2024

Cook Islands High Court Bench Book

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I Foundations

1. Constitutional framework of the Cook Islands

1.1 The Cook Islands Constitution

The Cook Islands Constitution (the Constitution) came into effect in August 1965. The Constitution gives effect to three important constitutional principles:

1 the doctrine of the separation of powers;

2 the independence of the judiciary;

3 the rule of law.

1.1.1 The doctrine of the separation of powers

There are three distinct and separate branches of government:

1 The executive: makes policy and administers public policy and allocates funds;

2 The Parliament: makes the law (legislature);

3 The judiciary: legal system and the Judges and Justices who interpret the 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. 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.

1.1.2 The independence of 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 appointing or removing judicial officers, and conditions of their appointment;
- the immunity of Judges and Justices from civil actions.

1.1.3 The rule of law

This is the principle that all people and institutions are subject to and accountable to law that is fairly applied and enforced. Its purpose is to protect people from the arbitrary use of state authority. The rule of law also recognizes that the Constitution is the supreme law of the land and provides checks and balances for the executive and legislative branches of government: Art 64 Constitution.

1.2 Branches of government

1.2.1 The executive (government)

The role of the executive is to make and put into place government policy. The executive effectively runs and controls the public affairs of the country. The executive and Parliament are distinct even though some members are in both.

The executive is made up of:

- the head of state;
- the King's Representative;
- the Prime Minister;
- the Cabinet of Ministers; and
- the Executive Council.

Head of state: See Arts 2 and 12 of the Constitution.

- His Majesty the King is the head of state and has the executive authority of the Cook Islands: Arts 2, 12 Constitution.

The King's Representative: See Arts 5 and 12(1) of the Constitution.

- The King's Representative exercises the executive authority of the Cook Islands either directly or through their officers. His Majesty the King appoints the King's Representative who stays in office for a 3-year term: Art 3 Constitution.
- Except as provided in the Constitution, the King's Representative shall act on the advice of Cabinet, the Prime Minister or the appropriate minister when performing their duties: Art 5 Constitution.
- The King's Representative also grants assent to Bills acting on the Prime Minister's advice once passed by Parliament: Art 44 Constitution.

Prime Minister: See Art 2(6) of the Constitution Amendment (No. 9) Act, 11–74.

- The Prime Minister is the head of government, in charge of Cabinet and a Member of Parliament (MP): Art 2 (6). When Parliament is in session, the Prime Minister is appointed by the King's Representative on the basis that they command the confidence of a majority of the MPs (if not in session, then is it based on whether they are likely to command the confidence of a majority of MPs).

Cabinet: See Art 2 of the Constitution Amendment (No. 23) Act 1999.

- Cabinet is made up of the Prime Minister and 6 Ministers, being Members of Parliament (MPs) or will be MPs (if appointed after an election but before the first session). Five Ministers other than the Prime Minister are appointed by the King's Representative on the advice of the Prime Minister. The Cabinet sets the direction and oversees the executive government but is collectively responsible to Parliament.
- The King's Representative may appoint one minister who is not an MP (but is eligible to be an MP). This minister may attend and address meetings of Parliament and any committee but may not vote on any question before Parliament.
- The Prime Minister gives each minister responsibility for any government department or subject. This includes the minister that looks after the justice department and the judiciary.

Executive council: See arts 22(1), 25, 52, 54 of the Constitution.

- The Executive Council consists of the King's Representative and the members of Cabinet.
- At least three Ministers must be present at the meetings of the Executive Council.

- The council may:
  - consider any decision the Cabinet makes as recorded in the Cabinet minutes: Art 25;
  - give advice on the appointment and removal of Judges: Arts 52, 54.

1.2.2 Parliament

Art 27 of the Constitution.
Parliament (also known as the "House") consists of 24 members elected by secret ballot under a system of universal votes by electors from the various islands. The speaker, who is nominated by the Prime Minister, enforces the rules.

The House's role is to:

- provide members to form the government (executive);
- make new laws and update old laws;
- represent the people of the Cook Islands;
- examine and approve government taxes and spending;
- hold the government to account for its policies and actions.

Members of parliament vote on every issue, and any decisions made must be decided by a majority of the votes of the members present (and at least 12 MPs must be present), except when changes to the Constitution arise.

Every question before Parliament shall be decided by a majority of the votes of the members present (must be at least 12 not including the speaker), except for changes to the Constitution. The King's Representative dissolves Parliament every 4 years unless it has been dissolved earlier. See Art 44 of the Constitution, which defines how Parliament makes law. 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.

Once a Bill has passed through all its parliamentary stages it can become an Act of Parliament, forming part of the law. Any Member of Parliament may introduce any Bill or propose any motion for debate in Parliament.

A Bill is not a law until it is signed by the King's Representative acting on the advice of the Prime Minister. This is called the "royal assent". The King's Representative may summon the Executive Council to consider amendments to a Bill when the King's Representative proposes changes or refuses to assent to the Bill. This must be done within 14 days after the Bill is presented to the King's Representative.

If the Executive Council decides that the Bill should be returned to Parliament to debate the proposed amendments or because the King's Representative refuses to assent to it, the King's Representative shall return the Bill to Parliament to reconsider.

If the Executive Council decides that the Bill should **not** be returned to Parliament to reconsider, or that the King's Representative should not refuse their assent to the Bill, then the King's Representative must declare their assent to the Bill.

At that point, either the Bill is passed with the proposed amendments, different amendments, or in its original form without any amendments, and then it goes back to the King's Representative who must declare their final assent.

Members of parliament (MPs): see Art 36 of the Constitution.

- The Constitution gives immunity to MPs from civil or criminal proceedings when they are acting in their official capacity such as:
  - exercising their powers in government;
  - words said or any votes made in Parliament or in any committee of Parliament;
  - any publication of any report, paper, vote or proceeding by or under the authority of Parliament.
- MPs can be sued and prosecuted in respect of acts by them outside their official capacity.

House of Arikis: See Arts 8, 11 of the Constitution; House of Arikis Act 1966 (HAA).

- The House of Arikis consists of up to 14 Arikis (chiefs) appointed by the King's Representative (subject to the Constitution).
- The House of Arikis has the following members (Art 8(2) Constitution (as amended in 2002):
  - 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.
- The House of Arikis meets at least once every 12 months in Rarotonga and eight members must attend the meeting: s 11 HAA.
- Their functions are to (s 8 HAA):
  - consider any welfare issues relating to the people of the Cook Islands that Parliament submits and give an opinion and make recommendations to Parliament on these issues;
  - make recommendations together with their reasons on any issue affecting customs or traditions to the legislative assembly with the premier or their appointed representative invited to take part in the proceedings (if views are not unanimous an explanatory note must also state the minority views);
  - perform any other functions as prescribed by law, but they have no power to make laws: Art 9(b).

1.2.3 The judiciary

The judiciary is an independent body that:

- interprets and applies the laws made by Parliament in accordance with the Constitution;
- develops and interprets case law;
- solves disputes of fact and law between individuals, and between individuals and the State.

1.3 The High Court

The High Court is an important part of the constitutional framework. It is described in detail in "High Court" below.

2. Sources of law

2.1 Introduction

The sources of law are:

- The Constitution;
- legislation, including Acts, ordinances and regulations;
- the common law (case law decided by the Courts);
- custom.

2.2 The Constitution

Arts 39, 41; Constitution.

The Constitution is the supreme law of the Cook Islands and all Acts of Parliament must not conflict with what the Constitution sets out. This means Judges and Justices must interpret and apply all other laws according to what the Constitution provides for: Art 39(3). The Constitution itself may be interpreted and therefore is affected by developments in the common law.

The members of the Cook Islands Parliament can only change the Constitution by voting on any Bill to change or repeal any part of the Constitution as follows:

- at the vote before the final vote and at the final vote, the Bill must receive affirmative votes of not less than two-thirds of the membership (including vacancies) of Parliament and this final vote must take place at least 90 days after the reading that preceded it;
- no such Bill is to be presented to the King's Representative for assent unless it is accompanied by a certificate from the speaker of Parliament to that effect: Art 41(1).

Likewise, no Bill to change or repeal any part of the Constitution shall be submitted to the King's Representative unless:

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

2.3 Legislation

Art 39 of the Constitution.

Parliament may make laws (Acts) for the peace, order, and good government of the Cook Islands: Art 39(1). These laws then become legislation, unless they are inconsistent with the Constitution, in which case they can be declared void: Art 39(3).

Judges and Justices must interpret and apply legislation, which is therefore affected by developments in the common law.

Legislation in the Cook Islands consists of:

- Acts (statutes);
- subordinate legislation, such as regulations and rules.

Statutes that apply in the Cook Islands are:

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

Legislation can be found in the Consolidated Laws of the Cook Islands 1997, and in subsequent amendments. To see statutes online, go the Pacific Islands Legal Information Institute. Regulations and rules are made by the King's Representative by order of the Executive Council.

While human rights Conventions ratified by the Cook Islands are not in and of themselves sources of law, where they have been incorporated into domestic law through legislation stating an intention for the Act to be interpreted consistently with a human rights convention, then the terms of the Convention should also be considered in interpreting the Act. For example, the Family Protection and Support Act 2017 states an intention at s 3(f) for the Act to be read consistently with three Conventions ratified by the Cook Islands, being the Convention on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD).

Even where a ratified Convention has not been expressly incorporated into a relevant national law, it can still be used as a guide in interpretation, especially regarding any gaps, inconsistencies or ambiguities in the national laws.

In addition, where national laws are inconsistent with Art 64 or 65 of the Constitution, courts can make declaratory judgments that particular provisions of a law are inoperative. In *George v Attorney-General* [2013] CKHC 65; OA 1.13 (28 August 2013) the High Court held that declarations of incompatibility or inconsistency between the terms of a national law and a constitutional provision (in this case, the Electoral Amendment Act 2007 and the freedom of speech and expression in Article 64(1)(e) of the Constitution), where the Court found there could be a basis for a declaration that the Electoral Amendment Act 2007 was inoperative.

2.3.1 Understanding and applying legislation

Judges and Justices interpret and apply the law through the court system by hearing and deciding cases. If you are hearing a case where you must make a decision and the statute leaves this up to your discretion, you may look at earlier court decisions on similar cases. This is called case law.

Generally, the meaning of certain words and phrases in a statute are usually found in an interpretation or definition section at the beginning of each Act. If not, the word or phrase should be given its natural and ordinary meaning.

When interpreting a word or phrase, consider:

- definitions in the Act (if any),
- a legal dictionary,
- the context of how it has been used in the particular Act and section,
- the purpose of the Act,
- relevant case law, and
- whether it has been drawn from the constitution or from ratified human rights treaties.

When an Act says the court:

- 'may' do something, this means the power may or may not be exercised – it is at your discretion;
- 'shall' do something this means that you must exercise the power.

Take note of any amendments that have been made to the legislation. When an amendment comes into force, it will change particular sections in the relevant Act. It may also affect the operation of other legislation.

2.4 Common law

s 100 Judicature Act (JA); s 616 Cook Islands Act (CIA).

Common law is the law that is made and developed by higher courts. It is also called case law. Courts in the Cook Islands apply the rules of common law and equity, but if there is a conflict between them, the rules of equity come first: s 616 CIA; s 100 JA.

The higher courts make and develop case law:

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

The development of the common law does not mean that you can make arbitrary decisions. You must follow the 'doctrine of precedent' and give reasons for your decision.

The doctrine of precedent means you must follow decisions of the Judges in the High Court and the Court of Appeal, as the higher courts, unless the material facts in the case are different. This 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.

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, as well as relevant standards from ratified human rights treaties and case law from international human rights courts, such as to the European Court of Human Rights.

2.5 Customary law

Art 66A of the Constitution.
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 inconsistent with any articles in the Constitution or any Act, including those that relate to human rights.

Parliament may make laws giving effect to custom and usage of the local people of the Cook Islands. For example, the Cook Islands Act 1915 provides that where the court is asked to investigate title to customary land, interests in customary land are to be determined by custom: ss 421–422.

The opinion or decision of the Aronga Mana of the island or vaka as to the existence, extent or application of any custom or as to matters relating to custom, tradition and usage shall be final and conclusive and shall not be questioned in any court of law: Art 66A(4). While the Aronga Mana makes final decisions regarding whether as a matter of fact a particular custom exists or its extent, the court still retains its power to decide whether, as a matter of law, such customs are consistent with other provisions of the Constitution and therefore whether they are lawful or not. Future case law will likely further clarify the interaction between Art 66A(4) and other provisions of the Constitution.

3. The High Court

3.1 Relevant Acts

General	
The Constitution and the Cook Islands Constitution Act 1964 (Constitution)	Establishes the High Court and Court of Appeal and protects fundamental rights and freedoms
Judicature Act 1980–81 (JA) Relevant amendment Acts: ➢ Judicature Amendment Act 1986 (JAA 1986) (amends ss 19–20). ➢ Judicature Amendment (No. 2) Act 1986 (JAA No. 2 1986) (amends ss 19–20). ➢ Judicature Amendment Act 1991 (JAA 1991) (amends ss 2, 8, 15A, 16, 20, 21, 99, 102). ➢ Judicature Amendment Act 1998 (JAA 1998) (amends s 19). ➢ Judicature Amendment Act 2000 (JAA 2000) (amends s 19). ➢ Judicature Amendment Act 2011 (JAA 2011) (repeals ss 51–75).	Establishes the jurisdiction for Justices and Judges
Cook Islands Act 1915 (CIA)	Sets out the jurisdiction of the High Court and court procedures
House of Arikis Act 1966	Establishes the house of Arikis
Evidence Act 1968	Sets out the rules of evidence in civil and criminal cases

Criminal	
Crimes Act 1969 (CA) Relevant amendment Acts: ➢ Criminal Procedure Amendment Act 1998 (CPAA19) (adds s 79A) ➢ Criminal Procedure Amendment Act 2000 (CPAA20) (adds s 79B)	Establishes various criminal offences
Criminal Procedure Act 1981 (CPA)	Sets out the criminal process for hearing criminal cases
Criminal Justice Act 1967	Establishes the probation service in the criminal justice system
Transport Act 1966	Regulates motor vehicles and road traffic and establishes various related offences
Narcotics and Misuse of Drugs Act 2004	Establishes various drug offences
Harassment Act 2017	Establishes civil and criminal harassment orders and various related offences
Cook Islands Arms Ordinance 1954	Offences related to firearms and registration of firearms
Prevention of Juvenile Crime Act 1968	Establishes the Children's Court and the Juvenile Crime Prevention Committee
Victims of Offences Act 1999	Provides rules for better treatment of victims of crime
Family	
Family Protection and Support Act 2017	Sets out the law relating to family law remedies, child protection and protection orders against family violence

3.2 The Cook Islands Constitution

The Cook Islands courts are structured like a pyramid. At the top is the Privy Council. Below it, in descending order, are:

- the Court of Appeal;

- the High Court.

This hierarchy is essential to the "doctrine of precedent" – that is, the principle that requires Judges to follow the rulings and determinations of Judges in higher courts, where a case involves similar facts and issues. A decision by a senior court is binding on a lower court. The Privy Council is the final appeal court, but it hears only a small number of cases. Decisions of the Privy Council are binding on all other courts.

If someone wants to appeal a decision made by a court, they can ask a senior court to review the decision from the lower court where grounds exist and fees paid or waived.

3.3 Overview of the courts

3.3.1 The Sovereign in Council (Privy Council)

Art 59(2) of the Constitution.

There is a right of appeal from decisions of the Court of Appeal to His Majesty the King in Council with leave of:

- the Court of Appeal; or
- His Majesty the King in Council, if leave is refused by the Court of Appeal subject to any conditions set out in the relevant Act.

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

3.3.2 The Court of Appeal

Arts 56–60 of the Constitution; ss 51–75 JA; ss 51–75 JAA.

The Court of Appeal is established under Art 56 of the Constitution and sits as a panel of three Judges. Appeals are decided by a majority vote of the panel: Art 57 of the Constitution. 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: Art 58 of the Constitution. Some of the sittings of the Court of Appeal are in New Zealand.

The Court of Appeal's decision is final and binding on the High Court, unless a right of appeal with leave of the Court of Appeal is granted, or, if such leave is refused, with the leave of His Majesty the King in Council: Art 59 of the Constitution; ss 51, 58 JAA.

The Court of Appeal can hear and decide any appeal from a judgment of the High Court (subject to the relevant provisions of the Constitution): Art 60(1); ss 59–60 JAA.

The Court of Appeal can hear appeals as of right including:

- if the High Court certifies that a case involves a substantial question of law to interpret or apply any article of the Constitution;
- against conviction by the High Court in its criminal jurisdiction, where the appellant has been sentenced to imprisonment for life or more than 6 months, or a fine of not less than $200, or any sentence (not fixed by law);

- when a civil matter in dispute on appeal is in respect of $4000 or more;
- from any judgment that interprets or applies any provision in Part IVA of the Constitution (fundamental human rights and freedoms).

All appeals to the Court of Appeal shall be by way of rehearing: s 74 JAA.

On any appeal from the High Court in a criminal matter (ss 67–69 JAA), the Court of Appeal may grant an appeal against conviction if it thinks the jury's verdict or a Judge's decision should be set aside based on the following grounds:

- the verdict or decision is unreasonable or cannot be supported by the evidence;
- the judgment is materially affected by a wrong decision of a question of law;
- there was a miscarriage of justice: s 69 JAA.

For every appeal the Court of Appeal refers to the evidence heard at trial for any question of fact, unless the Court of Appeal grants leave otherwise: s 61 JAA.

When leave to appeal against conviction is granted by the High Court, the High Court may, if it thinks fit, release the appellant from custody on bail pending the hearing on appeal. Otherwise ss 83–95 CPA (relating to bail) apply as if the appellant were a defendant remanded in custody who had been granted bail: s 72 JAA.

For more details about the Court of Appeal procedures, please refer to ss 63–75E JAA.

3.3.3 The High Court

Arts 47–48 of the Constitution.

The High Court is the court where most people encounter the country's judicial system. The High Court of the Cook Islands is a Court of Record and has original jurisdiction to hear all criminal, civil and land matters.

The High Court has four divisions:

1 Criminal division
2 Civil division
3 Land division
4 Children's Court.

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

- any proceedings authorized by the relevant statute;
- such other proceedings that may be determined by the chief justice, either in a particular case or classes of proceedings.

The Te Reo Maori Act 2003 specifies that there are two official languages of the Cook Islands: English and Māori. The current practice in court is that the defendant may choose which language they would like the case to be heard in. The Constitution also sets out the right to a fair hearing.

This means that any proceedings should be carried out in a language that the defendant understands, or that an interpreter is provided to the defendant or any other party who requires interpretation.

3.4 Jurisdiction of the courts and governing Acts

Jurisdiction is the power and authority to hear or determine a particular matter. Courts may only act within their jurisdiction, as defined by law. The Constitution establishes the High Court, and the Judicature Act is the main Act that governs the High Court and its jurisdiction.

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. As a result, the decision and any orders made are not lawful and therefore invalid. So, it is important to check that you have authority to hear any matter before you before proceeding.

3.4.1 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. You should ensure that you know the relevant provisions of the Constitution and the Judicature Act.

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 is the main Act that sets out acts and omissions that are crimes in the Cook Islands.

Criminal jurisdiction to hear, determine, and pass sentence in any criminal matter	
One Justice of the Peace	**Three Justices sitting together**
s 19(a) JA	s 20(a) JA
An offence specified in Part I, Schedule 1 JA	An offence specified in Part II, Schedule 2 JA
Any offence other than those above, but only to take the defendant's plea	Where an Act creating the offence expressly provides that three Justices shall have jurisdiction to preside over the matter
Where the Act creating the offence expressly provides that a justice has jurisdiction to hear the matter	In any case where an election or its withdrawal is made under s15A JAA (1991)
Offences punishable by fine only or by a term of imprisonment not exceeding 3 years under the Transport Act 1966	

Sentencing	
s 21(1) JAA (1991)	s 21(2) JAA (1991)
You may only sentence a defendant to imprisonment for a maximum term of 2 years; or a maximum fine of $500; or both, and if an Act specifically states the maximum penalties (as above) then that is the maximum penalty you can impose	The three Justices may only sentence a defendant to imprisonment for a maximum term of 3 years; or a maximum fine of $1000; or both
If an Act provides a minimum penalty, you must sentence the defendant to at least that minimum penalty	If an Act provides a minimum penalty, the Justices must sentence the defendant to at least that minimum penalty

Note: The tables in "Common offences" show the offences under the Crimes Act 1969, Narcotics and Misuse of Drugs Act 2004 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.

3.4.2 Election

s 15A JAA (2019).
As long as ss 14–15 JA do not apply, a defendant can elect to have a trial before three Justices sitting together or before a Judge alone where the matter is to be tried under:

- Part X CA and the information is for a monetary value of up to $5000, with a possible sentence of 10 years or less;
- s 250 CA;
- s 119 Transport Act;
- 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.

3.4.3 Civil and other jurisdictions

To hear and determine a civil action	
One Justice of the Peace	**Three Justices sitting together**
s 19(b) JAA (No 2 1986); s 19(b)(iii) JA	s 20(b)(i) JAA (No 2 1986); s 20(e) JA
For the recovery of any debt or damages not exceeding $1500	For the recovery of any debt or damages exceeding $1500 but not exceeding $3000
For the recovery of chattels not exceeding $1500 in value	For the recovery of chattels exceeding $1500 in value but not exceeding $3000 in value
Where any other Act expressly gives civil jurisdiction to a justice	Where any other Act expressly gives civil jurisdiction to three Justices sitting together
Other jurisdiction	
s 19 JA; s 19 JAA (2000)	s 20 JA
In any application for an order under s 141 CIA (judgment summonses)	In proceedings under Part VIII CIA relating to extradition
In proceeding under s 589 CIA relating to the custody of persons of unsound mind arrested under that section	In proceedings under the Fugitive Offenders Act
In proceeding under s10 JA relating to custody of a minor	To hear a case and commit a fugitive to prison to await his/her return in the manner prescribed in the Act

3.5 Judges

3.5.1 Appointment

Arts 49, 52 of the Constitution.

If only one Judge is appointed, they are the Chief Justice of the Cook Islands. If more than one Judge is appointed, then one will be chosen to be Chief Justice: Art 49(2).

The King's Representative, acting on the Executive Council's advice given by the Prime Minister, appoints the Chief Justice of the High Court: Art 52. Other Judges are also appointed in a similar way, but on the advice given by the Chief Justice of the High Court and the Minister of Justice.

To be qualified for appointment as a High Court Judge, the person must:

- be or have been a Judge of the New Zealand High Court, Court of Appeal or the Supreme Court or any equivalent office in any other part of the Commonwealth or in a designated country; or

- have been in practice as a barrister in New Zealand, or in any other part of the Commonwealth or in a designated country, or partly in both, for a period(s) of not less than 7 years: Art 49.

3.5.2 Jurisdiction

Arts 47, 49 of the Constitution.

The Judicature Act sets out the jurisdiction and powers of Justices appointed under the Constitution. A Judge of the High Court may exercise any of the jurisdiction and powers of any division of the High 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.

3.5.3 Term of office

Art 53 of the Constitution.

A person of any age who is resident in the Cook Islands and who is qualified for appointment, may be appointed as the chief justice or other Judge of the High Court for a term of up to 3 years. They may be reappointed for one or more further terms if each term is not more than 3 years.

Non-resident persons of the Cook Islands who are 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 3 years, but may be reappointed for one or more further terms, being in each case a term of not more than 3 years.

The Chief Justice or any other Judge of the High Court may resign by writing to the King's Representative.

3.5.4 Removal from office

Art 54 of the Constitution.

The King's Representative is the only person who can remove a Chief Justice or other Judge of the High Court. The only grounds for removal from office are the inability to discharge the functions of their office due to infirmity of mind, body, any other cause, or misconduct.

The King's Representative must first refer the matter to a tribunal (consisting of three persons qualified to be appointed as Judges) to inquire into the matter and report to the King's Representative with their recommendations. While the matter is being decided, the King's Representative acting on the advice of the Prime Minister may suspend the Judge in question for up to 1 month, and for another month if the matter has not been decided earlier.

3.6 Justices of the peace

3.6.1 Appointment and removal from office

Art 62 of the Constitution.

The King's Representative, acting on the advice of the Executive Council given by the Minister of Justice, appoints Justices of the Peace. If a justice decides to stand for election to Parliament they must stop acting in a judicial capacity before becoming a candidate, but this does not otherwise affect their status as a Justice of the Peace: Art 62(2) of the Constitution Amendment (No. 17) Act 1994–95.

The King's Representative, acting on the advice of the Chief Justice may remove a Justice of the Peace from office.

3.6.2 Jurisdiction

The Judicature Act prescribes the jurisdiction and powers of Justices of the Peace appointed under Art 62 of the Constitution.

3.7 Transfer of cases to a Judge

ss 22, 24 JA.

Under s 22 of the Judicature Act, you may take a plea for an offence for which only a Judge has jurisdiction. You may also:

- if they plead guilty, remand the defendant, with or without bail to appear before a Judge to enter any conviction or for sentencing; or
- if the defendant pleads not guilty, take an election under s 16 of this Act, if it is required, and remand the defendant, with or without bail, to appear in the High Court for trial by a Judge alone or a Judge sitting with a jury.

Under s 24 of the Judicature Act, where you have jurisdiction to deal with the matter (either before three Justices, or before one justice) you may:

- decline to deal any further with the matter, at any time before the defendant has been sentenced or otherwise dealt with and require that it shall be dealt with by a Judge of the High Court; and
- endorse on the Information a certificate stating the reasons for the decision to transfer the case: s 24(1) JA.

If a defendant has been convicted or has pleaded guilty, you must:

- remand them for conviction or sentence or both by a Judge;
- make an order to change the place of the hearing under s 37 CPA; and
- have the Information, a statement of the facts of the case, and the bail bond presented to the Judge as soon as is practical: s 24(2)(a) JA.

In all other cases the Judge shall deal with the information in all respects as a rehearing: s 24(2)(b) JA.

3.8 Other officers of the court

Other officers of the court include:

- the registrar;
- the deputy registrar;
- administrative officers.

3.8.1 Registrar

s 4 JA.

The registrar of the High Court is appointed under the Public Service Act (PSA) 1975 and can give valuable help and advice on procedure and the law.

The registrar:

- keeps the records of the Court;
- performs administrative duties of the Court that the chief justice directs;
- is, in effect, the sheriff of the Court: s 4 JA.

In addition to the general duties above, the relevant sections of the Criminal Procedure Act specify that the registrar may:

- issue summonses or arrest warrants for the defendant or witnesses;
- grant leave for an arrest warrant to be withdrawn;
- issue search warrants;
- take the oath for an Information to be substantiated;
- give leave for an Information to be withdrawn or amend an Information;
- take pleas and accept guilty pleas made in writing;
- adjourn the hearing of a charge;
- remand a defendant in custody;
- grant bail and accept bail bonds;
- prohibit the publication of names;
- take statements of dangerously ill witnesses;
- amend minutes or judgments or other records of the Court.

3.8.2 Deputy registrar

s 5 JA.

Deputy registrars of the High Court are appointed, as is necessary under the PSA and have 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 ss 79 and 79A CPA (s 79A was inserted by CPAA 1998), remand a defendant in custody under s 81 CPA, grant bail or prohibit the publication of names under s 79B CPA (as inserted by CPAA 2020).

3.8.3 Administrative officers

s 6 JA.

Administrative officers are sheriffs, bailiffs, clerks, interpreters, or other officers needed for the High Court. Court administrative officers perform administrative duties as assigned to them by the registrar.

4. Judicial conduct

4.1 Judicial conduct generally

You must conduct yourselves to avoid both any compromise in carrying out your obligations, as well as giving the appearance of doing so. 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 that will not bring themselves or their office into disrepute.

All judicial officers also share a collective obligation to maintain respect for the judiciary and for the law. These obligations extend beyond judicial work and carry into social responsibilities that can (at times) be more onerous for judicial officers than are expected of others in the community.

There are three basic principles guiding judicial conduct (and private affairs):

- judicial independence – your conduct is governed only by the law and by the judicial oath;
- impartiality – in both the decision and the decision-making process; and
- integrity – your conduct in court and in private dealings is above reproach in the view of reasonable, fair-minded and informed persons.

4.2 The rule of law

The doctrine of "The rule of law", in its simplest form, means that we are all subject to clearly defined laws and legal principles (rather than the person whims of powerful people) and that those laws apply equally to all people, all the time.

The rule of law provides checks and balances for all three branches of government including the executive (the government), legislature (Parliament), and the judiciary. It is the judiciary's role to interpret and implement the Constitution, which may include situations where the court needs to decide whether the executive or the legislature have overstepped the boundaries of their constitutional powers. Upholding the constitutional roles of the executive and the legislature is ultimately the most important duty and contribution that the judiciary makes to upholding the rule of law.

In a criminal justice system, the "separation of powers" principle means that:

- Parliament is responsible for passing laws about what acts are crimes;
- the executive government is responsible for investigating and prosecuting crimes and enforcing court sentences; and
- independent courts are responsible for interpreting the laws, deciding whether a person is guilty or not guilt and sentencing.

4.3 Natural justice

Natural justice is the duty to act in a procedurally fair manner. A decision made in a court, although it may be justified on the evidence before it, can be appealed against or judicially reviewed because of procedural unfairness.

The two fundamental principles of natural justice are:

- hear the other side;
- no one may Judge in their own cause.

Together, these principles combine to ensure that:

- all relevant information is submitted;
- bias and prejudicial information is ignored;
- proceedings are fair in the sense that each party has the opportunity to know what is being said against them and has an adequate opportunity to reply.

Decision-makers should not allow their decisions to be affected by bias, prejudice or irrelevant considerations.

Bias arises when a decision-maker is leaning towards a particular result, or that it may appear to the party that that is the case. There may be:

- pecuniary or other interest;
- some relationship with a party or witness; or
- a personal prejudice or predetermination of an issue. This could include bias against a party or legal issue on the basis of a party's gender, race, religion, age, class, disability or other social status. Being self-aware and consciously avoiding applying stereotypes based on these kinds of characteristics is an important part of a judge's duty not to be affected by bias, prejudice or irrelevant considerations.

Each case depends on its own factual and legal circumstances, and these – and the evidence advanced about them – must be the only basis for your decision.

Justice must not only be done but must be seen to be done. The appearance to others is important. If you have any interest in a case, or if it looks as though you may have an interest, disqualify yourself from presiding.

When you are applying the law you should bear in mind that no enactment should be construed or applied so as to deprive any person of the right to a fair hearing, or deprive any person charged with an offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal: Art 65(1)(d) and (e).

4.4 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 His Majesty as the Head of State of the Cook Islands, His 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 oath can be divided into parts to illustrate several well-established ethical principles of judicial conduct.

4.4.1 "Well and truly serve"

You should diligently and faithfully carry out your judicial duties. This means you should:

- devote your professional activity to all your judicial duties;
- bring to each case a high level of competence and be sufficiently informed so you can provide adequate reasons for each decision;
- deliver all decisions, rulings and judgments as soon as possible and with as much efficiency as circumstances permit – to do this you should:
  - be familiar with common offences, jurisdiction and procedure;
  - prepare before sitting in court;
  - make particular efforts to efficiently progress cases involving people held in pre-trial detention and more vulnerable parties (such as children, survivors of family or sexual violence, people with disabilities etc).
- 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 approve such conduct in colleagues.

You must also be diligent when overseeing the conduct of the court in assuring that each party is given full opportunity to present their case efficiently.

4.4.2 Act "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 matters when making your decisions nor should you be swayed by the media – the exercise of judicial discretion should only be influenced by legally relevant matters;
- not hand over your discretionary powers to another person – it is for you to decide; and
- defend the constitutionally guaranteed rights of the Cook Islands people.

"Law" means any law for the time being in force in the Cook Islands; and includes this Constitution and any enactment: Art 1(1) Interpretation; Constitution.

"Enactment" means any Act of the [Parliament] of the Cook Islands, any Ordinance, any Act of Parliament of New Zealand in force in the Cook Islands, and any proclamation, order, regulation, or rule, or any Island Council Ordinance or bylaw: Art 1(1) Interpretation; Constitution.

4.4.3 "Do right to all manner of people"

You should strive to conduct yourself with integrity to sustain and enhance public confidence in the judiciary. Judicial officers make decisions that affect peoples' lives. You should demonstrate a good and moral character so you can be trusted and respected.

You are expected to put the obligations of judicial office above your own personal interests. Encourage and support your judicial colleagues to observe this high standard.

You should conduct yourself and any proceedings to ensure equality according to the law. This means you should:

- carry out your duties for all persons (parties, witnesses, court personnel and judicial colleagues) without discrimination including on the basis of their gender, age, religion, race, class, disability or other social status;
- during proceedings before you, 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 that are prohibited by law.

Article 64(1)(b) also protects the right of the individual to equality before the law and to the protection of the law in the Cook Islands, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex. While not specifically mentioned in Article 64(1)(b), people with disabilities are also legally protected from all forms of discrimination, as per the Disability Act 2008, reflecting the Cook Islands' ratification of the *Convention on the Rights of People with Disabilities* in 2009.

Care should be taken to ensure proper access to justice and equality of treatment where one or both of the parties before the court are unrepresented or suffer from other particular vulnerabilities or disadvantages in accessing justice. This includes victims of family and sexual violence, children, people with disabilities, those who are poor, less-educated or live in remote locations.

4.4.4 "Without fear or favour, affection or ill will" (conflict of interest)

Judicial independence is a part of the rule of law and helps to guarantee a fair trial. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also the process by which the decision is made.

Article 65(1)(e) of the Constitution also affirms the right of any person charged with an offence to be presumed innocent until they are proved guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Impartiality must exist both as a matter of fact and as a matter of reasonable appearance. The appearance of impartiality is measured by the standard of a reasonable, fair-minded, and informed person: the question in each case is whether to a reasonable and informed observer there would appear to be a real danger of bias: see *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142.

Judicial independence and impartiality means you should:

- 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;
- exhibit and promote high standards of judicial conduct to reinforce public confidence.

You must be, and should appear to be, impartial with respect to your decisions and decision making. The appearance that a Judge is not impartial can be given by apparent conflict of interest, by judicial behaviour on the bench, and by your associations and activities off the bench.

This means you should:

- strive to ensure that your conduct, both in and out of court, improves confidence in your impartiality and that of the judiciary;
- be aware of and understand differences arising from gender, race, religious conviction, culture, ethnic background and suchlike;
- not allow your decisions to be affected by:
    - bias or prejudice, including those based on stereotypes or assumptions about different groups or characteristics of people,
    - personal or business relationships,
    - personal or financial interests.

This principle touches several different areas of your conduct.

Judicial manner

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 (see "Courtroom conduct" below).

Civic and charitable activity

You are free to participate in civic, charitable and religious activities, but:

- avoid any activity or association that might be seen to affect your impartiality or interfere with the performance of your judicial duties;
- do not solicit funds (except from judicial colleagues or for appropriate purposes) or support any such fundraising;

- avoid involvement in causes and firms engaged in litigation;
- do not give legal or investment advice.

Political activity

Independence from political influence must not only be maintained but it must be seen to be maintained. For this reason, you must resign from judicial office if you are standing for Parliament. You must be independent of all sources of power or influence in society, including the media and commercial interests (but you may still be involved in business as long as it does not conflict with your judicial duties).

Make no public comment about the government or the need for the government to act or stop acting in any way, unless it is in the context of a judgment where it is relevant to assess the lawfulness of government acts. The judiciary must be seen to have no political opinion. You should not:

- join or contribute to political parties and or attend political fundraising events;
- publicly take part in controversial political discussions, except for matters directly affecting the operation of the courts, the independence of the judiciary or the administration of justice;
- sign petitions to influence a political decision.

Family members may be politically active, but if this negatively affects the public's view of your impartiality in any case, you should disqualify yourself from hearing the case.

Conflict of interest

A conflict of interest is any situation where your decision making could be affected by some other relationship, obligation or duty that you have. You must disqualify yourself in any case in which you believe that you will be unable to judge impartially.

Even if there is no actual conflict, 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.

Relevant categories of conflicts of interest include:

- Personal: for example, an opportunity to gain personal advantage or economic or other benefits, or to avoid disadvantage;
- Family: for example, an opportunity or pressure to assist or provide an advantage or economic or other benefits to, or avoid a disadvantage for, family or friends
- Community: for example, an opportunity or pressure to assist or provide an advantage or economic or other benefits to, or avoid a disadvantage for, a community or stakeholder group.

Therefore, 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. That also means you have a conflict of interest. You must disqualify yourself wherever you have personal knowledge of disputed facts in proceedings, or wherever you have a personal view concerning a party or witness of disputed fact in the case.

The question of disqualification is for you. It is sensible for you to decline to sit in cases of doubt. Be alert to any appearance of bias arising out of connections with litigants, witnesses or their legal advisors. You should always inform the parties of facts that might reasonably give rise to a perception of bias or conflict of interest.

The registrar should make written disclosure with sufficient information to all the parties as early as possible before the hearing. There may be circumstances not known to you that may be raised by the parties after such disclosure.

Advance disclosure often may not be possible due to listing arrangements with disclosure on the day of the hearing. The parties should be given an opportunity to make submissions on recusal after full disclosure of the circumstances giving rise to the question of disqualification. It is not enough to get the parties' consent if an actual conflict of interest exists. You have to make your own decision.

If a conflict of interest arises, 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. 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 argue for disqualification;
- no other Justices of the Peace are available to deal with the case; or
- because of urgent circumstances, failure to act could lead to a miscarriage of justice, place someone at risk due to lack of legal protection or lengthen pre-trial detention.

Note this carefully on the record.

4.5 Conduct in the court

4.5.1 Preparing for a case

Ensure you have studied and understood the cases you will be dealing with. Before court starts you should:

- arrive in good time – at least half an hour beforehand;

- study the court list;
- read any reports that are relevant for that day;
- ensure you know the relevant sections of Acts and penalties (especially for infringement matters) and have these at hand;
- if possible, check the list of defendants to see if you know any of them and to ensure you can pronounce all names correctly;
- check that arrangements have been made for the participation of any parties with particular needs, for example:
    - ensure that court staff have directed vulnerable witnesses or children to a separate waiting area and that screens are available and in place in the courtroom, or for them to provide video evidence from a separate room, for when they give their evidence;
    - reasonable accommodations have been arranged for people with disabilities so they can access, understand and participate in their case as others can;
    - for cases involving children, consideration has been given to creating a less formal environment, such as by changing the layout of court room furniture;
    - interpreters have been arranged for those who require them.
- ask the registrar any questions you may have.

For criminal matters, make sure you know what elements of the offence must be proved; that is, the essential parts an offence. Each essential element must be proved beyond reasonable doubt by the prosecution before the charge is proven. See "Common criminal offences" to find out more about the elements for common offences.

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

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

It is a well-established principle of natural justice, and 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.

A party whose interests or property may be affected by a decision has the right to be heard before the decision is made. This includes hearing from any children who may be affected by a court decision, whether they are a party to a case, or not, so that their 'best interests' can be made a primary or even 'paramount' consideration (as per the Family Protection and Support Act 2017, which must be interpreted in accordance with the Convention on the Rights of the Child,('CRC', ratified by the Cook Islands in 1997), which includes Article 12 giving children a right to be heard in any case which affects them. The way that you hear from children and the weight that you place on their expression of preferences will depend on the age and maturity of the child. This principle focuses on the procedures followed by the decision-maker and its effect on the parties.

