Nauru District Court
Bench Book

Foreword

It is a privilege to write the introduction to Nauru's first Bench Book for the District Court.

The Bench book serves both as a guide to newly appointed lay magistrates and as a useful source of reference to the more experienced Resident Magistrate. It is intended to be a practical, user-friendly and informative guide to many aspects of the jurisdiction of the District Court.

The contents of this Bench Book are not designed to be exhaustive. It includes useful background information. It aims to provide quick and practical assistance in the conduct of proceedings, and to be easily referred to on the Bench.

I gratefully acknowledge the initiative and commitment on the part of the Pacific Justice Sector Programme (PJSP) to produce this handbook, and the work of Janine Ford, the Legal Publications editor, and Daniel Matallana, for their commitment in bringing this project together.

I would also like to acknowledge the contributions made, from a Nauru perspective, to the development of the Bench book by Resident Magistrate – Vinay Sharma, former Resident Magistrate – Neil Rupasinghe, and Registrar – Ronald Prakash.

This joint effort has produced a Bench Book of which we can all be proud. The Bench Book has been published online and will be produced in loose-leaf format to enable on-going revision and updating. I urge every Magistrate to use it often, to add to it and become part of developing and improving it further in the years ahead.

Hon. Justice Kiniviliame T Keteca

September 2024

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- The Constitution of Nauru 1968

1.2 The Constitution of Nauru

The Constitution of Nauru 1968 (the Constitution) came into force on 29 January 1968 and incorporates amendments made by the Constitutional Convention of Nauru under Article 92 on 17 May 1968.

The Constitution sets out the basis of Nauru's government by defining:

- the roles, responsibilities and powers of the President, the Executive, Legislature and the Judiciary (which incorporates the doctrine of separation of powers)
- the organization and structure of the legal system
- the fundamental requirements of citizenship and details related to finance, the public service, and emergency powers
- fundamental human rights including the principles of equality, social justice, human dignity and communal solidarity will be upheld.

The Constitution gives effect to three important constitutional principles:

1 the doctrine of separation of powers

2 the independence of the judiciary

3 the rule of law.

1.2.1 The doctrine of separation of powers

There should be three distinct and separate branches of government:

1 the Executive: administrator and policy maker

2 Parliament (legislature): makes the law

3 the Judiciary: interpreter of the law.

Each branch of government checks the roles and functions of the other branches. This checking maintains the balance of power between the three branches and does not allow the executive to assume too much power. The independence of the judiciary is an important element of the doctrine of separation of powers and is vital for maintaining the balance of power.

1.2.2 The independence of the judiciary

The judiciary must be independent and free from all political or other influence in carrying out its duties and in making decisions.

The independence of the judiciary is protected by:

- the Constitution,
- the concept of the rule of law,
- the process of appointing or removing judicial officers, and conditions of their appointment, and
- the immunity of judges and justices from civil actions.

1.2.3 The rule of law

Article 10 Constitution

The rule of law is the principle that all people and institutions are subject to and accountable to law that is fairly applied and enforced. No person can be convicted of an offence that is not defined by law. It requires that every action of a public servant is authorised by a law. Its purpose is to protect people from the arbitrary use of state authority. The rule of law also recognizes that the Constitution is the supreme law of the land (as provided for in Article 2) and provides checks and balances for the executive and legislative branches of government.

1.3 The branches of government in Nauru

1.3.1 The executive

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

- the President
- the Cabinet
- the Chief Secretary.

1.3.2 President

Articles 16, 21 and 24 Constitution

The President of Nauru is elected by Parliament and must be a member of Parliament. The Speaker and the Deputy Speaker are not qualified to be elected President. The President holds office until another President is elected.

Parliament must elect a President whenever:

- the office of the President is vacant
- Parliament sits after it has been dissolved
- the President resigns their office in writing delivered to the Speaker
- a resolution for the removal from office of the President and Ministers is approved under Article 24; or
- the President ceases to be a member of Parliament otherwise than by reason only of its dissolution: Art 16(5).

The Cabinet may appoint a Minister to perform the duties and exercise the functions of the President during any period during which the President is unable to act owing to illness, absence from Nauru or other cause: Art 21.

If Parliament has no confidence in the Cabinet, it may vote on a resolution approved by at least one-half of the members of Parliament that the President and Ministers be removed from office and an election of a President shall be held. Where a President has not been elected before the expiry of seven days after the day following the approved resolution, Parliament is dissolved: Art 24.

1.3.3 The Cabinet and Ministers

Articles 17-19 and 22-23 Constitution

Cabinet, consisting of the President and the Ministers appointed under Article 19 is the executive authority of Nauru and controls the government of Nauru. The Cabinet is collectively responsible to Parliament: Art 17. The President presides over Cabinet meetings: Art 22.

Each Minister must:

- before entering office, take and subscribe the oath set out in the First Schedule
- not hold an office of profit in the service of Nauru or of a statutory company: Art 18.

The President may assign, vary or revoke any business of the government of Nauru to each Minister or themselves: Art 23.

Whenever a President is elected, they should appoint four or five members of Parliament (MP) to be Ministers as soon as they can. If there are less than four Ministers at any time the President must appoint an MP to be a Minister. However, if Parliament is dissolved, the President must appoint a person who was a member immediately before the dissolution. Whenever there are four but not five Ministers, the President may appoint a member of Parliament to be a Minister: Art 19.

1.3.4 Chief Secretary

Articles 25 and 68

The Cabinet must appoint a Chief Secretary of Nauru, who is not a member of Parliament. The Chief Secretary has such powers and functions as the Cabinet or the Constitution sets out or by law. The Chief Secretary may resign office by writing delivered to the President and may be removed from office by the Cabinet: Art 25.

The Chief Secretary has the power to appoint, remove or discipline persons who hold or act in offices in the Public Service, with the Cabinet's approval for any person in charge of a department: Art 68(1) and (3). They may delegate these powers: Art 68(2).

The Chief Secretary also reports to the Cabinet on matters relating to the exercise of the powers at least once a year and the Cabinet produces a copy of the report before Parliament: Art 68(4).

