6. Judicial conduct

6.1 Judicial conduct generally

You must conduct yourselves to avoid any compromise in carrying out your obligations, or to give the appearance of doing so. The judicial role is a public one and your conduct will be under public scrutiny.

The respect and confidence of the public in the justice system requires that judicial officers respect and comply with the law and conduct themselves in a manner which will not bring themselves or their office into disrepute.

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

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

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

6.2 The Rule of Law

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

The Rule of Law provides checks and balances for all three branches of government including the executive (the Government), legislature (Parliament), and the judiciary.

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

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

6.3 Natural justice

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

The two fundamental principles of natural justice are:

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

Together, these principles combine to ensure that:

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

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

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

- pecuniary or other interest;
- some relationship with a party or witness; or
- a personal prejudice or predetermination of an issue.

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

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

6.4 The judicial oath

A judge of the Supreme Court must take and subscribe to the oath set out in the Fourth Schedule before carrying out their official duties of office: Art 52, Constitution of Nauru (the Constitution).

As a Judge of the Supreme Court, you have sworn the following oath on appointment:

> "I, ... swear by Almighty God that I will be faithful and bear true allegiance to the Republic of Nauru in the office of ..... and that I will do right to all manner of people according to law, without fear or favour, affection or ill-will. So help me God!"

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

6.4.1 "Be faithful and bear true allegiance"

You should diligently and faithfully carry out your judicial duties.

This means you should:

- devote your professional activity to all your judicial duties
- bring to each case a high level of competence and be sufficiently informed so you can provide adequate reasons for each decision
- deliver all decisions, rulings and judgments as soon as possible and with as much efficiency as circumstances permit. To do this you should:
  - be familiar with common offences, jurisdiction and procedure
  - prepare before sitting in court
- take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for your role
- not engage in conduct incompatible with the diligent discharge of judicial duties or approve such conduct in colleagues.

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

6.4.2 "Do right to all manner of people according to law"

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

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

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

- carry out your duties for all persons without discrimination (parties, witnesses, court personnel and judicial colleagues)
- during proceedings before you disapprove of clearly irrelevant comments or conduct by court staff, counsel, or any other person subject to your direction. Improper conduct can include sexist, racist, or discriminatory language or actions which are prohibited by law.

Article 3 of the Constitution also protects the right of the individual to the protection of the law in Nauru, without discrimination by reason of race, place of origin, political opinions, colour, creed or sex.

Care should be taken to ensure proper access to justice and equality of treatment where one or both of the parties before the court are unrepresented.

You should act lawfully within the authority of the law. This means you should:

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

"Law" means any law for the time being in force in Nauru; and includes the Constitution which is the Supreme law: Art 2 Constitution.

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

Judicial independence is a part of the rule of law and to help guarantee a fair trial.

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also the process by which the decision is made.

Article 10(3)(a) of the Constitution also affirms the right of any person charged with an offence to be presumed innocent until they are proved guilty; and under Article 10(2) they are entitled to a fair hearing within a reasonable time by an independent and impartial court.

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

Judicial independence and impartiality means you should:

- exercise your judicial functions independently and free of irrelevant influence
- firmly reject any attempt to influence your decisions in any matter before the court outside the proper process of the court
- exhibit and promote high standards of judicial conduct to reinforce public confidence.

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

- strive to ensure that your conduct, both in and out of court, improves confidence in your impartiality and that of the judiciary
- be aware of and understand differences arising from gender, race, religious conviction, culture, ethnic background etc
- not allow your decisions to be affected by:
    - bias or prejudice

- personal or business relationships
- personal or financial interests.

This principle touches several different areas of your conduct.

6.5 Judicial manner

While acting decisively, maintaining firm control of the process and ensuring cases are dealt with quickly, you should treat everyone before the court with appropriate courtesy (see courtroom conduct below).