There are three parts to this principle:

1 Prior notice.

2 Fair hearing.

3 Relevant material disclosed to parties.

If the defendant:

- is not represented by a solicitor;
- is clearly not familiar with procedures;
- is not fluent in English/Maori; or
- has other difficulty in good self-expression, due to their lack of education, age, mental or physical disability or for any other reason, they may be unable to put forward their side of the case, which may compromise the fairness of the process to them,

they may be unable to put forward their side of the case. These questions require your judgement of the situation, including your ability to still conduct a fair trial, based on the degree of disadvantage and legal consequences the person may face. The right to retain and instruct a solicitor where practicable is recognised in the Constitution (Art 65(1)(c)(ii)). If you have doubts, then do not proceed but rather adjourn the case and refer the person to legal aid or if necessary, a pro bono lawyer, or to a duty lawyer if one is available.

Relevant sections of the Criminal Procedure Act 1980–81 (CPA) also provide for prior notice, fair hearing and disclosure in criminal trials including:

- s 17 (further particulars for an Information);
- s 22 (issue of summons to defendant);
- s 23 (issue of summons or warrant for attendance of witnesses);
- s 25 (mode of service of documents on defendant);
- s 30 (proof of service);
- s 99 (pre-trial disclosure);
- s 101 (adjourn trial where the defence has been taken by surprise).

Prior notice

You should:

- allow each party sufficient notice to prepare their case including: submissions, to collect evidence to support their submissions and to rebut or contradict the other party's submissions;
- be satisfied that adequate notice has been given, as required by law or otherwise adjourn the case; and
- if the defendant or respondent does not take any steps or appear at the hearing, ensure you have 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.

Fair hearing

Article 65(1)(d) of the Constitution protects the right of any person to a fair hearing, in accordance with the principles of fundamental justice, to determine their rights and obligations before any tribunal or authority having a duty to act judicially.

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. See *Samatua v Attorney General* [2015] CKHC 14; Plaint 5.2012 (3 June 2015).

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. The parties must be given an opportunity to respond to everything that is said to you by the other side. At the same time, the court must balance other aspects of providing a fair hearing, such as ensuring that someone held in pre-trial detention is not held for any longer than is strictly necessary, and the urgency of the case type.

It always requires you to ensure you have all the relevant facts and materials before deciding. Be careful not to:

- discuss the case outside the courtroom;
- receive any information about the case privately – if you receive information privately, you must disqualify yourself;
- conduct your own research into questions of fact;
- ensure that any affected children are heard by the court and their views and 'best interests' taken into account as primary or 'paramount' considerations, where relevant.

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 may take into account.

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

Any decision on whether adequate disclosure has been made is up to your judicial discretion. You may order the party holding the relevant information to disclose all or part of it to the defendant or refuse to make the order. You must consider what effect this will have on the fairness of the trial or hearing process.

See Cook Islands *Police v Arioka* [2006] CKCA 6; CA 15 of 2005 (9 February 2006), which held that the obligation of further pre-trial disclosure beyond the provisions of s 99 of the Criminal Procedure Act must be assessed on a case-by-case basis. Failure to disclose documents may in some cases give rise to a breach of the Constitution. Before that can occur, however, there must have been an actual miscarriage of justice or a real risk of miscarriage of justice.

4.5.3 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, patient and dignified; take the time to explain things thoroughly, checking that the parties understand, and invite them to ask questions at any time. For most people this will be their first time coming to court and they will not know what is expected of them.
- be humble: if a mistake is made you should apologise;
- continually remind yourself that a defendant is not simply a name on a piece of paper – they want to see justice administered fairly, objectively and impartially;
- remember going to court is nerve-wracking for most people, often made worse by their lack of knowledge and familiarity with the court, its processes and their role within it, plus a fear of potential outcomes of the case;
- remember that vulnerable parties may experience great fear in coming to court. The court has obligations to ensure that all parties feel physically and psychologically safe to perform their role in the process including through checking no one in the court compound is allowed to enter with weapons, ensuring vulnerable parties can wait in separated areas, use of screens for when they give evidence, providing them with detailed briefings/viewing of the court room beforehand by court staff to explain what is expected of them on the day, and judges ensuring that cross examination of witnesses/victims is tightly controlled to ensure they are always treated with dignity and respect and only asked relevant questions;
- never make fun of a defendant or witness;
- show appropriate concern for distressed parties and witnesses;
- never state an opinion that some features of the law are unsatisfactory – if you believe that amendments are needed, discuss this with the Chief District Court Judge;
- 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 with other Justices who are not sitting on the case.

4.5.4 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.

Manage unruly defendants, parties, witnesses and spectators by:

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

- allowing a disaffected person to speak briefly before intervening;
- ensuring vulnerable witnesses are not directly questioned by defendants but rather directing defendants to address their questions to you, and then you ask questions to the witness.

Manage lawyers by:

- exercising your authority in the courtroom;
- asking for an explanation from those who have caused delay or have come unprepared;
- ensuring that witnesses are not bullied and are only asked relevant questions and are treated with dignity and respect at all times;
- dealing promptly with discourteous or unhelpful advocates.

4.5.5 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:

- Your role is not to conduct the case for parties 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, unless it is to manage the tone or relevance of questions being asked to witnesses.
- You may ask questions at the conclusion of cross-examination, but only to try to clarify any unclear matters 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 fairly and impartially with all court users

- Ensure courtesy to all court users.
- Demonstrate a non-prejudicial attitude.
- Address the defendant in an appropriate and respectful manner.
- Ensure that all those before the court understand what is going on by explaining things several times or in different ways, if necessary.
- Show appropriate concern and take appropriate actions to reduce distress to parties and witnesses.

Dealing with parties who do not understand

You may often have unrepresented defendants and parties who do not appear to understand what the proceedings are about. You must ensure that the defendant or party understands:

- the charge faced (criminal); or
- matters in issue (civil); and
- the procedures of the court.

Criminal cases:
When dealing with an unrepresented defendant, you should explain to them:

- the nature of the charge;
- the procedure and formalities of the court;
- the legal implications of the allegations and of their own decisions, such as whether to plead guilty or not.

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

- why they are appearing in court;
- what their 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

- An interpreter should be obtained and sworn in to assist parties with limited fluency in languages used by the court. If you are in any doubt about whether the defendant or a party properly understands what is happening, adjourn the hearing until an interpreter is available.

Fit but compromised – dealing with communication or learning difficulties or mental health issues

People with communication difficulties might find it hard to:

- express themselves through speaking, writing or non-verbal communication;
- understand the spoken or written word;
- understand body language, facial expressions and other ordinary social cues;
- listen to what is being said directly to them or around them;
- remember the information they receive;
- express their feelings and emotions in an appropriate way;
- relate to others in socially acceptable ways;
- think clearly.

A person with communication difficulties, learning difficulties, or mental health issues might benefit from the following changes to the hearing:

- taking breaks at regular intervals, especially while the person is giving evidence – for example, every 20–30 minutes;
- shortening the day – allowing late start times and early finish times;
- ensuring the courtroom is quiet and without distractions;
- speaking slowly and clearly;
- making one point at a time in short sentences;
- allowing time for the defendant to process information and respond;
- allowing pauses for the person to process what has been said and respond;
- be ready to calmly repeat instructions and questions;
- for a litigant in person, frequently summing up the current stage of the court process and what is expected.

If a mentally-ill person does appear before you, the police doctor may be able to advise you on the best way forward. However often people with mental illness have no previous diagnosis or medical history, and you may need to order that the person undergo assessment from a psychiatrist or psychologist to provide you with relevant information to decide what next steps might be needed for the case. If confinement of a mentally ill person is needed, for example if bail bonds need to be signed, the confinement should not be in 'cells' but should be in a medical environment.

Court preparation for cases involving people with disabilities

Under both the Disability Act 2008 and the CRPD, the court is required to make 'reasonable accommodations' to ensure that people with disabilities are able to access, understand and participate in their case on the same basis as others. It is helpful for the court to have advance notice of parties with disabilities so that the court can make preparations to accommodate needs.

For people with hearing impairments, you can make arrangements beforehand as to how they can participate in the hearings, whether it be by simple measures, such as you speaking loudly and clearly and them sitting close to the bench, or whether another mode of communication may be necessary, such as using a deaf interpreter or through exchanging written notes/transcript of the proceedings.

For people with visual impairments, it may be necessary for court staff to read court documents to them beforehand, and to meet and escort them to and from the court room (and to the bathroom etc) on the day of the hearing. It may also be necessary to consider in advance how the person can engage with any visual evidence involved in the case.

For people with mobility disabilities, it is important to schedule the hearing in an accessible space and ensure that court staff meet the person to help them enter the court and to ensure that doorways and court spaces are wide enough for wheelchairs or other mobility devices to pass through and move around. It will also be necessary to identify a disability accessible bathroom they can use; if not at the court premises, close by, and for court staff to accompany them as needed.

For further information see the PJSP Human Rights Checklist 5: When people with disabilities come to court.

4.6 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. Differences of opinion between panel members, whether personal or professional, should never be aired in the media or in court.

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

The role of the chair is to manage the proceedings. From the perspective of the public and those in the court, they oversee the courtroom. This includes structuring and guiding any panel discussions out of court, ensuring the discussions are purposeful and relevant and all members of the bench can be heard.

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

The role of the other members involves:

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

4.7 Appeals

You must not do anything to obstruct an arguable appeal, whether by making findings of fact more conclusive than the evidence justifies or by passing an unduly lenient sentence in the hope that this will deter an appeal. The litigant must not be deprived of the rights provided by the justice system. You should not communicate privately with an appellate court that is hearing an appeal of a determination you have made.

5. Evidence

5.1 Introduction

Evidence is the information used to prove or disprove the facts in issue that are relevant to the case before the court. Evidence includes:

- oral evidence, or what the witnesses say in court;
- written evidence, such as any documents produced;
- real evidence or physical items, such as a knife used in a criminal offence.

When real or documentary evidence is introduced in court, it becomes an exhibit.

In criminal trials, the prosecution generally bears the burden of proving or disproving the facts in issue to establish the guilt of the defendant, unless an enactment specifically provides otherwise. Evidence rules have been established to assist the court as to what evidence the court may (or may not) consider or accept (admissible). The key point with evidence is relevance.

The principal statute dealing with this area of law is the Evidence Act 1968 (EA) and its two amendments:

- Evidence Amendment (No. 2) Act 1986–87 (EAA No. 2)
- Evidence Amendment Act 1986–1987 (EAA).

You may either:

- admit evidence – accept and act on such evidence as you think sufficient, whether such evidence is or is not admissible or sufficient at common law: s 3 EA; or
- reject evidence – refuse to receive evidence whether admissible or not at common law, which you consider irrelevant or needless, or unsatisfactory as being hearsay or other secondary evidence: s 4 EA.

The hearsay rule is that a statement made by a person, other than a person giving oral evidence at trial, is inadmissible as evidence to prove the truth of some fact that has been asserted (see the paragraph below on the hearsay rule).

5.2 Classification of evidence

In a criminal trial you should understand how evidence is classified to properly apply the rules of evidence and take into account both the form of evidence and the content of the evidence. For example, oral evidence (the form) given during a trial may be direct or circumstantial (the content).

5.2.1 Classification by form

Classification by form 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 – 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 – is the statements, or representation of facts, made by witnesses.

5.2.2 Classification by content

Classification by content refers to the way the evidence is relevant to the facts in issue, and in this context evidence is split 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.

2 Circumstantial evidence – this is evidence from which the existence or non-existence of facts in issue may be inferred. It 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. It often works cumulatively in that there may be a set of circumstances, the individual components of which are insufficient to establish the facts in issue, but that when taken as a whole would be enough to do so.

3 Corroborating or collateral evidence – is evidence that is not relevant to 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). It should come from another independent source – for example, an analyst or medical report.

5.3 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 and photographs: s 21 EA;
- statements in documents produced by computers (note that certain rules may apply to this form of documentary evidence);
- tape recordings;
- photographs.

Documentary evidence consists of 'out of court' statements or representations 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 s 22(1) of the Evidence Act.

In any civil or criminal proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document (on production of the original) and tending to establish that fact, is admissible as evidence of that fact if the maker of the statement:

- had personal knowledge of the matters dealt with by the statement; or
- where the document is or forms part of a continuous record, made the statement in the performance of a duty to record information;
- is called as a witness in the proceedings: s 22(1) EA.

However, you don't have to call the maker of the statement as a witness under s 22(1) of the Evidence Act if:

- that person:
- has died;
- is unfit by reason of bodily or mental condition (this could be due to, for example, the young or old age of the person or due to a physical or mental impairment or disability);
- is overseas and it is not reasonably practicable for them to attend;
- has not been found having made all reasonable efforts; or
- the other party, who has a right to cross-examine the witness, does not require the person to be cross-examined.

You may, at any stage of the proceedings (even if the maker of the statement is available but not called as a witness):

- order that such a statement as is mentioned in s 22(1) is admissible as evidence; or
- admit such a statement in evidence without any order: s 22(2) EA.

Also, a certified true copy of the original document or of the material part of it may be produced if specified in the order or as the court may approve: s 22(2)(b) EA.

A statement in a document is not deemed to have been made by a person unless they wrote, made or produced the document (or most of it) or signed or initialed it or otherwise recognised it as accurate: s 22(3) EA.

In deciding on the admissibility of a document, you may draw any reasonable inference from the document's form or contents or any other circumstances: s 22(4) EA.

In deciding whether a person is fit to attend as a witness, you may act on a certificate of a medical officer: s 22(4) EA.

When you are deciding on the weight, if any, to be attached to a statement that is admissible you may consider:

- all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement;
- whether the statement was made at or around the same time as the occurrence or existence of the facts stated;

- whether the maker of the statement had any incentive to conceal or misrepresent the facts: s 23(1) EA.

5.4 Real evidence

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

Documents can also be real evidence when:

- the contents of the document are only 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 facts about a person may also, in some circumstances, be regarded as real evidence:

- their behaviour;
- their physical appearance;
- their conduct or attitude, which may be relevant to their credibility as a witness, or whether they 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.

5.5 Exhibits

When real or documentary evidence is introduced in court, it becomes an exhibit.

5.5.1 Checklist for exhibits

Has:

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

Once an item has become an exhibit, the court must:

- keep the exhibit safe from loss or damage if the court retains the exhibit; or
- if the prosecutor or the police are entrusted with the item, ensure that the defence is given reasonable access to it for inspection and examination.

5.6 Oral evidence

Oral evidence 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 their testimony a statement that they, or somebody else, made outside of the court, the witness is making an "out of court" statement.

The difference between "in court" statements and "out of court" statements is important. If a witness wants to refer to "out of court" statements in their 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:

- outward behaviour of the witness (demeanour);
- delivery;
- tone of voice;
- body language;
- attitude towards the parties.

5.7 Evidentiary issues relating to witness testimony

There are a number of issues that may arise related to witness testimony during a criminal trial including issues around:

- 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 of evidence by witnesses.

5.7.1 Competent and compellable witnesses

A witness is competent to give evidence if they 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: s 77(2) CPA.

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

Privilege is a rule of evidence that allows the holder of the privilege to refuse to disclose information or provide evidence about a certain subject or to bar such evidence from being disclosed or used in a judicial or other proceeding.

Under s 9 of the Evidence Act the following persons have a privilege:

- a minister must not disclose any confession made to them in their professional character, except with that person's consent; or
- a physician or surgeon must not, without their patient's consent, disclose in any civil proceeding (unless the sanity of the patient is in issue) any communication made to them by the patient whilst acting in their professional capacity and that is necessary in order to prescribe or act for that patient.

However, this privilege does not apply to protect:

- any communication made for any criminal purpose; or
- prejudice the right to give in evidence any statement or representation at any time made to or by a physician or surgeon relating to the patient taking out life insurance.

The defendant and co-defendant

s 6 EA; s 75 CPA.

The general rule is that 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 themselves, nor can the court require the defendant to do so.

A defendant is a competent witness for the defence but cannot be compelled to give evidence in their defence at trial unless they choose to: s 75 CPA. If they do choose to give evidence, then they may be cross-examined like any other witness, even if it might incriminate them.

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

- the proceedings against the co-defendant have been stayed;
- the information for a summary conviction has been withdrawn or dismissed;
- the co-defendant has been acquitted of the offence;
- the co-defendant has pleaded guilty to the offence;
- the co-defendant is being tried separately from the other defendant: s 6(5) EA.

Where two or more persons are jointly charged with any offence, the evidence of any person called as a witness for either party may be received as evidence either for or against any of the co-defendants: s 6(2) EA.

Silence does not mean guilt

Sometimes before or after a defendant is charged with a crime, they are asked by the police (and sometimes by friends or family) what they have to say in response to the charge. Some defendants reply and what they have to say – if it is relevant – is admissible in court as an exception to the hearsay rule. Some defendants refuse to say anything in response according to their right to remain silent.

Generally, someone accused of a crime is entitled to say to the prosecution, "You charged me, you prove it", and say nothing further in response. It is for the prosecution to prove beyond reasonable doubt that the defendant is guilty.

This approach is emphasised by a warning that the police are obliged to give to a person suspected of a crime when the police ask the suspect to make a statement. The warning is in these words or similar:

> "You do not have to say anything but anything you do say may be recorded and may be given in evidence."

Note the warning – the suspect does not have to say anything – and so it would be unfair to use the suspect's refusal to say anything as an indication of guilt.

When a defendant refrains from giving evidence as a witness, this cannot be held against the defendant: s 75(1) Criminal Procedure Act 1980–1981 (CPA).

Spouses

ss 6(2)(b), 6(3) EA.
A spouse is a competent and compellable witness for the defence and only the defendant may apply to call their spouse to give evidence: s 6(2)(b) EA.

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 offence is against the wife or husband (or may affect them or their liberty) 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 specifically provides for a spouse to be called without the consent of the defendant;
- the defendant is charged with an offence against s 215 (cruelty to a child) Crimes Act 1969: s 6(3) EA;
- 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 (even if not legally married); or
- at the time of the alleged offence, the person was under the care and protection of the defendant or his wife; and

- the offence is an offence, or attempt to commit an offence, under ss 141– 148, or ss 153–155 of the Crimes Act 1969: s 6(4) EA.

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

Children

Great care should be taken with child witnesses to ensure that, if possible, they tell the court all the relevant information they have.

Children can be competent witnesses in a criminal trial, even in cases where they might not understand the implications of swearing an oath.

Every witness in any criminal matter is required to be examined upon oath under s 332 Cook Islands Act 1915 (CIA) except for children under 12 years of age: s 331 CIA. You may ask them to make the following declaration instead:

> "I promise to speak the truth, the whole truth, and nothing but the truth" (or a declaration to the like effect): s 331 CIA.

You will need to satisfy yourself by questioning the child that they understand what a promise is and that they understand what telling the truth is. You might prepare a series of simple questions for the child designed to see if the child understands a "promise" and "the truth".

Once you have satisfied yourself the child can give evidence, then you need to carefully control how the child gives evidence:

- Ensure that the child is accompanied by a support person to the court.
- If it is possible the child is scared of the defendant, ensure the child is greeted by court staff and taken to a separate waiting area so they do not have contact with the defendant or their associates attending court.
- Consider whether to screen the child from the defendant so that the child cannot see the defendant when giving evidence; alternatively, consider if the child can give their evidence via video conference from another room.
- Make sure any questioning of the child uses simple words that can be easily understood and that all questions are necessary, relevant, understood by the child and asked in an appropriate tone and manner.
- You should never allow a child witness to be harassed or bullied.
- Take regular court breaks to help the child's concentration, and if the child becomes upset, take a break.
- If the child's parents or another support person wants to sit beside the child when giving evidence, you should allow this. Make sure that the parent or support person does not prompt the child.

In any case, the child's evidence is given at your discretion and will depend upon the circumstances of the case and upon the child themselves.

In *Marsters v The Crown* [2018] CKCA 3; CA 3.2018 (9 November 2018) the Court of Appeal confirmed that a child's evidence can be relied upon. The Court stated:

> "At common law and under Cook Islands law there is no competency issue around the calling of a child witness. There is no authority supporting the proposition that the evidence of children cannot be relied on."

In the same case the Court found that the trial judge should have warned the jury regarding assessing evidence of events occurring long ago (in this case, the alleged sexual abuse had occurred 18 years earlier) but that this error had not resulted in any miscarriage of justice as the convictions were inevitable based on all the evidence.

5.7.2 Examination of witnesses

Either party may apply to you or the registrar at any time to obtain a summons calling on any person to appear as a witness at a hearing: s 23(1) CPA.

It is an offence for a witness who has been served with a summons to refuse or neglect to appear in court, or to bring the required evidence to court, without a just excuse. They are liable to a fine not exceeding $40; alternatively you may deal with them through contempt of court.

However, the witness may have a just excuse if they prove:

- there was no summons served on them;
- they did not have the means to travel to the court; or
- they would not be able to recover the cost of travelling and attending court from the party calling them: s 23(4) CPA.

Examination-in-chief

The purpose of a party calling and examining a witness is to gain evidence in support of that party's case (examination-in-chief).

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

Usually, a party is not allowed to attack the credibility of a witness they have called. However, if a witness acts in an adverse manner that frustrates the party calling the witness, they may be treated as a hostile witness and their credibility may be attacked through showing inconsistent statements (see below).

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

- the prosecution must call all their evidence before the close of their case;
- leading questions are not permitted;
- refreshing memory may be permitted (see below).

Cross-examination

The purpose 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;
- to draw questions, in appropriate circumstances, as to the credibility of the witness.

> **Note**: *Browne v Dunn (1893) 6 R 67 (HL)* applies as a rule of practice to allow a fair trial. It requires counsel to "put the case" of their client to the witnesses called by opposing counsel. Failure to do so might be held to imply acceptance of the evidence-in-chief.

It does not displace the other rules of practice that when you put something to a witness, you must provide evidence of what you are proposing. The purpose of the rule is to:

- ensure fairness to the party and the witness whose evidence is contradicted; and
- promote accurate fact-finding by ensuring the trier of fact has the benefit of the witness's response.

The duty is not intended to protect the interests of the party cross-examining the witness.

Inconsistent statements by witnesses

A cross-examining party (or a party in the examination-in-chief) may seek to attack the witness's credibility by asking the witness if they made any prior statements that are inconsistent with present testimony in any civil or criminal trial. If the witness, after being given the circumstances of that statement, does not admit that they made such statement, proof may be provided that they did in fact do so: s 11 EA.

Normally a witness may be cross-examined on written statements without showing these, but if it is intended to contradict such witness then the cross-examining party must make the witness aware of those parts that are being relied on: s 12(1) EA.

You may also at any time during the trial require the writing to be produced for inspection and any use you think fit relevant to the trial: s 12(2) EA.

5.7.3 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 that either:

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

Leading questions may be allowed in the following circumstances for:

- formal or introductory matters, for example, the name, address and occupation of the witness;

- facts that are not in dispute or introductory questions about facts that are in dispute;
- the purpose of identifying a witness or object in court.

5.7.4 Refreshing memory

While giving evidence, a witness may refer to their notes to refresh their memory if:

- the notes have been made by the witness or under their supervision; and
- the notes were made at the time of the incident or almost immediately after the incident occurred.

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 practicable course is to allow the witness to read them.

If the defendant or their lawyer wishes to see the notes, there is a right to inspect them.

5.7.5 Lies

If it is established that the defendant lied (that is, told a deliberate lie as opposed to making a genuine error), this is relevant to their credibility as a witness.

However, it does not necessarily mean that the defendant is guilty.

Experience demonstrates that lies are told for a variety of reasons, and not necessarily to avoid guilt. As with a defendant, where a witness is shown to have lied, this is highly relevant to that witness' credibility.

5.7.6 Corroboration

Where corroboration is required (evidence must be backed up by at least one other source) 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 still convinced that the complainant was telling the truth, you may still convict the defendant.

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 still 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; and

- see whether they avoid giving straight answers in areas of importance.

Also, any documentary evidence admissible under s 23(1) of the Evidence Act as an exception to the hearsay rule is not corroboration of evidence given by the maker of the statement for the purpose of any rule of law or practice requiring evidence to be corroborated or regulating how uncorroborated evidence is to be treated: s 23(2) EA.

5.7.7 The warning to a witness against self-incrimination

Be aware of 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.

A witness may refuse to answer any question that may incriminate them: s 20 EA.

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.

5.7.8 Identification evidence by a witness

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 weight to be given to such evidence is determined by the circumstances under which the identification was made. See *R v Turnbull and Others* [1977] QB 224 where the United Kingdom Court of Appeal made the following guidelines for visual identification:

- How long did the witness observe the defendant?
- At what distance, and in what light, did the witness observe the defendant?
- Was the witness's view blocked in any way (for example, by passing traffic or a crowd)?
- Had the witness ever seen the defendant before?
- How often had the witness seen the defendant and, if only occasionally, had they any special reason for remembering the defendant?
- How long was the time between the original sighting and the subsequent identification to the police?
- Was there any major difference between the description of the defendant given to the police by the witness when first seen by them and their actual appearance?

In *Police v Ruaporo* [1985] High Court of the Cook Islands, Roper J adopted *R v Turnbull & Others* in his reasoning to apply these principles in the Cook Islands.

5.8 Rules of evidence

5.8.1 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 1968 (EA) and the Criminal Procedure Act 1980–81 (CPA).

The important rules of evidence are generally:

- evidence must be relevant to the issues before the court;
- the best evidence must be produced;
- hearsay evidence is not admissible;
- statements of opinion cannot be given unless that person is an expert;
- evidence and the law must be interpreted and understood by all parties to a case. These rules of evidence are discussed in more detail below.

5.8.2 Burden and standard of proof

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

Legal burden of proof

The legal burden is the burden imposed (or responsibility) 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.

Usually in criminal cases the prosecution bears the legal burden of proving all the elements in the offence beyond reasonable doubt (the standard of proof). They will do that by calling evidence from witnesses and using exhibits. The defendant does not have to prove they did not commit the offence.

A good explanation of what is "reasonable doubt" is offered by the New Zealand Court of Appeal in *R v Wanhalla* [2007] 2 NZLR 573. In that case, the Court stated:

> "Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if, at the end of the case, you are sure that the accused is guilty.
>
> It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.
>
> A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have reviewed all the evidence."

The defendant will try to establish a reasonable doubt on one or more elements of the charge or to prove a defence and may call and lead evidence to do so.

In some charges, the prosecution is required to prove something but the burden of proving a particular matter shifts to the defendant because the statute requires the defendant to prove "reasonable excuse"; "reasonable cause"; or "lawful justification".

If the legal burden is on the defendant, the standard of proof required is on the balance of probabilities. For example, if the defendant raises a defence of insanity, they have the onus/burden to establish the defence on the balance of probabilities.
The term "balance of probabilities" means that you must find that it is "more probable than not" that a contested fact exists. This standard of proof is lower than proof beyond reasonable doubt.

The evidential burden of proof

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, due to 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 their evidential burden, then the legal burden of disproving the defence will be on the prosecution.

5.8.3 Judicial notice

The doctrine of judicial notice allows the court to treat a fact as established although 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.
Part 3 of the Evidence Act sets out a list of official documents that you may take judicial notice of (without having to provide evidence) including:

- the Public Seal of New Zealand: s 24 EA;
- any seal or stamp is authorised to be used by any court, officer or body corporate: s 25 EA;
- all public Acts: s 26 EA.

Admissions

The defence may during the trial admit any fact alleged against the defendant and no proof is required of that fact: s 69 CPA.

5.8.4 Admissibility of evidence

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

However, if there are objections to the admissibility of evidence, you should refer the matter to a Judge pursuant to s 106 CPA ("Reservation by Justice of question of law for determination by Judge") as the submissions will likely deal with a question of law. Please see "Appeals, retrials and reservations".

Relevance

If the evidence proposed is relevant to the issues in dispute in the court case before you then, with some exceptions (some exclusionary rules), it will be admissible. Evidence is generally admissible if it goes to prove or disprove a relevant fact.

All evidence that is irrelevant or insufficiently relevant to the facts in issue should be excluded. A relevant fact is that which proves or disproves a claim that:

- the prosecution or defence in a criminal case need to prove to establish their case or disprove the other side's case; or
- the claimant or defence in a civil case need to prove to establish their case or disprove the other side's case.

Generally, a statement is only evidence if the person who, for example, saw the event makes a sworn statement as to its truth. The same generally applies to a document – the person who made the document or signed the document must also swear the document produced in court is the document made or signed by them (exceptions dealt with later).

Relevance is a question of degree and will have to be determined by you, according to specific facts in the case at hand.

What weight (importance) should be given to evidence

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

Once you are satisfied that evidence is truthful you will then need to decide if the evidence you have heard is reliable. Of course, a witness can be honest but the evidence they give can be unreliable. For example, their memory of a conversation may be poor, or an identification of an event may be too far away or too dark to reliably describe what happened.

You will have to decide what weight you give evidence you have heard when you come to a decision. The more reliable the evidence is, the more weight you give it.
To decide what weight to attach to statements rendered admissible, you must consider:

- all the circumstances to decide on the accuracy of the statement;
- if the statement was made at or nearly the same time as the occurrence of the facts stated in the statement; and
- if the maker of the statement was given any incentive to conceal or misrepresent the facts: s 23(1) EA.

Relevant credibility factors include:

- relationships between parties
- alcohol and/or drugs
- performance under cross-examination
- independent evidence
- offender's attempts to maximise/minimise their role in the offending
- statements made before/after/during the incident
- consistency/inconsistency with words or written material
- time between incident and hearing
- memory
- ability to see/observe the incident (lighting, distance and suchlike)
- motive/anger/tension/revenue.

Summary of approach to admissibility

Ask yourself:

- Is the evidence you have heard relevant to the case before you?
- If yes, is the evidence given truthful?
- If yes, how reliable is the evidence?

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.

You have a judicial discretion to exclude prosecution evidence that has been commonly used in cases where the police or prosecution unlawfully, improperly or unfairly obtained evidence.

5.8.5 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.

5.8.6 The hearsay rule

The general rule is that a witness can only give evidence on what they heard and saw but not give evidence of what someone else heard and saw. That is called a hearsay statement – a statement made by a person who is not a witness.

Hearsay evidence is generally not admissible because:

- when a person gives evidence of what another person has said that other person's statement is not given on oath; and
- the other person cannot be cross-examined.

To determine whether evidence is hearsay or not, you must:

- determine the purpose for which the evidence will be used;
- 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.

For example: a statement made to a witness by a person who is not called to be a witness may or may not be hearsay as follows:

- 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; but
- 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 the statement was made.

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.

The rule against hearsay evidence is qualified by common law and some statutory exceptions. However, you may exclude hearsay evidence, even if it is admissible at common law, if you consider it unsatisfactory as being hearsay.

Exceptions to the hearsay rule

Some of the exceptions to the hearsay rule that exist at common law or by statute are:

- confessions;
- evidence of persons about to leave the Cook Islands that is taken before a Judge or justice: s 32 CPA;
- dying declarations: s 33 CPA;
- res gestae (certain statements made during, or soon after, a transaction that is the subject of the court's inquiry);
- telephone conversations.

Confessions are where the defendant has made a statement to another person out of court about the crime they are charged with. This statement is hearsay, but it is admissible.

A confession made after a promise, threat, or other inducement (not being the exercise of violence or force or other form of compulsion) does not have to be automatically rejected on those grounds if you are satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made: s 19 EA.

The statement can be made to anyone – a police officer, friend, relative – anyone. That person, however, must come to court and tell the court what the defendant has said to them. Sometimes what the defendant has to say will be in writing, for example, in a police statement.

The confession can either admit or deny in whole, or in part, the charge. If the statement meets these conditions it will generally be admissible, even though it is a hearsay statement.

A defendant may give evidence in court either denying they made the statement, or admitting the statement was made but saying it was untrue. You will need to resolve this issue in your decision. Sometimes a defendant may challenge a statement they made to the police saying it was unfairly obtained and should not be admitted in evidence. Again, you will need to resolve this challenge and decide if the evidence should not be admitted under s 4 of the Evidence Act.

5.8.7 Opinion evidence

The rule on opinion evidence is that witnesses may only give evidence of facts they have seen, heard or done and not give evidence of their opinion on what they think or believe: this is irrelevant and not admissible.

For example, a witness in a case of alleged assault gives evidence they saw one man strike another. This evidence is relevant to the assault charge and is admissible. In the same case another witness says they are sure the defendant is guilty because he is a bad man. This evidence does not go to proving an assault – it is simply the opinion of one person of the character of another and so the evidence is irrelevant and it is not admissible.

There are two exceptions to the rule on opinion evidence:

- expert opinion evidence on matters within their expertise;
- non-expert's opinion evidence.

Expert witnesses may give opinion evidence if:

- they are qualified to do so (provide their background, qualifications and experience to establish their competence and authority to speak as an expert in the specific field); and
- the matter (issue of fact) requires such expertise 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.

Non-experts may give a statement of opinion on a matter to state relevant facts personally known by them and based on facts. The witness should be asked to describe the persons or circumstances prior to being asked for their opinion.

Examples of non-expert's opinion evidence:

- the identity of an object;

- the handwriting of someone with whom they are familiar;
- a person's age;
- the speed of a vehicle;
- the weather;
- whether relations between two persons appeared to be friendly or unfriendly.

Sometimes it is hard to tell the difference between fact and opinion. Therefore, use your common sense in deciding if the evidence is admissible, and if so, what weight you should give it.

5.8.8 Character evidence

Admissibility of evidence of bad character

The defendant: generally, the prosecution may not introduce evidence of the bad character of the defendant in any form. This includes any:

- previous convictions of the defendant;
- previous misconduct by the defendant;
- attitudes towards wrongdoing or immorality;
- bad reputation of the defendant in the community in which they live.

There are some exceptions to this rule at common law that apply if:

- evidence of other misconduct forming part of the same transaction of the offence charged is admissible at common law;
- the defendant puts their character in issue, evidence of bad character may be admitted at common law;
- the defendant gives evidence, they may in certain circumstances face cross-examination on their character.

Witnesses: A party producing a witness cannot discredit the witness by using general evidence of bad character but may contradict the witness by other evidence.

You may decide if a witness should be compelled to answer a question on cross-examination that is not relevant to the case but does affect the witness's credit by injuring their character: s 16(1) EA. In exercising your discretion, you may decide that such questions are proper if the truth of their allegations would seriously affect the opinion of the court as to the credibility of the witness on the matter they are giving evidence about. Such questions are improper if:

- they relate to matters so remote in time or are of such character that even if true they would not (or only slightly) affect the opinion of the court; or
- there is a large gap between the importance of the charges made against the witness's character and the importance of their evidence: s 16 EA.
- they relate to issues of previous sexual experience of the complainant.

A witness may be questioned as to whether they have 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: s 13 EA.

The proof of previous convictions of a witness can be by fingerprints under s 14 of the Evidence Act or by certificate signed by the registrar or officer of the court where the person was convicted: s 15(1) EA.

Admissibility of evidence of good character

A defendant may introduce evidence to show that they are of good character. But by doing this, they also put their character in issue and the prosecutor may cross-examine witnesses, or sometimes 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, and to point to the improbability of guilt. Evidence of good character also becomes important when sentencing the defendant upon conviction of an offence.

6. Human rights and criminal law

6.1 Introduction to fundamental rights and freedoms

Equality and fairness are the two key principles which underpin human rights law but these principles continue to be challenged by many factors in society today.

The Cook Islands are a party to several international human rights treaties including:

- the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979; ratified by the Cook Islands in 2006
- the UN Convention on the Rights of the Child (CRC) (1989), ratified by the Cook Islands in 1997; and
- the UN Convention on the Rights of Persons with Disabilities (CRPD); ratified by the Cook Islands in 2009.

These Conventions can be directly applied where there is separate national legislation incorporating Convention standards. Section 3(f) of the Family Protection and Support Act 2017, provides that one of the principle purposes of the legislation is to:

> "ensure that the matters to which this Act applies are consistent with the Cook Islands' commitment to Christian principles and to human rights and gender equality, particularly through its commitments to the CEDAW, CRC, and the CRPD."

Beyond the Family Protection and Support Act 2017, the standards contained in each of these three Conventions remain relevant as aids for courts in interpreting Article 65 Constitutional rights and can be referred to by the courts to help resolve issues of statutory interpretation, including any gaps or inconsistencies between national laws.

The three Conventions are relevant to both criminal and civil case types, as both involve fundamental human rights issues.

The CRC contains many guiding principles and standards for the treatment of children as complainants, defendants and witnesses in the criminal justice system.

Convention on Rights of the Child (CRC)

Key principles from the CRC are:

- The 'best interests' of any affected children should be a primary consideration in any decision which affects them (Art 3(1) CRC);
- Children have a right to be protected from all forms of physical or mental violence, injury, abuse or neglect while in the care of parents, legal guardians or others (Art 19 CRC);
- Children have a right to be heard and to have their views considered within any proceeding which affects them, based on their age and developmental stage (Art 12 CRC);
- Children have a right to be diverted from criminal justice processes wherever possible;

- Children have the right to be brought before the court as soon as possible after arrest;
- Children have a right not to be detained or imprisoned without a court order and only as a last resort and for the shortest possible time;
- Where detention or imprisonment cannot be avoided, children have the right to be held in modified facilities separated from adults;
- Children have the right to be provided with free legal representation;
- Children have the right to be accompanied by a responsible adult or parent;
- Children have the right to privacy (meaning they should not be identified through the criminal justice process). This may require their cases to be held in closed court, their names and other identifying information to be removed from public listings and in judgments.

The CRC requires that there be a stated minimum age of criminal responsibility (Art 40(3)(a)) and the CRC committee provides non-binding guidance that this age should be between 14 and 16 years. The global average age of criminal responsibility is 12.

Cook Islands law has an age of criminal responsibility of 10 years. Further the CRC defines a child as being under the age of 18 years, while the Prevention of Juvenile Crime Act 1968 defines a child as being under the age of 16. This means that child defendants aged 16 ('young persons') and 17, are legally treated as adults. This is contrary to the CRC.

Under s 26 of the Prevention of Juvenile Crime Act 1968, the High Court has a discretion to refer cases involving 'young persons' (those aged 16 and 17) to the Children's Court (s 26(1)) or to retain their matters in the High Court but to treat them as they would be treated in the Children's Court (s 26(2)). Expansive application of these provisions by the Court would assist to reduce the risk of children's rights not being upheld by courts due to them being treated as adults, without consideration of their minor age.

Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and Convention on the Rights of Persons with Disabilities (CRPD)

Both CEDAW and the CRPD protect women and people with disabilities from all forms of discrimination (Art 2 CEDAW, Art 5 CRPD) and provide for equality before the law (Art 2(a)-(c) CEDAW, Art 12 CRPD). The CRPD also creates a duty to make 'reasonable accommodations' for people with disabilities so that they are able to participate in all aspects of their cases without discrimination, on the same basis as others: (Art 5(3)).

The CRPD contains the following specific legal protections for those involved in criminal justice proceedings:

- Art 13, access to justice, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages,
- Art 14, prohibition on unlawful or arbitrary detention, existence of a disability shall in no case justify a deprivation of liberty. Reasonable accommodations must be provided to any people with disabilities who are detained or imprisoned.

It is important for you to have an understanding of human rights as they have a direct bearing on your work in upholding human rights as set out in the Constitution and in human rights instruments. Part IVA of the Constitution sets out the fundamental rights and freedoms that are protected in the Cook Islands.

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

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

Art 65(1)(e) of the Constitution.

Every person is entitled a fair and public hearing by an independent and impartial court: Art 65(1)(e).

Remember you are exercising a public function that must always be in open court, unless special circumstances apply.

In *John Michael Collier & Anor v The Attorney-General* [2001] NZCA 328[2002] NZAR 257, 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. The 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 regarded) with favour or disfavour the case of a party to the issues under consideration by the judicial officer.
>
> 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 …".

See also "Judicial conduct".

6.3 Presumption of innocence

Art 65(1)(e) of the Constitution.

Every person is entitled to the presumption of innocence until proven guilty according to law: Art 65(1)(e).

You must ensure that:

- you do not base your finding of guilty on previous knowledge of the accused, and

- the prosecution bears the burden of proving the accused's guilt, beyond reasonable doubt.