1.3.5 The National Legislature (Parliament)

Part IV Constitution

The Parliament of Nauru is established under article 26 and consists of 18 members of parliament (MPs): Art 28. Parliament is dissolved every three years unless dissolved earlier by the Speaker on the advice of the President: Art 41.

The Speaker, is elected by the MPs and presides (controls) over any session of Parliament: Art 44. They may discontinue a session of Parliament at any time.

If the President advises the Speaker to dissolve Parliament, the Speaker must refer that advice to Parliament as soon as possible within 14 days, unless the President withdraws this advice. The Speaker must dissolve Parliament on the seventh day after referring the President's advice to Parliament: Art 41.

Parliament may:

- make laws for the peace, order and good government of Nauru subject to the Constitution: Art 27, and
- introduce and pass Bills, which become law on the date when the Speaker certifies that it has been passed by Parliament: Art 47.

1.3.6 The judiciary

Part V Constitution

The judiciary is the third branch of government in Nauru and:

- is an independent body which is responsible for interpreting and applying Parliament's laws,
- creates and interprets case law, and
- solves disputes of fact and law between individuals as well as between individuals and the State.

The court system is hierarchical and comprises the Court of Appeal, the Supreme Court (Chief Justice and a Judge) and the District Court (the Resident Magistrate).

This hierarchy is essential to the doctrine of precedent. The hierarchy provides an appeal system, which allows decisions to be checked by more senior courts. This helps prevent inconsistency within the courts and provides a check and balance system for the fair administration of justice.

Jurisdiction

Jurisdiction is the power and authority to hear or determine a particular matter. Courts may only act within their jurisdiction, as defined by law. If a court acts outside its jurisdiction, it is said to be acting ultra vires (outside the power), which makes the court's decision invalid on that matter.

Statutes define a court's power and authority. For example, the power and authority given to the District Court is set out in the District Court Act 2018 and its amendments.

Inherent jurisdiction: means that the court can fill in any gaps left by a statute or by case law. This jurisdiction is generally reserved for the highest courts in any given country. The Supreme Court has inherent jurisdiction.

Original jurisdiction: This means that a court is given power to hear certain kinds of cases in the first instance, eg: the Supreme Court has original jurisdiction to hear any question arising under or involving the interpretation or effect of any provision of the Constitution: Art 54 Constitution.

Concurrent jurisdiction: means that several courts have the power to hear a particular kind of case.

Territorial jurisdiction: refers to a court's power to hear cases for a particular district or tract of land.

Appellate jurisdiction: This is the right of a court to hear appeals from a lower court. The Court of Appeal and the Supreme Court all have some type of appellate jurisdiction.

Criminal jurisdiction

A crime is the commission of an act that is forbidden by statute or the omission of an act that is required by statute. The Crimes Act 2016 as amended in 2020 sets out those acts and omissions that are crimes in Nauru.

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

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

Civil jurisdiction

This covers disputes between individuals, and between individuals and the State, that are not criminal matters.

Jurisdiction derived from custom

This jurisdiction arises from the customs, traditions and values of the people of Nauru.

Section 3(1) of the Customs and Adopted Laws Act 1971 has specifically recognised existing customary law and cultural practices for customary land cases and inheritance and any matters affecting Nauruans only. But does not apply to the ability to:

- take or deal with the property of any other person without that person's consent; or
- deprive the parents of a child of its custody and control without their consent.

The Child Protection and Welfare Act 2016 (CPWA), specifically in section 5 (Guiding Principles) also recognises Nauruan tradition, culture and community values apply when using or applying the CPWA in practice, except where such matters conflict with the rights of children as provided for in the CPWA.

In practice generally, common law will normally be followed without any consideration of whether there is an applicable customary law even though it is inferior.

Supervisory jurisdiction

Supervisory jurisdiction refers to the supervisory role that a higher court has over subordinate courts to ensure that justice is properly administered. Section 37 of the Supreme Court Act (SCA) gives the Supreme Court the supervisory power over inferior courts and tribunals. Where an appeal procedure is available, this remedy is not available for parties.

The Supreme Court may call for and examine the record of the District Court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order made and as to the regularity of any proceeding: s 58 SCA. The Resident Magistrate has the same powers over the Lay Magistrates (s 60(1) SCA) but it must forward the matter to the Supreme Court for any remedial action: s 60(2) SCA. See sections 61-64 of the SCA as to the exercise of the power.

1.4 The structure of Nauru's court system

1.4.1 Court of Appeal

The Nauru Court of Appeal Act 2018 (NCAA) establishes the Nauru Court of Appeal (CA) as a court of record which means that proceedings are recorded and available as evidence of fact: s 4 NCAA.

The CA has the power and jurisdiction to hear and determine all appeals which lie to the Court under the Constitution, this Act or any other written law: s 5 NCAA.

An appeal to the CA in any civil proceedings is available from any final judgment, decision or order of the Supreme Court:

- sitting in the first instance including a judgment, decision or order of a judge in chambers; District Court, Family Court, or other subordinate tribunals where the law allows those decisions to be appealed to the Supreme Court,
- on an appeal from a decision of the Nauru Lands Committee; or under the Refugees Convention Act 2012 in its appellate jurisdiction on questions of law only,
- interpreting the Constitution,
- when required as provided under this Act, other written law or the rules of the court: s 19 NCAA.

An appeal to the CA in criminal proceedings is available from any final judgment, decision or order of the Supreme Court:

- in its original jurisdiction against conviction on a question of law or a question of mixed law and fact:
  - with the leave of the court on a question of facts only,
  - against the sentence passed unless the sentence is fixed by the law,
  - with the leave of the court against the grant or refusal of bail including any conditions or limitations, made either by the accused or the Director of Public Prosecutions: s 29 NCAA
- in its appellate jurisdiction:
  - with the leave of the court
  - on a question of law only (error of law): s 30 NCAA
- for a case stated or the revisional jurisdiction of the Supreme Court:
  - with the leave of the court: s 31 NCAA.

