(3) Amdt)*	$10	1 Justice	*s19(c) JA*	N/A	N/A
Loaded firearms while operating motor vehicle	*ss118* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
Conversion of motor cars, etc.	*s119*	2 years				
Failure to trim hedges or trees considered dangerous	*ss121* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A
General offences	*ss123* & *124*	$100	1 Justice	*s19(c) JA*	N/A	N/A

D Common Traffic Offences

No Annual Licence for Motor Vehicle

Section

ss9 & 124 Transport Act 1966

Description

Every person must affix to the motor vehicle, in the prescribed manner, a licence every licensing year.

No license will be issued to any motor vehicle which is not registered under the Act.

Elements

Every element (i.e. numbers 1-6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a public place where the offence was alleged to have been committed.

Specific

4. The accused is the owner of a motor vehicle.

5. The accused:
   - did not have a licence for that motor vehicle for that licensing year; ***or***
   - did not attach the licence to the motor vehicle in the prescribed manner.

6. There is no legal excuse for not having an annual licence for the motor vehicle.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the

prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence that it was ***the accused*** who committed the offence, i.e. it was *the accused* who did not have an annual licence or who failed to affix an annual licence to the motor vehicle in the prescribed manner.

Motor vehicle
The prosecution will need to produce evidence that the accused who owned the motor vehicle which did not have a licence.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum penalty: Fine not exceeding $100.

No Driving Licence

Section

ss17 & 22 Transport Act 1966; Transport Amendment Act 1995 No. 3, Fourth Schedule

Description

A person will be guilty of an offence who:

- drives a motor vehicle on any road, unless he/she holds a licence which allows the person to drive a motor car at that time; ***or***
- employs or permits any other person to drive a motor vehicle on any road, unless that other person holds a licence which allows them to drive a motor vehicle at that time.

Elements

Every element (i.e. numbers 1-3 and 4-6 or 7-9) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a public place where the offence was alleged to have been committed.

Specific

s17(1)(a):

4. The accused drove a motor vehicle on a road.

5. The accused did not have a licence for the time being which authorised him/her to drive a motor vehicle.

6. The accused does not have a lawful excuse for not obtaining a licence which authorised the accused to drive a motor vehicle at the time of the offence.

OR

s17(1)(b):

7. The accused employed or permitted another person to drive a motor vehicle on a road.

8. That other person did not have a licence which authorised him/her to drive a motor vehicle at the time of the offence.

9. The accused does not have a lawful excuse for employing or permitting another person who did not have a licence which authorised the other person to drive a motor vehicle at the time of the offence.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove it was ***the accused*** who committed the offence, i.e.;

- it was ***the accused*** who did not have a licence which authorised him/her to drive a motor vehicle; *or*
- it was ***the accused*** who employed or permitted another person who did not have a licence, to drive the motor vehicle on any road.

Defences
If the prosecution has proved all the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. But note that no defence is provided for in s17.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Fine of $40: *Transport Amendment Act 1995 No. 3, Fourth Schedule*

Reckless or Dangerous Driving

Section s27 Transport Act 1966

Description A person commits an offence who recklessly drives a motor vehicle, or does so at a speed or in a manner which, having regard to all the circumstances of the case, is or might be dangerous to the public or to any person.

Elements **Every element (i.e. numbers 1-3 and 4 or 5 below) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused recklessly drove a motor vehicle;

or

5. The accused drove at a speed or in a way that was dangerous to the public or to any person at the time of the alleged offence.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who was driving recklessly or speeding and/or driving dangerously.

Drives

Section 2 Transport Act states that "driver" includes the rider of a motor cycle or power cycle or pedal bicycle; and "drive" has a corresponding meaning.

Motor vehicle
Motor vehicle is defined in s2 Transport Act as including a motorcycle, motorised quad-bike or trike.

Reckless
The term "recklessly" is not defined in the Transport Act.

Dangerous
Danger generally refers to the danger of injury to a person or serious damage to property. Any danger to any person, if it is obvious to a careful and competent driver, will be sufficient for dangerous driving.