In *Frances Neale v Cook Islands Police Department* [1992] CR NO 228 (High Court), Quilliam J stated:

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

Sometimes before or after a defendant is charged with a crime, they are asked by the police (and sometimes by friends or family) what they have to say in response to the charge. Some defendants reply and what they have to say – if relevant – is admissible in court as an exception to the hearsay rule. Some defendants refuse to say anything in response according to their right to remain silent.

Silence is the right of the accused. There is no onus on the defendant at any stage to prove their innocence. The presumption of innocence means that the defendant does not have to give or call any evidence and does not have to establish their innocence. It is for the prosecution to prove beyond reasonable doubt the defendant is guilty. There is no obligation for the defendant to give an explanation to prove their innocence.

For the right to silence see ss 71 and 75 of the Criminal Procedure Act 1980–81 (CPA):

- before the prosecution evidence is given at trial you must caution a defendant who is not legally represented that they are not obliged to give or call evidence and, if they do not, that fact will not be allowed to be the subject of any comment: s 71 CPA;
- no adverse comment may be made where the defendant refrains from giving evidence as a witness: s 75 CPA.

In most countries this approach is also shown by police, who are obliged to give a warning to a person suspected of a crime when the police ask the suspect to make a statement. The warning is in these words or similar:

> "You do not have to say anything, but anything you do say may be recorded and may be given in evidence."

6.4 Right to freedom from cruel or degrading treatment

Art 65(1)(b) of the Constitution.

Article 65(1)(b) of the Constitution protects the right to freedom from cruel or degrading treatment. In *Re Metuavaine Miri* [1995] CKHC 7 (9 May 1995), 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 especially Art 65(1)(b) of the Constitution, the right to freedom from cruel or degrading treatment.

The defendant, who had escaped from prison several times and was up for sentencing after committing several 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 the hope that never again in [the Cook Islands], should such treatment be given to any prisoner ..."

6.5 Right to legal counsel

Art 65(1)(c)(ii).

Article 65(1)(c)(ii) of the Constitution protects the right of any person who is arrested or detained, 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 them and to be able to defend themselves against those charges.

The court should ensure that a defendant is given time to meet with a legal representative if they so choose.

The right to retain and instruct a barrister or solicitor, was canvassed in *Police v Ngametua Tutakiau* [2002] NZAR 520 (19 November 2001). 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 said:

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

6.6 Right not to be convicted of any offence unless it is in breach of a law in force

Art 65(1)(g) of the Constitution.

Article 65(1)(g) protects the right of any person not to be convicted of any offence except for the breach of a law in force at the time of the act or omission.

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.

6.7 Freedom from unlawful and arbitrary detention

Art 65(1)(c)(iii) and (1)(f) of the Constitution.

Article 65(1)(c)(iii) protects the right of any person who is arrested and detained to apply, by themselves or by someone on their behalf, for a writ of habeas corpus to determine the validity of their detention and to be released if their detention was unlawful.

Habeas corpus is an ancient court petition that 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. It provides that on application, the High Court may 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
- that every person who disobeys such order shall be guilty of contempt of the High Court.

Article 65(1)(f) of the Constitution provides people charged with criminal offences the right to 'reasonable bail, except for just cause' creating a strong Constitutional presumption in favour of bail and against the use of pre-trial detention.

7. Principles of criminal law and criminal responsibility

7.1 Introduction

In the Cook Islands, every criminal offence is created by a statute, regulation or by-law and not the common law, under s 8 of the Crimes Act. The Crimes Act 1969 (CA) is the main statute that sets out those acts or omissions that should be regarded as a criminal offence in the Cook Islands.

This section will discuss:

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

7.2 Principles of criminal law

7.2.1 Innocent until proved guilty

One of the most important principles in criminal law is that the defendant is innocent until proved guilty: Art 65(1)(e) of the Constitution.

Unless and until the prosecution proves beyond reasonable doubt that the defendant is guilty of all the elements of the offence, they are innocent in the eyes of the law. Acting on this principle, for example, you may grant alleged offenders bail allowing them to remain in the community while they await trial. See "Bail".

Silence is the right of the accused. The defendant does not have to give or call any evidence and does not have to establish their innocence. It is for the prosecution to prove beyond reasonable doubt the defendant is guilty. See also ss 71 and 75 of the Criminal Procedure Act 1980–81 (CPA). See also "Human rights and criminal law" to find out more about the presumption of innocence.

7.2.2 Double jeopardy

Another important principle is that a person cannot be prosecuted, and punished, for the same crime more than once. There are two parts to this rule: it prohibits not only double punishment, but also protects individuals from repeated attempts by the state to prosecute them for the same offence. See *Police v Ngau* [1992] CKHC 3; CR 727–730.1991 & 757.1991 (24 June 1992).

7.2.3 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. The defence does not have to prove anything unless they raise an affirmative defence. This could be insanity, for example, or a statutory defence where it is an element of the defence itself, for example that the defendant acted "without reasonable excuse" (which they must prove on the balance of probabilities).

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 decide the guilt or innocence of the accused by reason and not by emotion.

The standard of proof, on which the prosecution must satisfy you, is beyond reasonable doubt. 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.

See also "Evidence" to find out more about the burden and standard of proof.

7.2.4 What must be proved

Physical act (actus reus)

Most offences require proof of a physical act or series of acts, conduct or omission (actus reus) 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.

Mental capacity (mens rea)

Most offences require the prosecution to prove the defendant had a particular state of mind in addition to the act and its consequences.

The state of mind could be:

- intention – the defendant means to do something, or desires a certain result (this can include deliberate or negligent acts or omissions);
- 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 that 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.

It is then open to the defendant to point to an absence of intention or bring sufficient evidence on which a finding of absence of intention could reasonably be based. The defendant does not have to prove that there was no intention – it is for the prosecution to prove there was an intention beyond reasonable doubt.

In most cases, proof that the defendant did the prohibited act is also sufficient on first impression (prima facie) of evidence of intention. You can infer "intention" from the fact that the defendant committed the essential act – that is, you can presume that individuals intend the natural consequences of their actions.

If, after hearing the defence evidence, you are not satisfied beyond reasonable doubt that the defendant had the necessary intention, then you must dismiss the charge.

7.2.5 Criminal responsibility

Part III of the Crimes Act provides for statutory justifications or excuses in the case of all charges to which they apply: s 23(2) CA. Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

All common law rules that provide for a justification, excuse or defence to any charge, still apply to an offence under the Crimes Act or under any other statute, unless they are altered by or are inconsistent with the Crimes Act or any other statute: s 23(1) CA.

Generally, a defendant's case will rely on one of the following:

- the prosecution has not proved all the elements beyond reasonable doubt;
- they have a specific defence, specified in the actual offence (for example, without lawful excuse, reasonable excuse, or reasonable cause or lawful justification);
- they were not criminally responsible under Part III of the Crimes Act or the common law.

In the case of a specific defence or lack of criminal responsibility under Part III of the Crimes Act or the common law, the defendant must provide some evidence in support of the defence. Then, it is the prosecution that must exclude that defence beyond reasonable doubt.

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 intention for the offence.

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

1 Those rules that relate to the defence that the defendant did not have the mental intent or was acting involuntarily. These include:

- ignorance of the law

- negligence, involuntary actions and accidents
- mistake of fact
- intoxication
- insanity
- infancy.

2 Some of the rules that relate to excuses or circumstances that justify, in law, the conduct of the defendant are:

- compulsion
- self defence or defence of person
- defence of property
- claim of right.

7.2.6 Ignorance of the law

The fact that an offender is ignorant of the law is not an excuse for any offence committed by them: s 28 CA. The prosecution does not have to prove the defendant's knowledge of the law to prove its case. However, you may take this into account when determining the appropriate sentence.

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 may raise evidence that they did not know that their acts 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.

7.2.7 Negligence, involuntary acts and accidents

A person is generally not criminally responsible for an act or omission that occurs independently of the exercise of their will or for an event that occurs by accident unless a statute expressly states otherwise for negligent actions and omissions.

Negligent acts or omissions

Criminal negligence is where the defendant's act or omission, which constitutes the offence, does not comply with the standards of a reasonable person. 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 behaviour in the same situation.

For example: Robert balances a 10-litre bucket of paint on top of the partly open front door of his busy café during normal opening hours without putting up any signs to warn customers not to use the door.

Involuntary actions

Most criminal offences require that the defendant's actions or omissions be 'willed' or 'voluntary'. A defendant will not be criminally responsible for acts or omissions that are involuntary.

For example: Robert was thrown through his café shop window by an irate customer and landed on a car bonnet. 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.

Automatism

Automatism is a common law defence when a defendant is not consciously in control of their own mind and body. It must 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 they fell into the condition.

The state of automatism can arise from: concussion; sleep disorders; acute stress; some forms of epilepsy and some neurological and physical ailments. Expert medical evidence is usually required. The prosecution must prove 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 their actions were involuntary: *Bratty v Attorney-General for Northern Ireland* [1961] 3 All ER 523.

Accidents

A person is generally not criminally responsible for an event that occurs by accident and was not intended. You must ask yourself, "would such an event have been easily foreseen by an ordinary person in the same circumstances?"

The prosecution must prove that the act or omission was not an accident, beyond a reasonable doubt. However, the defendant must supply some evidence to support the defence of accident if they raise this.

7.2.8 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 taken from the evidence presented: did the defendant have a genuine and honest belief as to the state of things, even though they were mistaken in that belief?

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

- the prosecution must prove the unlawfulness of the defendant's action;
- if the defendant has been labouring under a mistake as to the facts, they must be Judged according to their mistaken view of the facts; and
- if the defendant was or may have been mistaken as to the facts, it is does not matter that the mistake was unreasonable.

7.2.9 Intoxication

Intoxication or being drunk is not itself a defence to a crime. But instead goes to the state of mind of the defendant: see, for example, *R v Kamipeli* [1975] 2 NZLR 610 (CA) and *R v Clarke* [1992] 1 NZLR 147 (CA).

People may do things when intoxicated that they would not do when sober. But the law holds people responsible for their intentional acts, even if they are drunk at the time. However, if you think it is a reasonable possibility that the defendant was so grossly intoxicated that they did not form any conscious intent at all, then the prosecution has not proved intent to the required standard. See *R v Hagen* CA162/02 4 December 2002.

7.2.10 Insanity

Every person is presumed to be sane at the time of doing or omitting any act until it is proven otherwise: Crimes Act 1969 (CA), s 26(1). However, s 26(2) CA then provides the test for insanity as a defence to criminal responsibility. You must be satisfied on the balance of probabilities that:

- the defendant suffered from "natural imbecility" or a "disease of the mind"; and
- the defendant was so affected by it that:
  - they were incapable of understanding the nature and quality of their act; or
  - they were incapable of knowing that what they did was morally wrong, in light of commonly accepted standards of right and wrong: s 26(2) CA.

Insanity before or after the time of acting, and insane delusions, though only partial, may be evidence that the offender was at the time in such a condition of mind as to render them irresponsible for the act or omission: s 26(3) CA.

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

"Disease of the mind"

The first question is whether there is proof that the defendant suffered from a "disease of the mind" or "natural imbecility" at the time of the offending. This requires a disease or disorder of the mental faculties affecting the ability to understand and think rationally. The mind refers to the mental faculties of reason, memory and understanding, in the ordinary sense. It need not be a permanent condition and it is irrelevant whether the disease is curable.

The defendant should have medical evidence that points to their mental incapacity, to plead insanity. But ultimately the meaning of "disease of the mind" is a legal question for you to decide rather than a medical question, even though medical evidence may be required.

The disease must so severely impair these mental faculties and lead the defendant not to know the nature and quality of the act that they were doing, or that they did not know that what they were doing was wrong.

Even if the disease is shown to have affected the defendant's mind, it is not enough. They must show, on the balance of probabilities, that the disease deprived them of the capacity to know or the capacity to understand.

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 due to doing or omitting to do something, such as taking alcohol with pills against medical advice.

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

Capacity to stand trial is also different from whether the person is exempt from criminal responsibility for their acts due to 'insanity'. Separately from whether a person may or may not have a valid defence for their acts at that time, the court must be satisfied that a person facing trial has capacity to stand trial at that time. The standard necessary for a person to be competent to stand trial includes an ability to (*R v Presser* [1958] VR 45 (a decision of the Victorian Supreme Court):

- form a layperson's understanding of the nature of the charges and the court proceedings;
- challenge jurors and understand the evidence;
- decide what defence to offer; and
- explain his or her version of the facts to counsel and to the court.

See the decision of the Supreme Court of Samoa in *Police v Poloite* [2021] WSSC 50 for a useful discussion on capacity to stand trial.

"Incapable of understanding the nature and quality of their actions"

The next question is whether, if the disorder existed, it rendered the defendant incapable of understanding the "nature and quality" of their actions. The "nature" of the act means its physical characteristics. The "quality" of an act refers to its consequences. For example, a person might understand that they are holding someone's head under water (the nature), but may not understand, in terms of the quality of the act, that doing so will cause that person to drown.

"Incapable of knowing what they did was morally wrong"

Alternatively, the issue is if the disorder existed has it been proven that the defendant was incapable of knowing that what they did was morally wrong. This is judged by the commonly accepted standards of right and wrong.

"Morally wrong" is defined according to the everyday standards of reasonable people. The focus is on the state of mind of the accused and whether they appreciated that what they were doing was wrong. See *R v Macmillan* [1966] NZLR 616 (CA).

7.2.11 Children and criminal responsibility

No person shall be convicted of an offence, by reason of any action or omission, when the person is under the age of 10: s 24(1) CA. 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

Children aged between 10 and 14 shall not be convicted of an offence by reason of any act done or omitted by them when of the age of 10 but under the age of 14 years, unless they knew either that the act or omission was wrong or that it was contrary to law: s 25(1) CA.

It is for the prosecution to prove, beyond reasonable doubt, that when committing the offence, the child knew that their act was seriously wrong or contrary to law. This is distinct from an act of mere naughtiness or childish mischief: *R v Sheldon* [1996] 2 Cr App R 50.

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 they ought not to commit the offence (for example, 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?

In assessing the capacity of a child aged between 10 and 14 to commit a crime, you should bear in mind that the age of criminal responsibility in the Cook Islands, being 10, is below the age recommended by the UN Convention of Rights of the Child Committee of between 14 and 16.

7.3 Rules relating to excuses or special circumstances

7.3.1 Compulsion (or duress)

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

- commit the offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed; and
- believe that the threats will be carried out; and
- are not party to any association or conspiracy whereby they are made subject to compulsion: s 27(1) CA.

A defendant cannot use the excuse of compulsion to avoid criminal responsibility where the offence is: aiding or abetting rape; treason (s 75) or communicating secrets (s 80); sabotage(s 81); piracy (s 103) or piratical acts (s 104); murder (ss 187–188) or attempt to murder (s 193); wounding with intent (s 208); injuring with intent to cause grievous bodily harm (s 209(1)); abduction (s 230) or kidnapping (s 231); robbery (s 256) or arson (s 317).

A defence of compulsion may be available where the defendant intentionally committed the crime but acted under threat of immediate death or grievous bodily harm from a person present when the offence was committed. The threat of harm can be to the defendant or to another person.

In *Hay v R* [2015] NZCA 329, the New Zealand Court of Appeal confirmed that the elements of the defence (similar statutory wording under s 24 of their Crimes Act to the Cook Islands) are:

- The existence of a threat to kill or cause grievous bodily harm.
- The threat must be to kill or cause grievous bodily harm immediately upon refusal to comply.
- The person making the threat must be present during the commission of the offence.
- The defendant must commit the offence in the belief that the threat will be carried out immediately.

Once the defence has been raised, the onus is on the prosecution to disprove compulsion if the defence is supported by credible evidence.

Where a married woman commits an offence, the fact that her husband was present at the commission of the offence shall not raise the presumption of compulsion: s 27(3) CA.

7.3.2 Defence of person

There are three defences in the Crimes Act where a person is justified in using force in defending themself or another person. These are:

- self-defence against an unprovoked assault: s 50 CA;
- self-defence against provoked assault (provocation may be by blows, words or gestures under s 52 CA): s 51 CA;

- in defence of a person under their protection against an assault, if the defendant uses no more force than is necessary to prevent the assault or the repetition of it: s 53 CA.
- For the force to be justified for self defence under s 50 CA it must be:
  - not meant to cause death or grievous bodily harm; and
  - no more than is necessary for the purpose of self-defence.

If the defendant does in fact cause death or grievous bodily harm, this is still justified if the defendant:

- does so due to a reasonable fear of death or grievous bodily harm from the violence of the original assault by the attacker; and
- believes, on reasonable grounds, that they cannot otherwise preserve themself from death or grievous bodily harm: s 50(2) CA.

For self-defence under s 51 CA this is justified if the defendant:

- used the force due to a reasonable fear of death or grievous bodily harm from the violence of the party first assaulted or provoked and believing on reasonable grounds, that it was necessary to save themself from death or grievous bodily harm; and
- did not begin the assault with intent to kill or do grievous bodily harm and did not try at any time to kill or do grievous bodily harm before they had to save themself; and
- declined further conflict and quitted or retreated from it as far as was practicable before the force was used: s 51 CA.

The defence must point to some evidence of this defence to be raised. The prosecution must then show that the act was not done in self defence or defence of another under their protection and/or that the force used was unreasonable: see *R v Bridger* [2003] 1 NZLR 636 (CA).

7.3.3 Defence of property

There are several defences in the Crimes Act where a person with peaceable possession of any property is entitled to use reasonable force to defend their property. These include defence of:

- movable property against trespassers: s 54(1) CA;
- movable property with claim of right: s 55(1) CA;
- a dwelling house: s 57 CA;
- land or buildings: s 58(1) CA.

Peaceable entry to assert your lawful right to any land or buildings is justified under s 59(1) CA, but you must have peaceable possession of that land or building with a claim of right: s 59(2) CA.

Likewise, any person is justified in peaceably entering on the land to exercise any right of way, other easement or profit, to exercise that right of way, easement, or profit: s 60 CA.

The defendant has an evidentiary burden to raise this as a defence, which the prosecution must refute "beyond reasonable doubt": *R v Gorrie* [2007] NZCA 144.

Excess of force: But even though any person may be legally allowed to use force, if they use excessive force they are still criminally responsible according to the nature and quality of the act that makes up the excessive force: s 64 CA.

7.4 Other defences and statutory defences

7.4.1 Claim of right

This is an honest belief that the act was lawful. The test is subjective. This is only a defence where the definition of an offence requires the prosecution to prove absence of claim of right. When successful, a claim of right means the conduct does not attract criminal (or civil) liability. For example, this defence may be raised for the offence of theft. An accused may have a valid defence if they have an honest belief that they had a legal right to take the goods in question.

7.4.2 Statutory defences

There are some offences within your jurisdiction where the provision creating the offence also specifies a defence. For example, where provisions make it an offence to do something:

- "without reasonable excuse"; or
- "without reasonable cause"; or
- "without lawful justification".

Once the elements of the offence have been proved by the prosecution, the burden of proof shifts to the defendant to prove on the balance of probabilities that they had a reasonable excuse.

7.5 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).

7.5.1 Principal offenders

A principal offender is the person(s) whose conduct comes within 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 commits the offence. In cases where there is only one person who is involved in the offence, they will be the principal offender.

7.5.2 Parties

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 offences: s 68(1)(b);

- abets any person in the commission of the offence s 68(1)(c); or
- incites, counsels, or procures any person to commit the offence: s 68(1)(d) CA.

An accessory or party is a person who aids, abets, or counsels or procures the commission of an offence under s 68(1)(b)–(d) CA. 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.

"Aiding or abetting"

The physical acts of aiding, abetting and the offence itself are required for being liable as a party to that offence. Aiding means "assisting, helping, or giving support to" at the time of offence or "encouraging": see *R v Curtis* [1988] 1 NZLR 734 (CA).

The key elements are:

- an offence must have been committed by the principal;
- the defendant was acting in concert with the principal offender (providing encouragement in one form or another); and
- there was some sort of mental link or meeting of the minds between the secondary party and the principal offender regarding the offence.

"Inciting, counselling or procuring"

Inciting means "encouraging, rousing, stimulating, urging or spurring on, or stirring up": see *R v Tamatea* (2003) 20 CRNZ 363 (HC); or to "persuade, pressure or threaten: see *Race Relations Board v Applin* [1973] QB 815.

The elements for inciting are:

- an offence must have been committed by the principal;
- the defendant incited the principal to commit an offence; and
- the defendant intends or assumes that the person they incite will act with the intention or state of mind required for that offence.

The term, "to counsel or procure", generally describes advice and assistance given before the offence is committed.

Counselling means "advising, recommending or instigating": see *R v Tamatea*; or to "incite, solicit, instruct or authorise".

The elements for counselling are:

- an offence must have been committed by the principal;
- the defendant counselled the principal to commit an offence; and
- the principal acted within the scope of their authority: *R v Calhaem* [1985] 2 All ER 267.

It does not matter that:

- the principal offender would have committed the offence anyway, even without the encouragement of the counsellor;
- the offence actually committed is the same as the one that was counselled or a different one; or
- the offence is committed in the way counselled or in a different way.

To procure means to bring about or to cause something or to acquire, provide for, or obtain for another. It requires effort. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening: see *Cardin Laurant Ltd v Commerce Commission* [1990] 3 NZLR 563 (HC).

The elements for procuring are:

- an offence must have been committed by the principal;
- the defendant procured the principal to commit an offence; and
- there is a causal link between the procuring and the offence committed.

Withdrawal

A party may escape criminal responsibility for the offence if they change their mind about participating and take steps to withdraw their participation in the offence before it is committed. Under the common law withdrawal should be:

- made before the crime is committed;
- communicated by telling the one counselled that there has been a change of mind (if the participation of counsellor is confined to advice and encouragement);
- communicated in a way that will serve unequivocal notice to the one being counselled that help is being withdrawn: *R v Becerra and Cooper* (1975) 62 Cr App R 212.

Withdrawal should give notice to the principal offender that, if they proceed to carry out the unlawful action, they will be doing so without the aid and assistance of the person who withdrew.

7.5.3 Accessories after the fact

A person is an accessory after the fact when they:

- know that a person is a party to an offence; and
- receives, comforts, or assists another, or tampers with or actively suppresses evidence against them, so that they are able to avoid arrest or conviction, or escape after arrest: s 73(1) CA.

But a married person does not become an accessory after the fact for the offence of the spouse if they do any of the acts stated in s 73(1) to assist their spouse (or their spouse and any other person) to avoid arrest: s 73(2) CA.

The elements for accessories after the fact are:

- the principal offender was guilty of an offence punishable by imprisonment;
- the defendant knew that they were a party to the offence;
- the defendant received or assisted or comforted the principal offender to the offence, or tampered with or suppressed evidence; and
- the defendant did so, to enable the principal offender to avoid arrest or conviction or escape after arrest.

7.5.4 Conspiracy

Conspiracy requires two or more people to agree to commit an unlawful act with the intention of carrying it out. A spouse is capable of conspiring with their spouse (or their spouse and any other person): s 68 CA.

The elements of conspiracy are:

- there must be a firm agreement between at least two people; and
- there must be an intention to carry out an unlawful act.

See *R v Morris (Lee)* [2001] 3 NZLR 759 (CA) at [15], where the Court said:

> "A conspiracy is a conscious common design of two or more persons to do an unlawful act or to do a lawful act by unlawful means."

The offence of conspiracy is committed when the agreement is made: *R v Simmonds & Others* (1967) 51 Cr App Rep 316, and *R v Gemmell* [1985] 2 NZLR 740 (CA) at 743.

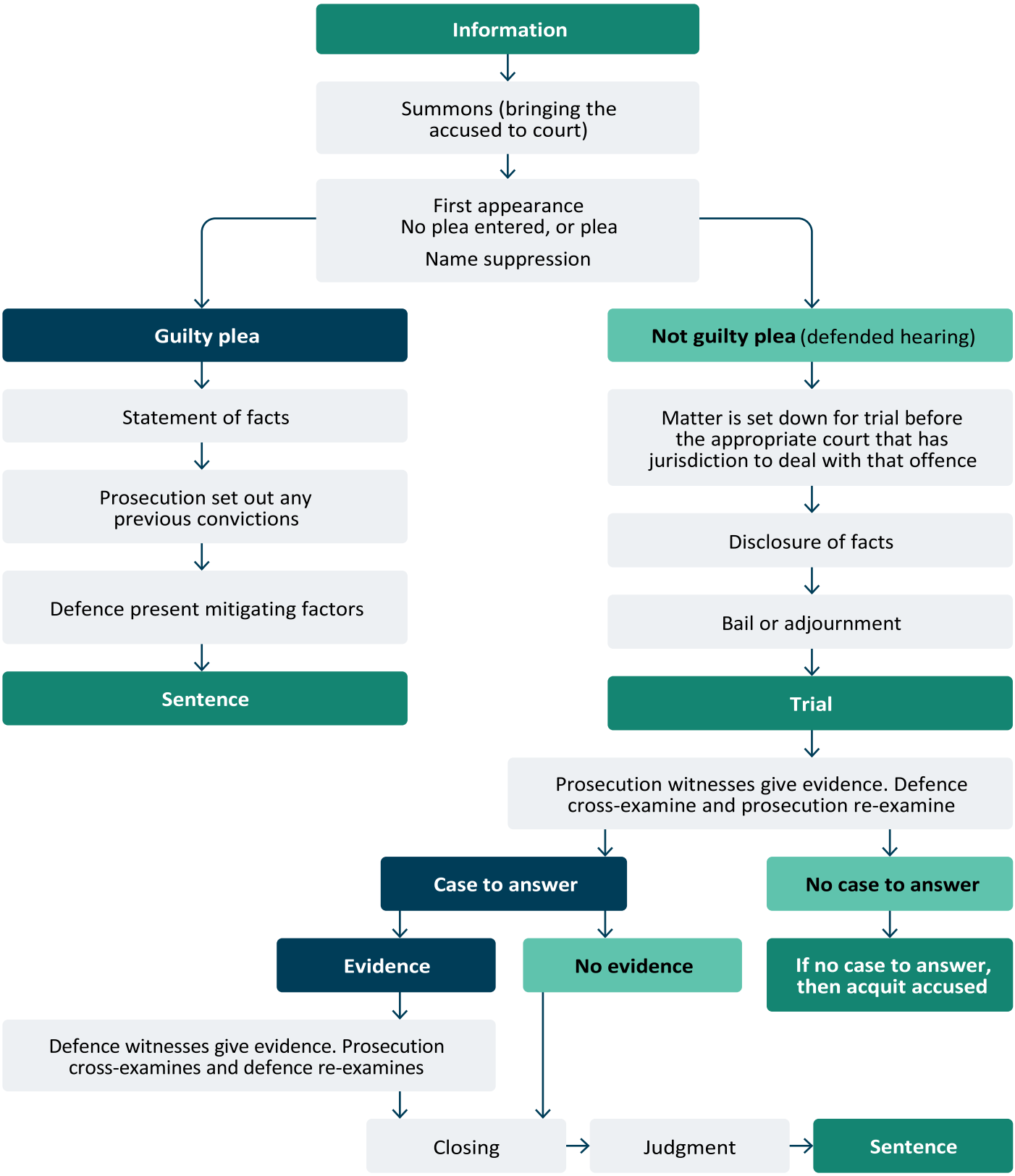
As long as the agreement continues, others may become conspirators by joining the agreement: see *R v Harris* CA121/06, 27 September 2006.

They may be liable on conviction to imprisonment for a term not exceeding 7 years if the maximum punishment for that offence exceeds 7 years imprisonment; or the same punishment as if they had committed that offence; or the punishment for conspiracy expressly set out in the Crimes Act or any other enactment: s 333 CA.

Knowledge of the relevant law that makes the proposed conduct illegal need not be proved: *R v Broad* [1997] Crim LR 666.

II Criminal Process

1. Outline of the criminal process



2. Bringing the accused to court

2.1 Commencing criminal proceedings

ss 9(5)–10 Criminal Procedure Act (CPA).

Every person who is arrested for any offence should be brought before the court as soon as possible, but in any case, **no later than 48 hours after their arrest**: s 9(5) CPA.

The police commence criminal proceedings by laying an Information in writing: s 10 CPA. The Information sets out the defendant's name and details of the alleged offence. Wherever possible in advance, the Information will be given to the clerk to open a file and register the case in the court records.

Occasionally the police will commence criminal proceedings using a Charge Sheet, where the person has been arrested without a warrant and no Information has been laid (see "Arrest without a warrant" below).

Art 64(1)(a) of the Constitution also applies to all arrests and summons to uphold the right of the defendant not to be deprived of their liberty and security, except in accordance with law.

Art 65(1)(c) of the Constitution also provides for certain rights to any person who is arrested or detained as follows:

- to be informed promptly of the act or omission for which they are arrested or detained, unless it is impracticable to do so or unless the reason for the arrest or detention is obvious in the circumstances;
- wherever practicable to retain and instruct a barrister or solicitor without delay;
- to apply for a writ of habeas corpus for the determination of the validity of their detention, and to be released if the detention is not lawful;
- to be granted reasonable bail except for just cause (Art 65(1)(f)).

2.2 Processes to compel the defendant to appear in court

ss 9(5), 22 CPA.
You or the registrar may compel the defendant to appear by summons under s 22 or by a warrant of arrest under s 6 (see below).

Anyone who is arrested on a charge of any offence shall be brought before the court **as soon as possible, and in any case no later than 48 hours after the time of their arrest**: s 9(5) CPA.

2.3 Serving a summons

ss 22, 25–26, 29–30 CPA.

Once an Information is laid, the registrar or you can then issue a summons to the defendant to appear (using Form 4, Schedule of the CPA): s 22 CPA.

The police, any officer of the court, or anyone else authorised by the registrar, or you may serve the summons, and every other court document on the defendant: s 26 CPA.

Different ways of serving the defendant include:

- being delivered to the defendant personally;
- being brought to the defendant's notice if the defendant refuses to accept the summons: s 25 CPA;
- being delivered to the person who is in charge of the vessel at the time of the service, if the defendant is living or serving on board any vessel: s 29(2) CPA;
- being delivered to the superintendent or officer in charge of the prison, if the defendant is an inmate of any prison: s 29(4) CPA.

Proof of service may be made by the person:

- who served the document, showing the fact, time and how the defendant was served, by affidavit; or
- giving evidence on oath at the hearing; or
- if an officer of the court or the police served the document, by endorsing the fact, time and how the defendant was served and signing a copy of the document: s 30(1) CPA.

It is an offence for any person to wilfully endorse any false statement of the fact, time or how the defendant was served on a copy of any document: s 30(2) CPA.

2.4 Warrant to arrest

ss 6, 8 CPA; ss 33–34 Crimes Act (CA).

Once an Information has been laid, and even if a summons has been issued or served, a judge, you, the registrar, or the deputy registrar may issue a warrant to arrest the defendant: s 6(1) CPA.

A judge may issue a warrant (in Form 1) to arrest the defendant and bring them before the Court: s 6(1)(a) CPA.

You, the registrar, or the deputy registrar may issue a warrant (in Form 2) if the defendant is liable on conviction to imprisonment and you or they think that:

- a warrant is necessary to make sure the accused appears in court: s 6(1)(b)(i) CPA; or
- a warrant is desirable, due to the serious nature of the offending and the circumstances of the case: s 6(1)(b)(ii) CPA.

Every warrant to arrest a defendant should be addressed to a specific police officer, or to the police generally and may be executed by any police officer: s 6(2) CPA.

Any warrant to arrest a defendant may be withdrawn by the person who issued it at any time before it is served on the defendant (executed): s 8 CPA.

The police (or anyone assisting them) are protected from criminal responsibility if they arrest the wrong person, if they do so in good faith and on reasonable and probable grounds that they are the person named in the warrant: s 33 CA.

Every constable is justified in arresting any person without warrant under any other statute conferring on them a power to so arrest: s 34 CA.

2.5 Entering premises to execute the warrant and police duties

ss 7, 9(2) CPA; Art 65 of the Constitution.

Any police person who is executing the warrant, has the power to enter onto any premises, by force if necessary, if they have good cause to suspect that the defendant is on those premises: s 7 CPA. If the police are not in uniform at the time, they must produce their badge or other evidence that they are a constable before entry, if requested.

The police have certain duties when arresting someone, including to:

- promptly inform the person arrested of the grounds of their arrest, and of any charge against them;
- allow them to consult legal counsel without delay;
- produce the process or warrant if they have it at the time of the arrest, if required by the arrested person to do so; or if it is not in their possession, then to produce it for the arrested person as soon as practicable after the arrest: s 9(2) CPA; Art 65(1)(c) of the Constitution; and
- tell the person arrested that they have a right to silence and that anything they say may be admissible as evidence against them.

> **Note:** Any failure to do these duties is only relevant to any inquiry as to whether the arrest might not have been affected, or the process or warrant executed, by reasonable means in a less violent manner.

Article 65(1)(c)(iii) of the Constitution also sets out the defendant's right to apply for a writ of habeas corpus to determine the validity of their detention, and to be released if unlawfully detained.

2.6 Arrest without a warrant

s 4 CPA; ss 35, 37, 39–41 CA; s 29 TA; s 6 TAA (2007).

No person shall be arrested without a warrant, except where the Criminal Procedure Act or some other statute expressly gives power to arrest without a warrant: s 4(1) CPA.

Any person may arrest without a warrant any person whom they find committing any offence punishable by imprisonment for 3 years or more: s 4(2) CPA.

The police (and anyone assisting them) may arrest and take into custody without a warrant any person whom they find:

- committing an alleged offence punishable by imprisonment for 3 months or more: s 4(3)(a); or
- committing an offence against certain sections of the Transport Act 1966 (TA) set out in s 29 TA and who:
  - fails to give their name and address on demand; or
  - after being warned to stop, persists in committing the offence: s 4(3)(b) CPA; s 29 TA (as substituted by s 6 TAA (2007); or
  - committing an alleged breach of the peace and have good cause to believe that the person may harm others or themselves because of the breach of the peace; or
  - drunk in a public place and have good cause to believe that the person may harm others or themselves due to their drunkenness: s 4(3)(c) CPA.

If anyone else (not the police) has the power to arrest any other person without a warrant, under any other statute (not the CPA), then the police may exercise that power in the same cases and in the same manner as that person: s 4(5) CPA.

Every constable is justified in arresting any person without a warrant:

- under any statute that gives them this power to arrest someone without a warrant: s 34 CA; and
- where they have the power under any other statute, to arrest without a warrant any person believed on reasonable and probable grounds to have committed an offence. This is so, whether the offence has in fact been committed, and whether the person arrested committed it: s 35 CA.

Any other officer (and anyone assisting them) is justified in arresting someone without a warrant under any other statute: s 36 CA.

Any person is justified in arresting without warrant any person whom they find:

- committing any offence against the Crimes Act that the maximum punishment is greater than three years' imprisonment;
- by night committing any offence against the Crimes Act: s 38 CA.

Any person is also protected from criminal responsibility for arresting without warrant any person whom they believe on reasonable and probable grounds:

- is committing an offence at night against the Crimes Act: s 39 CA;
- has committed an offence against the Crimes Act: s 40 CA;
- has committed an offence against the Crimes Act, and is escaping from someone who has lawful authority to arrest that person for the offence: s 41 CA.

2.7 Entering premises for an arrest without a warrant and police duties

ss 5, 7(2) CPA.

Where the police (and anyone assisting them) are authorised by any Act to arrest someone without a warrant, they may enter onto any premises without a warrant and, by force if necessary, to arrest that person if the police:

- have found that person committing any offence punishable by imprisonment for three months or more and are freshly pursuing that person; or
- have good cause to suspect that that person has committed any such offence on those premises; or
- have to prevent the commission of any offence that would be likely to cause immediate and serious injury to any person or property, if they have good cause to suspect that any such offence is about to be committed: s 5 CPA.

If the police are not in uniform and the occupier requires them to produce evidence of their authority, they shall do so (if they have it on them) before entering or proceeding further on the premises, or as soon as practicable after the arrest: s 7(2) CPA. This power does not limit in any way the power of any police to enter any premises under a warrant.

3. The Information

3.1 What an Information is and the rules for filing an Information

ss 10–13, 19, 36 Criminal Procedure Act 1980–81 (CPA).

3.1.1 Laying an Information

An Information is a sworn statement before a justice or registrar of the court under s 13 CPA, that the informant or person making it (usually a police officer) has reasonable cause to suspect, or does suspect, that a specified criminal offence has been committed: s 10 CPA.

The police or any other informant must start all criminal court proceedings by laying a written Information (Form 3 CPA), unless the person has been arrested without a warrant – then the police will use a Charge Sheet initially: s 10 CPA.

Usually this is a police officer, but an Information may also be 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: s 11 CPA.

3.1.2 Place of filing an Information and hearing the charge

As soon as practicable after an Information is laid, the informant must file the Information in the court closest to where the offence was alleged to have been committed, or where the informant believes that the defendant may be found: s 19(1) CPA.

However, both parties can also agree to file the Information in a different court office: s 19(1) CPA. Even if not filed in accordance with s 19(1), this does not invalidate the proceedings: s 19(1) CPA. If there are two or more Informations filed against the same defendant, it is sufficient if they are filed in the court in which any one of them could be filed or has been filed: s 19(2) CPA.

Hearing of the charge is in the same court in the island in which the Information is filed, subject to s 37 (changing the place of hearing): s 36 CPA.

However, if either party applies or of your own accord, you may make an order either before or at the time of hearing, changing the court where the hearing will be held within the island in which the Information is filed or to some other island, if you think this is expedient in the interests of justice: s 37 CPA.

3.1.3 Time limit for laying an Information

The police or other informant must lay an Information within 12 months from the time the offence occurred (except where the Act states otherwise) if:

- the maximum punishment for the offence does not exceed 3 months imprisonment; and/or
- the maximum punishment for the offence does not exceed a $50 fine: s 12 CPA.

However, there may be other time limits for filing an Information that are set out in different statutes.

3.2 Charge sheets

s 10(2) CPA.

If the person has been arrested without a warrant and no information has been laid, particulars or details of the charge against them will be set out in a Charge Sheet: s 10(2) CPA. This Charge Sheet is then treated as if it were an Information and all the other provisions of the CPA apply below. However, this will usually be followed by an Information.

3.3 Prior consent to prosecution

s 14 CPA.

If a certificate, leave, or consent to an Information is required by a judge or attorney-general or any other person, this certificate, leave or consent may be endorsed on the Information or set out in a memorandum. That endorsement or memorandum is accepted as proof that the leave or consent or certificate has been given.

3.4 Information for one offence only but charges can be in the alternative

s 15 CPA.

Every Information is for one offence only unless the relevant Act creating the offence states otherwise.

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

The defendant can at any time apply to amend or divide the Information if this would unfairly disadvantage the defendant in their defence.

3.5 Deciding an application to divide an Information

ss 15, 47, 50 CPA.

You may hear more than one Information together against the defendant.

However, the defendant can apply to amend or divide the Information if it is framed in the alternative, on the basis that the Information is framed to unfairly disadvantage (embarrass) them in their defence: s 15(2) CPA.

If you are satisfied that this is the case, you may direct that:

- the defendant should elect between the alternative charges. The Information will then be amended and the hearing will proceed as if the Information had been originally laid in the amended form; or

- the Information is divided into two or more charges, in which case the hearing will proceed as if a separate Information had been laid for each charge: s 15(3) CPA.

You may in the interests of justice make such an order before or during the trial.
If the defendant requests an adjournment, you may also make an order to adjourn the hearing if you are satisfied that the defendant would be unfairly disadvantaged in their defence because of such amendments: s 47 CPA.

Where any Information is framed in the alternative and the defendant is convicted you may, at their request, limit the conviction to one of the alternative charges: s 15(4) CPA.