The CA sits at least once a year and is notified in the Gazette by the Registrar no later than 15th January of each year, subject to the Court being able to sit as the President of the Court of Appeal deems necessary: s 6 NCAA.

If the CA or a single Justice of Appeal is unable to sit in Nauru due to urgent or exceptional circumstances, the Court or a single Justice of Appeal may sit to hear or make orders in a cause or matter from outside the Republic through audio visual link: s 6 NCAA.

The CA consists of not less than three Justices of Appeal including the President of the Court of Appeal. However, the Court may sit with two Justices of Appeal where the President of the Court of Appeal deems it is impractical to summon a full court: s 8 NCAA.

If the President of the CA is unable to sit in an appeal by virtue of Article 57(6) of the Constitution or another reason, the Senior Justice of Appeal shall preside in the sitting of the Court, and another Justice of Appeal shall substitute the President of the Court of Appeal: s 8 NCAA.

A majority of the Justices of Appeal decide the judgment, decision or order of the Court. If they are equally divided, the judgment, decision or order appealed from the Supreme Court is taken as affirmed and the appeal is deemed to be dismissed. A Justice of Appeal or the Registrar may deliver the judgment, decision or order of the CA where it cannot be constituted in accordance with section 8: s 16 NCAA.

A judgment, decision or order of the court may be enforced by the Supreme Court as if it had been given or made by the Supreme Court: s 18 NCAA.

1.4.2 Supreme Court

Articles 48, 49 and 54 Constitution, Supreme Court Act 2018 (SCA), and Criminal Procedure Act 1972 (CPA)

The Supreme Court of Nauru is established under Article 48 of the Constitution, as confirmed by the Supreme Court Act 2018: s 4(1) SCA. It has the jurisdiction conferred on it by the Constitution, this Act, any other written law and inherent jurisdiction: s 4(2) SCA. The Supreme Court is a Superior Court of record: s 4(3) SCA. It has civil, criminal, commercial, family, probate, appellate, constitutional and administrative, miscellaneous, and such other divisions which the Chief Justice may deem appropriate; s 4(4) SCA.

The Supreme Court has original and appellate jurisdiction to try all civil and criminal matters: s 17 SCA. The Court hears civil and criminal appeals from final decisions of the District Court. Criminal appeals may be based on questions of fact or of law: s 38 SCA. This right of appeal is limited to the extent and legality of the sentence and only with leave of the Supreme Court, in the case of a guilty plea or for petty cases where the sentence is a fine under $100: s 39 SCA.

The Supreme Court has the following jurisdiction:

- to hear any offence under the Crimes Act 2016, subject to the provisions of any written law relating to children or young persons: s 4 CPA,
- to hear any offence under any other statutes than the Crime Act 2016, where the court is not specified or even where the court is specified to be tried by a court other than the Supreme Court or the District Court: s 5 CPA,
- pass any sentence or combination of sentences, and make any order, authorised by law for which provision is made in the Crimes Act 2016 or in any other written law: ss 6 and 8 CPA,
- unlimited original civil jurisdiction: s 65 SCA. Although the Civil Procedures Rules 1972 continue to apply to civil proceedings, the Chief Justice may also make these rules: s 76 SCA. The Supreme Court is paramount on constitutional issues: Art 54 SCA,
- supervisory jurisdiction over subordinate or inferior courts and tribunals, which are not criminal proceedings: s 37 SCA.

The Supreme Court may direct any matter be transferred into the District Court for determination, except where the District Court has already transferred this matter to the Supreme Court to determine a question involving the interpretation or effect of the Constitution: s 23 SCA.

The Supreme Court consists of a Chief Justice and any other judges appointed by the President in consultation with the Chief Justice and prescribed by the law: s 6 SCA. To be eligible a judge must have been entitled to practise as a barrister or solicitor in Nauru and have been entitled to do so for not less than ten years: Art 49. A single judge may exercise the jurisdiction of the Supreme Court except where a full Supreme Court is required as set out below.

The full Supreme Court is made up of a panel of three judges selected by the Chief Justice to:

- hear any matter of significant public importance,
- hear an important point of law,

- render an opinion under Article 55 of the Constitution, and
- hear any matter as required under any written law or the rules of the court exercisable by the Master, Registrar or other officer of the Supreme Court: s 7 SCA.

The Chief Justice directs when the Supreme Court sits for a trial or hearing of a cause, matter or an interlocutory application in the Republic and the registrar will issue notice to the parties in compliance with the directions of a judge or rules of the court: s 80 SCA.

Where a judge of the Supreme Court is not able to be in the Republic, in urgent or exceptional circumstances, they may hear or make orders for a cause or matter from outside the Republic through audio visual link: s 80(4) SCA (as amended by s 10 SCAA No 2 (2020)).

1.4.3 District Court

Article 48 Constitution, District Court Act 2018 (DCA), and Criminal Procedure Act 1972 (CPA)

The District Court has jurisdiction to deal with:

- criminal matters under the Criminal Procedure Act 1972,
- any jurisdiction conferred on it by the DCA or any other statute, and
- dividing chattels, recovering land in limited circumstances, interpleader applications, and family matters under the DCA: s 14 DCA.

See the chapter on District Courts to find out more details about the District Court's jurisdiction.

1.4.4 Family Court

The Family Court is a separate court. It has specific jurisdiction under the:

- Family Court Act 1973
- Matrimonial Causes Act 1973
- Guardianship of Children Act 1975
- Maintenance Act 1959
- Adoption of Children Act 1965

Proceedings are not open to the public.

See Chapter 4 for further information on the Family Court Act 1973.

1.5 Public Service Board and Police Service Board

Article 69 Constitution

Parliament may vest the powers and functions of the Chief Secretary under Article 68 (appointments in the public service etc) in:

a) a Public Service Board consisting of the Chief Secretary as Chairperson, and at least two other persons who are not members of Parliament; and

b) the public officer in charge of the Nauru Police Force, for appointments of public officers in the Nauru Police Force. This power is subject to the consent if any, of the Police Service Board.