You will need to consider:

- Does the way the accused drove fall far below what would be expected of a competent and careful driver and would it be obvious to a competent and careful driver that driving in that way would be dangerous?
- The circumstances of the case, which may include the nature, condition and use of the road, and the amount of traffic actually on the road or reasonably expected to be on the road.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. Section 17 of the Transport Act does not list any defences.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum penalty: 12 months imprisonment or fine of $1000. The Court may in addition to a fine or imprisonment, impose disqualification: s31(2) Transport Act 1966.

Driving under the Influence of Drink or Drugs

Section ss28 & 28F Transport Act 1966

Description A person commits an offence who is under the influence of a drink or a drug or both, and drives or attempts to drive a motor vehicle on a road, or is in charge of a motor vehicle which is on a road.

Elements **Every element (i.e. numbers 1-4 and 5 or 6 below) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused was under the influence of a drink or a drug or both;

5. The accused drove or attempted to drive a motor vehicle on a road;

or

6. The accused was in charge of a motor vehicle on a road.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who was driving under the influence of a drink or drugs on a road, or was in charge of a motor vehicle on a road.

Drives

Section 2 Transport Act states that "driver" includes the rider of a

motor cycle or power cycle or pedal bicycle; and "drive" has a corresponding meaning.

Motor vehicle
Motor vehicle is defined in s2 Transport Act as including a motorcycle, motorised quad-bike or trike.

Drink
The term "drink" is defined in s2 of the Transport Act as "alcoholic drink".

Drug
The term "drug" is defined in s2 of the Transport Act as including any substance, not including alcohol, that affects control of the human body whether taken for medicinal, curative, recreational or ceremonial purposes.

Under the influence
This term is not defined in the Transport Act but s25 suggests that it means that the person is incapable of having proper control of the vehicle.

In charge of
This term is not defined in the Transport Act and therefore has its commonsense meaning.

Road
This term is defined in s2 of the Transport Act as including a street and any place to which the public have access, whether as of right or not; and also includes all bridges, culverts, ferries, and fords forming part of any road, street, or place.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. There is a defence to the second part of this offence in s28(4) of the Transport Act.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum penalty: 12 months imprisonment or fine of $1000 or both. The Court shall in addition to a fine or imprisonment, impose disqualification of not less than 12 months: s28(2) Transport Act 1966.

Driving with Excessive Breath or Blood-Alcohol

Section ss28A & 28F Transport Act 1966

Description A person commits an offence who drives or attempts to drive a motor vehicle on a road, or is in charge of a motor vehicle which is on a road, and has the proportion of alcohol in his/her breath or blood exceeding the prescribed limit.

Elements **Every element (i.e. numbers 1-5 below) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The proportion of alcohol in the accused's breath or blood exceeded the prescribed limit;

5. The accused
   - drove; *or*
   - attempted to drive; *or*
   - was in charge of;
   - a motor vehicle;
   - on a road.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. ***the accused's*** breath or blood exceeded the prescribed limit and the accused was driving or

attempting to drive a motor vehicle on a road or was in charge of a motor vehicle on a road.

Drives
Section 2 Transport Act states that "driver" includes the rider of a motor cycle or power cycle or pedal bicycle; and "drive" has a corresponding meaning.

In charge of
This term is not defined in the Transport Act and therefore has its commonsense meaning.

Motor vehicle
Motor vehicle is defined in s2 Transport Act as including a motorcycle, motorised quad-bike or trike.

Prescribed limit
The term "prescribed limit" is defined in s2 of the Transport Act.

Road
This term is defined in s2 of the Transport Act as including a street and any place to which the public have access, whether as of right or not; and also includes all bridges, culverts, ferries, and fords forming part of any road, street, or place.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. There is a defence to the second part of this offence in s28A of the Transport Act.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum penalty: 12 months imprisonment or fine of $1000, or both. The Court may in addition to a fine or imprisonment, impose disqualification, with our without conditions, of not less than 12 months: s28(2) Transport Act 1966, and may also impose a sentence in addition of community work.

Careless Driving

Section *ss30 & 124 Transport Act 1966*

Description A person commits an offence who uses a motor vehicle on any road carelessly or without reasonable consideration for other persons using the road.

Elements **Every element (i.e. numbers 1-5 below) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a public place where the offence was alleged to have been committed.

Specific

4. The accused used a motor vehicle on a road.

5. The accused:
   - was careless; *or*
   - did not use reasonable consideration for other persons using the road.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt.