Since every Information is divisible, the defendant may be convicted of any other offence that fits within the offence set out in the relevant Act or the Information, even though the whole offence charged is not proved; or they may be convicted of an attempt to commit any offence so included: s 50 CPA.

3.6 Deciding if an Information has sufficient details

ss 16–17 CPA.

Every Information must contain enough details so that the defendant knows the substance of the offence that they are charged with. The Information must include:

- the nature of the alleged offence, using the words of the statute creating the offence as much as possible;
- the time and place of the alleged offence; and
  - the person against whom the alleged offence was committed; or
  - the thing against which the alleged offence was committed: s 16(1)– (3) CPA.

However, no Information is invalid for want of form or substance: s 16(1)(4) CPA.

You may be asked to consider an objection to an Information at the first appearance or before the hearing under s 18 or during a defended hearing under s 47 (see below).

After ruling on the sufficiency of an Information, you may request further details in writing from the police or the defendant, to ensure a fair trial and adjourn the case: ss 17, 79(1) CPA.

3.7 Deciding on an objection to an Information before or during a hearing

ss 17, 18 CPA.

3.7.1 Objection before a hearing

At any time before a hearing, the police or the defendant may ask the court to amend an Information on the grounds that it does not state in substance an offence; or the defendant may ask the court to quash it or (rarely) in arrest of judgment (see below): s 18(1) CPA. If the defendant is self-represented, you may raise this on their behalf.

"In arrest of judgment" means the defendant can apply 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 that has not been cured by amendment or by the verdict of the court.

A useful way to check if the Information sets out, in substance, the relevant offence is to refer to the descriptions given for offences listed in "Common criminal offences", "Common traffic offences" and "Common drug offences".

If you are deciding this issue before the defendant pleads, you may either quash the Information or amend it: s 18(2) CPA.

3.7.2 Objection during a hearing

If you are deciding any objection (as above) to an Information during the trial, you may if you think fit:

- amend the Information;
- quash the information; or
- leave the objection to be taken in arrest of judgment: s 18(3) CPA.

If you quash the Information, the effect is that the criminal prosecution no longer proceeds on the matter dealt with in that Information. However, the police may apply for a substituted Information to be laid under s 47.

Before deciding on what to do with any application, you may want to order that further particulars be given by the police in writing, if you decide that further information is necessary for a fair trial: s 17 CPA.

3.8 Application to amend an Information during a hearing

s 47 CPA.

You may amend the Information in any way, including substituting one charge for another, at any time during the trial: s 47(1) CPA.

Where a charge is amended or substituted on the Information during a trial you should:

- read out and explain the amended or substituted charge to the defendant;
- if the defendant is self-represented, explain the difference between the essential ingredients of the former charge and the amended charge; and
- ask the defendant how they plead: s 47(2) CPA.

If the defendant requests an adjournment, you then need to decide whether this is fair in order to allow them to properly prepare for their defence: s 47(4) CPA.

If the defendant chooses to proceed, then the amended or substituted offence replaces the original Information. Any evidence already given is treated as if it had already been given for the purpose of the amended or substituted charge.

However, both parties have the right to recall, examine, cross-examine or re-examine any witness whose evidence was given with respect to the original charge: s 47(3)(b) CPA.

3.9 Application to withdraw an Information during a hearing

s 46 CPA; s 92 JA.

With leave of the court, the police (or other informant) may withdraw an Information at any time:

- before the defendant has been convicted;
- before the Information has been dismissed;
- where the defendant has pleaded guilty, before they have been sentenced or otherwise dealt with: s 46(1) CPA.

Section 46(3) CPA provides that the withdrawal of an Information does not bar further proceedings against a defendant for the same offence.

You must discharge the defendant once leave to withdraw has been granted, unless a substituted Information is laid: s 46(3) CPA.

In *Allsworth v Puna* [2020] CKHC 1; CR 308–315 of 2020 (23 December 2020) in the High Court, Williams CJ dismissed the application by the defendant to obtain a discharge under s 111 CPA. This discharge was not available, as the leave to withdraw under s 46(1) CPA had already been granted on application by the prosecution, so there was nothing left to dismiss.

The other issue raised in *Allsworth v Puna* was whether relaying the charges in identical terms without new evidence is an abuse of the court's process under s 46(3) CPA. The court has a discretionary power to stay a prosecution on the ground that continuing it is an abuse of the court's process: see *Moevao v Department of Labour* [1980] 1NZLR 464, and *Fox v Attorney-General* [2002] 3 NZLR 62. Williams CJ also dismissed the application for a permanent stay of the latest set of Informations that were filed, as there was no evidence to show that this was an abuse of process.

You may award the defendant such costs as you think reasonable where the Information is withdrawn. The costs awarded may be recovered as if the costs were awarded on a conviction: s 46(2) CPA. Under s 92 of the Judicature Act you have the power to award any costs in criminal proceedings that you think fit. You must hear submissions from both parties as to the award of costs, before awarding any costs.

4. First appearances

4.1 Procedural list matters

s 53 Criminal Procedure Act (CPA).

The court clerk will call 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.

Every defendant is entitled to be present in court during the whole of their trial unless they misconduct themselves to such an extent that it is impractical to continue the trial: s 53(1) CPA. But you may permit the defendant to be out of the court during the whole or any part of the proceedings on such terms as you think fit: s 53(2) CPA.

The immediate issues are:

- appearances or non-appearances by the parties and legal representation including:
  - whether the defendant has appeared, and if they are the right person (identification of the person charged);
  - if the defendant does not appear, whether the case should be adjourned (because the defendant may have a good reason), or whether you should issue a warrant (see below);
  - whether an unrepresented defendant understands the charge (see below);
- whether the Information correctly sets out the defendant's personal details;
- whether you have jurisdiction to hear the matter;
- whether the matter is simple enough that you can put the charge to the defendant, or if it is complex enough that you should grant an adjournment so that the defendant can get legal advice (see "Defended criminal hearing");
- taking pleas (and if relevant any election for trial by three justices or judge alone):
  - if the defendant pleads not guilty, what directions are called for to set the matter down for trial (see "Defended criminal hearing"); or
  - if the defendant pleads guilty what needs to be before the court on sentence (for example, victim impact statements; probation, psychiatric, psychological, and reparation reports) (see "Defended criminal hearing" and "Sentencing");
- any application for bail (if made) and whether you remand the defendant at large, on bail, or in custody (see "Bail applications");
- whether the defendant is seeking name suppression (see "Name suppression");

- whether the defendant is a child and if so, if they are over the age of criminal responsibility (10 years), or if aged between 10-14, assessing whether they are capable of being tried, and if they are under 16, referring the case to the Children's Court, or if they are aged 16 or 17, deciding whether they should still be tried with the legal protections of a child; and
- whether the defendant has any physical or mental impairments which may need to be accommodated or taken into consideration in order to provide access to justice and a fair trial.

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

See "Judicial conduct" to find out more about conflicts of interest.

At first appearance, the matter will generally be adjourned to a fixed date. This adjourned hearing is usually called a callover.

4.2 Legal representation or self-representation for the defendant

s 53(3) CPA; arts 64, 65(1) of the Constitution.

Every defendant may defend themselves or be represented by their lawyer or with your leave (which may at any time be withdrawn) by any other agent: s 53(3) CPA. If the defendant is represented by a lawyer (even if not present), then continue as if the defendant was present.

A defendant who is appearing in court and is not legally represented may have the following issues:

- feeling fear, anxiety, frustration, impatience or annoyance;
- being unfamiliar with their surroundings;
- not knowing or understanding court procedures;
- not knowing or understanding the rules of evidence;
- feeling the process is unfair;
- a physical or mental disability or be a child, which may further exacerbate the issues listed above.

You should inform the defendant of their right to legal counsel once their name has been called in the List. You may advise them not to enter a plea to any charge(s) before getting legal advice. This is especially so depending upon:

- the seriousness of the offence(s);
- if it is not the defendant's first offence;
- if the defendant looks unsure or afraid and does not understand the proceedings.

You should offer them referral information regarding free legal assistance which may be available for those without means to pay.

Where the defendant is representing themselves, consider their fundamental rights under Art 64 and principles under the Constitution including:

- their right to a fair hearing in accordance with principles of fundamental justice: Art 65(1)(d) Constitution and whether you think it is possible to conduct a fair hearing without them receiving independent legal advice and representation;
- the presumption of innocence until proven guilty according to law in a fair and public hearing by an independent and impartial court: Art 65(1)(e) Constitution; and
- the burden of proof that is on the police to prove the charge(s) beyond reasonable doubt.

(See "Dealing with evidence").

Where a person remains unrepresented, take extra time to explain the process and rights available to the defendant to conduct their own defence and ensure that they at all times understand the legal significance and consequences of decisions they will need to make without legal assistance.

4.3 Jurisdiction to hear the matter

ss 19(a)–20(a) Judicature Act (JA); s 15A Judicature Amendment Act 1991 (JAA).

Jurisdiction is the power and authority to hear or determine a particular matter. Courts may only act within their jurisdiction, as defined by law. Check that you have jurisdiction to hear the matter before you. You may have done this when you reviewed the Information(s) before coming into court. Most offences can be heard by a single justice.

However, if you are not certain, check in "Common criminal offences", "Common drug offences" and "Common traffic offences".

4.4 Non-appearance by the defendant

ss 54, 56 CPA.

Ultimately you must always stand back and have regard to the **interests of justice**. If the defendant has been duly summoned and does not appear in court, you may:

- try the defendant and sentence them for that offence in their absence, if they are only liable to a fine under s 56 CPA; or
- adjourn the matter under s 79; or
- issue a bench warrant under s 54 CPA if they fail to appear: to plead to an Information that has been laid; or for sentencing if they have been duly remanded (see below).

See "Adjournments" to find out more.

4.4.1 Dispensing with the defendant's appearance

s 56 CPA.

Where the punishment is a fine, you may try, convict and sentence a defendant for an offence in their absence, as long as the defendant has been duly summoned to appear.

4.4.2 Issuing a warrant of arrest for the defendant's arrest (bench warrant)

s 54 CPA.

You have a general discretion to issue a bench warrant for the defendant's arrest if they fail to appear to:

- plead to an Information that has been laid; or
- for sentencing, once they have been remanded for sentencing.

First check that the date and time on the summons, or the date of a due remand for sentencing (as the case may be), is correct. Next stand down the case until the end of the list – they could be late for a good reason.

When exercising your discretion to issue a warrant for the defendant's arrest consider:

- what efforts the police have made to serve the defendant;
- whether the defendant has failed to appear previously without good reason (for example, a good reason might be lack of transport).

An affidavit should be on the file with proof of service. This should contain the date, time and mode of service, and who carried out the service: s 30 CPA.

Make the order:

> "I order a warrant of arrest of …."

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 (by using the stamp or writing it).

4.4.3 Defendant arrested and brought before you under a bench warrant

s 54 CPA.

If a defendant is arrested and brought before you under a bench warrant for non-appearance, even if the court is not in session for the trial of criminal cases, you may:

- grant the defendant bail; or
- remand the defendant in custody so that they may attend the court at its next sitting.

However, if the defendant has failed without reasonable excuse to attend according to their bond, they are not "bailable" as of right and so it is up to your discretion.

See "Bail applications" for more details on your discretion to grant bail or remand in custody. You must also cancel the bench warrant, since once the defendant has been brought before the court, the bench warrant is now executed.

4.5 Non-appearance by the police

s 55 CPA.

If the defendant appears but the police do not appear, you must adjourn the trial to a time and place you think fit if the police have not been given adequate notice of the trial date.

In any other case, you may:

- adjourn the trial to such time and place and on such conditions as you think fit; or
- (where the police have been plainly derelict) dismiss the Information for want of prosecution.

4.6 Where neither party appears

s 57 CPA.

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

- adjourn the matter to such time and place, and on such conditions, as you think fit; or
- (where the police have been plainly derelict) dismiss the Information for want of prosecution.

See "Adjournments" to find out more about when to adjourn a case.

> **Note:** A dismissal of an Information for want of prosecution under ss 55 or 57 CPA does not act as a bar to any further or other proceedings in the same matter. Ultimately you must always stand back and have regard to the **interests of justice.**

4.7 Where the defendant appears

4.7.1 Identifying the defendant

The defendant has been called by name and has been brought before you. You must first check who the defendant is (of course, you may already know the person).

The court clerk or you should ask the defendant their full name, occupation, age (for a child, their date of birth so you can determine their age at the time of the alleged offence, being the relevant time for determining which laws may apply to them) and any other relevant details.

More than one person may share the same name and some people may have more than one name that they use, so the other details are important.

The name that should be used where there is a conflict is the one the defendant has on their passport or, if they don't have one, their birth certificate.

If the defendant is a juvenile, you will need to transfer the matter to the Children's Court. See "Children's Court and Te Koro Akaau" for more information.

4.7.2 Child and youth defendants

Convention on the Rights of the Child (CRC):

- Art 37: Right to freedom from torture, degrading treatment of punishment, no capital punishment or life imprisonment for those under 18 years; no detention or imprisonment of those under 18 years except as a matter of last resort and for the shortest possible time. Where a person under 18 years is detained or imprisoned, they must be held in a facility separated from adults and with access to age-appropriate services and supports, including family visits. Detained children must be provided with free access to legal representation and be able to challenge the lawfulness of their detention/imprisonment.
- Art 40: Any person under 18 years accused of a crime has the same legal rights as adults (right to silence, presumed innocence, right to a swift trial before a competent independent tribunal, right to non-self-incrimination and to examine witnesses etc) and additionally, the right to be diverted from the criminal justice system wherever possible, and where not, the right to be tried through a process that takes into account the child's age, to have parents/guardian present during justice processes, right to free interpreter if needed, right to privacy being protected throughout the legal process, right to legal representation.
- ss 2, 20, 21, 24, 26, 30, 36, 41 Prevention of Juvenile Crime Act 1968 (PJCA); s 20A Prevention of Juvenile Crime Amendment Act 2000 (PJCAA 2000).

The Children's Court deals with all criminal offences committed by children except for murder or manslaughter, and matters relating primarily to children: s 21 PJCA.

Children are defined as a boy or girl under the age of 16 years: s 2 PJCA. 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: s 26 PJCA.

A young person is anyone under the age of 17 years: ss 30, 36 PJCA. As noted earlier, these provisions for treating 16- and 17-year-old defendants as adults, are inconsistent with the Cook Islands' commitment to uphold the standards contained in the CRC, especially Articles 37 and 40 which require people aged under 18 years to be treated by the legal system as a child. Given this gap between CRC standards and PJCA definitions, where a 16- or 17-year-old is to be treated as an adult under the PJCA, you should still take into account their youth throughout all steps of the procedure, including, at minimum, diverting them from criminal procedures if possible, ensuring they have access to legal representation, ensuring their privacy and identity are protected, ensuring they are only detained or given custodial sentences as a last resort and for the shortest possible time, and never held mixed with adult prisoners.

If you are unsure of the age of any child or youth, in the absence of sufficient evidence you may fix their age, which will then be deemed to be the true age of such child or young person for any matters under the PJCA: s 41 PJCA.

Only a judge or justice who has been appointed under s 20 PJCA and s 20A PJCAA may exercise jurisdiction in the Children's Court. But you may do all necessary acts preliminary to the hearing such as adjourning, remanding the defendant, or granting bail within a closed court as s 24 (closed court proceedings) applies: s 20 PJCA.

See "Children's Court and Te Koro Akaau" to find out more about the special procedures that apply to children and young offenders.

4.7.3 Considering issues about the Information

s 16 CPA.

At a first appearance, or later during a defended hearing, you may have to consider if the Information has sufficient details to identify (amongst other matters) the:

- defendant; or
- time and date of offending; or
- offence under the relevant statute: s 16 CPA.

See "Information" to find out more.

4.8 Applications for name suppression

An application for name suppression is likely to arise, if at all, at this first appearance stage. The names of all defendants aged under 18 at the time of the alleged offence should be suppressed by court order and proceedings held in closed court.

See "Name suppression" to find out more.

4.9 Process for callovers

At the first appearance, you will usually adjourn the matter to a fixed date called the callover, except for certain minor matters where, if the defendant pleads guilty, you can deal with sentencing immediately. See "Defended hearings" and "Sentencing" to find out more about entering a guilty plea and sentencing.

If the offence is beyond your jurisdiction to sentence, then take the plea, order the probation report and adjourn to the next three justices' sitting or the next judge's sitting. You may state the following:

> "This matter is adjourned for sentencing at the next sitting before a High Court judge with the date to be set by the registrar. A probation report is ordered."

4.10 Relevant case law

4.10.1 Due process at first appearances

Samatua v Attorney General [2015] CKHC 14; Plaint 5.2012 (3 June 2015).

- The High Court found that at his first appearance Mr Samatua was:
  - not given the opportunity to instruct a lawyer without delay;
  - unfairly detained;
  - not given the opportunity to elect a trial by jury;
  - prevented from making his case to the Court;
  - not provided evidence on which the charges against him were based; and
  - not provided with a written statement of the prosecution witness.

4.10.2 Leave to withdraw a guilty plea

Crown v NH [2009] CKHC 7; CRN 803, 815–819, 823–824 of 2008 (3 July 2009).

- There is a difference in the cases between applications to withdraw or change a plea before, compared to after, sentencing.
- Applications made to review a plea after sentencing were properly brought as appeals against conviction and subject to a much higher threshold, being permitted only in exceptional cases.
- Overall if the interests of justice or fairness require that the accused should be allowed to change their plea to one of not guilty, then leave should be granted.
- Although the discretion is unlimited, it will not lightly be exercised, particularly when the applicant is legally represented. The applicant must make out relevant grounds without simply regretting their guilty plea, otherwise the application will not be granted.

4.10.3 Dismissal for want of prosecution

Cook Islands Police v Narsimulu [2013] CKHC 68; JP Appeal 8.13 (27 November 2013).

- The High Court heard an appeal from the justice's decision to dismiss the case for want of prosecution. This was on the basis that the complainant wished to withdraw her complaint against her partner on a charge of assault, after a plea of guilty was entered by the defendant.
- Rather than dismiss the case for want of prosecution which was incorrect under s 55 since the police had appeared, the Court held that it would have been open to the justice, after inquiry as to the circumstances of the case, discharging the defendant without conviction under s 112 CPA.

4.10.4 Withdrawal of the charge

Queen v Katoa [2010] CKHC 12; CR 568 of 2009 (29 November 2010).

- The High Court granted the police's application to withdraw charges. The police were not properly prepared with the evidence legally required (analysis by ESR NZ) to prove a drugs charge against the defendant. This was opposed by the defendant who had sought to be discharged without conviction.
- In the interests of justice due to the serious nature of the offence (importation of cannabis) the judge found that there is evidence that, if accepted, may prove the case. Therefore, the police were able to withdraw the charges.

5. Adjournments

5.1 Statements used for adjournment

If no plea is taken at a first or second appearance and the matter is adjourned to a callover, say:

> "No plea was taken and this matter is adjourned to a callover on [date]. The defendant is remanded [at large/on bail/in custody. If remanded on bail also enter and state the bail conditions]."

Note: You must enter reasons for the adjournment and for the remand in custody/at large/or on bail on the Criminal Decision Sheet.

5.2 The general power to grant an adjournment before or during a trial

s 79(1) CPA and s 79A CPAA.

The basic principle is that a trial should proceed continuously after it has started, unless you decide it is unfair not to grant an adjournment. You or a registrar may adjourn a hearing before or after it has started: s 79(1) CPA and s 79A CPAA.

When deciding to adjourn a case, you may take into account:

- the reasons for the adjournment – including any fault causing the delay;
- the effect of the adjournment on the parties, especially the impact of delay to those held in pre-trial detention;
- when a new trial could be heard;
- the "interests of justice", including:
  - the right of the defendant to a speedy and fair trial; and
  - the interests of the public in ensuring efficient prosecutions.

One of the possible reasons for adjournment that may arise during a hearing is that all the evidence needed for the case is not available on the date of hearing. You should hear the application in full and ask for the other party to respond before ruling.

5.3 Specific reasons for granting adjournments

The following are other possible reasons for adjourning a case.

5.3.1 Reasons for adjourning a case at the first appearance or pre-trial

- To obtain further details for the Information if this is necessary for a fair trial under s 17 CPA (see "Information"): s 79(1) CPA.

- For the defendant to obtain legal representation: s 79(1) CPA.
- For the non-appearance of the defendant: s 79(1) CPA.

5.3.2 Reasons for adjourning a case at the start of, or during, a defended hearing

- Lack of jurisdiction: At any time and place appointed for the hearing of any charge, if the court has no jurisdiction to hear the charge, you may adjourn the hearing to be heard by the appropriate authority: s 79(2) CPA.
- Non-appearance by the police/informant (s 55 CPA), or the defendant (s 59 CPA) or neither parties appear at the initial hearing (s 57 CPA).
- Amendments to the Information: If the defence would be prejudiced in their defence because of any amendment or substitution made to the Information or charges before or during the trial (see "Information"): s 47(4) CPA.
- Witnesses: The defendant is taken by surprise in a way that is prejudicial to their case by a witness for the police who either:
  - has not made any written statement; or
  - has made a written statement that was not given to the defendant early enough to prepare; or
  - you are of the opinion that in the interests of justice that inquiries should be made about a witness who has not been called: s 101 CPA.
- Questions of law: A complex question of law arises and either the police or the defendant may request an adjournment or you may decide on an adjournment for retrial before a judge: s 105 CPA.
- Sentencing inquiries: To make inquiries into the circumstances of the case or sentence, or otherwise deal with the defendant after conviction but before sentencing: s 80 CPA.

5.4 Failure to appear by one or more of the parties

ss 55–59 CPA.

This includes the situation where a trial has already been adjourned.

5.4.1 Non-appearance of the defendant before trial

You may adjourn the matter under s 79 CPA to make further inquiries if you think fit.
You have a general discretion to issue a bench warrant for the defendant's arrest if they fail to appear:

- to plead to an Information that has been laid; or
- for sentencing once they have been remanded for sentencing: s 54(1) CPA.

See "First Appearances" to find out more.

5.4.2 Non-appearance of the police (or other informant) at trial

If the police fail to appear, whether you adjourn or dismiss the case depends on whether they had sufficient notice of the time, date and place of trial.

If the police have not had sufficient notice, you must adjourn the case: s 55(a) CPA. If sufficient notice was given, you may:

- usually adjourn the trial to such time and place and on such conditions as you think suitable for the police/informant to appear; or
- in extreme cases if the police have been plainly derelict, dismiss the case for want of prosecution (which is not a bar to the police bringing another case later on under s 58 CPA): s 55(b) CPA.

5.4.3 Non-appearance by the defendant at trial

If the defendant is not personally present, you may, if you think fit:

- adjourn the trial to enable them to be present: s 59 CPA;
- if a fine is the only possible sentence on conviction, hear the case in their absence, try, convict and sentence the defendant: s 56 CPA; or
- if they are liable on conviction to a sentence of imprisonment, issue a warrant for their arrest in Form 7: s 59 CPA. But first find out if the police have made reasonable efforts to serve the defendant with a summons and, if so, when the summons was issued; or
- issue a warrant to arrest the defendant (Form 7) if they are released on bail and do not attend personally at the time and place specified in the bond, or at any adjourned hearing: s 92 CPA.

5.4.4 Non-appearance by both parties at trial

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): s 57 CPA.

5.5 Lack of jurisdiction to hear the case

s 79(2) CPA.

If you do not have jurisdiction to hear any charge before you, you will need to adjourn the hearing of the case to be heard by the proper authority – usually a judge.

5.6 Witnesses

s 101 CPA.

If a witness's evidence is likely to be prejudicial to the defence and either:

- 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, then you may adjourn the hearing.

If you think that any witness who has not been called by the police should be called, you may:

- require the police to call them; or
- make an order for their attendance if the witness is not in attendance, and adjourn the hearing to the time when that witness attends.

5.7 Sentencing inquiries

s 80 CPA.

You may from time to time adjourn the hearing after the defendant has been convicted and before they have been sentenced or otherwise dealt with, to make inquiries or to determine the most suitable method of dealing with their case.

After adjournment, any justice with jurisdiction to deal with offences of the same kind, whether or not they were the initial justice to whom the charge was heard, may, after inquiry into the circumstances of the offence, sentence or otherwise deal with the defendant for the offence to which the adjournment relates.

See "Sentencing" to find out more about adjournments for sentencing reports.

5.8 Questions of law

s 105 CPA.

If a question of law arises for any offence, you may adjourn the case for retrial before a judge, either at your own decision, or where the police or defendant applies.

In the case of a retrial, 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 your specific order(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 your orders.

5.9 Process where an adjournment is granted at trial

s 79 CPA.

Every adjournment must be made for a specific time and date. Usually hearing dates are fixed well in advance in consultation with the parties.

Before fixing the date:

- inform the defendant of their right to legal counsel (if unrepresented) ;
- advise the defendant to prepare for hearing the case;

- consider both the time the parties need to prepare their cases and the court diary.

Once you have adjourned a matter you need to either:

- remand the defendant; or
- allow the defendant to go at large, if bailable as of right (see "Bail"); or
- release the defendant on bail on the condition that they attend trial at the date and time scheduled, and subject to any other relevant bail conditions.

Record all the above in the Criminal Decision Sheet.

5.10 Case law on adjournments

The New Zealand Court of Appeal in *Condon v R* (2006) 22 CRNZ 755 looked at whether a refusal to grant an adjournment was unfair. The defendant had represented himself at trial but stated he might seek legal advice if an adjournment was granted.

The Court of Appeal concluded that it was not unfair: The main reason the adjournment was sought was to arrange for certain defence witnesses to be called, but there was no material evidence from those witnesses that would have changed the outcome of the trial. However, the Court of Appeal also noted that, other than in exceptional circumstances, an accused who conducts their own defence to a serious charge, without having declined or failed to exercise the right to legal representation, will not have had a fair trial.

6. Bail applications

6.1 The right to be released on bail

s 83 CPA; arts 64, 65 of the Constitution

You will usually consider bail at the first or any subsequent appearances of the defendant; or where the defendant is remanded in custody under s 86 CPA.

Everyone has a right to bail, unless there are good reasons why not: Art 65(1)(f) of the Constitution.

You also need to consider the defendant's fundamental rights under Art 64 and the principles in Art 65 of the Constitution, including:

- their right to life, liberty, and security of the person, and not to be deprived of these rights except in accordance with law: Art 64(1)(a); and
- the presumption of innocence until proven guilty according to law in a fair and public hearing by an independent and impartial court: Art 65(1)(e).

Here are the two main situations in which a defendant automatically has the right to be released on bail.

1 Where the defendant is either charged with a less serious offence:
   - that is not punishable by a sentence of imprisonment; or
   - for which the maximum punishment is less than 2 years' imprisonment: s 83(1)–(2) CPA.

2 Where they are charged with any of the following offences in the Crimes Act 1969 (CA) under s 83(3) CPA:
   - s 122 (false statements or declarations)
   - ss 172–173 (duty to provide the necessaries)
   - s 174 (abandoning a child who is under 6 years)
   - s 205 (female procuring her own miscarriage)
   - s 210 (injuring by unlawful act)
   - s 224 (setting traps, etc)
   - s 272 (acknowledging instrument in false name)
   - s 285 (taking reward for recovery of stolen goods)
   - s 303 (imitating authorised marks)
   - s 304 (imitating customary marks)

However, there is no automatic right to bail if the defendant:

- has been previously convicted of an offence punishable by imprisonment; and

- is now charged with an offence punishable by imprisonment: s 83(4) CPA.

You have **no** power to grant bail for:

- offences against s 75 CA (treason);
- offences against s 80 CA (communicating secrets);
- any drug dealing offences against s 73 of the Narcotics and Misuse of Drugs Act 2004. Bail for these offences must be dealt with by a judge: s 83(5) CPA.

6.2 Relevant factors when deciding to grant or refuse bail

ss 83(5), 90(2) CPA; s 87 CPAA (2007).

You may decide to grant bail to a person, even if they are not 'bailable as of right' under s 83(5) and section 90(2) CPA (see "Process where bail is breached" below).

In deciding whether to grant bail or not the following factors may be relevant to your discretion (s 87 CPAA):

6.2.1 Is the defendant likely to appear in court on the date they have been remanded to, and does the defendant present an unacceptable risk to the community?

For example, with a serious charge such as rape or murder, the risk to the community may be greater, decreasing the likelihood of granting bail. Also, if the defendant has a record of failing to turn up on bail in the past or breaching court orders, then bail is less likely. In a small country with limited means of leaving, the chances of 'flight' are far reduced, especially if you order confiscation of their passport.

6.2.2 Risk of interfering with witnesses or evidence

This ground of opposition to bail requires specific evidence from the police. What evidence do they have to back up their claim? What is the quality of the evidence provided by police and has it been lawfully obtained? Has the defendant/their counsel had an opportunity to respond to this evidence and to present alternative evidence in favour of release?

6.2.3 Risk of offending on bail

This objection mostly arises when the defendant has a history of offending while on bail. Again, ask the police to present evidence of any previous offending while on bail, and provide the defendant/their counsel with the opportunity to respond to such evidence.

6.2.4 Other matters

Keep in mind the strong presumption in favour of release unless there is no other way to ensure the defendant appears in court or if they present an unacceptable risk to the community. These are the relevant legal tests, not simply the seriousness of charges faced. In some cases, the defendant's own safety may be in issue, in which case the focus should be on addressing the threat they may face (such as by issuing orders restraining anyone from threatening the defendant) rather than detaining the defendant. The victim's views are also relevant. You should never remand a defendant in custody for a longer period than any prison sentence he or she is likely to get if convicted. Where pre-trial detention becomes protracted, it can become arbitrary and breach Art 65(1)(a) of the Constitution. This situation, of courts breaching human rights by not adequately managing the duration and lawfulness of pre-trial detention, should be avoided.

6.3 Bail applications for youth defendants

s 84 CPA.

For defendants under 21, you must grant bail, subject to such conditions as you think fit.
For defendants under 18, you may remand them in the custody of a probation officer or any reputable adult.

However, if a young person is charged with an offence for which they would not be bailable, except for their age (s 84 CPA), you may order them to be remanded in custody if, in all the circumstances of the case, you decide that no other option is available. Where you order remand of a person aged under 18, they should be held only for the shortest possible time, they must be separated from adult detainees/prisoners, and they must be accommodated in a facility where they have access to education, sporting activities, adequate support and regular visits from their families (Art 37, CRC).

6.4 Bail applications for family violence offences

Family violence offending has a unique risk profile in which conditions of bail can be crucial in managing the risk of future family violence occurring.

You have the power to hear criminal cases for breaches under s 138(2) of the Family Protection and Support Act 2017 (FPSA).

This is for an offence against:

- s 51 (failure to notify);
- s 113(2) (failure to remain at place detained by police);
- s 118(1) (breach of protection order or police safety order).

Also, three justices have criminal jurisdiction for an offence against:

- s 118(3) (subsequent breach of protection order or police safety order);
- s 133 (taking child out of the Cook Islands).

Please see "Temporary protection orders" to find out more about temporary protection orders.

6.5 Police bail

s 95 CPA as amended by s 3 CPAA (2007).

If the police think it is prudent to do so, they may take the bail bond of the defendant who:

- is charged with an offence punishable by not more than 5 year's imprisonment;
- has been arrested without warrant and brought into the custody of the police in charge of a police station or watch house; and
- cannot practicably be brought immediately before the court.

Any such bail bond may be:

- either with or without sureties as the constable thinks fit;
- in such sum(s) as the police think sufficient; and
- subject to the condition that at a time and place to be specified in the bond, not later than 7 days from the date of the bond, the person bailed attend personally before the court.

Every such bail bond shall have the same effect as if it had been taken before a judge or justice or the registrar. **Note** that the constitutional right in Art 65(1)(f) to 'reasonable bail, except for just cause' places some constraints on police discretions regarding grant of bail.

The police may impose any condition that may be imposed by you or the registrar under s 87 CPAA.

6.6 Process to deal with bail applications for adult defendants

At a defendant's first appearance, the matter will usually be adjourned to a fixed date. Consider whether the defendant is to be kept in custody or released on bail.

Usually, the option of bail will be adopted, unless the offences are related to drugs (see below). If not released on bail immediately and no bail has been applied for, the defendant has the right to apply for bail after being remanded on custody and they should be brought before a court to apply for bail: s 86 CPA.

6.7 Refusal of bail and remand in custody

s 85(1) CPA.

If you refuse to grant bail to a defendant who is remanded in custody, you should:

- issue a warrant in Form 9 for their detention in custody for the period of the adjournment;
- **record your reasons carefully** for refusing bail on the Criminal Decision Sheet attached to the Information.

Bail may only be refused in certain circumstances and for just cause. An order refusing bail is subject to review/re-trial by a judge of the High Court under s 102(1) CPA.

> **Note**: Any defendant who has been remanded in custody on any charge and has not been released on bail may be brought before the court at any time to deal with that charge, notwithstanding that the period of their remand has not expired: s 4 CPA.

6.8 Granting bail

If you decide to grant bail you will also need to consider what conditions may apply under s 87 CPAA. You must also certify, in writing, that bail has been granted in the form of a bail bond.

This will include the amount of the bail bond, and whether it is with or without sureties. The court staff will print this out and give it to you, to sign in court, or to the registrar.

If the defendant is remanded in custody and is granted bail then, if not released immediately, you must issue a warrant in Form 9 for their detention in custody for the period of the adjournment and certify on the back of the warrant:

- your consent to bail;
- the number of sureties (if any) to be required and the sum(s) fixed;
- the conditions (if any) imposed.

The bail bond is then sent to the superintendent of the institution where the defendant is detained: s 85(2) CPA.

6.9 Bail conditions

s 87 CPAA.

The police will suggest what conditions should be imposed on the bail. All bail conditions must relate to the concerns about granting bail. When granting bail you need to state what conditions apply. Try to keep the bail conditions to a minimum and keep these simple so that the defendant can understand and comply with them.

If a defendant is granted bail, the defendant must attend personally at the time and place to which the hearing is adjourned at first and also if adjourned subsequently during proceedings: s 87(1) CPAA.

Section 87(2) sets out the specific bail condition that the defendant report to the police at the time and place that the court directs.

Section 87(3) allows you to impose any other condition that you think is reasonably necessary to ensure that the defendant:

- appears in court on the date to which they have been remanded;

- does not interfere with any witnesses or any evidence;
- does not commit any offence whilst on bail.

Section 87(4) sets out further bail conditions that you may consider imposing if they are reasonably necessary in the circumstances of a particular case, including conditions that the defendant must:

- remain in the Cook Islands or on any specified island within the Cook Islands;
- surrender their passport to the registrar of the High Court to be held by the registrar pending further order of the court;
- not purchase or consume alcohol, or enter licensed premises when alcohol is sold or consumed;
- not be at large during such hours as the court may specify;
- reside where directed by the court;
- not associate with such persons as the court may specify.

State:

> "The matter is adjourned to [date and place of hearing] and bail is granted with the following conditions: [list conditions - use plain language that the defendant will understand]."

Record these conditions on the Criminal Decision Sheet attached to the Information.

6.10 Form of the bail bond

s 89 CPA; Schedule of the CPAA.

Use the bail bond form in the Schedule of the CPAA. The parties will enter into the bond before the registrar or before the superintendent of the prison where the defendant is detained.

6.11 Release of the defendant on bail

The defendant will 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: s 89(3) CPA.

6.12 Variation of conditions of bail and renewal (new grant) of bail

s 88 CPA.

Bail expires each time a defendant is brought back to court. Therefore, if a defendant who has been granted bail is now before you (usually on a callover), then on that second (or next) court date when the Information is before the court, then the original grant of bail has expired.

Therefore, you must re-grant bail each time the defendant is required to appear subsequently, even if the new grant is on the same terms as the previous one(s).

Each time bail is re-granted a new bail bond is also required, even if it's only to change the court date. This is because, if a new bond is not given to the defendant and they do not turn up next time, it would be hard to prosecute the defendant for breach of bail, and a bench warrant for non-appearance might not be justified.

You may need to consider whether a defendant's bail is to be varied or revoked. Usually, it would be re-granted unless there are new reasons to amend the bail conditions or revoke bail.

If a defendant is granted bail, they may later make an application to vary the conditions of the bail order. If you receive such an application, you may make an order changing:

- the terms on which bail has been granted; or
- the conditions of any bail bond entered into; or
- revoking any conditions of bail: s 88 CPA.

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 the parties consent in writing or a new bail bond is entered into.

Record your reasons and decision on the Criminal Decision Sheet attached to the Information.

6.13 Process where bail is breached

s 90 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 to evade justice; or
- breached a condition of bail that they report to police as required; or
- not personally attended the hearing at the time and place specified in the bond: s 90(1) CPA.

After the person is arrested and brought before you, if you are satisfied that the defendant had absconded or was about to abscond, you may remand the defendant in custody (subject to their right to apply for bail); or grant bail but the defendant shall be bailable only at the discretion of the court: s 90(2) CPA.

6.14 Forfeiture of a bail bond

s 93 CPA.

Where you are satisfied that the defendant has breached a bail condition, you may set a time and place to estreat the bail bond (forfeiting if already paid into court or, if the subject of an undertaking to pay, becoming liable to pay into court): s 93 CPA.

You need to certify this on the back of the bail bond.

Then, not less than 7 days before, the registrar serves a notice on the defendant, if they can be found, and on any surety that they will lose the bail bond, unless any person bound by the bond can prove that it should not be.

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 for the court to take the bond for such an amount as you think fit.

If the defendant cannot be found, you may make this order against the defendant, even though that notice has not been served on them.

6.15 Bail pending an appeal

s 76(4) Judicature Act (JA).

A person who appeals (an appellant) may be released on bail pending an appeal.

However, you may issue a warrant of arrest and have an appellant appear before a justice or judge, where:

- they have 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: s 128 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 remanded into custody until their appeal is heard.

An appellant released on bail pending appeal may also surrender themselves and apply for the discharge of their bail bond: s 129 CPA. You may also issue a warrant for the defendant's arrest to serve the rest of the original sentence in custody.

Record the reasons and your decision on the Criminal Decision Sheet attached to the Information.

6.16 Remanding into custody

s 81 CPA.
Where you have adjourned the hearing after a defendant has been arrested and brought before the court, you may remand the defendant in custody (subject to their right to apply for bail under ss 83 and 84 CPA) or allow the defendant to go at large.

A remand in custody places a defendant under the control of the court and:

- ensures their attendance at the hearing;
- removes the defendant from the community in the case of a serious alleged offence.

In the interests of justice and to ensure Art 65 of the Constitution is not breached by the court, long remands in custody should be avoided as much as possible. If a long remand in custody is likely, you may remand the defendant to appear as soon as possible before a judge and let the judge decide.

6.17 Relevant case law

Police v Tiatoa [2004] CKHC 17; CR203.2004 (9 July 2004) citing *Hubbard v Police* [1986] 2 NZLR 738.

- Relevant factors when considering bail for the defendant who was charged with burglary and murder included:
  - the seriousness of this offence;
  - the length of remand in custody is also relevant;
  - previous convictions of the defendant;
  - opposition to the bail application from the victim's family;
  - strength of the case for the police.

Tatira v Crown [2013] CKHC 32; JP Appeal 4.13 (18 July 2013).

- The court granted bail to the defendant who was accused of rape with several bail conditions.
- The court looked at s 8 of the Bail Act 2000 (New Zealand), which codifies the common law. Relevant factors included the:
  - possibility of the accused's flight;
  - seriousness of the offence; and
  - possibility of interference with witnesses, especially of the complainant.

7. Name suppression

7.1 The power to clear the court and prevent reporting of the case

s 76 CPA (CPA).

You may exclude all or any persons for the whole or any part of the proceedings where you think that it is in the interests of:

- justice or public morality;
- the reputation of any victims of alleged sexual offences or extortion: s 76(1) CPA.
- the privacy of any children affected by the case.