If this power is delegated under paragraph b, Parliament must also establish a Police Service Board consisting of at least three people who are not members of Parliament. One should be a person qualified to be appointed as a judge of the Supreme Court to be appointed by the Cabinet (the chairperson), the Chief Secretary, and one person elected by members of the Nauru Police Force in accordance with the law.

The Police Service Board may exercise such other powers and functions as are conferred on it by law and should regulate its own procedure, subject to this Article and any law.

The Police Service Board may hear any appeals from a decision of the public officer in charge of the Nauru Police Force to remove a public officer from office or to exercise disciplinary control over a public officer. There is no appeal from a decision of the Board.

1.5.1 Public Service Appeals Board

Article 70 Constitution

The Public Service Appeals Board consists of a person qualified to be appointed as a judge of the Supreme Court to be appointed by the Cabinet (the chairperson), one person appointed by the Cabinet and one person elected by public officers. A member of Parliament is not qualified to be a member of the Public Service Appeals Board (see Article 70 for more details around appointment or removal from the Board).

Except where an appeal lies to the Police Service Board, the Public Service Appeals Board may hear appeals from a decision to remove a public officer or to exercise disciplinary control over a public officer made by that public officer. Their decision is final.

The Public Service Appeals Board shall exercise and perform such other powers and functions as are conferred on it by law and regulate its own procedure (subject to the law and the Constitution).

1.5.2 Court processes

Article 10 Constitution

For criminal matters, the constitution provides for the right to a fair trial within a reasonable time by an independent and impartial court under Article 10. An independent judiciary will generally enforce this. Procedural safeguards are based on English common law. The defendant's fundamental rights include:

- the presumption of innocence until proven guilty according to the law,
- the right to be informed promptly of charges in a language the defendant understands or the right to use an interpreter free of charge and to be informed of the details of the nature of the offence,

- given adequate time and facilities to prepare a defence,
- the right to legal counsel (appointed at public expense when required in the interest of justice if they do not have sufficient means to pay the costs incurred),
- the right to examine the prosecution witnesses, present evidence, and be present for the whole of their trial (unless they behave so badly it is impractical for them to remain), and
- a prohibition on double jeopardy and forced self-incrimination.

All trials are held in public, except where you exclude persons, other than the parties and their legal representatives, where you are empowered to do so and:

- you consider it necessary or expedient in the interests of public morality or in circumstances where publicity would prejudice the interests of justice, the welfare of persons under the age of 18 years or the protection of the private lives of persons concerned in the proceedings; or
- in the interests of defence, public safety or public order.

For civil actions, there is an independent and impartial judiciary, including access to a court to bring lawsuits seeking damages for, or cessation of, human rights violations.

2. Sources of law for Nauru

2.1 Relevant legislation (including amendments)

- Custom and Adopted Laws Act 1971
- District Court Act 2018 (DCA)
- Interpretation Act 2011
- Nauru Court of Appeal Act 2018
- Supreme Court Act 2018 (SCA), Supreme Court (Amendment) Act 2019 (SCAA 2019), Supreme Court (Amendment) Act 2020 (SCAA 2020), Supreme Court (Amendment) No 2 Act 2020 (SCAA No 2 2020)
- The Constitution of Nauru 1968

2.2 Introduction

The sources of law for Nauru, include:

- the Constitution
- Acts of Parliament
- customary law
- the rules and principles of common law and equity.

2.3 The Constitution of Nauru (the Constitution)

The Constitution is the supreme law of Nauru and any other law that is inconsistent with this Constitution, is void, to the extent of the inconsistency: Art 2(1) and (2).

This means any law passed before or after the Constitution, including legislation, customary law and the common law, which is inconsistent with the Constitution, is void.

The Supreme Court interprets and decides the meaning of any provisions in the Constitution in the first instance and then the Court of Appeal, so the Constitution is affected by developments in the common law. The Supreme Court has original jurisdiction to determine any question arising under or involving the interpretation or effect of any provision of the Constitution: Art 54.

The Constitution (apart from the Fifth Schedule and any provisions specified in it) may only be amended by a vote of not less than two-thirds of all members of Parliament after a 90-day interval between the introduction of the proposed law in Parliament and the passing of the proposed law by Parliament: Art 84(1)-(2).

The Fifth Schedule and any of the provisions specified in that Schedule may only be amended, after it has been passed by Parliament, if it has also been approved by not less than two-thirds of all the votes validly cast on a referendum held: Art 84(3).

A person who, at the time the referendum is held, is qualified to vote at an election of members of Parliament, is entitled to vote at a referendum held for the purposes of this Article and no other person is so entitled: Art 84(4).

A proposed law to alter this Constitution shall not receive the certificate of the Speaker under Article 47, unless it is accompanied by a certificate:

- under the hand of the Clerk of Parliament that Article 84(2) has been complied with; or
- if relevant, under the hand of a person prescribed by law stating that it has been approved as provided for by Article 84(3).

2.4 Statute law

Parliament has the power to make laws for the peace, order and good government of Nauru subject to the Constitution. Laws so made may have effect outside as well as within Nauru: Art 27.

A proposed law becomes law on the date when the Speaker certifies that it has been passed by Parliament: Art 47.

The legislation passed by Parliament is the next superior law after the Constitution.

The laws that are prescribed by Parliament, in the form of statutes, are binding on the courts and can only be changed by Parliament.

The courts may also, in certain circumstances, recommend changes to the law, or they may declare parts of or the whole statute void to the extent that it is inconsistent with the Constitution.

It is the role of the courts to interpret and apply statutes.

2.5 Understanding and interpreting legislation

When interpreting statutes in the Republic of Nauru, you must consider:

- the Constitution,
- any definitions or rules of interpretation that are provided in the specific Act, and
- common law rules of statutory interpretation.

You must recognise and understand the terms used in statutes to convey a particular meaning, for example when an Act says:

- you "may" do something, that means the power may be exercised or not, at your discretion,
- you "shall" do something, this means you "must". You have no choice.