If the defence establishes to your satisfaction that there is reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who used a motor vehicle carelessly or used a motor vehicle without reasonable consideration for other persons using the road.

Place
The use of motor vehicle must have on a road, which is defined in s2 of the Transport Act.

Sentence

Maximum penalty: Fine not exceeding $100. The Court may in addition to a fine, impose disqualification: s31(2) Transport Act 1966.

Failing to Stop at a Stop Sign

Section *ss45(1) & 124 Transport Act 1966*

Description A person shall, when approaching a stop sign affecting any portion of an intersection, stop his/her vehicle before entering the intersection in such a position as to be able to ascertain that the way is clear from him/her to proceed, and shall not proceed unless the way is clear.

Elements **Every element (i.e. numbers 1-6) must be proved by the prosecution.**

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a public place where the offence was alleged to have been committed.

Specific

4. The accused used a motor vehicle.

5. The accused:
   - approached a stop sign at an intersection and did not stop in such a position as to be able to ascertain that the way was clear; *and*
   - did not check to see if the way was clear; *and*
   - proceeded through the intersection when it was not clear.

6. There was no legal excuse to pass through the intersection.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged

by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who failed to stop at a stop sign.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The *Transport Act 1966* itself provides as a defence that the driver need not comply with the requirements of this subsection if he/she is using a siren or bell under authority of this Act, *and* does not exceed 20 kilometres an hour in speed, and takes due care to avoid collision with other traffic.

This section of the Act does not apply at an intersection where traffic at that time is being controlled by a constable.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum penalty: Fine not exceeding $100.

Speeding

Section

ss56 & 124 Transport Act 1966; Transport Amendment Act 1995 No. 3, Fourth Schedule

Description

A person shall not on any road drive a motor vehicle, motor cycle, motorised quad-bike or trike:

- at a speed exceeding 50 kilometres per hour in zones not designated as reduced speed zones
- at a speed exceeding 30 kilometres in reduced speed zones.

Elements

Every element (i.e numbers 1-5 below) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a public place where the offence was alleged to have been committed.

Specific

4. The accused must have driven a vehicle on a road in excess of 50 kilometres an hour.

or

5. The accused must have driven a vehicle in a restricted area in excess of 30 kilometres an hour.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who drove in excess of the speed limits described above.

Restricted area
The Minister may from time to time by notice published in the Gazette declare any portion of any road as being a "restricted area". In cases where the accused is charged with driving to excess in a “restricted area” the prosecution will need to provide evidence that the area in which the offence occurred was a “restricted area”.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum penalty: Fine of $100.

No Warrant of Fitness

Section

ss79 & 124 Transport Act 1969; Transport Amendment Act 1995 No. 3, Fourth Schedule

Description

A person is guilty of an offence who operates any motor vehicle on any road without a current warrant of fitness attached in the prescribed form to the motor vehicle.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a public place where the offence was alleged to have been committed.

Specific

4. The accused operated a motor vehicle on a road.

5. The motor vehicle did not, at that time, have a current warrant of fitness attached to it at the prescribed place, in the prescribed form.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who operated a motor vehicle on the road without a current warrant of fitness affixed in the correct position.

Defences

If the prosecution has proved the elements of the offence,

beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum penalty: Fine of $100. *Transport Amendment Act 1995 No. 3, Fourth Schedule*

E Common Drug Offences

Dealing with Controlled Drugs

Section

s6 Narcotics and Misuse of Drugs Act 2004

Note: s73 provides that bail for this offence can only be granted by a judge.

Description

No person shall:

a. import into, or export from the Cook Islands any controlled drug
b. produce or manufacture any controlled drug
c. supply or administer, or offer to supply or administer, any Class A or Class B controlled drug to any other person, or otherwise deal in any such controlled drug
d. supply or administer, or offer to supply or administer, any Class C controlled drug to any other person
e. sell, or offer to sell, any Class C controlled drug to any other person
f. have in his/her possession any controlled drug for any of the above (c), (d) or (e) purposes.

No person shall conspire with any other purpose to commit any of the above offences.

Note: "controlled drugs" are listed and described in the First, Second and Third Schedules of the Act.