6.5.1 Civic and charitable activity

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

- avoid any activity or association that might be seen to affect your impartiality or interfere with the performance of your judicial duties,
- do not solicit funds (except from judicial colleagues or for appropriate purposes) or support any such fundraising,
- avoid involvement in causes and firms engaged in litigation,
- do not give legal or investment advice.

6.5.2 Political activity

Independence from political influence must not only be maintained but it must be seen to be maintained. For this reason, you must resign from judicial office if you are standing for Parliament.

You must be independent of all sources of power or influence in society, including the media and commercial interests (but you may still be involved in business if it does not conflict with your judicial duties).

Make no public comment about the Government or the need for the Government to act or stop acting in any way. The judiciary must be seen to have no political opinion. You should not:

- join or contribute to political parties and or attend political fundraising events;
- publicly take part in controversial political discussions, except for matters directly affecting the operation of the courts, the independence of the Judiciary or the administration of justice;
- sign petitions to influence a political decision; or
- family members may be politically active, but this if this negatively affects the public's view of your impartiality in any case you should not sit.

6.6 Conflict of interest

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

Even if there is no actual conflict, you should also disqualify yourself if a reasonable, fair minded and informed person would have suspicion of conflict between your personal interest (or that of your immediate family or close friends or associates) and your duty.

Relevant categories of conflicts of interest include:

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

Therefore, you should not preside over a case where the accused or witness:

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

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

- issues
- witnesses
- parties.

Given that Nauru is a relatively small jurisdiction, you should also be careful not to let personal or local knowledge of individuals before you affect your judgement. You may know something about the facts of the case already. That also means you have a conflict of interest. You must disqualify yourself wherever you have personal knowledge of disputed facts in proceedings, or wherever you have a personal view concerning a party or witness of disputed fact in the case.

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

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

Advance disclosure often may not be possible due to listing arrangements with disclosure on the day of the hearing. The parties should be given an opportunity to make submissions on recusal after full disclosure of the circumstances giving rise to the question of disqualification. It is not enough to get the parties' consent if an actual conflict of interest exists. You must make your own decision. If a conflict of interest arises, you should either not hear the matter at all and have it allocated to another Justice or adjourn the matter for hearing at another date before another Justice.

Disqualifying yourself from a case is not appropriate if:

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

Note this carefully on the record.

6.7 Conduct in the court

6.7.1 Preparing for a case

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

- arrive in good time—at least half an hour beforehand
- study the court list
- read any reports that are relevant for that day
- ensure you know the relevant sections of Acts and penalties (especially for infringement matters) and have these at hand
- if possible, check the list of defendants to see if you know any of them and to ensure you can pronounce all names correctly
- ask the Registrar any questions you may have.

For criminal matters, make sure you know what elements of the offence must be proved i.e. the essential parts an offence. Each essential element must be proved beyond reasonable doubt by the prosecution before the charge is proven.

See the chapter on Common Offences to find out more about the elements for common offences.

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

6.7.2 Affected parties have the right to be heard

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

A party whose interests or property may be affected by a decision has the right to be heard before the decision is made. This principle focuses on the procedures followed by the decision-maker and its effect on the parties.

There are three parts to this principle:

1. prior notice
2. fair hearing
3. relevant material disclosed to parties.

The defendant may be unable to put forward their side of the case if he or she:

- is not represented by a solicitor,
- is clearly not familiar with procedures,
- is not fluent in English, or
- has other difficulty in good self-expression

These questions require your judgement of the situation and of the degree of disadvantage. If you have doubts, consider taking an adjournment. A duty lawyer may be able to assist.