Please note that the meaning of words and phrases in a statute is a question of law and not a question of fact. You should follow the following process to determine the meaning of words within the statute and refer to:

1. the definition section of the relevant statute,

2. part 8 (Construction of laws) of the Interpretation Act 2011,
3. relevant Nauru cases which may have given a definition for that word or phrase,
4. overseas case law (UK and Australia) in some instances where relevant eg: when interpreting UK or Australian statutes that have been adopted by Nauru or very similar legislation, and
5. a respected legal dictionary or legal textbook. This should only be used as a reference and may not be relevant to the particular statute or the context of Nauru.

The Custom and Adopted Laws Act 1971 (CALA) provides for the adoption of UK common law, equity and the statutes (including rules and regulations), which were in force in England on 31 January 1968: s 4(1)-(2) CALA. This is subject to the provisions of sections 3, 5 and 6 of this Act. This adoption of UK laws applies only so far as:

- the circumstance of Nauru and the limits of its jurisdiction permit; and
- they are not repugnant to or inconsistent with the provisions of this Act or of any Ordinance or Act in force at the commencement of this Act or from time to time with any law enacted hereafter by Parliament or with any Act, statute, Ordinance, law, rule or regulation of the Commonwealth of Australia, the State of Queensland, the Territory of Papua or the Territory of New Guinea for the time being expressly applied in, or adopted as the law of, Nauru by any Act or Ordinance: s 5 CALA.

Certain English laws are not adopted as specified in the First Schedule: s 6 CALA.

2.6 Customary law

Customary law that existed before the Custom and Adopted Laws Act 1971 has effect as part of the law of Nauru relating to the following matters:

(a) title to, and interests in, land, other than any title or interest granted by lease or other instrument or by any written law not being an applied statute;

(b) rights and powers of Nauruans to dispose of their property, real and personal, inter vivos and by will or any other form of testamentary disposition;

(c) succession to the estates of Nauruans who die intestate; and

(d) any matters affecting Nauruans only: s 3(1) CALA.

But any custom or usage **is abolished** by which any person is or maybe entitled or empowered to: s 3(2) CALA:

(a) take or deal with the property of any other person without that person's consent; or

(b) deprive the parents of a child of its custody and control without their consent,

The only place in the criminal law where cultural practices are taken into account is in the Child Protection and Welfare Act 2016 (CPWA 2016), specifically in section 5 (Guiding Principles when dealing with the CPWA 2016) which provides in part:

(1) The core principle for administering this Act is that the safety, wellbeing and best interests of a child are paramount.

(2) This Act must be applied, implemented and enforced in accordance with Nauruan tradition, culture and community values, except where such matters conflict with the rights of children as provided for in this Act.

This principle is applicable in offences relating to the disciplining of children, defined as persons under the age of 18 years: s 3(1).

2.7 Common law

The principles and rules of the common law and equity have effect as part of the law of Nauru if they are not:

- inconsistent with the Constitution or any Act of Parliament: Art 2(1) and (2).
- inconsistent with any existing customary law applying to the matter: s 3(1) CALA.

The common law is law made and developed by judges and magistrates. Judges and magistrates can make and develop the law by:

- interpreting existing legislation
- interpreting the Constitution
- covering matters which are not dealt with by statute.

The development of the common law does not mean that judges can make arbitrary decisions.

They must follow the Doctrine of Judicial Precedent and must give reasons for their decision.

2.8 Doctrine of Judicial Precedent

The Doctrine of Judicial Precedent means that judges and magistrates in lower courts are bound to follow decisions of higher courts.

Binding authority means that lower courts are "bound to" or must apply the legal principles announced in the decision of a higher court.

Persuasive authority means that the court may apply the decision of another court but are not required to do so. You should always carefully consider the decision of the other court but if the reasoning of the decision does not persuade you, do not apply it.

The courts are not bound by any decision of a foreign court. However, they may consider decisions from foreign jurisdictions to develop the common law of Nauru. These decisions would have persuasive value only.

3. The District Court

3.1 Introduction

The District Court Act 2018 (DCA) including amendments establishes the District Court and grants both criminal and civil jurisdiction on the District Court.

3.2 Criminal legislation

Criminal procedures followed in the District Court are:

- as set out in the Criminal Procedure Act 1972 (CPA) including amendments,
- the Criminal Procedure (Forms) Rules 1972, and
- the common law (rules of practice in the UK courts which are adopted pursuant to sections 4, 5 and 6 of the Custom and Adopted Laws Act 1971).

Other relevant criminal legislation includes:

- Anti-Money Laundering and Targeted Financial Sanctions Act 2023
- Bail Act 2018 (BA)
- Constitution of Nauru
- Crimes Act 2016 (CA)
- Criminal Code (Amendment) Acts (Criminal Code is the First Schedule to the Criminal Code Act 1899 of the State of Queensland)
- Criminal Justice Act 1999 (CJA)
- Cybercrime Act 2015
- District Court Act 2018 (DCA); District Court (Amendment) Act 2020 (DCAA 2020)
- Domestic Violence and Family Protection Act 2017
- Evidence (Confidential Information) Act 1976
- Illicit Drugs Control Act 2004
- Motor Traffic Act 2014
- Nauru Court of Appeal Act 2018
- Supreme Court Act 2018

3.3 Civil legislation

The Civil Procedure Act 1972 including amendments sets out civil procedures in the District Court. Under section 76 of the CPA, the Chief Justice may make rules of court to regulate the practice and procedure of the Supreme Court and the District Court. Accordingly, the Civil Procedure Rules 1972 and amendments apply to civil cases.

Other relevant civil legislation includes:

- Child Protection and Welfare Act 2016
- Civil Evidence Act 1972
- District Court Act 2018
- Interpretation Act 2011
- Nauru Court of Appeal Act 2018
- Supreme Court Act 2018

3.4 Composition of the court

3.4.1 Magistrates

The District Court is presided over by the Resident Magistrate or three lay magistrates: s 6(1) DCA. All matters in the District Court are currently dealt with by the Resident Magistrate. A Resident Magistrate, must:

(a) be qualified to be admitted as a legal practitioner to practice as a barrister and solicitor under the Legal Practitioners Act 2019; and

(b) have at least five years' experience in legal practice or experience as a judicial officer in the Republic or a court with similar jurisdiction to that of the District Court: s 7 DCAA (2020).