Elements

Every element (i.e. numbers 1-4 below) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused either:

- imported; *or*
- exported; *or*
- produced; *or*
- manufactured; *or*
- supplied or offered to supply; *or*
- administered or offered to administer; *or*
- sold or offered to sell; *or*
- had in his/her possession;

a controlled drug

- *or*; conspired with another in regard to any of the above.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence at the time the alleged offence occurred.

Sentence

Maximum penalty:
Class A controlled drug: up to 20 years imprisonment.
Class B controlled drug: up to 15 years imprisonment.
Other than a Class A or Class B controlled drug: up to 10 years imprisonment.

Possession and Use of Controlled Drugs

Section

s 7 Narcotics and Misuse of Drugs Act 2004

Note: This offence should only come before you in regard to arrest and remand. Your power is limited to the granting of bail, or otherwise.

Description

No person shall procure or have in his/her possession, or consume, smoke or otherwise use, any controlled drug; or supply or administer, or offer to supply or administer, any Class C controlled drug to any other person, or otherwise deal in any such controlled drug.

Note: "controlled drugs" are listed and described in the First, Second and Third Schedules of the Act.

Elements

Every element, (i.e. 1 – 5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a place where the offence was alleged to have been committed.

Specific for possession

4. The accused did one or more of the following activities in relation to a controlled drug:
   - procured; *or*
   - had in his/her possession; *or*
   - consumed; *or*
   - smoked; *or*
   - otherwise used.

Specific for use

5. The accused did one or more of the following activities in relation to a Class C controlled drug:
   - supplied; *or*
   - administered; *or*
   - offered to supply; *or*

- offered to administer;

to any other person; *or*

- otherwise dealt in any such controlled drug.

6. There was no legal excuse for any activities described immediately above.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who committed one of the acts in element 4 or 5 above.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused has a sufficient defence against the charge if he/she can provide evidence that he/she:

- knowing or suspecting it to be a controlled drug, took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug, *and* as soon as possible after taking possession took all reasonable steps to deliver it to a person lawfully entitled to have possession of it.
- knowing or suspecting it to be a controlled drug, took possession of it for the purpose of delivering it to a person lawfully entitled to have possession of it.
- was exempted under s8 of the Narcotics and Misuse of Drugs Act or had a licence under the Act.

Further, this charge will not apply to the possession of a narcotic by any person in the service of the Crown for the purposes of an investigation of any offence, suspected offence or prosecution of any person.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence	Maximum penalty: *Class A controlled drug*: maximum imprisonment is 5 years or a fine not exceeding $10,000 or both. *Any other controlled drug*: maximum imprisonment is 2 years or a fine not exceeding $5,000 or both.

Cultivation of Prohibited Plants

Section

s9 Narcotics and Misuse of Drugs Act 2004

Note: This offence should only come before you in regard to arrest and remand. Your power is limited to the granting of bail, or otherwise.

Description

No person shall cultivate any prohibited plant.

Elements

Every element (i.e. numbers 1-4 below) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused cultivated a prohibited plant.

Note: "cultivate" and "prohibited plant" are defined in section 2 of the Act.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence at the time the alleged offence occurred.

The accused has a sufficient defence against the charge if he/she can prove that he/she had a licence or was otherwise permitted by regulations made under the Act to cultivate a prohibited plant.

Sentence	Maximum penalty: Imprisonment up to 20 years.

Possession of Prohibited Items

Section

s13 Narcotics & Misuse of Drugs Act 2004

Note: This offence should only come before you in regard to arrest and remand. Your power is limited to the granting of bail, or otherwise.

Description

A person commits an offence who has in his/her possession:

- any pipe or other utensil (not being a needle or syringe, for the purpose of commission of an offence against this Act; or
- (unless excepted by regulations under the Act), a needle or syringe for the purpose of commission of an offence against this Act; or
- (unless excepted by regulations under the Act),a seed or fruit (not being a controlled drug) of any prohibited plant, which is not authorised to cultivate under the Act.

Elements

Every element (i.e. numbers 1-5 below) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court.

2. There is a date or period of time when the offence charged is alleged to have taken place.

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused had whatever is prohibited in his/her possession.

5. There is no exception under regulations made under the Act

---

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged

by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

The prosecution must also prove that whatever was prohibited was intended to be used for the prohibited purpose.

Sentence

Maximum penalty: 5 years imprisonment or a fine not exceeding $5000 or both.