The power to clear the court does **not** give you power to exclude:

- the police or defendant or their agents/lawyers;
- any accredited news media reporter.

With or without this order, you may also make an order forbidding the publication of any report, or an account of the whole or any part of the evidence presented in court: s 76(2) CPA.

You may deal with a breach of this order as contempt of court and order a fine up to $100 for any breaches: s 76(2) CPA.

This also does not limit your power under s 25 Criminal Justice Act (CJA) to prohibit the publication of any name.

7.2 Name suppression orders

s 25 CJA; s 76(2) CPA.

If the defendant has been previously convicted of any offence punishable by imprisonment, you must not grant name suppression: s 25 CJA.

You have a discretion to grant a name suppression order to prevent anyone publishing:

- the defendant's name in any proceedings connected to the offence; or
- any other person's name connected with the proceedings (including a complainant and other witnesses, or any other person connected to the case but who is not taking part in the actual proceedings): s 25 CJA; and
- any report, or an account of the whole or any part of the evidence presented in court: s 76(2) CPA. (Crown law opinion from Kim Saunders, Special Counsel Crown Law Office, to John Kenning, Justice of the Peace (cc. Chief Justice David Williams) (25 May 2009)).

The name suppression order covers any name or details likely to lead to the identification of the person: s 25(2) CJA.

When deciding on name suppression you may ask the question:

> "Is it likely that the possible harm to the person from publishing their name outweighs the requirement that justice be open to the public in all respects?"

It is an offence to breach orders made under s 25 CJA or s 76 CPA, which carries a fine not exceeding $100: s 25(3) CJA; s 76(4) CPA.

7.3 Principles impacting name suppression

7.3.1 The principle of open justice

The general principle is (other than in special circumstances) that criminal prosecutions are conducted in courts that are open to the public and to the media.

Therefore, publication is permitted unless circumstances show that it is inappropriate: *Police v Quarter* [2011] CKHC 39; CR137.2009 cited in *Cook Islands Police v Rakanui* [2013] CKHC 63; JP Appeal 2.13 (9 May 2013).

The applicant seeking name suppression must satisfy you that it is in the proper interests of justice in that particular case that name suppression be granted.

Suppression will not be common – it will be rare, except in cases involving children and vulnerable complainants whose privacy must be protected by the court.

7.4 Relevant case law

Cook Islands Police v Rakanui [2013] CKHC 63; JP Appeal 2.13 (9 May 2013).

- The High Court referred to the relevant provisions of the New Zealand Bill of Rights Act 1990. The equivalent in the Cook Islands is the Cook Islands Constitution, arts 64(1)(b), 64(2)–65(1)(d)–(e).

Police v Quarter – Sentence [2011] CKHC 39; CR137.2009 (8 April 2011).

Queen v Arlander [2011] CKHC 44 (25 May 2011).

Lewis v Wilson & Horton Ltd [2003] NZLR 546(CA).

- The New Zealand Court of Appeal stated that the starting point must always be the importance of:
  - freedom of speech;
  - the importance of open judicial proceedings;
  - the right of the media to report court proceedings.
- The Court stressed that the overall principle as to reporting is always in favour of openness. The Court then referred to factors that it is usual to take into account in deciding whether this should be displaced in the particular case.

- You must identify and weigh the public and private interests, which are relevant in the particular case. There must be damage out of the ordinary and disproportionate to the public interest in open justice in the particular case to displace the presumption in favour of reporting.

8. Defended hearings

8.1 Commencement of trial

8.1.1 Appearances of the parties and witnesses

Usually, you cannot proceed unless the defendant, the police (or other informant) and all the witnesses are present in court.

If the defendant fails to appear at the trial date you may:

- adjourn the trial to such time and place and on such conditions as you think fit to enable them to be present: s 59 CPA; or
- issue a warrant to arrest the defendant (Form 7) and bring them before the court, if they are liable on conviction to a sentence of imprisonment: s 59 CPA; or
- issue a warrant to arrest the defendant (Form 7), if they are released on bail and do not attend personally at the time and place specified in the bond, or at any adjourned hearing: s 92 CPA.

See "Adjournments" to find out what to do if one or both parties or any of the witnesses are not present.

8.1.2 Jurisdiction to hear the matter

ss 19(a)–20(a) JA, s 15A JAA.

Jurisdiction is the power and authority to hear or determine a particular matter. Courts may only act within their jurisdiction, as defined by law.

Check that you have jurisdiction to hear the matter before you. You may have done this when you reviewed the Information(s) before coming into court. Most offences can be heard by a single justice. However, the defendant may also elect for certain offences to be tried by three justices or by a High Court judge alone (see "Election for trial by three justices or judge alone" below). However, if you are not certain, check "Common criminal offences", "Common drug offences" and "Common traffic offences" (under the heading "Jurisdiction").

If you do not have jurisdiction to hear the charge you may need to adjourn the trial to a specified time and place: s 79(2) CPA.

8.1.3 Putting the charge to the defendant

ss 53, 61 CPA.

If the defendant is not legally represented, ask them if they wish to seek legal representation, and advise how they could do so, before you put the charge to them and before they enter a plea: s 53 CPA.

The court clerk then reads the charge to the defendant.

You or the registrar must explain the charge to the defendant, so that the defendant fully understands the charge against them.

If you have any doubt that the defendant really understands the charge, you should clearly explain the elements involved and the nature of the offence to the defendant or use an interpreter or duty solicitor to do so or consider their fitness to plead (see below).

Unless the defendant clearly understands the nature of the offence with which they are charged, the evidence against them, and the legal consequences of a plea, the defendant will not be able to work out if they have a defence or should enter a plea.

When you are satisfied that the defendant understands the charge, ask the defendant how they plead to the charge.

If the defendant stubbornly refuses to plea or will not answer directly, you or the registrar may enter a plea of not guilty. In practice, the registrar will only deal with minor matters: s 61(3) CPA.

8.1.4 Fitness to plead

ss 105–106 CPA; ss 590–593 CIA.

If a defendant is unable to plead, understand the nature of proceedings, or instruct a lawyer, it is better to find out the nature of the problem first than to allow proceedings to continue. You should adjourn the hearing to obtain expert medical evidence (a psychological or psychiatric report). See "Evidence".

The question of whether a person is insane at the time of the alleged offending, and therefore not criminally responsible for the offence, is a separate question from whether they are fit to plead at the time of the trial, but both can involve difficult questions of law and of fact. See the "Principles of criminal responsibility – Insanity" for more guidance.

There is no legal guidance currently about when insanity is required to be determined, whether at a preliminary stage or at the substantive hearing of the offence(s). However unfairness would arise through progressing a defendant who is not fit to stand trial through preliminary proceedings of a criminal trial process and so it is best to determine fitness to stand trial at the outset of the proceeding.

You should refer the matter to a judge of the High Court pursuant to either ss 105 or 106 CPA. See "Appeals, retrials and questions of law".

A finding of disability can result in the defendant's:

- detention in a hospital or psychiatric facility; or
- immediate release: ss 590–593 CIA.

Except in a case of murder or manslaughter, a person shall not be detained under such an order for longer than 1 month. The King's representative may discharge them at any time: s 592 CIA.

8.1.5 Pleading guilty in writing

s 60 CPA.

Where a defendant is not liable to imprisonment, they may plead guilty to the offence by written notice to the registrar. After receiving such a notice, the registrar gives notice to the police.

If the defendant pleads guilty in writing, you have the power to deal with them as if they had appeared before you and pleaded guilty: ss 60 CPA.

Record your reasons in the criminal decision sheet.

Pleading guilty in writing does not prevent you from ordering a warrant of arrest for the defendant, if they failed to appear (see "Appearances of the parties and witnesses" above).

8.1.6 Taking pleas of guilty and not guilty

ss 61, 68 CPA.

A defendant may plead either guilty or not guilty, or, in a few limited cases, enter a "special plea": s 61(2) CPA.

Where a plea of guilty is entered and you are satisfied that the defendant understands the nature and consequences of their plea, you may adjourn the charge to another date for the court to deal with them.

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: s 68 CPA.

8.1.7 Amending the charge or Information

ss 15–18, 47 CPA.

Before or during the hearing either of the parties may make any of the following applications to amend, divide, quash or withdraw the Information:

- the Information has insufficient details to identify: the defendant; or the time and date of offending; or the offence under the relevant statute: s 16 CPA;
- there is any objection to the Information: s 18 CPA;
- the police have applied to amend or withdraw and relay the charge: ss 46–47 CPA; or
- the defendant has applied to amend or divide the Information or quash the charge: ss 15, 18, 47 CPA.

See "Information" to find out more.

8.1.8 Process for a guilty plea

ss 61, 68 CPA.

If the defendant admits the truth of the charge in court, but makes some remarks or comments, listen carefully because sometimes these may show a possible defence: s 61(4) CPA.

If the defendant admits the charge:

- ask the police to read a brief summary of the facts;
- tell the defendant to listen very carefully to the summary of facts;
- explain that they will be asked at the end whether they agree with the summary of facts; then
- ask the defendant whether they agree with the summary of facts.

If the defendant disputes any of the facts, consider whether the disputed facts are relevant to the elements of the offence.

> **Note:** A plea of guilty is a plea to the elements of the charge but may not be 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.

If the defendant pleads guilty, and you are satisfied that the defendant understands the nature and consequences of their plea, you may:

- convict the defendant (find the person guilty); or
- deal with the defendant in any other manner authorised by law: s 61(4) CPA.

You may adjourn the matter to a later date for sentencing if the matter is more complicated, and order that a probation report is prepared, rather than dealing with sentencing immediately.

The defendant may also withdraw a plea of guilty with your leave at any time before the defendant has been sentenced or otherwise dealt with: s 68 CPA.

The overall principle is whether this would be in the interests of justice or fairness.

Prior to sentencing, some key reasons that have been justified as grounds to set aside a guilty plea include:

- in entering the plea, the applicant acted upon a material mistake;

- there was a clear defence to the charge (the defence must at least be reasonably arguable); or
- proceedings were defective or irregular.

8.1.9 Process for a not guilty plea

s 61(5) CPA.

If the defendant denies the charge, that is, pleads not guilty, or if you enter a plea of not guilty for them, then you may have an immediate hearing, if:

- you are able to do so;
- all parties and witnesses are ready; and
- the matter can be dealt with quickly.

More usually you will adjourn the hearing to a later date and:

- find out the number of witnesses the parties intended to call to estimate the probable length of the trial, and set a date for the trial;
- deal with bail/remand in custody; and
- issue summonses for witnesses if necessary.

8.1.10 Special pleas

ss 63–67 CPA.

There are three special pleas that may be pleaded by the defendant in very rare circumstances. These are a plea of:

- previous acquittal;
- previous conviction;
- pardon: s 63 CPA.

If a special plea arises, seek advice from a High Court judge. See also "Special pleas" to find out more about special pleas.

8.1.11 Application for change of plea

s 68 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.

8.1.12 Election for trial by three justices or judge alone

s 15A JAA.

For certain offences, a defendant can elect to have a trial by three justices or a trial by a High Court judge alone. These are offences under:

- Part X of the Crimes Act 1969, where the fine on conviction will not exceed $5000, and the offence if punishable by a sentence of 10 years or less;
- s 250 of the Crimes Act 1969;
- s 119 of the Transport Act 1966;
- the Public Money and Stores Act 1987;
- the Income Tax Act 1968–69;
- the Turnover Tax Act 1980;
- the Customs Act 1913 (New Zealand);
- the Import Levy Act 1972.

You should ask the defendant to make an election. The defendant may, with your leave, at any time before the charge is gone into but not afterwards, withdraw their election, and then the matter may be dealt with by three justices sitting together: s 15A(4) JAA.

You must say (s 15A(2) JAA):

> "You are charged with an offence for which you are entitled, if you desire it, to be tried by three justices sitting together, or by a judge alone. Do you desire to be tried by three justices sitting together, or by a judge alone?"

If the defendant elects to be tried by a judge alone or does not elect when requested by you to do so, you must remand them with or without bail, to appear before a court with a judge alone: s 15A(3) JAA.

8.1.13 Withdrawal of the charge

s 46 CPA.

The police may apply with your leave to withdraw the charge (Information) at any time before:

- conviction;
- dismissal of the Information;
- the defendant has been sentenced or otherwise dealt with if they have pleaded guilty.

If the charges are withdrawn, you may also award the defendant reasonable costs if there is a good reason to do so.

Any withdrawal does not operate as a bar to any further or other proceedings against the defendant in respect of the same offence.

The High Court in *Queen v Katoa* [2010] CKHC 12 granted the police's application to withdraw charges. The police were not properly prepared with the evidence legally required (that is, analysis by ESR NZ) to prove a drugs charge against the defendant. This was opposed by the defendant who had sought to be discharged without conviction. But in the interests of justice due to the serious nature of the offence (importation of cannabis) the judge found that there was evidence, which if accepted, may prove the case.

8.1.14 Summons or warrant for a witness to appear

ss 23–24 CPA.

You may issue a summons in Form 5 calling on any person to appear as a witness at a hearing, where a witness is being difficult about appearing in court. The summons may also require them to produce at the hearing any books, deeds, papers, writings, and photographs: s 23 CPA.

You may also issue a warrant in Form 6, (with or without a summons) if you are satisfied that any person whose evidence at the hearing is required by either party, will not attend to give evidence without being compelled to do so. You may also withdraw this warrant at any time before it is executed: s 24 CPA.

8.2 Defended hearing trial process (fixtures)

8.2.1 Cautioning an unrepresented defendant

s 71 CPA

Before the police case is heard, you must give an unrepresented defendant the following information:

> "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 explain this in simple terms so that the defendant fully understands the options before making their choice.

Once the defendant has stated their choice, record it on the Criminal Decision Sheet.

8.2.2 The power to clear the court and prevent reporting of the case

s 76 CPA.

You may exclude all or any persons for the whole or any part of the proceedings where you think that it is in the interests of:

- justice or public morality, or
- the reputation of any victims of alleged sexual offences or extortion.

This does not include the prosecutor or the defendant, or their agent, or any barrister or solicitor, or any accredited news media reporter: s 76(1) CPA.

You may also or alternatively make an order stopping the publication of any report or account of the whole or any part of the evidence adduced; and any breach may be treated as contempt of court: s 76(2) CPA.

See "Name suppression" to find out more.

8.2.3 Opening addresses

The prosecutor may open their case with an address before calling their witnesses.

At the end of the case for the prosecution, the defendant or their counsel may give an opening address before calling evidence.

8.2.4 The prosecution's case

ss 69, 73–74 CPA.

The court first hears the evidence of the prosecution and then the evidence of the defence. Evidence can be given:

- by witnesses in court;
- in the form of documents.

During the trial the defence may admit any fact alleged against the defendant so the prosecution does not need to prove that fact: s 69 CPA.

See "Evidence" for more information about the rules of evidence.

There may be up to three stages in the presentation of evidence for each side:

1. Witnesses present their evidence-in-chief to support the prosecution or defence case (for the police or the defence).
2. The other side can then cross examine each witness to test their evidence.

3. The prosecution/defence can re-examine any witness, after they have been cross-examined by the other side, if any new matter was raised in cross-examination.

Before a witness can give evidence, they must swear an oath or make an affirmation: ss 73–74 CPA. If the witness chooses to swear an oath, they stand in the witness box, hold the Bible in their hand, and face you.

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, they can affirm instead, in which case the question from the court clerk is:

> "Do you solemnly, sincerely and truly declare and affirm that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth ?"

8.2.5 A "no case to answer" submission

At the closing of the police's case, the defence may submit that there is "no case to answer" – that is, that the evidence (at its highest) does not establish the offence.

You can 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; or
- 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.

If a reasonable court might convict on the evidence given so far, 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, the defendant is entitled to a discharge without having to give or call evidence. Record your decision that there is no case to answer on the Criminal Decision Sheet and include your reasons.

8.2.6 The defendant's case

ss 69, 72 CPA.

After the prosecution have completed examining their witnesses, if the defendant is self-represented you must ask the following (or words to that effect): s 72 CPA.

> "Do you wish to give or call evidence?"

If the defendant decides to give evidence, you may then ask the defendant to give you their version of the events. You may help lead the defendant through the preliminary matters to give them confidence to say their own account of the crucial event.

The same procedure as used for the prosecution's evidence is followed:

1. Evidence-in-chief;
2. Cross-examination; and (possibly)
3. Re-examination.

If the defendant admits any fact alleged against them during the trial, there is no need for the prosecution to prove that fact: s 69 CPA.

The court may also hear evidence given by the prosecution in rebuttal of evidence given by the defence, if you think that:

- the defence evidence that the prosecution seeks to rebut contains fresh matters that 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.

8.2.7 Closing addresses

s 74(3) CPA.

For a defended hearing, both parties may only sum up with your leave (commonly granted): s 74(3) CPA. The final address should be only on the law.

8.2.8 Witnesses

Excluding a witness

s 78 CPA.

At the request of any party or where you think fit, you 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: s 78(1) CPA.

A witness who has given evidence shall not leave the courtroom unless given permission of the court: s 78(2) CPA.

See "Evidence", for further information.

Self-incrimination by a witness

Watch out for self-incriminatory statements (saying something that indicates guilt) for the witness. If a question is asked that could be self-incriminatory:

- 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.

It would be wise to stand the witness down to see a lawyer to explain the consequences.

Adverse comment

Where the defendant doesn't give evidence as a witness, no adverse comment can be made by the prosecution or you about not giving evidence: s 75(1) CPA. The defendant has a legal right not to give evidence in their own defence. This does not mean they are guilty.

Likewise, where the defendant does not call their spouse as a witness, no adverse comment about that can be made: s 75(2) CPA.

Witness refusing to give evidence

s 77 CPA.

Any person present in court at the hearing of any charge, whether or not they have been summoned to give evidence, may be required to give evidence: s 77(1) CPA.

If they refuse to give evidence, or refuse to be sworn, without offering any just excuse, or having been sworn refuse to answer questions concerning the charge, you may:

- order that unless the person consents to give evidence or be sworn or answer questions, they may be detained in custody for a period not exceeding 7 days; and
- issue a warrant in Form 8 for their arrest and detention: s 77(2) CPA.

However, this power to detain a witness in custody is an extreme sanction and should be exercised only after the witness has been offered the chance to take legal advice. The court should appoint legal counsel if necessary.

After being in custody for 7 days, if that witness still refuses to give evidence, or be sworn, or answer questions, you may direct that they are to be detained in custody again for 7 days, and so on, until such time as they change their mind: s 77(3) CPA.

This does not limit the power of the court to commit the person for contempt of court: s 77(4) CPA.

8.2.9 Documentary evidence (exhibits)

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; and
- 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 and so on, and defence exhibits are letters A, B, C and so on. An exhibit produced by a prosecution witness during cross-examination is a defence exhibit.

Marking of exhibits by witness

Often parties pass exhibits to witnesses and invite them to mark some point – for example, the impact point in a collision. Ensure that the witness marks all photos, plans, or maps with a differently coloured pen, and that your notes clearly describe the significance of these marks.

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.

9. Making a decision: Reaching a verdict

9.1 Preparation

- Know what the essential elements of the offence are.
- The onus of proof is on the prosecution to prove all the essential elements beyond reasonable doubt. The defendant does not have to prove anything (unless there are statutory exceptions: see "Evidence").
- Take full notes.
- Witnesses should give their evidence at your speed.
- Questions from you are for clarification only.

9.2 Who is your audience?

Consider who you are giving the decision for:

- prosecution
- defendant
- victim
- media
- public
- appellate court.

Consider their need for reasons. This is really the most important aspect of a judgment. Who are you writing for? The answer is firstly and most importantly the parties to the criminal proceeding and any victim(s) involved.

For a criminal conviction, the essence of a judgment is that you are telling the defendant why they have, or have not, been convicted and, in doing so, you are also telling the prosecution why they have, or have not, succeeded.

There are other important audiences. You are writing to tell the public the reasoning and result of the criminal charge so that they can understand and have confidence in the justice process in practice. Finally, you are writing so that any Appeal Court can understand why you reached the decision you did.

The essence of judging is both the decision and the reasons for the decision.

9.3 Oral or reserved judgments

Judgments may be oral or reserved.

The reasons why you may want to deliver an oral judgment include:

- immediate decision;
- no delay;

- fresh in your mind; and
- brings matters to a conclusion for the parties.

There are reasons why, in some circumstances, an oral judgment cannot or should not be made in more complex cases:

- time required to consider and reflect, re-read evidence, consider submissions, and research the law;
- if there is tension in the court and a likelihood of violence.

Decisions (whether oral or reserved) should:

- be ordered, logical and structured;
- make factual findings;
- apply the law;
- give reasons;
- provide a decision.

The difference is in the preparation.

9.4 Oral judgments

Before the trial. You should:

- know and have written down beforehand the legal ingredients of each charge;
- find out what the trial issues are (if possible);
- get out your template;
- from the template, before trial, fill in the law section, possibly the issues section and perhaps prepare an introduction.

At the trial:

- once the trial begins, make notes under each heading, for example, identify facts not in dispute and facts in dispute (maybe using coloured pens);
- do the same for any dispute about the law;
- at the end of the trial, your template should contain relevant written material;
- do not forget, **you need reasons for all your conclusions**;
- sometimes it is better to adjourn for an hour or so to structure a decision, or even to wait until first thing the next morning to deliver your judgment.

Do not give an "interim" oral decision first. The decision must be either entirely oral with reasons clearly stated for the transcript or written and read out entirely accurately. What you say becomes the official court record and the basis for any appeal, not what you write.

You should not alter the substance of reasons for decisions given orally. While the correction of slips or poor expression including citations omitted at the time of delivery of oral judgments is acceptable, this should not extend to the addition or omission of material reasons or findings. When delivering an oral judgment, it is not necessary to state that you are reserving the right to edit the judgment.

9.5 Reserved judgments

You should try to deliver reserved decisions within a month. Start immediately after the hearing to do a draft while it is still fresh in your mind.

When you are judgment writing, you must:

- use the template to structure your decision;
- use straightforward language and short sentences;
- not use legal terms (unless it cannot be avoided);
- focus on the real issues in the case;
- make clear findings - avoid words such as "maybe" or "possibly". You must reach a firm conclusion on the facts and the law;
- give reasons for your decisions.

9.6 Template for oral or reserved judgments

The following structure is suggested for oral or reserved judgments

Decision template

1. Introduce the case and the charge(s)
What are the charges? Use the language of the statute.

2. The legal ingredients of the charge(s)
The onus of proving the charge is on the prosecution (the standard of proof being beyond reasonable doubt). Make sure you cover all the elements of the offence(s).

3. Undisputed facts

4. Disputed facts and a resolution
Summarise the disputed facts as you have found them and explain why the prosecution/defence witness evidence is not accepted or is accepted.

5. Relevant law

6. Apply the law to the facts
Apply the law from 2. to the facts in 3. and 4. (including any defences). Show each element of each charge has been proved or not proved, beyond reasonable doubt.

7. Formal decision
Use the wording of charge and "beyond reasonable doubt".

9.7 Guidance on using the template

9.7.1 Introduction and the legal charges

This short section is intended to tell the reader in a few short sentences what the case is about and what the issues are – for example, assault/self-defence.

> **Note:** It is important to use formal terms of address. Defendants and others are entitled to be addressed respectfully.

9.7.2 The legal ingredients of the charge(s)

The elements of the offence are the essential components of the offence. Each element must be proved beyond reasonable doubt before a charge can be proved.

9.7.3 Undisputed facts

When describing the undisputed facts – generally those that lead up to the alleged crime – you do not need to recount what each witness has said. Simply describe what has happened. There is no need to say this witness said this and the next witness said the same.

9.7.4 Disputed facts and a resolution

For the disputed facts of the case, you now need to recount what each party says about what happened next. Summarise 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.

At the end of this section, summarise the disputed facts as you have found them. If after hearing all the evidence you are just not sure who to believe, then the verdict must be "not guilty". If you are "not sure", you have not been persuaded beyond a reasonable doubt.

9.7.5 Relevant law

Describe the law as relevant to the case. You need to identify if there is any dispute about what the law is; if there is a dispute, you need to resolve it and declare the relevant law.

Typically, you will need to:

- identify each element of a criminal charge;
- say the onus of proof is on the prosecution to prove each element of the charge beyond reasonable doubt before there can be a conviction;
- identify any other aspects of the case that the prosecution have to prove beyond reasonable doubt.

For example, looking at self-defence, the prosecution must prove beyond reasonable doubt the defendant did not act in self-defence to prove their case.

Some questions rely almost entirely on your discretion. For questions of this sort, you can sometimes find help in guidelines established by statute or case law 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.

9.7.6 Applying the law to the facts

It is helpful to have some idea what the issues in the trial are before the case begins. Check with the parties in the court room before the trial commences. This means you can focus on the relevant facts.

9.7.7 The formal decisions (verdict)

Finally, state the verdict. In criminal cases it will always be guilty of the charge (or some or all of the charges) or not guilty.

10. Sentencing

10.1 Introduction

After a defendant pleads guilty or is found guilty after a trial, and after you have heard and considered all the relevant evidence, you must sentence the offender to an appropriate sentence without delay. In most cases where a fine is appropriate, this will be done immediately. In more complex cases, you may adjourn to allow time for pre-sentence reports and submissions to be prepared.

The offender (or their representative) should be allowed to ask the court to take their comments into consideration before you pass sentence (known as a plea in mitigation).

The victim may also wish to submit a victim impact statement for consideration in sentencing.

The court may want to inform itself of:

- any relevant programs for youth that may be available to assist in rehabilitation and skills/educational development of young people,
- any community-based programs that could contribute to meaningful sentences for offenders.

You must explain the sentence and your reasons for it so that the defendant understands how the court has assessed the harm done by the defendant and what they need to do to comply with the sentence.

10.2 Jurisdiction

s 21 JA, as amended by s 21 JAA 1991.

If you need to check whether you have power to impose a sentence, please check "Common criminal offences" or "Common traffic matters" (under the heading "Jurisdiction") for guidance.

The limits to your sentencing powers are: 15A

	Maximum sentence: 1 justice	Maximum sentence: 3 justices
Imprisonment	Up to 2 years	Up to 3 years
Fine	Up to $500	Up to $1000

However, if the particular statute provides a lower maximum sentence than those limits, then that is the maximum penalty or fine you may sentence someone. Likewise, if the statute provides a minimum penalty, you must sentence the defendant to not less than that minimum penalty: s 21(1) JAA 1991.

If the trial is held following an election made pursuant to s 15A JAA, the maximum sentences that three justices may impose is the sentence set out in the Act: s 21(2) JAA 1991.

10.3 Purposes of sentencing

There are five basic purposes of sentencing that you to consider when deciding on an appropriate sentence:

- *Punishment*: Punish the offender for their criminal behaviour.
- *Deterrence*: Put the offender off from breaking the law again and act as a warning to others not to do the same.
- *Prevention*: Prevent the offender from doing the same thing again.
- *Rehabilitation*: Change the defendant's behaviour so they do not reoffend.
- *Restoration*: Restore or repair the damage done to others.

10.4 Exercising your sentencing discretion

The level of sentence in each case is up to you to decide, from a minimum level up to the maximum limit for the offence. It must also be within your sentencing jurisdiction.

You must decide on what is a just and correct sentence in the particular facts of the case before you. The defendant 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 the offence was committed: Article 65(h) Constitution.

When deciding on a suitable sentence for the defendant you need to balance or weigh up:

- relevant sentencing purposes;
- the gravity or seriousness of the offence;
- any aggravating or mitigating factors relating to the offending or the defendant;
- consistency in dealing with similar offences.

10.4.1 Aggravating (bad) and mitigating (good) factors

These are factors related to:

- the nature of the offending; or
- the offender themselves and their personal circumstances.

Aggravating (bad) factors will cause you to deal with the offender more harshly. These include violence, multiple defendants, abuse of trust relationship (such as when the defendant is a family member, teacher or priest in a relationship of trust with the victim), exploitation of victim vulnerability, such as their young age or disability, and use of a weapon.

Mitigating (good) factors will cause you to deal with the offender more lightly. These include first offender, minor or no harm caused, young offender, genuine remorse, old age or physical/mental disability which may have contributed.

Factors may fall in between these two, depending on the circumstances, where you must decide on their relevance and weight in sentencing, such as previous good character and family ties.

Drunkenness/drugs: If the defendant chooses to drink or take drugs, this is not a mitigating factor but if they suffer from addiction, make orders that they receive appropriate health treatment if they are sentenced to prison, as denying an imprisoned person access to the healthcare they need may constitute an inhumane, cruel or degrading treatment or punishment in breach of Art 65(1)(b) of the Constitution.

Age: If a defendant is young or very old that may be relevant to sentencing. Young people are less responsible for their offending. Their brains are not fully developed, so they are less able to understand the consequences of what they are doing. But if there are no alternatives to prison, make the period as short as possible and if the young person is a child, ensure they are not imprisoned with adults and are held in an age-suitable facility including access to education, sport and recreational activities and regular family visits (Art 37, CRC).

Disabilities: Take into account whether the defendant has any significant physical or mental disabilities. A mental disability may make the defendant less responsible (culpable) than a defendant without that disability. A physical disability such as being in a wheelchair, may add extra difficulty if imprisoned, than for an able-bodied person.

10.4.2 Consistency

It is important you are consistent when sentencing so that you treat:

- similar cases in the same way,
- serious cases more seriously than less serious cases,
- treat minor cases less seriously than serious cases.

10.5 The sentencing process

s 80 CPA.

Where you have found the defendant guilty (conviction) or the defendant has pleaded guilty, if it is a simple matter you may sentence the defendant immediately.

But where it would be useful to obtain background reports, you may then adjourn the case for two or so weeks, to make further enquiries to decide the most suitable method of dealing with their case. These reports may be required to assess appropriate sentencing options and include:

- a probation report;
- police submissions;
- a victim impact statement (from the police);
- psychiatric assessment (if necessary);
- defence submissions (including letters of support): s 80 CPA.
- investigation of any relevant community-based programs or services which could be part of the sentence.

If you are adjourning, you will also need to consider bail or remand in custody until the next hearing. See "Adjournments" and "Bail" for more details.

At the sentencing hearing, the usual procedure is:

1 **Submissions:** The police will make submissions on sentencing options first. These will likely include where appropriate, a victim impact statement, a medical report (in case of injury to a person), information regarding reparation, and other relevant material.

2 **Previous convictions:** The police will set out the offender's prior convictions (if any) to help you to assess their character and the likelihood of re-offending. The offender has to accept them as correct first. If the convictions are in dispute, the police will need to show the court records as evidence.

3 **Plea of mitigation:** The registrar or you should ask the offender whether they have anything to say as to why the sentence should not passed upon them according to the law: s 109(1) CPA. Also ask if they have anything to say on their own behalf (or their lawyer will if they have one), so any mitigating factors are outlined to you.

4 **Pronounce sentence:** Your sentence will include not only the penalty but also orders as to costs, reparation and possibly compensation.

5 **Appeal (if relevant):** The offender or their lawyer may indicate that the offender intends to appeal against your sentence. There is a time limit to lay a formal documented appeal.

10.6 Delivering the sentence

Use the relevant sentencing simple or complex template to prepare your notes and record the relevant factors. This helps you to make sure you have followed a fair process, have considered all the relevant matters, and makes delivering your sentencing remarks easier. It also helps an appeal judge to understand what you have done if an appeal is made.

10.6.1 State the charge(s)

Start by restating each charge and the maximum penalty. Say whether the defendant pleaded guilty, (and when they did so after being charged), or whether the defendant was convicted after trial. You will know which charges the defendant was convicted on after trial. Make sure the charges you are sentencing on are the same charges on which you convicted the defendant.
If there is a guilty plea, again check each guilty plea has been recorded in writing by a judicial officer and you are sentencing only on those charges the defendant has pleaded guilty to.

When you have the court file, check the charges, the section in the relevant statute (Crimes Act or other criminal statute) and check the maximum penalty for each charge. Make sure you are legally allowed to sentence the defendant (that is, it is within your jurisdiction).

10.6.2 Set out the summary of facts

Briefly check:

- the legal elements of each charge (see "Common offences"),
- the summary of facts, which should detail each ingredient of each charge,
- aggravating or mitigating features relating to the offending and the defendant.

After a guilty plea, it is good practice to get the defendant to acknowledge the correctness of the police summary of facts, either orally or by their initialling the summary.

This may not be usual for ordinary low-level offending but should be followed in cases serious enough that sentencing will not occur on the day the plea is entered and a probation report is called for.

In other cases, if the relevant facts (essential to the verdict) on which the defendant is to be sentenced are in dispute, you could issue a minute setting out the express and implied facts you regard as essential to the verdict and leave it to the parties to apply for a disputed facts hearing if they disagree.

If they do apply, you can follow the New Zealand disputed facts on sentencing procedure set out in s 24 of the Sentencing Act 2002 (NZ) and referred to in *Police v Mahia* [2017] CKHC 53; JP Appeal 4.17 (18 September 2017).

10.6.3 Summarise any reports

If there are any reports, provide a very brief summary of the essential points and support for any sentences. Some probation reports may make a recommendation as to the sentence. While of some value, you do not need to impose the sentence recommended in the report. It is up to **you** to decide the sentence.

10.6.4 Summarise submissions of the prosecution and defendant

This is a summary of the main points made by the prosecution and the defendant. You should briefly cover the submissions, including aggravating/mitigating facts. Both sides should be equally covered.

If a particular sentence is suggested by either the prosecution or the defendant, include this suggestion in your summary. If the defence want, for example, a respected person from the defendant's village to speak about the defendant personally (not about the offending) then welcome this.

10.6.5 Mention the impact on the victim(s)

You may have a written victim impact report before sentencing or perhaps a victim will come to court and want to speak personally or through the prosecution. Explain to the victim they are there to speak about the effect of the crime on them rather than abuse the defendant or their family. Include a brief comment in your remarks about the effect on the victim.

10.6.6 Set the starting sentence

This is the sentence you would impose based on the facts alone (not including the offender's personal circumstances). Where do the facts of this case fall, from the least serious to the most serious offence of this type?

Start with a brief summary of the facts setting out the good or bad features. Are there are any aggravating features of the offending? For example, offending while on bail or when subject to another sentence would justify a small increase in the start sentence. Likewise, are there any good features that would justify decreasing the start sentence? Be specific on how these affect the starting sentence.

You would say:

> "Therefore, the starting sentence is…"

10.6.7 Adjust the starting sentence: Aggravating and mitigating factors of the offender and early plea adjustment

You may adjust the starting point up to reflect the aggravating factors that are relevant to the offender (after which, you may then make an adjustment down for any personal mitigating factors, together with any guilty plea discount.

If the defendant has pleaded guilty, they will be entitled to a deduction. The deduction is typically a maximum of 25% to 33% of the above sentence. The maximum is only given where the guilty plea is at the **earliest reasonable opportunity**. The later it is before trial, the lower the percentage, for example, if a guilty plea is entered one to two days before trial then perhaps only 10% to 15% reduction. State this percentage for a guilty plea.

10.6.8 Consider whether the sentence is fair

Now ask yourself if this is a fair sentence overall for this offence and this offender.

10.6.9 Sentence the offender

Finally, at the end tell the offender what the sentence is:

> "Mr/Mrs/Ms [*name*], on the charge of ....., you are sentenced to ....." [Add any specific conditions, for example, terms of probation, time to pay, fine, amount of compensation, and so on.]

10.7 Where the defendant is convicted of more than one offence

s 9 CA, s 15 CPA.

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 prior sentence, you may direct that the sentences shall take effect:

- one after the other (cumulatively); or
- at the same time (concurrently).

Where an act or omission constitutes an offence under two or more provisions of the Crimes Act or any other Act, the offender may be punished under any one of those provisions or relevant Acts. But no-one is liable, on conviction, to be punished twice in respect of the same offence: s 9 CA.

Where an information is framed in the alternative and the defendant is convicted, you may limit the conviction to one of the alternative charges: s 15 CPA. See "Information" to find out more.

10.8 Types of sentences

There are various types of sentence you can impose under the relevant statute. For all the different sentences, record your reasons and final order(s) on the Criminal Decision Sheet and include any conditions, costs and so on. Sentencing options and guidance on costs are set out here.

10.8.1 Imprisonment

Section 21 JAA 1991, and ss 108(1) and 114 CPA.

- Anyone liable to imprisonment for any term for any offence may be sentenced to imprisonment for any shorter term: s 108(1) CPA.
- Imprisonment is appropriate only when no other sentence is appropriate and should be as short as appropriate in the circumstances.
- A defendant may be sentenced for a definite term up to the maximum allowed in the statute creating the offence and within your jurisdiction: Article 65(g) Constitution and s 21 JAA19.
- You may direct that the sentence shall start on the expiry of another specified sentence: s 114 CPA.
- The Cook Islands legal system does not have suspended sentences as an option for sentencing. There is no home detention either.

Example pronouncement:

> "[Mr/Mrs/Ms ....,] on the charge of ... ., a conviction is entered, and you are sentenced to a term of imprisonment of ..... months."
>
> *[If there are other charges:*
>
> "And on the additional charge of ....., you are sentenced to a term of imprisonment of ..... months to be served concurrently [or cumulatively] with the other charge of ....."]

10.8.2 Probation

Sections 6-11 CJA.

- Instead of imprisoning the defendant, you may release them on probation for a minimum period of one year and up to three years.
- A probation report will include suggested conditions of the probation. As part of the probation order, you must name the probation officer that is to supervise the offender's probation programme: s 6 CJA.
- Relevant factors to decide whether probation is suitable include:
  - the nature of the offence;
  - the defendant's character and age (young offenders should be given another chance wherever possible);
  - their home surroundings and supportive family and community members; and
  - whether you can deal efficiently with their case.
- There are mandatory conditions of probation under s 7 CJA and non-mandatory conditions under s 8 CJA.
- You should warn the defendant that any breach of the probation order entitles you to sentence them for the original offence, in addition to the breach: s 11 CJA.
- Both the defendant and the probation officer may apply at any time to vary or suspend the conditions in the probation order and, if they have done half the term of their probation, apply for a discharge from probation (or to extend the term if less than 3 years): s 9 CJA.
- Any probation officer or member of the police who reasonably believes that the defendant has breached their probation conditions may arrest them without a warrant, as this is an offence: s 10 CJA. For such a breach you may fine the defendant, order a further term of imprisonment of up to 3 months, and/or extend the term of probation for up to 3 years.

10.8.3 Fine

Section 5A CPAA 2000 (CPAA 2000), ss 108 and 117 CPA, s6 CJA.

- You may fine the defendant as well as or instead of imprisonment (if the statute provides for either), provided that the fine is not greater than the maximum fine allowed by the statute creating the offence: s 108(1) CPA.
- Where no fine is set by statute, you **may not** sentence the defendant to pay a fine exceeding the amount which you have the power to impose under your jurisdiction under the Judicature Act and s 108(2) CPA.
- When imposing a fine, you **must** consider the defendant's ability to pay the fine: s 108(4) CPA.
- If a company is convicted of an offence punishable only by imprisonment, they may be sentenced to pay a fine, but you cannot impose a fine beyond your jurisdiction: s 108(3) CPA.
- When you release any person on probation you may also sentence that person to pay any fine authorised by law: s 6(2) CJA.

- Payment options for fines include in instalments over time, or immediately if you think the defendant can afford to do so, or has no fixed address or for any other reason.
- If the offender fails to pay the fine immediately if so ordered or within 28 days afterwards, you may:
  - issue a warrant to seize property
  - make and attachment order from their wages; or
  - imprison the offender for a period of one day for every 50 cents not paid up to 180 days: s 5A CPAA 2000. **Note:** imprisonment would be extremely rare and an absolute last resort

10.8.4 Community service order

Sections 8-14 CJAA.