When the powers and jurisdiction of the District Court are exercised by three lay magistrates together, it is by majority decision: s 15 DCA.

Subject to the provisions of this Act and to any directions given by the Chief Justice:

- the Resident Magistrate determines which magistrates shall exercise the powers and jurisdiction of the District Court;
- where the powers and jurisdiction of the District Court are exercised by lay magistrates, the most senior of those magistrates by date of first appointment as a magistrate oversees the proceedings in the District Court;
- where two or more of the magistrates were first appointed on the same date, the Chief Justice will decide their seniority relative to one another, unless the magistrates agree that one of them other than the most senior will oversee proceedings: s 20 DCA.

If a matter has started in the District Court before three magistrates, but before being determined one magistrate dies or, or is unable to continue due to illness or absence from Nauru and is unlikely to be able to do so within a reasonable time, the two other magistrates may with the parties' consent in writing, complete the hearing and make a determination. If they are unanimous, this is final but if not, then the hearing has to start afresh before a properly constituted court: s 25 DCA.

3.4.2 Registrar of the District Court

s 11 DCA

The Registrar of Courts shall be the Registrar of the District Court. The Registrar provides monthly returns of cases filed, heard and disposed of in the respective court to the Minister for Justice.

3.4.3 Deputy Register and other officers of the District Court

ss 12 and 13 DCA

The Deputy Registrar of the District Court is the principal administrative officer for the court. Other officers of the court may be appointed as required to administer the District Court efficiently. The Deputy Registrar and other officers of the court are supervised by the Chief Justice, under the immediate direction and control of the Registrar: s 12 DCA.

Their duties are to:

- attend sittings of the District Court as a Resident Magistrate may direct;
- prepare summonses, warrants, decrees, orders, convictions, recognisances, writs of execution and other documents and to submit them to a Resident Magistrate or if that Resident Magistrate so directs, to another magistrate, for signature;
- issue civil process if authorised by rules of the court;
- maintain case files and registers to record judgments, decisions or orders of the District Court and to make, or cause to be made, copies of proceedings when required to do so;
- receive all fees, fines and penalties, and all other moneys paid or deposited in respect of proceedings in the District Court, and to keep an account of them; and
- perform, or cause to be performed, such other duties connected with the District Court as may be assigned to them by a Resident Magistrate: s 13 DCA.

3.5 General jurisdiction

The Resident Magistrate has jurisdiction to hear cases within any district throughout Nauru.

The lay magistrates have limited jurisdiction to hear and determine (s 6(2) DCA):

- traffic offences contained under the Motor Traffic (Traffic Infringement Notices) Regulations 2018,
- bail applications for offences for which the maximum term of imprisonment is 12 months,
- matters for which jurisdiction is vested in the District Court under section 14(g) of the Act, and
- such other matters which the Chief Justice may from time to time assign or vest to the lay magistrates.

The jurisdiction of the District Court includes (s 14 DCA):

- jurisdiction vested in it by the Criminal Procedure Act 1972 and any other written law that it had prior to the commencement of this Act;
- jurisdiction conferred on it by the DCA or any other written law;
- power and jurisdiction as may from time to time be vested in it under the DCA or any other written law;
- jurisdiction to divide chattels;

- jurisdiction in relation to the recovery of land in limited circumstances provided for under this Act;
- jurisdiction to hear and determine interpleader applications; and
- family related jurisdiction.

The District Court has ancillary jurisdiction to (s 23 DCA):

- grant relief, redress or remedy, or combination of remedies; and
- give effect to defence on equitable or legal grounds or counter-claim as could be granted or made by the Supreme Court.

3.6 Criminal and sentencing jurisdiction

An offence is taken to be committed in Nauru, whether or not the person charged with the offence was in Nauru at the time the conduct was engaged in or the event took place, if:

- conduct which is part of an offence is undertaken within Nauru, or
- an event necessary to complete an offence took place in Nauru,

Subject to this, conduct engaged in outside Nauru is not an offence except as provided by this or another Act: s 5 CA.

The District Court has authority to cause to be brought before it any person who is in Nauru and is charged with an offence committed within, or which may be inquired into or tried within, Nauru and to deal with him or her according to its jurisdiction: s 43 CPA.

The criminal jurisdiction of the District Court under section 14 of the DCA, is amended by the limits of its sentencing jurisdiction set out in section 7 of the Criminal Procedure Act (as amended by ss 4 and 5 of the Criminal Procedure (Amendment) No 2 Act 2018). The District Court may try any offence, subject to the provisions of any written law relating to children or young persons and other provisions of this Act under:

- the Crimes Act if it is punishable with imprisonment for not more than ten years: s 4 CPA
- any written law other than the Crimes Act 2016 and it does not state the Court by which that offence may be tried (or even if does), if it is punishable with imprisonment for not more than ten years: s 5 CPA.

The sentencing provisions are set out in Div 15.3 (ss 277-282A) of the Crimes Act 2016 as amended by the Crimes (Amendment) No. 2 Act 2020.

The District Court may pass any sentence and make any order authorised by the Crimes Act 2016 or in any other written law except for (s 7 CPA):

- a sentence of death,
- a term of imprisonment exceeding five years in respect of any one offence,
- a fine in an amount exceeding $50,000 in respect of any one offence, or

- any written law which expressly provides that the District Court has no jurisdiction; or the Supreme Court has the original jurisdiction over the criminal cause or matter.

Any person who has, on at least two previous occasions been convicted of any sexual offence (whether similar or not) shall be declared a habitual sexual offender and shall be sentenced to life imprisonment without eligibility for parole: s 7A CPA.

You may pass any lawful sentence combining any two or more of the sentences which the District Court is authorised by law to pass, subject to the provisions of the Crimes Act 2016 and of any other written law: s 8(1) CPA.