Article 10(3)(b) of the Constitution provides that the accused must be informed promptly in a language that they understand and in detail of the nature of the offence with which they are charged. Relevant sections of the Criminal Procedure Act 1972 (CPA) and the District Court Act 2018 (DCA) as amended by the District Court (Amendment) Act 2020 (DCAA 2020) also provide for prior notice, fair hearing and disclosure in criminal trials including:

- ss 51 and 90-93 CPA (details of complaint and formal charge including sufficient details to give reasonable notice of the nature of the offence(s) charged),
- ss 52 and 54 CPA (issue of summons to defendant),
- s 37 DCA (as amended by s 7 DCAA 2020) and s 100 CPA (issue of summons and examination of witnesses),
- ss 55-59 CPA (mode of service of documents on defendant),
- s 60 CPA (proof of service),
- s 99 (pre-trial disclosure), and
- s 100 CPA (adjourn trial where the defence/prosecution needs time to prepare cross examination of any witness that the court or either party has called to prevent prejudice).

Prior notice

You should:

- allow each party sufficient notice to prepare their case including: submissions, to collect evidence to support their submissions and to rebut or contradict the other party's submissions;

- be satisfied that adequate notice has been given, as required by law or otherwise adjourn the case; and
- if the defendant or respondent does not take any steps or appear at the hearing, you will need some evidence that the documents have been served before proceeding with the hearing.

For criminal matters, you will need proof of service of the warrant or summons. For civil and family matters, you will need proof of service of the writ with particulars of the claim.

Fair hearing

Article 10(2) of the Constitution protects the right of any person to a fair hearing, in accordance with the principles of fundamental justice, within a reasonable time by an independent and impartial court. The way the hearing is managed, and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.

The general rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with a new and relevant issue. The parties must be given an opportunity to respond to everything that is said to you by the other side.

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

- discuss the case outside the courtroom
- receive any information about the case privately. If you receive information privately, you must disqualify yourself
- conduct your own research into questions of fact.

Relevant material disclosed to parties

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

Before a hearing is concluded, you should ask yourself:

> "Has each party had a fair opportunity to state their case?"

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

6.8 Communication in court

6.8.1 Speaking

- use simple language without jargon
- make sure you know what to say before you say it
- avoid a patronising or unduly harsh tone
- generally, do not interrupt counsel or witnesses
- always express yourself simply, clearly and audibly.

It is important that:

- the party examined and every other party understands what is happening in the court and why it is happening
- the Court Clerk is able to hear what is being said for accurate note-taking
- the public in the courtroom are able to hear what is being said.

6.8.2 Listening

- be attentive and be seen to be attentive in court
- make accurate notes
- maintain eye contact with the speaker.

6.8.3 Questioning

Criminal cases

- your role is not to conduct the case for parties but to listen and determine
- generally, you should not ask questions or speak while the prosecution or defence are presenting their case, examining or cross-examining witnesses
- you may ask questions at the conclusion of cross-examination, but only to try to clarify any unclear matters arising from the evidence. If you do this, you should offer both sides the chance to ask any further questions of the witness, limited to the topic you have raised
- never ask questions to plug a gap in the evidence.

Civil cases

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

6.8.4 Dealing fairly and impartially with all court users

- Ensure courtesy to all court users.
- Demonstrate a non-prejudicial attitude.
- Address the defendant in an appropriate manner.
- Ensure that all those before the court understand what is going on.
- Show appropriate concern for distressed parties and witnesses.

6.8.5 Dealing with parties who do not understand

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

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

Criminal cases

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

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

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

- why they are appearing in court
- what their rights are
- what the court is doing
- why the court is following that course.

Civil cases

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

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

6.8.6 Dealing with language problems

Ideally, an interpreter should be obtained and sworn in when there is a language problem: art 10(3)(d) Constitution, s 149 (CPA), s 35 (DCA). Often, however, one is not available. In this case:

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

6.8.7 Fit but compromised (dealing with communication or learning difficulties or mental health issues)

People with communication difficulties might find it hard to:

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

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

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

If a mentally ill person does appear before you, the police doctor will be able to advise you on the best way forward. These cases are easily managed as the next steps have usually been decided by all concerned before appearance. If bail bonds need to be signed, they can be organised away from the cells if that is not an appropriate environment.

6.9 Appeals

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