- For anyone older than 13 years, instead of imprisonment, you may order them to do community service of up to 12 months: s 8 CJAA.
- You should only order community service after you have considered a report issued by a probation officer outlining:
  - the offender's character and personal history; and
  - any other relevant circumstances of the case: s 13 CJAA.
- You may order community service of up to 12 months, where the offender is liable to imprisonment for non-payment of fine: ss 8–10 CJAA. Any unpaid fines are then cancelled. First you must first consider:
  - the probation officer's report under s13 CJAA;
  - any other fines owing by that person.
- You may also make a probation order to follow community service for a period up to one year, after the expiry of the offender's term of community service, and all the probation conditions under s 7 CJA apply, and any special conditions you impose from s 8 CJAA (see "Probation orders" above): s 10 CJAA.

10.8.5 Compensation for loss of property

Section 415 CA.

- You may order the defendant 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.
- Where the defendant was arrested and money was taken from them, you may order the whole or any part of the money to be paid as compensation. Compensation under s 415 CA is to be enforced in the same manner as a fine.
- This order for compensation does not affect the right of any person to recover any extra sum by way of civil proceedings.

10.8.6 Compensation to a person injured by assault

Section 217 CA.

- As compensation, you may award the victim of an assault up to half of the fine if you are satisfied that that assault was wanton and unprovoked and 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 does not affect the right of the victim, or of any other person, to recover damages in excess of the amount awarded in a civil claim.

10.8.7 Restitution of property

Section 416 CA.

- If the defended is convicted and any property is found in their possession, or someone else's on their behalf, you may order that the property is returned to its true owner.
- Where someone has bought the property in good faith and was unaware of it being stolen, you may also order that the offender pays them the purchase price.
- If the defendant has been convicted and has stolen or dishonestly obtained any property which has been pawned to a pawnbroker, you may order the pawnbroker, with or without payment, return the property to its true owner. You must give the pawnbroker a chance to be heard if they are not paid.

10.8.8 Order to "come up for sentence"

Section 113 CPA.

- You may order the offender to appear for sentence at a later date (when called upon) and on such conditions as you think fit. Relevant factors include:
  - the circumstances of the case
  - the nature of the offence
  - the character of the offender: s 113(1) CPA.
- You may call the offender to appear for sentence within any period up to 3 years from the date of the conviction, or if no period is so specified, within one year from the date of the conviction: s 113(3) CPA.
- You may then, after looking into the circumstances of the case and their conduct since the order was made, sentence or otherwise deal with the defendant for the offence in respect of which the order was made: s 113(4) CPA.
- In making this order, you may still order the payment of costs, damages, compensation, or for the restitution of any property, if the statute creating the offence allows you to make such other orders: s 113(2) CPA.

10.8.9 Discharge without conviction

Section 112 CPA.

- Where the offender has **pleaded guilty**, after an inquiry into the circumstances of the case, you may discharge the offender without convicting them, **unless a minimum penalty applies** under the relevant statute creating the offence: s 112(1) CPA.

- This is also treated as an acquittal: s 112(2) CPA.
- However, this would be rarely used and only in special circumstances where the consequences of conviction far outweigh the crime committed.
- This requires you to make an inquiry into the circumstances of the case first. If any of the key facts are in dispute, follow the process for facts in dispute set out in "Summary of facts" above.
- After discharging the defendant, if you are satisfied that the charge was proved against them, you may also make an order for the payment of costs, damages or compensation, or the restitution of property, as if the person had been convicted and sentenced: s 112(3) CPA.
- Relevant factors include (based on the equivalent s 107 of the Sentencing Act 2002 (NZ)):
  - the seriousness of the offending (including good and bad factors of the offending and those personal to the defendant)
  - direct and/or indirect consequences of conviction (and how much of a risk there that these will occur)
  - whether the consequences are out of all proportion to the offence(s).
- Essentially when making a decision, you must balance the consequences of the conviction with the gravity of the offence.
- It is for the offender to tell you what they say the consequences of a conviction will be. You will need to be satisfied that what the offender claims is true. This requires you to assess the seriousness of the crime. If the seriousness is minor and the effect of a conviction on the offender is high, then you may discharge.

10.8.10 Security for keeping the peace

Sections 121-127 CPA.

- Anyone may apply for an order for a bond for keeping the peace (Form 18, CPA), with or without sureties where:
  - the applicant has cause to fear that the defendant will (or provoke someone else to):
    - harm the applicant or his wife or child or household member;
    - destroy or damage the applicant's house;
  - the defendant (to annoy or provoke the applicant or the public) has:
    - used provoking or insulting language;
    - exhibited any offensive writing or object;
    - done any offensive act;
  - the defendant has threatened to (or will get someone else to) do any act within s 317 CA (arson); s 321 CA (wilful damage): s 121 CPA.
- This application is treated as if it were an Information: s 122 CPA.
- You may only make this order if you are satisfied under:

- s 121(a) that the applicant has just cause for their fear; or
- s 121(b) that the conduct complained of is likely to be repeated and may tend to provoke a breach of the peace; or
- s 121 (c) that there is just cause to fear that the defendant will, if not prevented, carry out the threats: s 123(2) CPA.

➢ You may order the bond for up to one year. You may also make such an order where the defendant is charged with an offence (whether or not they are convicted or sentenced) and the evidence establishes one of these grounds: ss 123-124 CPA.

10.8.11 Probation

Sections 7 and 8 CJA.

Mandatory probation conditions: s 7 CJA (you must order these conditions):

➢ Within 24 hours after release, the defendant has to report in person to the supervising probation officer and continue reporting as directed.

➢ Give reasonable notice to their supervising probation officer if moving to another district; and notify the next probation officer including their address, and workplace within 48 hours

➢ Not reside at an address, continue in any job, or associate with any named person, or with persons of any specified class as the probation officer directs.

➢ Be of good behaviour and commit no offence against the law.

Extra probation conditions: s 8 CJA (use if appropriate):

➢ Return to their island of origin and stay there for a set time period.

➢ Pay the police costs.

➢ Pay damages for injury or compensation for losses suffered by the victim(s).

➢ Do not consume alcohol or drugs.

➢ Do not associate with any named person or person of any specific group.

➢ Comply with any conditions as to where they live, work or their earnings.

10.8.12 Costs

Relevant legislation is ss 92 JA and s 414 CA.

➢ You may make an order as to costs for any proceedings or by any party to the proceedings: s 92 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 police costs including the cost of obtaining a blood alcohol report: s 414 CA.

➢ Likewise, where any person is acquitted, you may order costs against the police: s 414 CA.

Any order of costs under s 414 CA has the same effect as a judgment.

10.9 Relevant case law

10.9.1 Proof of facts for sentencing

Police v Mahia [2017] CKHC 53; JP Appeal 4.17 (18 September 2017).

- For sentencing, the starting point is that, when a plea of guilty is entered, the defendant admits all facts express or implied that are essential to the plea. That being so you must accept as proved those core facts for the purpose of sentence, or when faced with an application for discharge without conviction.
- Then the prosecution must prove beyond reasonable doubt any aggravating fact, and negate to the balance of probabilities any mitigating fact that is not believable or false.
- The defence must establish any mitigating fact on the balance of probabilities, but may not advance in mitigation any fact "that is related to the nature of the offence or to the offender's part in the offence."

10.9.2 Discharge without conviction

Police v Anguna [2013] CKHC 41; JP Appeal 7.13 (11 September 2013).

- The High Court accepted there was a three-stage process to consider when using this discretion:
  1. the gravity of the offence and whether the offending is serious,
  2. the negative direct and indirect consequences of a conviction on the defendant, and
  3. whether the direct and indirect consequences of a conviction would be out of proportion to the gravity of the offence committed.
- This approach was based on the equivalent section 107 of the New Zealand Sentencing Act 2002. Therefore this duty requires you to balance the consequences of the conviction with the gravity of the offence.

Police v Waters [2018] CKHC 16; CR 538.2018 (17 September 2018).

- The defendant was granted a discharge without conviction for a driving accident (supported by the police) where she:
  - accepted responsibility immediately;
  - paid reparation to the victim and police costs; and
  - had excellent references and worked for a non- profit organisation.

Police v Pare [2005] CKHC 5; CR 454-459 of 2005 (25 November 2005).

- The serious offence of the misuse of public money charge meant that the Judge did not deem it appropriate to grant a discharge without conviction, regardless of the defendant's blameless record and excellent community contributions.

Police v Mahia [2017] CKHC 53; JP Appeal 4.17 (18 September 2017).

Police v Metcalfe [2017] CKHC 14; JP Appeal 3.2016 (15 March 2017).

Police v Okotai [2009] CKHC 19; CR31.08 (10 December 2009).

11. Criminal harassment

11.1 Introduction

There are two parts to the Harassment Act 2017 (HA)**: civil restraining orders** and **criminal offences**. A person's behaviour can amount to both criminal and civil harassment. In those situations, the person being harassed can both complain to the police and apply to the court for a restraining order:

- If a person wishes to get a legal order to prevent harassment, they can apply for a restraining order from the court under Part 3 HA. See "Civil harassment".
- Protection orders are also available from the Family Court where family members are involved. See "Temporary protection orders".

This part relates to criminal harassment.

11.2 Meaning of harassment

ss 4–5 HA.

A person harasses another person if they engage in a pattern of behaviour, which includes any specified act and is directed against that other person, on at least two separate occasions within a period of 12 months: s 4 HA.

The two occasions can include the same or different specified acts, and these can be to the same person or to a different family member but directed against the same person: s 4 HA. It also includes one continuing act carried out on one occasion over any period of time or over a long period. For example, where offensive material about a person is placed online and remains there for a long time.

"Specified act" under s 5 HA, has the same meaning as "stalking" in the Family Protection and Support Act (FPSA) 2017, and includes:

- following someone;
- watching or loitering outside or near a building or place where a person resides, works, farms, fishes, carries on a business or studies, or any other place frequented by them;
- telephoning, text messaging, emailing, or using other technologically assisted means to contact someone, or inducing another person to contact that person;
- sending or delivering, or causing the delivery of letters, packages, or other objects to someone;
- entering or interfering with property in the person's possession without their express consent;
- keeping someone under surveillance;
- acting in any other way towards someone that could arouse fear in a reasonable person.

11.3 Purpose of the Harassment Act 2017

s 7 HA.
The purpose of the Harassment Act is to:

- recognize that behaviour that may appear innocent or trivial when viewed in isolation may amount to harassment when viewed in context;
- provide adequate legal protection for all victims of harassment.

The Act aims to achieve this purpose by:

- making the most serious types of harassment criminal offences;
- new civil restraining orders to protect victims of harassment (other than those who are covered by care orders under Part 6 Family Protection and Support Act);
- providing effective sanctions for breaches of the criminal and civil law relating to harassment.

11.4 Criminal harassment offence

s 9 HA.

It is a criminal offence to harass another person in any case where:

- the defendant intends that harassment to cause that other person to fear for their own safety or the safety of any other family member; or
- the defendant knows that the harassment is likely to cause the other person, given their particular circumstances, to reasonably fear for their own safety or that of any other family member.

The penalty on conviction is imprisonment for a maximum term of 2 years, a maximum fine of $3,000, or both.

11.5 Enforcement of restraining orders

s 26 HA.

It is an offence to contravene a civil restraining order without reasonable excuse, including:

- an act breaching the order; or
- failing to meet the restraining order conditions.

The penalty on conviction is imprisonment for a maximum term of 6 months, a maximum fine of $1,000, or both. But if it is not an individual, then a maximum fine of $5,000 may apply.

The penalty increases if a qualifying offence is committed and:

- the person has previously been convicted on at least two different occasions of a qualifying offence; and
- at least two of those qualifying offences were committed not earlier than 3 years before the current offence that is before the court.

A qualifying offence is where two offences are committed against the:

- same restraining order; or
- restraining orders granted to benefit the same person.

11.6 Power to require an alleged harasser to supply their name and details

ss 27–29 HA.

The police have the power to require an alleged harasser to give their name and address to them if:

- a complaint is made to a constable stating that a particular person (the alleged harasser) is harassing, or has harassed, another person; and
- the person making the complaint does not know the name, or address, or both, of the alleged harasser; and
- the police have reasonable grounds to suspect this harassment has happened.

An alleged harasser includes a person who is being, or has been, encouraged by another person to do any specified act to a person.

The police must tell the alleged harasser, at the time of requiring the particulars, that the particulars are being required under s 27 of the HA.

If the police suspect on reasonable grounds that any such details are false, they may require the alleged harasser to supply satisfactory evidence of those details.

If the alleged harasser, without reasonable excuse, refuses or fails to supply any details or evidence when required to do so, and still refuses after being warned by the constable, that person may be arrested without warrant.

It is an offence to refuse or fail to supply any such details or evidence if required by the police and the penalty is a fine up to $500: s 28 HA.

The police may release information to the registrar to enable an application to be made if they know the name, whereabouts, or address of a person who is alleged to be harassing, or to have harassed, another person: s 29 HA. This applies whether or not the information was obtained under s 27 of the HA.

Court staff must treat that information as confidential, and must not disclose the information other than to the applicant or their representative so that they may apply for:

- a restraining order against the alleged harasser; or
- a direction under s 19 HA (restraining order that applies to associates) in respect of the alleged harasser.

11.7 The power to clear the court and to prevent publication

Sections 39–41 HA, and s 76 CPA.

You may exclude all or any persons for the whole or any part of the proceedings, where you are satisfied that it is desirable to do so in the interests of any person (including the privacy of the applicant) and the public interest: s 39 HA.

Where you are of the opinion that the interests of justice, public morality, or the reputation of any victim of any alleged sexual offence or offence of extortion, require that all or any persons should be excluded from the Court for the whole or any part of the proceedings, you may direct that those persons be excluded accordingly. This power to clear the court **does not** give you power to exclude:

- the police or defendant or their agents/lawyers,
- any accredited news media reporter. (s 76(1) CPA).

With or without this order, you may also make a temporary or permanent order forbidding the publication of:

- any report,
- an account of the whole or any part of the evidence presented in court,
- submissions made,
- the name of any person or details that may disclose their identity or their affairs: s 39.

At any time on application by any person, you may renew a temporary order or review a permanent order for preventing publication: s 40 HA.

The penalty for breaching any such order is a maximum fine of $1,000 for an individual, or $5,000 for a company: s 41 HA.

11.8 Non-molestation order

s 44 HA.

If a non-molestation order was in force prior to the Harassment Act, then it remains in force as if it was a restraining order made under the Act. This order can be varied or discharged by virtue of the Act.

The penalty for a breach of a non-molestation order is:

- If the breach occurred before the HA came into force, the lesser of:
  - the penalty under the Cook Islands Amendment Act 1994 before its repeal; or
  - the penalty provided for in the HA.
- If the breach was after the HA came into force, then the penalty in the HA applies.

12. Other Matters

12.1 Preliminary inquiries

12.1.1 Relevant legislation

Criminal Procedure Act 1980–81 (CPA), ss 99–100.

12.2. Role and purpose of a preliminary inquiry

s 99 CPA.

A preliminary inquiry will only take place if it is requested by the defence in rare cases, and the offence is one to be tried before a judge under ss 14, 15A, 16 or 17 of the Judicature Act 1980–81: s 99 CPA.

The purpose of a preliminary inquiry is for you to decide if there is a sufficient case, evidence or grounds, to put to the defendant at their trial before a judge.

You should not:

- 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 you is "Would a judge, 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 you must discharge the defendant in cases where there is not sufficient evidence to commit them to trial by a judge of the High Court.

12.2.1 The process prior to a preliminary inquiry

s 99 CPA.

12.2.1.1 Tendering written statements

The police or prosecution will give to the court and the defendant, or their counsel or solicitor, not later than 28 days before the date fixed for trial, written statements of each witness that will be called by them at the trial: s 99(1)(a), (e) CPA.

Where a witness is a Cook Islander, the written statement given shall be given in both the English and Māori languages, or if a defendant who is a Cook Islander requires this.

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 s 653 of the Cook Islands Act 1915 that it is true to the best of their knowledge and belief. (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.)

Where a person under 21 makes a written statement, they shall give their age.
Where a person who cannot read makes a written statement, it shall be read to them before they sign it and be accompanied by a declaration by the person who read the statement that it was in fact read to the person.

If a written statement refers to any other document as an exhibit, it shall be accompanied by:

- a copy of that document; or
- such information that will enable the party who it is given to, to inspect the document or a copy of the document.

In any criminal trial a written statement by any person provided under s 99(1)(a) CPA is admissible as evidence to the like extent as oral evidence at trial with the defendant's consent: s 99(2) CPA [Amended Act 1991/7].

12.2.1.2 No written statements

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: s 99(1)(a) CPA.

12.2.1.3 Notice of preliminary inquiry

If a defendant is represented by counsel, counsel may, not later than 14 days before the date of the trial, notify the registrar that they require the written statements to be considered by a justice at a preliminary inquiry: s 99(1)(f)(i) CPA.

If no such notice is given, the defendant shall be deemed to have consented to their committal for trial and they shall be so committed: s 99(1)(f)(ii) CPA.

If 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: s 99(1)(g) CPA.

12.2.1.4 Hearing of the preliminary inquiry

s 99(1)(h) CPA.

You should conduct a hearing in accordance with the provisions of s 99(1)(h) of the Criminal Procedure Act. Before you decide whether the defendant should be committed for trial you must consider:

- all written statements that will be given at the trial; and
- any submissions made by either party.

12.2.1.4 Is 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 court 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.

12.2.1.5 The decision

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: s 99(1)(i) CPA.

If you decide the defendant should not be committed for trial, you should discharge them. This should be recorded on the Information: s 99(1)(j) CPA.

> **Note:** A discharge of the defendant does not operate as a bar to any other proceedings in the same matter: s 99(1)(k) CPA.

12.2.2 Evidence of witness not called at a preliminary inquiry

s 100 CPA.

Before or during a trial, you may make an order that the evidence of a witness shall be taken at a time and place fixed by you or a judge 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.

You or a judge may modify any times set for taking the evidence and give any directions in relation to the taking of the evidence under s 99, as you think necessary, and these also apply to the taking of evidence under s 100: s 100(2)–(3) CPA.

12.3 Special pleas

12.3.1 Relevant legislation

Criminal Procedure Act 1980–81 (CPA): ss 63–67

12.4 Types of special pleas

s 63 CPA.

There are three special pleas that are extremely rare but may be pleaded by the defendant. These are a plea of:

- previous acquittal;
- previous conviction;
- pardon: s 63(1) CPA.

All other grounds of defence may be relied on under the plea of not guilty: s 63(2) CPA.

The three special pleas may be pleaded together and should be dealt with by the court before the defendant is called on to plead further.

12.5 How to determine the availability of special pleas

The availability of a special plea must be decided by you on any evidence you consider appropriate. This issue rarely arises but if it did, you should refer this as a question of law to a judge to decide under s 106 CPA.

You may issue written directions to assist with determining whether the plea is available, including calling for submissions, evidence or an oral hearing.

It is enough for the defendant to state that they have been lawfully acquitted or convicted of the offence(s) to which they are entering a special plea of previous acquittal or previous conviction: s 63(4) CPA.

If you decide that the special plea entered is not available, the defendant must be required to plead to the charge including a not guilty plea: s 63(3) CPA.

12.6 Test for the dismissal of a charge

The test for dismissal of a charge is the same for all three special pleas. You must dismiss the charge if you are satisfied that the defendant has been convicted, acquitted or pardoned of:

- the same offence as the offence currently charged, arising from the same facts; or
- any other offences arising from those facts.

On the trial of an issue on a plea of previous acquittal or conviction:

- A copy of the entry in the Criminal Record Book, a copy of the information, and a copy of any notes made by the judge or justice presiding at the former trial, certified by the registrar, shall be admissible in evidence to prove or disprove the identity of the charge: s 64 CPA.
- If you think that the matter on which the defendant was formerly charged is the same in whole or in part as the offence currently charged and that the defendant might, if all proper amendments had been made, have been convicted of all the offences in the Information, you must discharge the defendant: s 65(a) CPA.

- If you think that the defendant might on the former trial have been convicted of any offence on that Information, but now they may be convicted of some other offence on that Information, the court shall direct that that the defendant should plead as to any other offence charged: s 65(b) CPA.

Where an Information charges substantially the same offence as that with which the defendant was formerly charged but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction shall be a bar to the Information: s 67(1) CPA.

A previous acquittal or conviction on an Information charging murder or manslaughter or infanticide is a bar to a second Information for the same homicide charging it as any one of those offences: s 67(2) CPA.

If on the trial of an issue on a plea of previous acquittal or conviction to an Information charging murder or manslaughter or infanticide, if the victim died after the trial on which the defendant was acquitted or convicted, the court must direct that:

- if it appears that on the former trial the defendant might if convicted have been sentenced to imprisonment for 3 years or upwards, the defendant be discharged from the Information before it; or
- if it does not so appear so, then the defendant should plead: s 67(3) CPA.

12.6.1 Charge of previous conviction

Where any charge alleges that the defendant has been previously convicted:

a) the defendant does not have to plead to that allegation unless they plead guilty to the rest of that charge;

b) if they plead not guilty to the rest of that charge, the allegation must not be raised;

c) if they plead guilty to or are convicted of any charge then, before sentencing, this prior conviction may be queried, and if they deny it or are silent, the court must inquire into the matter: s 66(1) CPA.

At the trial of the defendant, if evidence of good character is given on the part of the defendant, the prosecutor, in answer to that evidence, may prove the previous conviction: s 66(2) CPA

III Civil Harassment

1. Civil harassment and the Harassment Act 2017

1.1 Introduction

The Harassment Act was brought in to provide a remedy for people who are subject to obsessive behaviour by other persons and for whom no satisfactory legal remedies are otherwise available.

There are two parts to the Harassment Act 2017 (HA): **civil restraining orders** and **criminal offences**. A person's behaviour can amount to both criminal and civil harassment. In those situations, the person being harassed can both complain to the police and apply to the court for a restraining order:

- If a person wishes to get a legal order to prevent harassment, they can apply for a restraining order from the court under Part 3 HA. See "Civil harassment".
- Protection orders are also available from the Family Court where family members are involved. See "Temporary protection orders".

This section relates to **civil harassment**.

1.2 Purpose of the Harassment Act 2017 (HA)

s 7 HA.

The purpose of the Harassment Act is to:

- recognize that behaviour that may appear innocent or trivial when viewed on its own, may amount to harassment when viewed in context over time;
- provide adequate legal protection for all victims of harassment.

The Act aims to achieve this purpose by:

- making the most serious types of harassment criminal offences;
- providing civil restraining orders to protect victims of harassment;
- providing effective sanctions (penalties/punishments) for breaches of the criminal and civil law relating to harassment.

When you are applying the Act to a particular case before you, keep in mind the purpose of the Act.

1.3 Definition of harassment

ss 4–5 HA.

A person harasses another person if they engage in a pattern of behaviour, which includes (s 4 HA):

- any specified act; and
- is directed against that other person, on at least two separate occasions within a period of 12 months.

The two occasions can include the same or different specified acts, and these can be to the same person or to a different family member but directed against the same person: s 4.

It also includes one continuing act carried out on one occasion over any period of time or over a long period. For example, where offensive material about a person is placed online and remains there for a long time.

Specified acts under s 5, are defined as the respondent:

- following someone;
- watching or loitering outside or near a building or place where a person resides, works, farms, fishes, carries on a business or studies, or any other place frequented by them;
- telephoning, text messaging, emailing, or using other technologically assisted means to contact someone, or inducing another person to contact that person;
- sending or delivering, or causing the delivery of letters, packages, or other objects to someone;
- entering or interfering with property in the person's possession without their express consent;
- keeping someone under surveillance;
- doing something that make a reasonable person fear for their safety.

1.4 Civil jurisdiction, standard of proof and evidence

s 30–32 HA.

You have jurisdiction (the power) to (s 30 HA):

- hear and determine an application for a restraining order (including for a direction under s 19 of the HA to extend the order to the associates of the alleged harasser);
- hear and determine an application to vary or discharge a restraining order;
- appoint a representative for the person being harassed under s 14 HA;
- make an order under s 34 of the HA (which concerns vexatious proceedings).

This is part of your **civil jurisdiction** and so the standard of proof is different from the standard required in criminal cases. Every question of fact arising in any proceedings under the HA (other than criminal proceedings) must be decided on the **balance of probabilities**: s 31 HA.

In any proceedings under the HA (other than criminal proceedings), you may receive any evidence that would not otherwise be admissible in a court of law, if you are satisfied that allowing this evidence is required in the interests of justice: s 32 HA. It is an overall question of fairness.

1.5 Applying for a restraining order

ss 10–16, 31 HA.

Any person (applicant) or their appointed representative who is being harassed by another person (respondent) can apply for a restraining order against the respondent, unless they are or have been in a domestic relationship with that other person: s 10 HA.

If the applicant is in a domestic relationship with the alleged harasser, they may apply instead for a protection order under Part 6 of the Family Protection and Support Act 2017. See "Temporary protection orders".
The application must be made on notice, with a copy served on the respondent (associates of the respondent) and every person in respect of whom the restraining order applies: s 16 HA.
If the person eligible for a restraining order is unable or unwilling to apply given their circumstances (this could be due to physical incapacity or fear of harm or other sufficient cause), they can appoint a representative to apply on their behalf: s 10, 14 HA.

A minor can apply through their representative and any restraining order will be enforced, as if the minor were of full age: s 12 HA.

You may hear and determine more than one application for a restraining order where all the applications are made against the same person (whether or not any or all of those applications also relate to any other person): s 33 HA.

1.6 Appointing a representative to apply on behalf of the applicant

ss 14, 15 HA.

You or the registrar must, on an application without notice, appoint a person to be a representative of another person, if you are satisfied that all of the following requirements are met (s 14 HA):

- the representative is an adult and not under any disability and has consented in writing to the appointment (or a company);
- reasonable steps have been taken to find out the wishes of the applicant and they either do not object to the appointment or their objection is not freely made; and
- it is in the best interests of that person to make the appointment if they are unable to make the application personally; or if that person is unwilling to make the application personally, that it is appropriate to make the appointment; and
- there is unlikely to be any conflict between the interests of the proposed representative and the interests of the person in respect of whom the application is made.

A minor can still be heard in the application proceedings where a representative is appointed on their behalf. If they object to the application, you must be satisfied that the objection is not freely made, before allowing any further steps to be taken: s 15 HA.

1.7 Power to make restraining order

ss 17, 19 HA; Art 64 (1)(e), (2) Constitution.

You may make a restraining order against the respondent as long as you are satisfied that all of the following requirements are met (s 17 HA):

- the respondent has harassed, or is harassing, the applicant/victim;
- the behaviour causes the applicant distress or threatens to cause the applicant distress;

- the behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances;
- in all the circumstances, the degree of distress caused or threatened by the behaviour justifies the making of an order;
- the making of an order is necessary to protect the applicant from further harassment.

A respondent who encourages someone else to do a specified act will still be treated as if they committed this act personally.

An order may be made where the need for protection arises from the risk of the respondent doing, or encouraging another person to do, a specified act of a different type from the specified act that was found to have occurred in the application.

Likewise, you may give a direction that the restraining order applies to the respondent's associate(s), if the respondent is encouraging, or has encouraged, that other person to do any specified act to the applicant and the above conditions are met: s 19 HA.

The timing of the specified act by any of the respondent's associates, whether before or after the restraining order is granted against the respondent, is irrelevant.

You should consider the rights and freedoms guaranteed under the Constitution, and whether the restraining order would unreasonably limit the right of freedom of speech under Art 64(1)(e).

However, also consider subject to Art 64(2) any limits imposed by the law to protect others' rights and freedoms, in this case the applicant and any child.

New Zealand case law says that s 14 of the New Zealand Bill of Rights Act 1990 (which is similar to Art 64(1)(e)) in protecting freedom of expression) is relevant when deciding:

- whether or not to make a restraining order; and
- in all the circumstances whether the degree of distress justifies making the order; and
- whether making the order is "necessary" to protect the applicant from further harassment.

Relevant New Zealand cases:

- *Burrows v Thomson* [2018] NZHC 2761.
- *Waxman v Crouch* [2016] NZHC 2004.
- *Beadle v Allen* [2000] NZFLR 639.

1.8 Defence that specified acts were done for a lawful purpose

s 18 HA.

The respondent has a defence to any alleged harassment if they can establish that the specified act was done for a lawful purpose.

1.9 Preventing vexatious proceedings that have no good cause

s 34 HA.

You may dismiss any civil harassment proceedings if you are satisfied that they are not serious (frivolous), totally without merit (vexatious proceedings) or an abuse of court procedures. In other words, proceedings are being brought without any good reason, other than to annoy or frustrate the respondent.

If you are satisfied that a person has persistently brought vexatious proceedings under this Act (whether against the same person or against different persons) you may make an order prohibiting that person from commencing any civil proceedings under this Act without your leave.

You must give the applicant the opportunity to be heard before making the order.

This does not apply to criminal proceedings.

1.10 Standard conditions

s 20 HA.

The standard conditions of a restraining order prevent the respondent and their associate(s) if any, from (s 20 HA):

- doing, or threatening to do, any specified act against the person protected by the order; or
- encouraging any person to do any specified act against the person protected by the order, where the specified act, if done by the respondent, would be in breach of the order.

It is a condition of every restraining order that applies to a continuing act that the respondent must take reasonable steps to prevent the specified act from continuing.

1.11 Length of restraining orders

s 22 HA.

You should always consider how long the restraining order should last for depending on the circumstances of the case before you. The question will be what duration you consider necessary to protect the applicant from further harassment. This is set against:

- any "relationship" between the respondent and the applicant;
- how serious and persistent the conduct is;
- how determined the respondent is and how vulnerable the applicant or victim is.

But in the absence of such a direction, the restraining order will expire 1 year after the date on which the order is made: s 22 HA.

As a matter of good practice, it may be sensible to include an express condition that the matter comes back before you for review at least 1 month before expiry or continuation of the restraining order.

1.12 Special conditions

s 21 HA.

You may impose such special conditions, and for any length of time, that you think are reasonably necessary to protect the person for whose protection the order is made, from further harassment by the respondent, their associate(s), or both.

If no time period is specified, any special condition has effect for the whole of the restraining order, unless sooner varied or discharged.

1.13 Variation or discharge of restraining orders

ss 23–25 HA.

Either the applicant, their appointed representative, or the respondent may apply for an order to:

- vary the duration of the order: s 23 HA;
- vary, discharge or impose any special condition(s): s 23 HA;
- discharge the restraining order: s 24 HA;
- vary the restraining order to apply against a particular person: s 23 HA;
- vary or discharge restraining orders on behalf of minors: s 25 HA.

You may make any of these orders as you think fit. However, you may only grant an extension if you are satisfied that it is necessary to protect the applicant from further harassment: s 23 HA.

An associate of the respondent can apply to discharge a restraining order: s 24 HA.

A representative of a minor can also defend any such application to vary or discharge a restraining order: s 25 HA.

1.14 Copies of orders to be sent to police

s 35 HA.

The registrar must ensure that a copy of the restraining order (or any variation) is made available, without delay, to the officer in charge of the police station nearest to where the person lives for whose protection the order was made. The order can be sent by post, email or other electronic means, for example, entering into a database accessible to the police, or in any other suitable manner.

1.15 Enforcement of restraining orders

s 26 HA.

It is an offence to either breach the restraining order or not meet any of the conditions, without any reasonable excuse. See "Criminal harassment" for more details.

1.16 If the applicant does not know the name and address of the harasser

s 27–29 HA.

Even if the applicant does not know the name or address of the person harassing them, they may make a complaint to the police with any information they have that could help the police find and identify the harasser.

If the police have reasonable grounds to believe this harassment has happened and that they have identified the harasser, the police can make them give their name and address.

If that person refuses or gives false information, they can be fined up to $500, and arrested if they continue to refuse after the police have warned them.

The police will then give this information to the court registrar to help the applicant to complete the application.

See "Criminal Harassment".

1.17 Non-molestation orders

s 44 HA.

If a non-molestation order was in force prior to this Act then it remains in force as if it was a restraining order made under this Act and can be varied or discharged.

If the breach occurred before the Act came into force, the penalty is the lesser of:

- the penalty under the Cook Islands Amendment Act 1994 before its repeal; or
- the penalty provided for in this Act.

If the breach was after the Harassment Act 2017 came into force, then the penalty in the Harassment Act applies.

IV Children's Court and Te Koro Akaau

1. The Children's Court

1.1 Jurisdiction and legislation

Convention on the Rights of the Child (CRC):

- Art 37:Right to freedom from torture, degrading treatment of punishment, no capital punishment or life imprisonment for those under 18 years; no detention or imprisonment of those under 18 years except as a matter of last resort and for the shortest possible time. Where a person under 18 years is detained or imprisoned, they must be held in a facility separated from adults and with access to age-appropriate services and supports, including family visits. Detained children must be provided with free access to legal representation and be able to challenge the lawfulness of their detention/imprisonment.
- Art 40: Any person under 18 years accused of a crime has the same legal rights as adults (right to silence, presumed innocence, right to a swift trial before a competent independent tribunal, right to non-self-incrimination and to examine witnesses etc) and additionally, the right to be diverted from the criminal justice system wherever possible, and where not, the right to be tried through a process that takes into account the child's age, to have parents/guardian present during justice processes, right to free interpreter if needed, right to privacy being protected throughout the legal process, right to legal representation.

Convention on the Rights of People with Disabilities (CRPD):

- Art 5: (non-discrimination), Art 12 (equality before the law), Art 13 (access to justice, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages), Art 14, (prohibition on unlawful or arbitrary detention, existence of a disability shall in no case justify a deprivation of liberty. Reasonable accommodations must be provided to any people with disabilities who are detained or imprisoned).

Parts II and III, Prevention of Juvenile Crime Act 1968 (PJCA); Prevention of Juvenile Crime Amendment Act 2000 (PJCAA/2000); Prevention of Juvenile Crime Amendment Act (PJCAA/2007).

Children may come to the Children's Court either as a "child in need" or if they have allegedly committed a crime. However, a criminal offence against a child by an adult is heard in the criminal division of the High Court, not the Children's Court.

Both types of child-related matters go initially to the Juvenile Crime Prevention Committee (the Committee), established under s 4 PJCA (see below).

The Children's Court is a division of the High Court and a judge of the High Court has jurisdiction in the Children's Court: s 20 PJCA; s 20 PJCAA (2000).

The Children's Court deals with all criminal offences committed by children except for murder or manslaughter, and matters relating primarily to children: s 21 PJCA.

Only a judge or justice who has been appointed under s 20 PJCA and s 20A PJCAA (2000) may exercise jurisdiction in the Children's Court. But any judge or justice may do all necessary acts preliminary to the hearing such as adjourning, remanding the defendant or granting bail within a closed court as s 24 (closed court proceedings) applies: s 20 PJCA.

Children are defined as a boy or girl under the age of 16 years: s 2 PJCA. 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: s 26 PJCA.

A young person is anyone under the age of 17 years: ss 30, 36 PJCA. It has been earlier noted that the provisions providing for children aged 16 and 17 (ie under the age of 18) to be treated as adults, are likely to breach the Cook Islands' obligations under the CRC and so courts should exercise their discretions to the maximum degree to take into consideration a 16 or 17 year old defendant's CRC rights at all stages of the case, including opportunities for diversion and ensuring:

- they are granted bail and not detained;
- their privacy to maintained through closed court hearings and removal of identifying information from the public listings and judgment;
- they have access to free legal representation throughout;
- they are able to understand and participate in the proceeding; and
- tailored community-based sentences are provided to maximise rehabilitation opportunities.

There is caselaw supporting reference and use of the Convention on the Rights of the Child outside of the context of the Family Protection and Support Act 2017, for sentencing a young offender. See *Police v Vakatini* [2017] CKHC 34; CR49.2017 (22 September 2017). The defendant was 15 years old at the time of the alleged burglaries but after he turned 16 his case was transferred to the High Court for him to be sentenced as an adult offender. The Crown prosecutor and the defendant's lawyer submitted he be provided with a non-custodial sentence in accordance with the Convention on the Rights of the Child, and the Court decided to do so, sentencing him to two years' probation and other conditions.

If you are unsure of the age of any child or youth, in the absence of sufficient evidence you may fix their age, which will then be deemed to be the true age of such child or young person for any matters under this Act: s 41 PJCA.

1.2 The powers of the Children's Court for young offenders

ss 21, 26 PJCA.

The Children's Court (the Court) does not have power to convict a child of an offence and sentence them. Rather, when a charge against a child is proven, the Court may – after considering their parents, their environment, history, education, mental state, disposition, and any other relevant matters – place the child under the supervision of a community youth officer: s 26(1) PJCA.

Where a charge of murder or manslaughter is brought against a child or young person it must be dealt with in the High Court. The Children's Court has no jurisdiction in such cases: s 21(2) PJCA. When dealing with such a child, the Children's Court may order their parents or guardians to pay any costs or damages incurred by or through the offence and this may be enforced as if it were a fine: s 26(2) PJCA.

Where the child is charged with any offence, at any time before a final decision has been given, having regard to the gravity of the offence and the public interest, the Children's Court may decline to deal with the offence: s 26(4) PJCA. The Court must note this on the Information with their reasons. Courts should exercise this discretion sparingly given the notable gaps in the rights of 16 and 17 year old children between the CRC and the provisions of the PJCA.

In that case, the Court will adjourn the Information for hearing "de novo" (as if the same had not previously been heard or otherwise dealt with) by the High Court under its criminal jurisdiction: s 26(4)–(6) PJCA.

1.3 Children's Court is closed to the public

s 24 PJCA.

All hearings in the Children's Court are closed to the public, and only the following people may attend:

- any officer or member of the Court;
- the persons immediately concerned with the proceedings, such as 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;
- 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 illegal to publish the name of any child, or any other name or particulars likely to lead to the identification of the child. This includes public court listings and any information which could identify the defendant or any child witness in the judgment.

1.4 Community youth worker's report

s 23 PJCA.

A community youth officer must have an opportunity to first investigate the circumstances of the case and to report to the Court before any case is heard or determined in the Court.

1.5 Sitting as a justice in the Children's Court

s 20A Prevention of Juvenile Crime Act 1968 (as inserted by PJCAA 2000).

As a justice, you may only sit in the Children's Court if appointed to do so by the King's Representative acting on the advice of the Minister.

But you may exercise jurisdiction to do all necessary acts preliminary to the hearing, including adjournment, releasing the young persons on bail or remanding them in custody.

See "Bail applications" to find out more about bail.

1.6 Conducting the Children's Court

ss 22, 37 PJCA.

You need to run the court in a way that is sensitive to the situation of the child. This includes:

- Prioritising cases and preventing delays in cases involving children, as delays have a disproportionately harmful impact on children.
- Adapting your tone, manner, language and being conscious of your height so that the child can best understand and participate in the proceeding.
- Consider whether hearing the case from the bar table rather than the bench or re-arranging the court room might help to create a less formal environment to enhance the understanding and participation of the child.
- Ensure that children coming to court are accompanied by a support person.
- Ensure arrangements are made for them to be met by court staff, shown the court room where the hearing will take place, have what will happen explained, and then accompanied to a separate waiting area away from others attending court.
- Ensure that any publicly displayed listing of the case does not include the child's name or other identifying information, including the judgment.

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 – for example, that the parent is at work or has not bothered to attend – you should adjourn and require the parents or guardians to attend by issuing a 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: ss 22(1), (5) PJCA.

In any proceedings before the Court, children should not be required to give evidence on oath under s 37. Instead, they must declare:

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

1.7 Trivial offences

s 25 PJCA.

You can decide, after considering the community youth officer's report, that the matter is trivial and dismiss the Information, in which case it is treated as if it had never been laid.

2. Criminal justice for young offenders who have acknowledged their offending: Te Koro Akaau

2.1 Introduction

ss 22, 36 PJCA.