In determining the extent of the jurisdiction of the District Court under section 7 of this Act, any term of imprisonment which is, or may be imposed in default of payment of a fine, costs or compensation shall be deemed not to be a sentence of imprisonment passed in respect of the offence for which the fine was imposed: s 8(2) CPA.

Where a person is convicted at one trial of two or more offences you must pass sentence separately in respect of each offence. If a sentence of imprisonment is passed for either of these offences, the sentences shall run consecutively in such order as the Court directs, unless that Court directs that they run concurrently: s 9(1) and (2) CPA.

The maximum aggregate sentences of imprisonment and fine which may be imposed by the District Court on any one person at one trial are 10 years imprisonment and $75,000 fine: s 9(3) CPA.

For deciding if there is a right of appeal, the aggregate of fines imposed on one person at one trial shall be deemed to be a single sentence: s 9(4) CPA.

3.7 District Court may transfer charges and proceedings to the Supreme Court

You may transfer the charge and proceedings to the Supreme Court if:

- a charge has been brought against any person of an offence not triable by the District Court; or
- you think that that it ought to be tried by the Supreme Court: s 162 CPA.

3.8 Civil jurisdiction

District Courts may hear and determine all civil cases involving not more than $3,000. This includes (s 17 DCA):

- any cause or matter founded on contract or on tort but not, except as provided, have jurisdiction to hear and determine any cause or matter for the recovery of land,
- any claim where the debt or demand up to a balance of $3,000 after set off (admitted by the plaintiff),
- any cause or matter for the recovery of any penalty (not including a fine on conviction), expenses, contribution or other like demand under any laws, if it is not expressly provided that the demand shall be recoverable only in some other court,

- proceedings for enforcing any charge or lien,
- proceedings for the specific performance, or for the rectification, delivery up or cancellation, of any agreement for the sale, purchase or lease of any property,
- proceedings for the dissolution or winding-up of any partnership, or
- proceedings for relief against fraud or mistake.

A plaintiff may abandon part of their claim for more than $3,000, to bring it within the jurisdiction of the District Court and, if so, the judgment will be in full discharge of all demands in respect of that application: s 20 DCA.

If the parties agree by signed memorandum under section 23 DCA, that the District Court has jurisdiction to hear and determine any cause or matter, then it has that extended jurisdiction subject to sections 24 and 25: s 21 DCA.

A cause of action may not be divided for the purpose of bringing two or more actions or any counterclaim: s 22 DCA.

For any (preliminary) proceeding that is pending, a magistrate may make any order or exercise jurisdiction which, if it related to an action or proceeding pending in the Supreme Court, might be made by a judge of the Supreme Court in their chambers: s 24 DCA.

3.9 Powers of the District Court

The District Court has the following powers:

- refer any cause or matter except for criminal matters, to arbitration with the consent of the parties: s 27 DCA.
- refer any cause or matter except for criminal matters, to a referee for inquiry and report if:
  - the matter requires any prolonged examination of documents or any scientific or local investigation; or
  - the question in dispute consists wholly or in part of matters of account;
  - the parties consent; or
  - any interlocutory issues arising in the cause or matter to which the parties consent: s 28 DCA.

3.10 General powers of magistrates

A magistrate has several powers including to:

- administer oaths and take affirmations and declarations; make such decrees and orders; and issue such process and exercise such powers judicial or administrative as authorised by any written law: s 29 DCA;
- recuse themselves (or if one of the parties apply) where a magistrate has a conflict of interest: s 30 DCA;

- transfer a cause or matter relating to the Constitution from the District Court to Supreme Court: s 31 DCA;
- award costs in a cause or matter as they deem fit and expedient: s 32 DCA. But s 7 of the Criminal Procedure (Amendment) No. 2 Act 2018 inserted a new s 118A to the CPA that prohibits the award of costs against prosecution or defence in any criminal matter;
- have a formal charge prepared and signed for criminal complaints: s 51 CPA;
- issue summonses and warrants for the arrest of accused, and penalise them for non-attendance: ss 52, 63 and 150 CPA;
- issue summonses and warrants for the arrest of witnesses, or to produce documents and penalise them for non-attendance or refusal to give evidence without a reasonable excuse: ss 37-40 DCA, ss 100 and 102 CPA; and
- require various people, including accused and witnesses, to enter into a recognisance, with or without sureties: s 65 CPA and s 22 BA.

4. Family Court Act 1973

4.1 Background

The Family Court Act 1973 (FCA) came into force on 3 October 1977. The Act established the Family Court (s 3) and stipulated the jurisdiction, powers and authorities available to the Court (s 6).

4.2 Composition and powers of the Family Court

The Chairperson of the Family Court is the Resident Magistrate, or someone appointed by the President after consulting with the Chief Justice (ss 2 and 4 FCA). Members of the Family Court are also appointed by the President, and the Court must be composed of the Chairperson and two or more members (s 4(4)). If a member other than the Chairperson becomes unavailable after a proceeding has commenced, you may continue to determine the matter in the absence of that member (s 11(2)).

Decisions are made by majority (s 5(1)). If the members of the Family Court are divided equally on any decision, the Chairperson has authority to determine the matter. Powers of the court are stipulated by ss 6 to 9 of the Act, which includes the power to compel attendance of witnesses and deal with contempt of court.

4.3 Procedure

You must follow the procedure for trials in the District Court, outlined in Part VI of the Criminal Procedure Act 1972, as much as possible (s 10(1) FCA). In all other matters, you must follow procedure prescribed for the District Court in exercise of its civil jurisdiction where possible. The Chief Justice may also prescribe the procedure to be followed by the Family Court in any type of proceedings (s 10(4) FCA), and make rules for any purpose (s 29 FCA).

Proceedings are not open to the public. Specified individuals who may be present at a hearing include court officers and legal representatives, parents or guardians of parties to the proceedings, and probation or welfare officers (s 18). It is illegal for the parties to be named or for reports of the proceedings to be published unless the Chairperson has given special leave (s 18(2)).

