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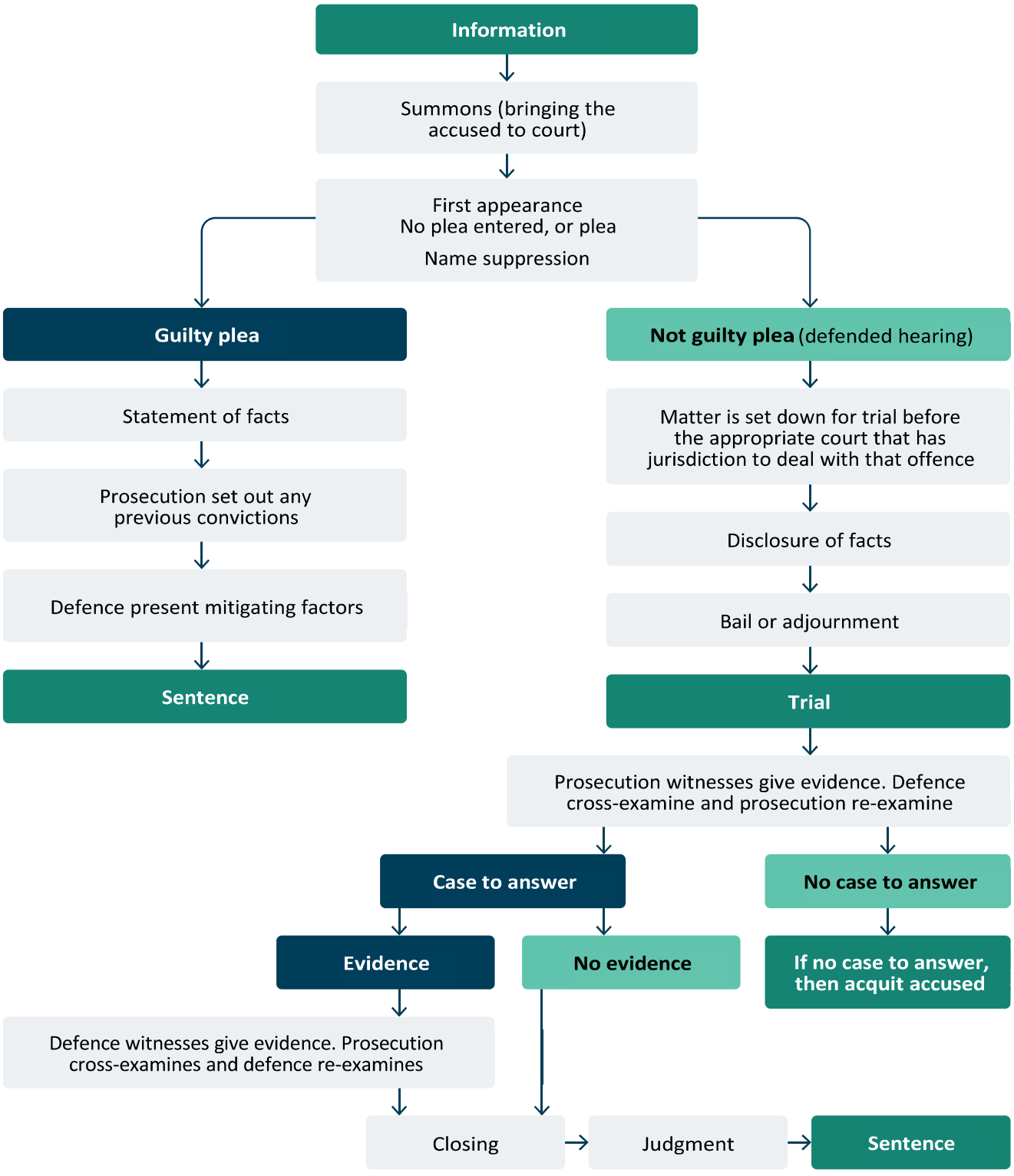
1. Outline of the criminal process



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.