If an Information is laid against a child in respect of any offence, you may issue a summons addressed to any parent, guardian or custodian of the child requiring them to appear before the Children's Court with the child at a time to be named in the summons: s 22(1) PJCA.

If any young person who has attained 16 years of age but is not more than 17 years of age appears before the High Court charged with any offence, the High Court may either:

- refer the case to the Children's Court. The Children's Court has the power to deal with the case, and may deal with the person as charged in the manner provided by s 26 of the Act as if they were a child: s 36(1) PJCA; or
- make any order that could be made by a Children's Court if the case were referred the Children's Court: s 36(2) PJCA.

If the offender **acknowledges their offence(s)**, the justice sitting in the Children's Court or the High Court judge, may refer the child or youth offender to Te Koro Akaau or the Children's Community Court: cl 1, MOU.

If not, then the child or youth offender is dealt with in the Children's Court or the High Court. As noted earlier, all efforts should be made by courts to take into account the age of any child, including 16- and 17-year-olds and to apply to them the most beneficial procedures available in the criminal justice process. This approach of avoiding punitive measures which will continue to impact their future life opportunities (such as criminal convictions), helps to maximise opportunities for their rehabilitation and a 'fresh start' to get back on track as a law-abiding person. The Te Koro Akaau Children's Community Court is a progressive model of justice which should be applied as widely as possible to all children, including those aged 16 or 17 who have committed minor offences.

2.2 Te Koro Akaau Children's Community Court

Since 2014, the Te Koro Akaau operative and procedures have been adopted in the Children's Court under the "Memorandum of Understanding Te Koro Akaau" (MOU) dated 24/9/2014 (MOU). This is set out in the Quick guides.

The Te Koro Akaau operates within the legal framework of the High Court and the Children's Court: cl 8 MOU.

The Ministry of Justice administers Te Koro Akaau which offers a more inclusive, restorative and community justice approach to dealing with juvenile and youth offenders: cl 1, Background, cl 7 MOU.

The Children's Court is still the primary court for dealing with child and youth offenders referred to it by the High Court: cl 2, Background, MOU.

2.3 Diversionary process

Schedule A MOU.

The aim of the Te Koro Akaau process is to see if the child or youth offender appearing before the Children's Court may receive a discharge without conviction if they have performed all aspects of a diversionary plan (kaveinga): cl 3, Background, MOU.

Clause 13 and Schedule A of the MOU sets out the following process:

- Te Koro Akaau remands the case to the community youth officer to commence the process.
- An Uipaanga Kopu Tangata (family group conference) is then organised and held before the next court date. The community youth officer will chair the conference and record any agreed recommendations.
- A kaveinga or diversionary plan (based on the best interests of the child and the public interest) is prepared and tabled at the Uipaanga Kopu Tangata.
- The child or young person and their family or support group plus others (see below) consider and agree to the kaveinga.
- The kaveinga is then presented to Te Koro Akaau who either accept or reject the kaveinga.
- If rejected, Te Koro Akaau may order another Uipaanga Kopu Tangata to be convened; or deal with the case by way of sentencing.
- If accepted, the kaveinga is monitored by Te Koro Akaau, and dates are set for review and completion of the kaveinga.
- Te Koro Akaau is given monthly progress updates until completion of the kaveinga.
- At the completion court date Te Koro Akaau may either discharge the child or young person or further sentence them.

2.4 People who may attend the Uipaanga Kopu Tangata

A family-based approach is an important part of the process, so the child or young person and their family or support group attend the Uipaanga Kopu Tangata. Other people who may attend the Uipaanga Kopu Tangata include:

- victims of offences,
- social worker(s), police officer(s), probation officer(s),
- the young person, their family and any family supporters,
- a youth advocate – either lay or professional or both,
- community (village, oire, tapere, or suchlike) support through aronga mana and religious leaders: cl 14(a) MOU.

Note: A case may be referred back to the Children's Court at any stage if it is no longer appropriate to use this process.

2.5 Purposes of Uipaanga Kopu Tangata

The purposes of the Uipaanga Kopu Tangata are to:

- discuss the circumstances of the offending;
- seek the views of those in attendance;
- consider whether a reconciliation or other outcome may be arrived at by the parties affected: cl 9(a) MOU.

A recommended outcome may include payment to any victims for reparation, property loss, medical expenses incurred, or any other reasonable loss suffered by the victim due to the young offender's actions: cl 9(b) MOU.

2.6 Kaveinga principles

The kaveinga and any recommendations must consider the following principles under cl 11 MOU:

- Accountability by the young offender for the wrong that has been done.
- Rehabilitation of the young offender and assessing the suitability of their current living arrangements.
- The involvement of the young offender's family, church, chief, and village.
- The public interest in protecting the community.
- An acknowledgement of the views of the victim, and to restoring the position of the victim according to Cook Islands custom and tradition.
- The putting in place of a plan to rehabilitate the young offender that:
  - fosters responsibility by the young offender; and
  - promotes their self-esteem, cultural awareness and understanding.

3. Sentencing young offenders

You may choose between the following sentencing options for children and young offenders:

- supervision orders;
- community service orders;
- probation orders.

3.1 Supervision orders

ss 27–29 PJCA.

You may make a supervision order placing a child under the supervision of a community youth officer for a term up to 3 years in total (using Form No. 4 in the Schedule). You may also include any conditions for the child to follow during their supervision as you think necessary to ensure their good conduct or to prevent future offending and/or to pay any costs or damages incurred by or through the offence (if any) committed by the child. It is not necessary to specify any community youth officer in the supervision order: s 27 PJCA.

The community youth officer may bring the child back before the Children's Court if either:

- a child fails to follow any instructions of the community youth officer or any condition(s) imposed by that officer or the Court; or
- they are not satisfied with the conduct of the child or with the conditions under which they are living.

You may, as appropriate:

- direct that the child be sentenced by the High Court for the initial offence for which the supervision order was made; or
- make such further order for the maintenance, care and control of the child as necessary in the circumstances: s 28 PJCA.

The community youth officer, or the child's parents, guardian or others supervising the child, may apply to the Court to review the supervision order. You may:

- cancel the order if it has been 12 months since order was made and subject to such conditions you think fit to impose; or
- refuse the application: s 29 PJCA.

No further application may be made within 6 months after the date of the refusal, except by a community youth officer.

3.2 Community service orders

ss 8–9, 13 Criminal Justice Amendment Act 1976 (CJAA).

You may make a community service order for a term up to 12 months, if the offender is not less than 13 years of age and has been found guilty of an offence that carries a prison sentence (even if not convicted); or is liable to imprisonment for non-payment of any fine imposed on them previously: ss 8–9 CJAA.

You must first consider the report of a probation officer (on the offender's character, personal history, and any other relevant circumstances) before you may order community service: s 13(1) CJAA.

If you do not consider the probation officer's report, although the community service sentence is not invalidated, the defendant or the prosecutor may at any time apply to have the sentence reviewed: s 13(2) – (3) CJAA.

You may also impose any fine or other legal penalty, but no other sentence: s 8(3) CJAA.

You may suspend, vary or cancel the community service order on application by the young offender within 7 days of the service of the order: s 9(5) CJAA.

3.3 Probation orders

ss 30, 31 PJCA; ss 10, 13 Criminal Justice Amendment Act 1976 (CJAA).

You may make an order for probation at the same time as:

- a community service order, for an offender over the age of 13 years, for a period of up to 1 year after the expiry of their term of community service: ss 10(1)–(2), 12–13(1) CJAA; or
- a supervision order, so that when the young person reaches 17 years of age, the supervision is to be replaced by probation for up to 2 years: s 30(1) PJCA.

The registrar must notify the Secretary for Justice and the probation officer in whose district the Court office is situated of this order. The community youth officer who is supervising must notify the probation officer in whose district that person then resides when the youth reaches 17 years of age: s 30 PJCA; s 10(3) CJAA.

A supervision order may still be reviewed under s 29 while that child is still under the supervision of a community youth officer, even with a probation order in force. If on review the supervision order is cancelled, then the order for probation is also cancelled: s 30 PJCA.

The supervising community youth officer may apply to the Children's Court to cancel the supervision order and substitute a probation order for a period between 1–2 years as the Court specifies. You may grant or refuse the probation order, having regard to the youth's behaviour while under the supervision of the community youth officer and any other circumstances of the case: s 31 PJCA.

3.4 Conditions of probation

s 32 PJCA; ss 7–10, ss 12–13 Criminal Justice Act 1967 (CJA); s 11 Criminal Justice Amendment Act 1976 (CJAA).

The conditions of probation in s 7 of the CJA (except subs 7(a)), apply to any probation order made in the Children's Court: s 32 PJCA.

In addition, the person on probation must report to a probation officer in the district in which they live, within 48 hours after beginning probation.

The probation officer who is responsible for that person must issue a probationary licence with the conditions to follow during the term of probation.

You may also order all or any of the additional conditions specified in ss 8(1)(e) and (i) of the CJA: s 33 PJCA.

See "Sentencing" to find out more about probation conditions.

3.5 Other provisions of the Criminal Justice Act

s 34 PJCA.

The following sections of the Criminal Justice Act apply to a youth probation order:

- s 9 (variation or discharge of probation);
- s 10 (breach of probation conditions);
- s 12 (effect of subsequent sentence on probation); and
- s 13 (discharge on expiry of probation).

Any necessary changes apply as if the youth had been released on probation on the day on which the term of probation began, including:

- every application must be made to the High Court in its criminal jurisdiction or a Children's Court, as the age of the person may require;
- the term of probation must not be extended beyond the end of 2 years from the date on which the term began: s 34 PJCA.

See "Sentencing" to find more about probation orders.

4. Child in need

4.1 Juvenile Crime Prevention Committee

Part II PJCA; s 5 Prevention of Juvenile Crime Amendment (No. 2) Act 2007 (PJCAA(No 2)/2007).

Where any police officer, community youth officer, school inspector, visiting teacher, head teacher, or chairperson of a village committee has reason to believe that any child is delinquent, neglected, not under proper control, is persistently truanting or otherwise engaged in troublesome or mischievous behaviour, or is living in an environment that is detrimental to their physical or moral well-being, they may notify the Secretary of their belief and reasons for that opinion. They must supply details of:

- the name of the child,
- the names of the parents or guardians of the child or the person in whose custody the child is currently,
- the home address of the child and their parents, guardians or custodians,
- details of the complaint: s 8 PJCA.

The Committee is made up of three members: the Chairperson, who is appointed by the Solicitor-General, and two members appointed by the Minister of Internal Affairs (the Minister). The quorum (enough members to hold a meeting) for meetings is two: s 5 PJCA; s 5 PJCAA (No. 2)/2007).

The Committee has extensive powers and most matters about children are settled by the committee. To find out more about the Committee please refer to Part II of PJCA.

4.2 Child in need and the Children's Court

ss 22–23, 26 PJCA.

Although a child in need is usually dealt with by the Juvenile Crime Prevention Committee, there is also 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, delinquent, is not under proper control, or is living in an environment detrimental to their physical or moral well-being (using Form No. 3 in the Schedule to PJCA).

The Family Protection and Support Act is a piece of legislation that aims to protect family members including children from violence and safeguard the welfare of children. Part 5 of this Act specifically addresses the care and protection of children by ensuring that they are not exposed to any harm, abuse, or neglect, and that their best interests are given utmost priority.

On the other hand, Section 22 of the PJCA serves as a mechanism to protect the best interests of the child in cases of neglect. This provision allows for a complaint to be filed against a parent who is neglecting their child, which will then require the parent to appear in court. The court will then determine the best course of action to ensure the well-being of the child.

Despite having different approaches, the Family Protection and Support Act and the PJCA share a common goal of protecting the best interests of the child. While the former focuses on ensuring the safety and protection of children, the latter serves as a mechanism to protect the child's best interests specifically in cases of neglect.

You may issue a warrant on receiving a complaint in the Children's Court if you think that the child is living in a place of ill-repute, likely to be ill-treated or neglected; or for any other reason the child should immediately be removed from their surroundings: s 22(2) PJCA.

This warrant authorises any police officer, community youth officer, or other person named in the warrant, to enter and search any place, with or without assistance, and take possession of the child until the complaint has been dealt with or to otherwise provide for the temporary care of the child: s 22(3) PJCA.

It is an offence to resist or obstruct any such person in the execution of the warrant. The penalty is a fine of up to $100 or to imprisonment for a term not exceeding 1 month: s 22(3) PJCA.

When a complaint is laid that a child is neglected, the Children's Court may, if satisfied as to the truth of the complaint, place the child under the supervision of a community youth officer: s 26(3) PJCA.

V Family Law and Family Violence Law

1. Family Protection and Support Act 2017: Civil jurisdiction

1.1 Relevance of human rights to family violence law

Constitutional rights and human rights apply equally to cases arising under the civil law jurisdiction which also often involve protection of fundamental human rights. Principles of non-discrimination, especially relating to women, and people with disabilities, as well as the 'best interests of the child' principle, are some of the most important human rights principles applicable.

Art 64(1) of the Constitution of the Cook Islands recognises the right of all people to equality before the law and equal protection of the law, without discrimination including due to their race, national origin, colour, religion belief or sex. This 'list' is not exhaustive and should be read to include other social groups prone to unlawful discrimination, such as people with disabilities. Further, the Cook Islands have obligations under the CRC, CEDAW and the CRPD, which all prohibit discrimination against women, children, and people with disabilities in all aspects of life, and require that particular attention be paid to their protection from abuse and violence and their right to access justice to obtain remedies where their rights are breached.

One of the purposes of the Family Protection and Support Act 2017 is to ensure the law is applied consistently with the Cook Islands' commitment to the CRC, CEDAW and the CRPD (s 3(f)). Key provisions of the three Conventions are set out below, but you should be familiar with all articles provided in the attached summaries, and your interpretation of the Act should be consistent with all three Conventions.

1.1.1 Convention on Rights of the Child (CRC)

Key principles from the Convention on the Rights of the Child (CRC) are:

- Art 3(1): the best interests of the child should be a primary consideration in all actions concerning children.
- Art 9: child should not be separated from parents against their will, except when competent authorities decide that it is necessary for the best interests of the child. If the child is separated, the child has the right to maintain personal relations and direct contact with both parents on a regular basis, providing it is in the best interests of the child.
- Art 12: children have the right to be heard and to have their views considered within any proceeding which affects them, based on their age and maturity.
- Art 18: parents have common responsibilities for the upbringing and development of the child and should have access to appropriate assistance from the state to fulfil their responsibilities. The best interests of the child should be the basic concern.
- Art 19: children have a right to be protected from all forms of physical or mental violence, injury, abuse or neglect while in the care of parents, legal guardians or others.
- Art 20: where children cannot be with their parents, the state has an obligation to provide special protection and assistance, and alternative care arrangements taking into account the need for continuity in a child's upbringing, and to the child's ethnic, religious, cultural and linguistic background.

- Art 21: adoption must always be in the best interests of the child. Inter-country adoption should only be considered where no other suitable care arrangements can be made for the child in their own country, such as through being placed in foster care or with an adoptive family. It must not be for financial gain and must be accompanied by safeguards and standards equivalent to those available for national adoptions.
- Art 23: a child with a mental or physical disability is entitled to special care and protection to ensure their full participation and maximum social integration in the community, including access to education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities and promotion of their self-reliance and dignity.
- Art 24: a child has the right to the highest attainable standard of health and access to facilities for the treatment of illness and rehabilitation of health.
- Art 25: right of the child to mental health support.
- Art 26: right of the child to benefit from social security.
- Art 28: right to free and compulsory primary school education and maximum support for secondary school and beyond.
- Art 32: right to be free from exploitative and harmful forms of work.
- Art 34: protection from all forms of sexual exploitation and sexual abuse.

1.1.2 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Under the CEDAW women and girls are entitled to:

- Art 2: Protection from all forms of discrimination, including gender-based violence as a recognised form of discrimination against women, see CEDAW Committee General Recommendation 19: Violence Against Women.
- Art 15: Equality before the law.
- Art 16: Equality in marriage, divorce, family relations, right to custody of children and to own marital property.

1.1.3 Convention on the Rights of People with Disabilities (CRPD)

The CRPD contains important rights and obligations to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. This includes rights to:

- Art 5: The equal protection and equal benefit of the law. There is a duty upon states to make 'reasonable accommodations' for people with disabilities so that they are able to participate in all aspects of life, without discrimination, on the same basis as others.
- Art 6: Recognises the multiple layers of discrimination faced by women and girls with disabilities, as they often face even greater discrimination due to both their gender and their disabilities
- Art 12: Recognition as persons before the law, and to enjoy legal capacity on an equal basis with others in all aspects of life. States should take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

- Art 16: Freedom from exploitation, violence or abuse including gender-based violence in or outside of the home.
- Art 23: Respect for home and family including the right to marry, found a family and to support and bring up children.

1.1.4 Family Protection and Support Act 2017 (FPSA)

Section 138 sets out your powers or civil jurisdiction to make different orders under the relevant sections of the FPSA, as set out in the table below.

Every question of fact arising in any proceedings under this Act (other than criminal proceedings) must be decided on the **balance of probabilities**.

Civil jurisdiction under the Family Protection and Support Act	
Domestic and child support orders	
1. Divorce order, s 10 2. Variation or discharge of support order, s 15 3. Domestic support order, s 17 4. Childbearing expenses order, s 19	➢ Child support order, s 21 ➢ Child support order for adult child, s 23 ➢ Support enforcement order, s 24 ➢ Paternity order, s 27 ➢ DNA parentage testing, s 29
Parenting orders	
➢ Parenting order, s 40 ➢ Vary or discharge parenting order, s 42 ➢ Parenting enforcement order, s 44	➢ Registration and review of parenting plan, ss 37–38 ➢ Major long-term issues order, s 35
Care and protection orders	
➢ Warrant for return of child, s 45 ➢ Safety warrant and extension ss 54(1), 55(4)(c) ➢ Supervision order, s 57 ➢ Variation or discharge of supervision order, s 61	➢ Care order, s 63 ➢ Variation or discharge of care order, s 64 ➢ Contact order, s 68 ➢ Preventing removal of child, s 132
Domestic violence protection orders	
➢ Temporary protection order, s 99 ➢ Variation and discharge of protection order, ss 106–107 ➢ Conditions relating to weapons, s 103 ➢ Conditions relating to occupation of shared residence, s 104	➢ Compensation for injuries and losses, s 119 ➢ Compensation for expenses, s 120 ➢ Direction to organise hearing, s 100

Procedural orders	
➢ Registration of overseas order, s 130 ➢ Social welfare report, s 70 ➢ Medical and psychological report, s 71 ➢ Non-disclosure of report, s 77	➢ Legal representation for child, s 128 ➢ Representative for child, s 129 ➢ Uipaanga Kopu Tangata, s 69

Justices of the peace are officers of the High Court. Accordingly, the Code of Civil Procedure of the High Court Act 1972 (the Code) applies to FPSA cases. Applications, such as an application for divorce, are originating applications under the Code.

2. Care and protection of children

2.1 Introduction

Convention on the Rights of the Child, CRC: Arts 3, 9, 12, 18, 19, 20, 21, 23, 24, 32, 34.

Convention on the Rights of Persons with Disabilities, CRPD: Art 3(h) (child development, Art 5 (non-discrimination), Art 7 (children with disabilities: best interests of the child and right of children with disabilities to be heard, participate and have their views taken into account in any cases that affect them).

Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW: Art 2 (non-discrimination), Art 15 (equality before the law), Art 16, (equality in marriage, divorce, family relations, right to custody of children and to own marital property).

Family Protection and Support Act 2017 (FPSA): ss 3, 46, 47.

One of the overall purposes of the Act is to ensure the safety and protection of adults and children in domestic relationships: s 3 FPSA.

For Part 5 (Care and Protection) the purposes are to ensure:

(a) the best interests of the child are the paramount factor in all matters relating to the care and protection of the child;

(b) an Uipaanga Kopu Tangata (family group conference) is held where appropriate to:

- encourage family to take part in decisions affecting the child;
- increase the support for the child by family and others;
- make agreed arrangements for the care and protection of the child;

(c) parents/caregivers are helped to exercise their responsibilities to prevent children from experiencing harm, abuse, neglect, or deprivation;

(d) children receive care and protection if they have experienced harm, abuse, neglect, or deprivation;

(e) a child is removed from their home only if they may be at serious risk of harm;

(f) if a child is removed from home, the child, wherever practicable, lives in an appropriate family-like setting nearby and keeps links with family members and others: s 46.

These purposes should guide you when exercising any of your powers under Part 5. The overall question that comes before all other considerations is whether care and protection is in the **best interests of the child**: s 47.

2.2 Definition of a child in need of care and protection

s 48 FPSA.

A child is in need of care and protection if any of the following apply:

- the child is being, or is likely to be, harmed (this may be physical, emotional or sexual harm), ill-treated, abused, or seriously deprived;
- the child's development, physical, mental, or emotional well-being is being, or is likely to be, seriously impaired or neglected and this could be avoided;
- serious differences exist between the child and their parents/caregivers so that the child's physical, mental, or emotional well-being is seriously impaired;
- the child has behaved, or is behaving, in a manner that:
  - is, or is likely to be, harmful to the physical, mental, or emotional well-being of the child or to others; and
  - the parents or caregivers of the child are unable or unwilling to control or to care for the child;
- the parents/caregivers of the child have abandoned the child;
- serious differences exist between a child's parent/caregiver and the other parent so that the child's physical, mental, or emotional well-being is seriously impaired.

2.3 Notice of abuse

ss 50–51 FPSA.

Any person who suspects a child is in need of care and protection may notify the Ministry of Internal Affairs (the Ministry) and provide the child's name, description, and the reasons for their belief: s 50. It is an offence to fail to notify of abuse without a reasonable excuse: ss 50-51.

2.4 Temporary care arrangements

ss 52–53, 65 FPSA.

Any person who is currently providing day-to-day care of the child may request or agree to temporary care arrangements for the child. The Secretary of the Ministry of Internal Affairs (the Secretary) may also do so themselves if that person cannot be found after making reasonable inquiries, or is incapable of requesting or agreeing to the arrangement: s 52(2).

The Secretary may make temporary care arrangements to provide day-to-day care arrangements for children placed in the care of the Ministry for up to 3 months: s 52(1).

Any temporary care arrangement that is agreed to must be in writing and set out:

- the term of the arrangement;
- that the Secretary or applicant may end the agreement on 7 days' notice in writing;

- provisions relating to the care of the child during the term of the arrangement, including, but not limited to:
  - educational, social and religious needs of child;
  - a programme for the provision of services and assistance for the benefit of the child;
  - the responsibilities of the parents, caregivers, or any other person who was providing day-to-day care immediately before the arrangement began;
  - contact times (or when contact is not allowed), venue, duration: s 53.

The Secretary also has various duties and power when a child is placed in the care of the Ministry that are set out in s 65.

At the end of the temporary care arrangement, the Secretary must convene an Uipaanga Kopu Tangata, unless a person who requested the temporary care arrangement is able and willing to resume providing day-to-day care of the child: s 52(3).

2.5 Uipaanga Kopu Tangata meetings (family group conferences)

ss 49, 52–54, 69, 79–80 FPSA.

The purposes of this meeting include the following:

- decide if the child is in need of care and protection;
- encourage family members to be part of the decision-making for the child;
- increase the support for the child's family members and other relevant persons;
- make agreed arrangements or a kaveinga a te kopu tangata (plan) for the care and protection of the child.

You may also direct the Secretary to convene an Uipaanga Kopu Tangata meeting and adjourn any hearing (to apply for any orders under Part 5) until the Uipaanga Kopu Tangata has been held: s 69(1).

If an Uipaanga Kopu Tangata makes a kaveinga a te kopu tangata in accordance with ss 81 and 82, you may stop hearing any application for an order: s 69(2).

This meeting about a child is to give the relevant Uipaanga Kopu Tangata participants an opportunity to:

- determine whether the child is in need of care and protection;
- make a kaveinga a te kopu tangata specifying agreed arrangements for the care and protection of the child;
- review the kaveinga if one is already in force in relation to the child: s 80.

At the Uipaanga Kopu Tangata the participants must:

- specify a caregiver or caregivers for the child; or
- apply to the court for a care order; or
- renew the temporary care arrangement for a further period not exceeding 3 months: s 52(4).

A further Uipaanga Kopu Tangata is held at the end of the extension (if this applies) and the participants must either:

- specify a caregiver or caregivers for the child; or
- apply to the court for a care order: s 52(5).

2.6 Process for the Uipaanga Kopu Tangata meeting

ss 83–88 FPSA.

2.6.1 Appointment of chairperson

The Secretary must appoint at least an equal number of women as men as registered chairpersons in each Vaka and each of the outer islands of the Cook Islands. These chairpersons must undertake approved training in chairing an Uipaanga Kopu Tangata, be experienced in care and protection matters, understand gender equality and meet other criteria for appointment (in the regulations): s 84.

2.6.2 Convening the Uipaanga Kopu Tangata

If you direct the Secretary or they wish to convene an Uipaanga Kopu Tangata, the Secretary must appoint a registered chairperson to do so. The chairperson must within a reasonable time set a suitable time, date, and place for holding the Uipaanga Kopu Tangata so that each person who is entitled to attend may do so, and request them to attend (by post, email, text message, orally): s 85. People who may attend an Uipaanga Kopu Tangata are:

- the child, unless the chairperson thinks it would not be in their best interests to attend, or may negatively impact on the child, or in any other way not be suitable for them; or they are too young or immature to understand the proceedings;
- the parents/caregivers/any proposed caregivers of the child;
- someone from the Ministry of Internal Affairs;
- any other family member, if the chairperson is satisfied it is in the best interests of the child for them to attend: s 86.

The chairperson, after consulting with the Secretary, may also request, allow, or refuse attendance of:

- anyone from the child's community that the child requests;
- a social welfare worker or police officer who is working with the child or the family, or both;
- a lawyer or lay advocate or any other support person the child requests: s 88(1).

If a child does not take part in the Uipaanga Kopu Tangata, the chairperson must take all reasonable steps to obtain and include the child's view and ensure those views are both known and taken into account when making the kaveinga a te kopu tangata: s 83. This is crucial due to the child's right to participate in proceedings which affect them and for their views to be given the maximum weight possible, taking into account their age and understanding.

Others who are entitled to attend but unable to do so may also be able to provide their views to the chairperson where they have been notified. s 87(3).

2.6.3 Functions of registered chairperson

The chairperson must:

- hear the child's view and other participants' views on whether the child is in need of care and protection and, if so, what is an appropriate arrangement for the care and protection of the child;
- assist the participants to make a written kaveinga a te kopu tangata;
- provide a written copy to either the court if the meeting was convened under s 69(1)(a); or to the Secretary if it was convened under ss 50(5)(a), 52(3), or 55(1)(b): s 87(1).

If the participants of an Uipaanga Kopu Tangata can't reach agreement the chairperson must inform the Secretary (if convened under ss 50(5)(a), 52(3), or 55(1)(b)) or the court (if convened under s 69(1)(a)) that no agreement was reached and the reasons why, if appropriate: s 87(2).

2.6.4 Sexual or physical abuse issues

If, at any time before or during an Uipaanga Kopu Tangata, the chairperson believes there has been sexual or physical abuse of the child by a parent, family member, or caregiver, they must:

- immediately stop the Uipaanga Kopu Tangata; and
- apply to the court for a supervision order or a care order: s 88(2).

2.7 Contents of a kaveinga a te kopu tangata (agreed plan)

ss 81–82 FPSA.

A kaveinga a te kopu tangata is an agreement between the Ministry of Internal Affairs and the relevant Uipaanga Kopu Tangata participants and must:

- specify the arrangements agreed to by the participants for the care and protection of a child; and
- be in in writing and signed by:
  - the chairperson; and
  - the relevant participants; and
  - a representative of the Ministry of Internal Affairs.

It may also include a requirement for the chairperson to fix a date by which a review of the kaveinga a te kopu tangata is to be carried out: s 81.

Every kaveinga a te kopu tangata prepared in respect of a child must specify:

- the caregiver(s) of the child;
- anyone who may have contact with the child and conditions that apply to that contact (how long, when, where and so on);
- who has parental responsibilities for a child, and if shared, how they should consult in any decision making;
- the aims and timeframes to achieve goals relating to the child;
- any organisation(s) or people who will provide services and support for the child and their caregiver(s);
- the responsibilities of the child and their caregiver(s);
- any other relevant details of the child's education, employment, recreation, and welfare;
- how to resolve disputes about the terms or how the kaveinga a te kopu tangata operates: s 82.

2.8 Different types of care and protection orders

ss 45, 54-68, 132-133, 138 FPSA.

You may make any of the following warrants or orders if a child is in need of care and protection.

2.8.1 Warrant for return of a child

A warrant for the police to immediately uplift a child and return them to the caregiver under a parenting order if a parenting order has been breached: ss 45, 138(1)(p).

2.8.2 Safety warrant

If the matter is urgent, the police or the Secretary may apply for this warrant. You may issue a safety warrant if you are satisfied a child is urgently in need of care and protection. Under the warrant, the police may enter, search, remove and detain the child and, where necessary, place them in the care of the Ministry. The Secretary may, at any time, release a child placed in the care of the Ministry if satisfied the child is no longer in need of care and protection: ss 54, 138(1)(q)–(r). The Secretary must, within 7 days:

- release the child from the care of the Ministry if satisfied they are no longer in need of care and protection; or
- convene an Uipaanga Kopu Tangata (but not if the Secretary believes there has been sexual or physical abuse of the child by a parent, family member, or caregiver); or
- apply to the court for a care order (especially in the case of suspected sexual or physical abuse): ss 54–55(1), (3).

If the parties cannot agree at an Uipaanga Kopu Tangata, the Secretary must:

- release the child from the care of the Ministry, if satisfied the child is no longer in need of care and protection; or

- make a temporary care arrangement for up to 3 months (see s 52); or
- apply to the court for a care order: s 55(2).

The child may be kept in the care of the Ministry:

- until an Uipaanga Kopu Tangata is held; or
- until they are brought before the court; or
- for such further period as you direct: s 55(4).

2.8.3 Supervision order

If the Secretary applies, you may grant a supervision order for the child, if satisfied that the child is in need of care and protection and the order is in their best interests: ss 56–57, 138(1)(s).

A supervision order may include any conditions that are in the best interests of the child. These may apply to the child, parent/caregiver, any person providing day-to-day care of the child, or anyone with whom the child is living, to comply with: s 58.

The Secretary must only appoint a person to supervise a child if satisfied that the person has suitably trained in supervision and is experienced in dealing with children in need of care and protection: s 59.
The supervisor's job is to advise and assist the child and to take such steps as are reasonably necessary to give effect to the supervision order. The supervisor may apply to the court to vary or discharge the supervision order if it is not wholly complied with; no longer necessary; or not in the best interests of the child: s 60.

A supervision order expires and ceases to have effect when a child turns 18, unless you vary or discharge the order earlier on application from the supervisor, the child, or, with leave of the court, any other person: s 61.

2.8.4 Care order

The Secretary may apply to the court for a care order if they believe on reasonable grounds that the child is, or is likely to be, in need of care and protection.

You may grant the order if satisfied that:

- the child is in need of care and protection; and
- it is in the best interests of the child to place the child in the care of the Ministry: ss 62–63, 138(1)(u)–(v).

If granted, the Secretary has the parental responsibility for the child and must ensure the child receives adequate and appropriate care. The care order also allows the Secretary to decide:

- if the child's parents may also exercise parental responsibility;
- any restrictions on contact with the child as necessary;
- who will be the child's caregiver and have parental responsibilities and provide day-to-day care: ss 65–66.

Unless it is not in the best interests of a child, the Secretary must allow any child in their care reasonable contact with the child's parents or caregiver (who was providing day-to-day care immediately before the child was placed into care): s 67.

A care order expires and ceases to have effect when a child turns 18, unless you vary or discharge the order earlier (if the Secretary, the child, or, with the leave of the court, any other person, applies to do so).

You may vary a care order if satisfied that:

- it is in the best interests of the child to do so, and
- the circumstances of the child have changed and so the order should be changed to safeguard or promote the child's welfare: s 64.

2.8.5 Contact order

Where a child is in the care of the Ministry, the person seeking contact can apply for a contact order: s 68(1)–(3). An application to prevent or restrict contact may be made by the Secretary, the child, or (with the leave of the court) any person: s 68 (4).

You may make a contact order with or without conditions to:

- allow contact (on application by the person seeking contact); or
- prevent or restrict contact (and impose any conditions) between the child and specified persons: ss 68(1)–(2), 138(1)(w).

The Secretary, child, or any person who is authorised to have contact under the contact order may apply to vary or discharge the contact order: s 68 (6).

You may vary or discharge a contact order if satisfied that the circumstances of the child have changed and the order requires variation, or is no longer necessary, to safeguard and promote the child's welfare, best interests, and development: s 68(5).

2.8.6 Orders to prevent removal of child

You must take steps to prevent the removal of a child from the Cook Islands if you are satisfied on reasonable grounds that a person is about to remove a child from the Cook Islands and that this is likely to:

- breach an order made under this Act; or
- breach a kaveinga a te kopu tangata; or
- defeat the claim of a person who has applied for, or is about to apply for, an order under this Act: s 132(1).

You may do either or both of the following:

- issue a warrant directing a police officer (or a named person) to take immediate custody of the child (using such reasonable force as may be necessary) and to place the child in the care of the Ministry until a further court order (within 28 days of the issue of the warrant the matter must be brought before you for determination under s 132(3)): s 132(1);

- order that any tickets or travel documents (including a passport) of the child or of a person believed to be about to remove the child from the Cook Islands, or both, be given to the police for any length of time and on any conditions you think necessary in the circumstances: ss 132(2), 138(1)(mm).

That person may later apply to you to discharge the order, and you may do so if satisfied that the order is no longer necessary: s 132(4).

Within 28 days a hearing must be scheduled for you to decide the issue of any possible breaches against any order under this Act or a kaveinga a te kopu tangata, or any attempts to defeat a possible claim of a person who will apply for an order: s 132(3).

It is an offence to remove or attempt to remove any child from the Cook Islands, without leave from the court if that person knows:

- another person has applied for, or is about to apply for, an order under this Act; or
- that a parenting order, a contact order, or a kaveinga a te kopu tangata is in force that makes another person the caregiver of, or authorises contact with, the child.

The penalty is a fine up to $1,000, or imprisonment for a term up to 12 months, or both: s 133.

2.9 Social welfare, medical or psychological reports

ss 70–77 FPSA.

You may of your own accord or at the request of any party, adjourn a hearing to order a written report such as a social welfare report or a medical and psychological report (under Part 5) for up to 28 days: ss 70–71, 75.

See s 70 for further details of what a social welfare report must include.

You may direct a parent/caregiver or proposed caregiver of the child (with their written consent) or the child (accompanied by an adult if too young or immature) to undergo a medical or psychological examination: ss 71–72.

You may make any relevant inferences (if any) if the person refused, but they must have had the opportunity to explain the reasons for that refusal: s 71.

There are further details and restrictions around the medical examination set out in s 73.

The registrar will provide a copy of every report to all the parties, the Secretary and any other person you think has a proper interest in receiving a copy of the report, no later than 1 working day before the sitting of the court: s 76.

However, you may direct that the whole or any part of a report must not be disclosed to a specified person if satisfied that it would or is likely to be detrimental to the physical, mental, or emotional well-being of a child or others in the report: s 77.

3. Parenting arrangements

3.1 Introduction

ss 3, 33 Family Protection and Support Act 2017 (FPSA).

The relevant purposes of Part 4 (Parenting arrangements) FPSA include:

- to ensure that parents/guardians are responsible for the care, welfare, best interests, and development of their children;
- the best interests of the child come first in any parenting, care and protection decisions made;
- to encourage parties to resolve any family relations issues by negotiation and agreement in the first instance where appropriate: s 3 FPSA.

3.2 Key principles for parenting arrangements

The overall principle is that the **best interests of a child are the first and paramount consideration in all proceedings**. Everything else is of lesser importance.

The purposes of Part 4 of the Act are to:

- ensure parents fulfil their duties and meet their responsibilities concerning the welfare, best interests, and development of their children;
- acknowledge the role that family members and other relevant persons may have in the care of children;
- encourage agreed parenting arrangements;
- provide for the resolution of disputes about the care of children; and
- provide mechanisms for the enforcement of parenting orders.

An important concept is that of "parental responsibility". Parental responsibilities include (but are not limited too) all the rights, responsibilities, and duties of guardianship. This includes the responsibility of the parent or caregiver to:

- safeguard and promote the child's welfare, best interests, and development;
- direct and guide the child, appropriately as per their stage of development;
- contribute to the child's intellectual, emotional, physical, social, cultural, and other personal development;
- maintain personal relations and direct contact with the child on a regular basis if the child is not living with the parent, if appropriate;
- act as the child's legal representative;
- decide questions about major long-term issues affecting the child for or with the child: s 34 FPSA.

These parental responsibilities carry on even if either or both parents/caregivers remarry or enter into a de facto relationship.

A caregiver of a child may perform parental responsibilities without the consent of the parent/caregiver, for issues that are not major long-term issues.

For comparison, New Zealand law (s 5 of the Care of Children Act 2004) sets out certain principles that may be helpful references in Cook Island circumstances (although they are not set out in the FPSA). These principles are all treated equally, although child safety is mandatory in New Zealand law. Those principles include:

- a child's safety must be protected, and they should be protected from all forms of violence (this is particularly relevant if there is family violence and there are any protection orders in place or parenting orders made);
- a child's care, development, and upbringing should be primarily the responsibility of their parents and guardians;
- parents, guardians, and any other person having a role in a child's care under a parenting or guardianship order, should continue to consult and co-operate over the child's care, development, and upbringing;
- a child should have continuity in their care, development, and upbringing;
- a child should continue to have a relationship with both of their parents, and their relationship with their family group, whānau, hapū, or iwi should be kept and strengthened;
- a child's identity (including, their culture, language, and religious identity and practice) should be kept and strengthened.

3.3 Contents of a parenting plan

s 36 FPSA.

A parenting plan is an agreement that states what the parental responsibilities and caregiving arrangements are for a child as between:

- the child's parents; or
- a parent or both parents and other persons involved in the child's care: s 36(1) FPSA.

This parenting plan must include:

- who the caregiver/s of the child are;
- the process for resolving disputes about the plan's terms or how the plan works;
- the process for changing the plan to account for changing wishes, needs or circumstances of the child or parties to the plan: s 36(2) FPSA.

A parenting plan may include:

- the time the child is to spend with any specified person;
- the parental responsibilities of each parent or caregiver;

- how the parents/caregivers should communicate when making any decisions about their parental responsibilities;
- any other people that the child may communicate with and how they do so; and
- any other issues relating to the child's welfare, best interests and development of the child: s 36(3) FPSA.

3.4 Determining major long-term issues by agreement or an order

ss 4, 35 FPSA.

Major long-term issues are long-term issues about the care, welfare, and development of the child including (but not limited to):

- their name, education, health, religious and cultural upbringing;
- changes to the child's living arrangements that will make it significantly more difficult for the child to spend time with a parent/family member: s 4 FPSA.

For any major long-term issues, a parent/caregiver must, wherever practicable, consult with and try to act jointly with any other person who has parental responsibility for the child.

If they cannot agree, and a person with parental responsibility applies, you may make a major long-term issues order giving directions on the major long-term issue, on application from a person with parental responsibility: s 35 FPSA.

3.5 Registering a parenting plan

ss 37, 40 FPSA.

The parties to a parenting plan may apply to the court to register the plan, and you must do so, if you are satisfied that the plan is in the child's best interests: s 37(1)–(2) FPSA.

If you are not satisfied that the plan is in the child's best interests, the registrar must set down the matter for a hearing and give the relevant parties notice of the date, time, and place of the hearing: s 37(3) FPSA.

After the hearing, you may:

- vary the plan, with the agreement of the parties, and register it; or
- cancel the plan and make a parenting order under s 40: s 37(4) FPSA.

A registered parenting plan has the same effect as a parenting order under s 40: s 37(5) FPSA.

3.6 Reviewing a registered parenting plan

s 38 FPSA.

You may review a registered parenting plan if one or more parties to the parenting plan apply for review; each party must be given an opportunity to be heard and make submissions: s 38(1)–(2) FPSA.

If you are satisfied that the child is of an age and maturity to understand the proceedings, you must give the child an opportunity to express any views on the application for review: s 38(3) FPSA.

You may vary, discharge or confirm the parenting plan after a review, if satisfied that it is in the best interests of the child to do so: s 38(4) FPSA.

Any variation has the same effect as if it were the plan originally agreed to and registered by the parties: s 38(5) FPSA.

3.7 Parenting orders and who may apply

s 39 FPSA.

An application for a parenting order may be made to the court by:

- either or both of the parents, or a representative of the child; or
- with the leave of the court, a family member, or any other person concerned about the welfare, best interests, and development of the child.

3.8 Your power to make a parenting order and the contents

ss 40–41, 43 FPSA.

You may make a parenting order if anyone applies under s 39 or as you see fit under s 37 (on application to register a parenting plan): s 40(1) FPSA.

The best interests of the child is the first and main issue when deciding whether to make a parenting order and what its terms should be: s 40(2) FPSA.

A parenting order must include the following contents:

1. The caregiver(s) of the child.
2. The time(s) when specified caregivers provide day-to-day care to the child.
3. Any person whose contact with the child must not be restricted.
4. Any person whose contact with the child is not allowed or restricted.
5. Directions on how questions relating to parental responsibility will be addressed.
6. An order that a parent/caregiver must obtain the consent of the court before taking any actions specified in the order.
7. If contact with a child is involved, any conditions to assist or restrict the contact (as required) such as:
   - the nature (for example, face to face or letters, phone calls, or email), place, duration and timing of the contact;
   - whether another person must or may be present during contact: s 41 FPSA.

If there is a conflict between a parenting order and a person's parental responsibility, the parenting order is more important and comes first: s 43 FPSA.

3.9 Expiry, variation and discharge of parenting orders

s 42 FPSA.
A parenting order expires and ceases to have effect when a child turns 18: s 42(1) FPSA. An application to vary or discharge a parenting order may be made by:

- a party to the parenting order;
- a representative of the child; or
- the Secretary, if the child is in the care of the Ministry of Internal Affairs: s 42(1) FPSA.

You may, on application, vary or discharge a parenting order if you are satisfied that all of the following factors have been met:

- it is in the best interests of the child to do so;
- each party to the parenting order, and if appropriate a representative of the child, has been given an opportunity to make submissions on the application: s 42(3) FPSA.

3.10 Your power to make a parenting enforcement order

s 44 FPSA.

A party to a parenting order, or with the leave of the court anyone else concerned with the welfare, best interests, and development of a child, may apply for a parenting enforcement order: s 44(1) FPSA.

You may make a parenting enforcement order, if satisfied that a party to a parenting order is in breach of the order, that does either or both of the following:

- varies, reduces, or prohibits contact between the child and the person who has breached the order;
- directs the person in breach of the order to deposit a bond not exceeding $5,000 in the court, as an incentive not to breach the parenting order again: s 44(2) FPSA.

If the person breaches the parenting order again after depositing a bond you may direct that:

- any costs incurred by the other party to the parenting order are paid from that bond; or
- some or all of the bond is paid to the Crown (forfeited): s 44(3) FPSA.

Once a parenting order has been discharged or expires, any bond deposited is returned to the person who paid it, less any amount paid or forfeited for a breach: s 44(4) FPSA.

3.11 Warrant for the return of a child

s 45 FPSA.

If you are satisfied that a party to a parenting order has breached the order by not returning a child, you may issue a warrant authorising a police officer (or another named person) to take the child and deliver them to their caregiver under the parenting order.

4. Divorce orders and family support orders

4.1 Introduction

CEDAW Art 2 (non-discrimination), Art 16 (gender equality in family law rights).

ss 3, 13 Family Protection Support Act (2017) (FPSA).

The relevant purpose of Part 2 (divorce) FPSA is to provide for the fair and orderly settlement of the affairs of spouses and de facto partners when a marriage or de facto relationship breaks down: s 3 FPSA.

The relevant purposes of Part 3 (domestic support) FPSA are to:

- provide for the payment of support by one spouse or partner to the other spouse or partner; and
- recognise equally the financial and non-financial contributions to a marriage or de facto relationship made by each spouse or partner; and
- recognise the economic advantages and disadvantages of a marriage or de facto relationship for each spouse or partner; and
- provide for the support of a child; and
- ensure that each parent contributes equitably to the financial support of their children; and
- ensure that a father makes an equitable contribution to the expenses of childbearing.

4.2 Divorce orders

4.2.1 Application for a divorce order

s 9 FPSA.

Either party to a marriage or both parties together may apply for a divorce order if at least one of them has been domiciled in the Cook Islands for more than 2 years prior to the application. Generally, an affidavit from the applicant will state this.

A person has been "domiciled" in the Cook Islands if they have ever visited the Cook Islands with the intention of making it their permanent home and have retained that intention, even if later, on one or more occasions, they reside in another jurisdiction.

Justices of the peace are officers of the High Court. Accordingly, Code of Civil Procedure of the High Court Act 1972 (the Code) applies to FPSA cases. Applications, such as an application for divorce, are originating applications under the Code.

When an application is filed, you should prescribe a date by which the respondent may file a defence. This might generally be 30 days after service but there will be some situations (for example, the respondent lives in a distant island or is resident outside the Cook Islands) where you may set a longer period. In such cases, the applicant should apply for an order fixing a time for filing a defence and provide evidence about the practicalities of service. You must ensure the respondent has a reasonable time within which to understand the application, to obtain legal advice and to file a defence (if they choose to defend).

4.2.2 Power to make a divorce order after separation

ss 10–11, 138(1)(a) FPSA.

You ***must*** make an order for divorce if the parties have been separated for at least 12 months at the time the application is made: ss 10(1), 138(1)(a).

You ***may*** make a divorce order if the parties have not been separated for at least 12 months at the time the application is made, and the following applies:

- it is made jointly by both parties; and
- neither party is living on a permanent basis with a child of the marriage: s 10(2).

A separation period begins when:

- the parties to a marriage make a joint application for divorce; or
- notice of one party's application for divorce is served on the other party; or
- the parties cease living together: s 11(1).

A separation period continues after an application for divorce is made even if the parties continue to live in the same house or provide domestic services to each other: s 11(2).

If the parties reconcile during their separation but then separate again, this reconciliation period is not included in the separation period: s 11(3). Any period of separation immediately before they reconcile must be included if the parties subsequently separate again: s 11(4).

4.3 Domestic support orders

Part 3 FPSA.

4.3.1 Legal effect of separation

s 12 FPSA; s 5 FPSAA.

On application by either party, you may at any time during a separation period:

- make a support order under Part 3 (for domestic support or child support);
- make a parenting order under Part 4;

- determine which party may live in their joint residence.

4.3.2 Definition of de facto relationship

s 5 FPSA.

A de facto relationship means a relationship between an adult man and woman (both over 18 years) who live together as a couple in a relationship as if they were married but are not married to each other: s 5(1).

In deciding if the parties are in a de facto relationship you may look at all or any of the following:

- the length of the period during which the parties have been living together (or lived together);
- their arrangements for financial support and the degree of financial dependence or interdependence;
- the degree of mutual commitment to a shared life;
- the degree of shared care and support of children: s 5(2).

However, none of these factors are necessary for you to find there is or has been a de facto relationship, and you may have regard to such matters, and attach such weight to any matter, as you think appropriate in their circumstances: s 5(3)–(4).

4.3.3 Granting domestic support orders

ss 14–18, 138(1)(c) FPSA.

You may grant a domestic support order, if a spouse or de factor partner applies to the court, following their separation or divorce: ss 14(1), 16, 138(1)(c).

A support order may include providing:

- domestic support by one former spouse or partner to the other former spouse or partner;
- childbearing expenses;
- child support for 1 or more children, including adult children: s 14(2).

This order requires domestic support payments be made to the applicant for a certain period and can be made in various forms:

- periodic payments for a specified period;
- a lump sum payment;
- property, land, or any other asset;
- valuable goods but only if the person paying does not earn or have sufficient money to pay the support ordered: ss 14(3)–(4), 17.

Also, if one spouse or partner is excluded from a legal or equitable interest in native land and this leads to an unfair result, you may order other forms of support: s 14(5).

4.3.4 Factors to decide the amount of domestic support payments

s 18 FPSA.

The factors to decide the amount of the domestic support payments are:

- the age and health state of each spouse or de facto partner;
- the income, earning ability, property, and financial resources of each spouse or de facto partner;
- either party's parental responsibility for a child or dependants;
- each party's ability to support themselves, any child they have parental responsibility for or dependants;
- eligibility for and the rate a pension, allowance or benefit (within or outside of the Cook Islands) is being paid, or will be paid, to either spouse or partner;
- the extent to which these domestic support payments would increase the receiving spouses earning ability by supporting them to:
- study or undertake further training;
- establish a business;
- gain an adequate income property;
- the extent to which the spouse applying for support has contributed to the other party's income, earning ability, property, or financial resources;
- how long their marriage or de facto relationship was, and the extent to which it impacted on the earning ability of the spouse applying for support;
- either party's access, use, or control over native lands, resources, and hunting and fishing grounds that results in material benefits to that party not equally shared by the other party;
- any other fact or circumstance you think necessary for justice in that case.

> **Note:** A dependant is a person relying on material support from another person because of their age, disability, or physical or mental weakness.

4.3.5 Childbearing expenses orders

ss 19, 27(2), 138(1)(d) FPSA.

An application for a childbearing expenses order may be made by the mother of the child or in respect of the deceased mother: s 19(1).

You may grant a childbearing expenses order requiring the child's father to make a fair contribution towards the mother's:

- pregnancy support;

- reasonable pregnancy and birth medical expenses;
- reasonable funeral expenses if the child is stillborn or dies during birth;
- reasonable funeral expenses if she dies during pregnancy or birth: ss 19(1), 138(1)(d).

This application can be made even if the mother and father were not married: s 19(2).

A paternity order is conclusive evidence for determining the issue of who is the father for childbearing expense orders: s 27(2).

4.4 Child support orders

4.4.1 Applying for and granting a child support order

ss 4, 20–21, 138(1)(e) FPSA; FPSAA.

A child is any person under the age of 18 years: s 4.

Any of the child's parents, caregivers, or any other person with your leave who is concerned with the welfare, best interests, and development of a child, may apply for a child support order: s 20.

You may make a support order requiring either or both parents to pay child support to the applicant, as they are both liable for reasonable and necessary support: ss 21, 138(1)(e).

A support order against one parent does not reduce the liability of the other parent to provide support for the child.

4.4.2 Factors relevant to determining amount of child support

s 22 FPSA.

You must consider the child's needs in determining the amount of child support payable including:

- suitable accommodation;
- their age, health and any special needs;
- their educational or training needs;
- the financial circumstances of the child;
- the availability and cost of suitable child-care facilities or services;
- the needs and resources of the person from whom child support is sought;
- the needs and resources of any caregiver/s;
- the previous commitments of the person from whom child support is sought to pay support to any other child or person if relevant;
- any other fact or circumstance that you think the justice of the case requires.

4.4.3 Child support for adult child (18 years and over)

s 23 FPSA.

You may make a child support order requiring either or both of the child's parents to pay child support for an adult child, if it is necessary for any of the following reasons:

- to enable the adult child to complete their education;
- because of a mental or physical disability of the adult child: s 23.

4.4.4 Expiry, variation, or discharge of support order

s 15 FPSA.

Any party to a support order may apply to vary or discharge a support order.
You may vary or discharge the order if satisfied this is justified because of a change in the circumstances of:

- a party to the order; or
- the subject of the order.

A child support order in respect of a child ends and ceases to have effect when the child turns 18, except for an adult child support order under s 23.

4.4.5 Support enforcement orders

ss 24, 138(1)(g).

You may grant a support enforcement order, if satisfied the terms of a support order have been breached, on the application of the person who the support order favours.

You may order the liable party to do one or more of the following:

- deduct an amount from their wages to be paid to the person with a support enforcement order;
- deduct a sum of money from their bank account with a support enforcement order.

You may also direct that a police officer:

- takes valuable goods owned by the liable person to the value you decide; and
- delivers them to the person with the support enforcement order.

The amounts can be a single or periodic deduction either weekly, fortnightly or monthly for the set period.

This does not prevent the person who has the support order from seeking a remedy based on the Code.

5. Temporary protection orders

5.1 Introduction

CEDAW, Art 2, (non-discrimination, which includes gender-based violence as a recognised form of discrimination against women, see CEDAW Committee General Recommendation 19: Violence Against Women), Art 15 (Equality before the law).

CRC, Art 19 (protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child).

CRPD, Art 16 (protection of people with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects), Art 6 (women with disabilities), Art 7 (children with disabilities), Art 12 (access to justice).

FPSA, ss 3, 89.

One of the overall purposes of the Family Protection and Support Act 2017 (FPSA) is to ensure the safety and protection of adults and children in domestic relationships: s 3.

For Part 6 (domestic violence protection orders) the purposes are to:

- ensure the safety and protection of all persons, including children, who experience, or are or may be exposed to, domestic violence;
- recognise that domestic violence in all its forms is unacceptable;
- prevent domestic violence: s 89.

These purposes should guide you when exercising any of your powers under Part 6. The overall question is whether protection is necessary having regard to the purposes of the Act.

5.2 Definitions

ss 90–96 FPSA.

A **domestic relationship** between two people is where:

- they are or were previously married, in a de facto relationship, or in a close personal relationship;
- they have a child together (even if they were not otherwise in a relationship);
- they are a family member or domestic worker;
- one of them is dependent on the other person for help with an activity of daily living required because of disability, illness, or impairment;
- they share or recently shared the same home;
- one of them is a child who:
    - ordinarily lives or lived with the other person; or

- regularly lives or stays, or lived or stayed, with the other person: s 90.

Domestic violence means any of the following conduct (including threats to do so) by a person (A) against another person (B) where they are, or have been, in a domestic relationship:

- physical, sexual, economic, emotional, verbal, or psychological abuse and stalking;
- causing the death of, or injury to, an animal, even if the animal is not person B's property;
- any conduct that reasonably arouses in person B fear of personal injury, or damage to property;
- causing or allowing anyone else to do any such conduct above;
- any of the above conduct against a person in a domestic relationship with person B if that conduct or threat is intended to arouse fear in person B.

The conduct can be a single act or several acts that form a pattern of behaviour (no matter how trivial on their own): s 91.

Physical abuse includes any of the following acts:

- physical assault or any use of physical force,
- forcibly confining or detaining a person,
- withholding access to adequate food, water, clothing, shelter, or rest: s 92.

Sexual abuse of a person includes any of the following acts:

- engaging them in sexual contact without their free agreement,
- engaging in any sexual conduct or exposing them to sexual material that abuses, humiliates, or violates their sexual integrity: s 93.

Economic abuse includes any of the following acts:

- withholding or limiting money needed for their support (for example, for household items, mortgage repayments or rent if a shared home);
- forcing them to give up control over money, assets, or income;
- selling or transferring matrimonial property, or assets owned during a de facto relationship, without their full and free consent;
- preventing them from making decisions over household spending;
- preventing or limiting their job opportunities or access to education: s 94.

Stalking includes any of the following acts on 2 or more separate occasions:

- following a person, watching or waiting outside or near where they live, work, farm, fish, carry on a business, study, or any other place they go to;
- telephoning, text messaging, emailing, or using other electronic means to contact a person, or inducing someone else to do so;

- sending, or delivering, or causing the delivery of letters, packages, or suchlike to a person;
- entering or interfering with a person's property in their possession without their express consent;
- keeping a person under watch;
- acting in any other way towards a person that could arouse fear in a reasonable person: s 95.

Emotional, verbal, or psychological abuse means a pattern of degrading or humiliating conduct towards the person, including:

- repeatedly insulting, ridiculing, or name calling, threatening or showing obsessive possessiveness;
- jealousy that is a serious threat to their privacy, freedom, integrity, or security;
- if they have a child, this also includes any such abuse towards a person with whom the child has a domestic relationship: s 96.

5.3 Preliminary matters

5.3.1 Role of the police

s 116 FPSA.

A police officer, if they receive a complaint of domestic violence and suspect that domestic violence has been, will be, or is likely to be committed, must:

- immediately investigate the matter;
- within 48 hours – if they don't make a police safety order and the person subject to domestic violence does not apply for a protection order – submit a written report detailing the reasons why not;
- immediately inform the person subject, or likely to be subject, to domestic violence of their right to apply for a protection order.

5.3.2 Police safety orders

ss 108–115 FPSA.

A police officer may make a police safety order against a person (the respondent) who is in a domestic relationship with another person (person P) if the police officer is satisfied that:

- the respondent has committed an act of domestic violence against person P; or
- person P has reasonable grounds to fear the respondent will commit an act of domestic violence: s 108.

A police officer must make a police safety order for the protection of a child if the officer reasonably believes:

- domestic violence has been committed, is being committed, or is likely to be committed; and

- the child's welfare has been, or is likely to be, adversely affected by the domestic violence: s 110.

A police safety order must not be made against a child under 16 years of age: s 111.

At the time of the making the order or when serving the respondent, the police officer must, where reasonably practicable to do so in the circumstances, explain to the respondent:

- the purpose, duration, and effect of the order; and
- what happens if the respondent breaches the order: s 115.

Once a respondent has been personally served with a police safety order they must immediately:

- give the police officer any weapons they have; and
- leave the home of the protected person (whether or not they have a legal or equitable interest in the home): s 112.

The conditions that the respondent must comply with in the order are the same as the mandatory conditions in "Temporary protection orders without notice" (see below).

The order lapses if it is not personally served within 24 hours after it is made. It comes into force once served and continues for the period specified (to ensure the safety and protection of the protected person) up to 5 days from the date of service: s 114.

If a police safety order lapses because it has not been personally served, the protected person must be advised immediately.

A police officer may keep the respondent for up to 2 hours, to get the authority to make the order, then make the order and serve it. Anyone under the rank of sergeant must obtain the authority from a sergeant or higher rank before making the order unless they are pa enua police: ss 108, 113.

If the respondent fails or refuses to remain there, they may be arrested without warrant as this is an offence. If convicted they are liable to community service not exceeding 6 months: s 113.

5.4 Process for protection orders

5.4.1 Who can apply for a protection order

ss 97–98 FPSA.

The following people may apply for a protection order:

- anyone who is or has been in a domestic relationship with another person: s 97(1) FPSA;
- anyone who has an interest in the safety of a person in a domestic relationship with the written consent of the person on whose behalf the application is made (for example, a family member, the police, social welfare, health care provider, teacher, traditional or religious leader, or an employer): s 97(2) FPSA;

- a child, but only with the leave of the court: s 97(4) FPSA.

However, written consent is **not** required if that person is:

- a child not of an age or maturity to understand the proceedings;
- mentally incapacitated or unconscious;
- regularly under the influence of alcohol or drugs;
- at risk of serious physical harm or in fear for their safety;
- illiterate or otherwise unable to provide consent in writing;
- lives in a rural area, outer island, or any other remote location and is unable to provide written consent: s 97(3) FPSA.

For a child who applies, you may grant leave only if satisfied the child understands both:

- the nature, purpose, and legal effect of the application; and
- the legal effect of making a protection order: s 97(5) FPSA.

The application may be in Māori or in English and made:

- verbally, whether in person, by telephone, or any other way, and the court will if needed put this into writing; or
- in writing, whether by post, email, text, or any other way: s 98 FPSA.

5.5 Temporary protection orders without notice

s 99 FPSA.

On receiving an application, you must make a temporary protection order (TPO) without notice if satisfied that **all three** of the following grounds are met:

1. the respondent is in a domestic relationship with the applicant;
2. the respondent has committed domestic violence against the applicant, or the applicant has reasonable grounds to fear that the respondent will commit domestic violence; and
3. the delay that would be caused by proceeding on notice would or might entail a risk of harm to the applicant or any child residing with the applicant: s 99(1) FPSA.

This order becomes a final protection order automatically after 3 months from the date that it is made: s 99(2) FPSA. Note, however, that the respondent can oppose and if so, a defended hearing will decide the matter.

The registrar must issue the final protection order, unless:

- you decide otherwise in a hearing requested by the respondent under s 121; or
- the order is discharged earlier or lapses: s 99(2) FPSA.

5.5.1 Principles to apply when making a temporary protection order

A cautious but realistic approach is needed when considering applications made on a without notice basis, as the New Zealand courts have stated. Overall, this requires you to balance two important considerations:

1. the need to protect victims and potential victims of family violence from the effects of delays in making a protection order;
2. making an order without notice, which means the respondent is not given the opportunity to be heard before the court imposes conditions on them (see *CRA v Family Court at Blenheim* [2015] NZFLR 731; [2015] NZHC 1604 at [20] per Dobson J.)

All three of the following grounds must be met on the face of the application (*prima facie*) and any evidence in support:

1. Is there evidence of a domestic relationship?
2. Does the evidence support a finding that there has probably been domestic violence or reasonable grounds to fear the threat of it?
3. On the face of it, will the delay in making the application on notice cause any risk of harm to the applicant or child in need of protection?

New Zealand case law on appeal directs you to view the overall pattern of behaviour, rather than focusing on individual episodes of violence, and the combined effect of the alleged acts on the victim (*SN v MN* [2016] NZCA 384 at [26]; *Surrey v Surrey* [2008] NZCA 565 at [99]).

Victims often report that psychological or ongoing mental abuse is just as harmful as physical or sexual abuse – if not more so.

Consider the applicant's own viewpoint; whether they are afraid of future violence and whether that fear is reasonably held. Factors to consider include:

- the nature and seriousness of past violence and risk of future violence. The single most reliable predictor of future violence is a history of prior multiple offences. But a serious one-off episode may still pose sufficient risk to justify an order;
- the applicant's view of the nature and seriousness of the respondent's behaviour (including subjective fears for the future);
- the effect on the applicant of how the respondent behaves including behaviours to control the applicant's movement, contact with family, finances and other controlling behaviours such as threats to self-harm or to harm the children, family pets or family property.

Other factors which are statistically significant for increased risk of family violence include:

- Where the applicant is pregnant or recently given birth,
- Where the applicant has recently separated or attempted to leave the relationship,
- Where the respondent has drug or alcohol addictions,
- Where the respondent has depression or other mental health issues,

- Where the respondent is unemployed or the couple have financial difficulties,
- Where the respondent possesses firearms or other weapons,
- Where the respondent has previously threatened applicant, children, others or breached previous orders,
- Where the respondent has a history of (non-family related) violent crime.

See the attached Risk Assessment Survey, which can help you to assess prospective risks of family violence.

You must still consider whether the application supports the decision that proceeding on notice would or might entail a risk of harm. Unless it does, the application must proceed on notice.

5.6 Final protection orders at a hearing

s 100 FPSA.

You may also direct the registrar to organise a hearing, if you are satisfied there is good reason for a hearing, at which either or both parties to the application are present or represented, soon after a TPO has been granted: s 100(1) FPSA. This may be useful in certain circumstances to get a better understanding of the situation.

You may make a final protection order if satisfied that the respondent:

- is in a domestic relationship with the applicant; and
- has committed domestic violence against the applicant, or the applicant has reasonable grounds to fear that the respondent will commit domestic violence: s 100(2) FPSA.

The main factor to consider is the safety and protection of the applicant and any child living with them: s 100(3) FPSA.

5.7 Advice and service of protection and police safety orders

ss 101, 139 FPSA.

When a protection order is made (or varied under s 106), the court must immediately advise the respondent, protected person (applicant) and the police officer at the station closest to where the applicant lives, either in person, by phone, or in writing (post, email, or any other way).

The police officer must serve the protection order on the respondent personally, within 24 hours, otherwise it lapses. If an order lapses, the court must advise the protected person and the police station nearest to where the person lives immediately: s 101.

If the order lapses those in need of legal protection will not have it, so it is good practice that after granting a protection order, the court should proactively follow up with the police to ensure that the order is served by them on the respondent within 24 hours. Alternatively, consider using powers under ss 141 and 142 (set out below) to dispense with the need for personal service and derive an alternative way to put the respondent on notice of the order.

Protection and police safety orders may be served on any day including a public holiday: s 139.

5.8 Protection orders – mandatory conditions

s 102 FPSA.

Every protection order must have the following conditions:

- The respondent must not do or threaten to do, or cause or allow another person to do, any of the following acts to the protected person or to a person in a domestic relationship with the protected person:
  - physically or sexually abuse the person,
  - stalk the person,
  - economically abuse the person,
  - damage, sell, give away, or otherwise dispose of the person's property,
  - emotionally, verbally, or psychologically abuse the person.
- Even if the respondent has a legal or equitable interest in the land or building, unless the protected person and the respondent are living together in the same residence with the express consent of the protected person, the respondent must not:
  - enter or remain on any land or building occupied by the protected person;
  - if the protected person is present on any land or building, enter or remain on that land or building where that would be a trespass (that is, being there without permission);
  - make any other contact with the protected person (whether orally or in writing, and whether in person, by phone, post, email, or any other medium) except such contact as is reasonably necessary in an emergency.

Also, while a protection order is in force, the terms of any parenting order, contact order, or kaveinga a te kopu tangata, that make the respondent a caregiver of a child, or authorise the respondent to have contact with a child, are suspended if the child lives with the protected person.

5.9 Protection orders – other conditions

ss 103–104 FPSA.

You may include the following conditions if the respondent has any weapons or shared living arrangements with the protected person.

5.9.1 Weapons

The respondent:

- must not possess, or have under their control, any weapon; and
- must dispose of any weapon or surrender it to a police officer for disposal.

5.9.2 Shared living arrangements

Grant the protected person and other family members:

- sole right to live in their home, regardless of any legal or equitable rights of possession or ownership;
- sole use of part of the protected person's home, if it is legally owned by a third party.

> **Note:** If the respondent and the protected person normally live in the same home with a child, you must presume that it is best if the protected person and the child continue to live there. Also consider the financial support needs of applicants and dependent children in tailoring orders to the individual circumstances of the parties.

Direct a police officer to:

- remove the respondent from the protected person's home immediately or within a specified time;
- accompany the respondent or another specified person, within a set time, to the protected person's home to supervise the removal of personal belongings.

When deciding on whether to add any conditions for shared living arrangements you must consider:

- if the condition is not made, how this would impact on the safety and protection of the protected person and any child or others living at the home;
- keeping social networks and support for the protected person and any child living with them;
- keeping the same care arrangements for any child who lives with a protected person;
- keeping the same childcare, education, training, and work for the protected person and any child who lives with them;
- the housing needs of the parties;
- the best interests of any child of the protected person or any child of the protected person and the respondent.

5.10 Who can apply to vary or discharge a protection order

s 105 FPSA.

The following people may apply to vary or discharge a protection order:

- the protected person,
- the respondent.
- with leave of the court, anyone who has an interest in the safety of a person who reasonably believes that there is sufficient reason to vary or discharge the order.

5.11 Your power to vary or discharge a protection order

ss 106–107 FPSA.

You may vary a protection order if you are satisfied that either the variation is necessary for the safety of the protected person or will not adversely their safety: s 106.

You may discharge a protection order if you are satisfied that:

- the respondent is not likely to commit domestic violence against the protected person or any person in a domestic relationship with the person; and
- the protected person does not reasonably fear the respondent will commit domestic violence: s 107.

5.12 Compensation

ss 119–120 FPSA.

You may also order a respondent to pay compensation to a protected person for:

- their injuries and losses sustained before or after the granting of a protection order or police safety order is made, due to acts of domestic violence committed by the respondent – for example, pain and suffering, physical and mental injury, medical treatment, loss of earnings, and the value of any property of the protected person that has been removed, damaged, destroyed, or sold: s 119(2)(f);
- reasonable expenses that the protected person has or will have in setting up a separate household (for example, accommodation expenses, moving expenses and any other related expenses): s 120.

5.13 Service of orders (not protection orders or police safety orders) and of applications

ss 140–142 FPSA.

Every application for an order or variation or discharge of an order and every order made under this Act must be immediately served personally or by email on all parties to the proceedings and on any other person specified by the court. The order has no legal effect until it is served on the respondent or as determined by the court under s 142(2): s 141. It is good practice for the court to proactively follow up with police to ensure that service has taken place so that legal effect can be given to the order, or alternatively, use the provisions below to dispense with the need for notice to be provided.

If an order cannot be served, the registrar must ask the court to determine when the order takes legal effect: s 142(1).

You may dispense with service on a person if they cannot be served with an application or order in accordance with s 141: s 142(2).

5.14 Process for defended hearings

5.14.1 Respondent can request hearing

s 121 FPSA.

If a temporary protection order is made without notice, the respondent may, at any time before the order becomes a final protection order under s 99(2), request the court for a hearing to determine whether:

- a final protection order should replace the temporary protection order,
- the temporary protection order should be discharged,
- a condition relating to weapons should be varied or discharged,
- a condition relating to occupation should be varied or discharged: s 117.

5.14.2 Pre-trial conference

s 122 FPSA.

The registrar must schedule a pre-trial conference after the respondent requests a hearing or you direct the registrar to organise a hearing. The pre-trial notice should set out the time, date, and place and explain the purpose of the conference and their rights, so that every party can understand.

The respondent, the applicant, and any other person you think necessary can be required in writing to attend. But the applicant may ask to be excused if they have reasonable grounds to fear for their safety, or request that a support person be present.

The registrar should provide you with all criminal files relating to the respondent 3 days before the pre-trial conference.

The purpose of the pre-trial conference is to:

- identify and simplify the issues,
- determine what facts, if any, are agreed by the parties,
- rule in advance on what evidence is required and its admissibility,
- determine how much court time is needed for the hearing.

5.14.3 Procedure for hearing

ss 123, 125 FPSA.

The registrar must schedule a hearing date within 2 weeks after the pre-trial conference and give the parties written notice of the time, date, and place for the hearing: s 123.

You may make a protection order even if the respondent does not appear at the hearing, and even if the respondent did not receive notice of the time, date, and place of the hearing: s 123.
No application fees are payable: s 125.

5.14.4 Conduct of hearings

ss 124, 128–129, 134–136 FPSA.

Evidence of protected person: s 124 FPSA

You may:

- allow the evidence of an applicant to be a written or recorded statement or to be given from behind a screen or partition;
- require a respondent to be in a different location or room than the protected person and allow the respondent to hear the evidence being given via a telephone or other appropriate technology.

Evidence of child: s 134 FPSA

You may:

- require a person to leave the court while the child gives evidence;
- require that cross-examination is conducted by video link with a screen;
- excuse the child from cross-examination if they are too young or immature to understand the proceedings;
- confer in private with the child in the presence of the child's lawyer or representative;
- receive the evidence of the child by written or recorded statement;
- hear any evidence that you think fit.

The way a child gives evidence must minimise any trauma or negative effects that may occur as a result of giving evidence.

Power of court to conduct hearings in private: s 135 FPSA

You may hear any proceedings in private or exclude any person from the court.

Power of court to call witnesses: s 136 FPSA

You may call as a witness any person whose evidence in your opinion may assist the court, including:

- any parent or caregiver of any child (in the proceedings); or
- any person with whom a parent or caregiver of the child is cohabiting; or
- any family member of the child.

A witness called by the court:

- has the same privilege to refuse to answer any question as if the witness had been called by a party to the proceedings;
- may be examined, cross examined or re-examined.

The court must pay the reasonable expenses of any witness called by the court under this section.

Mandatory separate legal counsel for child: s 128 FPSA

You must appoint a lawyer (at the court's expense) to act for a child who is a party to, or involved in proceedings, if any of the following apply:

- there is major conflict between the parents that can't be resolved;
- there are significant cultural or religious differences affecting the care of the child;
- either parent, caregiver, or other person with significant contact, has a significant medical, psychological, or psychiatric illness, or personality disorder issues that affect the care of the child;
- neither parent is suitable as the child's caregiver;
- an older child has expressed strong views that would change a long-standing living arrangement or prevent contact by a parent;
- a parent wants to permanently remove a child from the Cook Islands;
- it is proposed to separate siblings;
- child abuse is alleged, whether physical, sexual, or psychological.

The lawyer appointed to act for a child must:

- act in what the lawyer believes to be the best interests of the child;
- ensure that the child's views on the matters before the court are fully put before the court;
- analyse any report (or other document) relating to the child and let the court know of the most significant matters to decide what is in the best interests of the child;
- take all practicable steps to minimise any trauma to the child from the proceedings; and
- take all practicable steps to reach an agreement that is in the best interests of the child.

Court must appoint representative for child: s 129 FPSA

If a child who is the subject of, or a party to, proceedings is unable to understand the proceedings due to their age or maturity, or for any other reason is unable to express their views, the court must:

- appoint a representative for the child; and
- ensure the representative makes submissions to the court regarding the best interests of the child.

5.14.5 Content and explanation of court orders

s 126 FPSA.

All orders must explain the effect of the order (the obligations), how the order can be varied or discharged and what may happen if the order is breached.

A lawyer or any other person assisting a party to an order, must explain to the party the effect of the order.

Any explanations should be given in such a way and in a language that the parties can understand. This includes a lawyer acting for a child, who must take all reasonable steps to explain to the child in an age-appropriate manner and using simple language, the effects of any order.

But even if not properly explained, this does not affect the validity of the order concerned.

5.14.6 Register of court orders

s 127 FPSA.

The court must keep a written register of all applications for orders and all orders made by the court under the Act.

5.14.7 Enforcement – arrest for breach of orders and offences

ss 117–118 FPSA.

A police officer may arrest a person without a warrant if satisfied the person is breaching or has breached a police safety order or a protection order: s 117.

It is an offence to breach a protection order or police safety order or not comply with any of the protection order's conditions. This offence has a sentence of community service not exceeding 12 months or a fine not exceeding $500, or both. This sentence increases to imprisonment for a minimum term of 12 months but not exceeding 3 years, if convicted of a subsequent offence: s 118.

VI Appeals, retrials and reservations of questions of law

1. Appeals to the High Court

1.1 Introduction

ss 76, 80-83 Judicature Act 1980–81 (JA).

This part is for your information only, 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 when, after delivering your decision in court, counsel for one of the parties indicate they intend to appeal. In that case, you should grant a stay of execution of the judgment.

1.2 The right to appeal

In any civil or criminal proceedings, parties may appeal a decision made by a justice sitting alone or three justices sitting together to a judge of the High Court: s 76 JA.

In *Police v Ngau* [1992] CKHC 3, the police appealed against the unanimous acquittal of Laurence Ngau by three justices. The judge considered whether the right of appeal under s 76 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.

Dillon J set out three important points regarding the right to appeal under s 76 of the JA. They are:

1. Section 76 of the Judicature Act cannot override the common law principle 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 s 76 JA that 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 a justice is not enough for leave to appeal under s 76 JA. There must be evidence as to why the appellant is not satisfied.

See the "Appeal to High Court" process diagram in the Quick guides for more information.

1.3 General powers on appeal

s 80(1) JA.

On any appeal from a determination of a justice or justices, a judge may:

- affirm the judgment (so the decision stands),
- reverse the judgment,
- vary the judgment,
- order a retrial,
- make an order with respect to the appeal, at their discretion, or
- award costs against any party to the appeal.

On any appeal against any conviction, the judge may quash the conviction and substitute a conviction if the facts justify this, 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, they shall:

- quash the sentence and pass another sentence allowed in law; or
- vary the sentence, or any part of it, or any conditions, within the limits of the law; or
- dismiss the appeal.

1.4 Abandonment of appeal

s 82 JA.

An appellant in an appeal from a justice(s) may abandon their appeal at any time by giving notice to the registrar.

Once such notice is given, the appeal is treated as dismissed, subject to the right of the respondent to apply for costs.

1.5 Non-prosecution of appeal

s 83 JA.

If the appellant does not make any reasonable effort to progress their appeal or observe any of the conditions the judge imposed under s 79 JA (security of costs), the judge may dismiss the appeal. The judge may deal with any costs of the appeal, and/or security for costs as the judge chooses.

2. Retrials

ss 102, 104 Criminal Procedure Act 1980–81 (CPA).

2.1 Retrial applications by parties

s 102 CPA.

The police or the defendant may apply in writing to a judge for a retrial for any offence tried by the justice(s) where the justice(s) has acquitted, convicted, or made an order against the defendant. This application must be made within 14 days of the acquittal, conviction or the making of the order. However, the judge may allow a longer time if they are satisfied the application could not have been made sooner.

The retrial application must state:

- the grounds of the retrial application, and
- whether a complete retrial or a limited retrial is sought.

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.

Note that retrials should be ordered only sparingly as they can create legal uncertainty and breach prohibitions on 'double jeopardy', being a procedural defence applied in common law jurisdictions preventing an accused person from being tried again on the same or similar charges, following their acquittal or conviction.

While the Cook Islands Constitution does not include a specific provision prohibiting 'double jeopardy', it is widely considered a fundamental aspect of providing a fair trial, as reflected in the New Zealand Bill of Rights Act, 1990 s 26 (2) which states that:

> "No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again."

The recent New Zealand High Court case of 20 December 2022, found that the classification of a deportee as a returning prisoner and the subsequent imposition of special conditions on him amounted to double jeopardy and was therefore unlawful and contrary to s 26(2) of the New Zealand Bill of Rights Act 1990, as the man had already previously completed his criminal sentence for drug offences in Australia. (see CIV-2021-485-399 [2022] NZHC 3514 available here: https://www.courtsofnz.govt.nz/assets/cases/2022/2022-NZHC-3514.pdf).

See the "Appeal to High Court" process diagram in the Quick guides for more information.

2.2 Removal of a case for retrial by a judge

If a question of law arises on a trial before a justice or 3 justices, the Court, whether of its own accord or on the application either party, may refuse to continue the trial and adjourn it for retrial before a Judge.

If this is done, the Information or charge remains valid; but every other step taken, document filed, or direction or determination given in that trial is void, unless ordered by you or the 3 Justices to remain valid.

The retrial of that person will begin and proceed before a judge as if no steps, other than those saved as valid had been taken.

2.3 Powers of judge on application for retrial

ss 102, 104 CPA.

The decision (acquittal, conviction, sentence, or order) made on the original trial no longer applies: s 104 CPA.

On the hearing of any such application, the judge may (s 102 CPA):

- 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: s 104 CPA.

If the defendant was sentenced to a term of imprisonment that has not expired, and the retrial cannot be held immediately, you must remand the defendant in custody until the date fixed for the retrial unless the provisions for bail provide otherwise: s 104 CPA.

If the applicant does not appear at the time and place appointed for the retrial, the court of retrial may, without holding a retrial, order that the original acquittal, conviction, sentence, or order be confirmed.

3. Reservation of question of law for a judge (case stated)

3.1 Reserving a question of law for a judge

s 106 CPA.

A justice sitting alone or 3 justices sitting together may reserve a question of law for a judge to decide where such a question arises:

- on the trial of any person for any offence, or
- in any of the proceedings before, after or related to the trial.

If the justice(s) decides to reserve a question, they shall state a case for the determination of a judge.

Either the police or the defendant may also apply to reserve a question of law during the trial. This is for you to decide. If you refuse to reserve a question of law for a judge, you must take note of the application.

When such a question is reserved, the judge shall have the power to consider and determine that question.

In *Police v Tehaamatai* [2017] CKHC 7, CJ Williams noted that determining the question of law reserved for the High Court should not influence your decision on the facts of the case or as to any sentence that may be imposed, if a conviction is entered.