4.4 International obligations

You should have consideration for the Republic's international obligations when making decisions. Particularly relevant to the Family Court are the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CRC).

The Human Rights Council considered the Report of the Working Group on the 3rd cycle Universal Periodic Review of the Republic of Nauru on 2 February 2021 (A/HRC/47/17). As part of these proceedings, the government acknowledged that the minimum marriage age for females had been raised from 16 to 18, which honoured the Republic's commitment to its international rights obligations (at [97]). While the law on same-sex relations had been changed, Nauru did not have plans to recognise same-sex marriages or partnerships (at [98]).

5. Evidence

5.1 Relevant legislation (including amendments)

- Child Protection and Welfare Act 2016 (CPWA)
- Crimes Act 2016 (CA)
- Criminal Evidence Act 1898, UK (CEA 1898), Criminal Evidence Act 1965, UK (CEA 1965);
- Criminal Procedure Act 1865, UK (CPA, UK)
- Criminal Procedure Act 1972 (CPA), Criminal Procedure (Amendment) Act 2020 (CPAA), Criminal Procedure (Amendment) No 2 Act 2020 (CPAA No 2, 2020)
- Custom and Adopted Laws Act 1971 (CALA)
- District Court Act 2018 (DCA), District Court (Amendment) Act 2020 (DCAA)
- Evidence Act 1843, UK (EA)

5.2 Introduction

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

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

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

In criminal trials, the prosecution generally bears the burden of proving or disproving the facts in issue, to establish the guilt of the defendant, unless an enactment specifically provides otherwise.

Evidence rules have been established to assist the court as to what evidence the court may (or may not) consider or accept (admissible). The key point with evidence is relevance.

You may either:

- **admit evidence**: accept and act on such evidence as you think sufficient (and relevant) whether such evidence is or is not admissible or sufficient at common law: s 176(5) CPA (as amended by s 9 CPAA 2020); or
- **reject evidence**: refuse to receive evidence whether admissible or not at common law, which you consider irrelevant or needless, or unsatisfactory as being hearsay or other secondary evidence.

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

The Criminal Procedure Act 1972 (CPA) is the principal statute dealing with evidence. Section 158 (as amended by s 8 CPAA 2020) applies certain evidence provisions relating to the Supreme Court to the District Court. These include:

- evidence of the accused's previous convictions (s 193)
- cross-examination of prosecution witnesses by the defence (s 198)
- opening and evidence by the defence (s 202)
- extra witnesses may be called for the defence if they have relevant evidence (s 203)
- evidence in reply by the prosecution (s 204).

Also, section 4 of the Custom and Adopted Laws Act 1971 (CALA) applies the UK laws of evidence (amongst others) in force in England on the 31st day of January 1968 (and the Judges' Rules) to the extent that they are not repugnant to or inconsistent with the provisions of CALA or any other Nauru legislation or Australian legislation that has been expressly applied in, or adopted as the law of, Nauru: ss 4 and 5 CALA.

5.3 Classification of evidence

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

5.3.1 Classification by form

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

1. **Documentary evidence**: is information contained in written or visual documents.
2. **Real evidence**: is usually some material object or thing (such as a weapon) that is produced in court and the object's existence, condition or value is a fact in issue or is relevant to a fact in issue.
3. **Oral evidence**: is the statements, or representation of facts, made by witnesses.

5.3.2 Classification by content

Classification by content refers to the way the evidence is relevant to the facts in issue and evidence is split into three categories:

1. **Direct evidence**: is evidence which, if believed, directly establishes a fact in issue. Direct evidence is evidence given by a witness who claims to have personal knowledge of the facts in issue.
2. **Circumstantial evidence**: is evidence from which the existence or non-existence of facts in issue may be inferred. It is circumstantial because, even if the evidence is believed, the information or circumstances may be too weak to establish the facts in issue or to uphold a reasonable conviction. It often works cumulatively in that there may be a set of circumstances

that, individually, is insufficient to establish the facts in issue but taken as a whole would be enough to do so.

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

5.4 Documentary evidence

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

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

Documentary evidence consists of 'out of court' statements or representations and therefore the question of whether the document making the statement or representation is hearsay evidence will always arise.

Often, documentary evidence will only be admissible under a common law exception to the hearsay rule, or it will be admissible by statute as follows:

- s 1 of the Criminal Evidence Act 1965 (CEA), UK (business and trade records)
- s 146 CPA (proof by written statement)
- s 147 CPA (proof by formal admission)
- s 147A CPA (general admissibility of hearsay statements)
- s 176(5) CPA (discretion to allow admission of any evidence as you deem fit).

5.4.1 Business and trade records

In any criminal proceedings, any statement made by a person in the original document that establishes that fact, is admissible if:

- the document is (or is part of) a record relating to any trade or business and was made in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have (or may reasonably be supposed to have) personal knowledge of the matters dealt with in the information they supply; and
- the person who supplied the information is:

- dead, or beyond the seas, or unfit by reason of their bodily or mental condition to attend as a witness, or
- cannot with reasonable diligence be identified or found, or
- cannot reasonably be expected (because of the time passed since they supplied the information and the circumstances) to have any recollection of the matters dealt with in the information they supplied: s 1(1) CEA (UK).

Relevant definitions for this provision are:

- "statement" is any representation of fact, whether made in words or otherwise;
- "document" includes any device by means of which information is recorded or stored; and
- "business" includes any public transport, public utility or similar undertaking carried on by a local authority and the activities of the Post Office: s 1(4) CEA (UK).

In deciding on the admissibility of a document, you may draw any reasonable inference from the form or content of the document in which the statement is contained: s 1(2) CEA (UK).

In deciding whether a person is fit to attend as a witness, you may act on a certificate of a medical officer: s 1(2) CEA (UK).

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

- all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement;
- whether the statement was made at the same time as the facts occurred or their existence; and
- whether the maker of the statement had any incentive to conceal or misrepresent facts: s 1(3) CEA (UK).

5.4.2 Proof by written statement

In any criminal proceedings, a written signed statement by any person is admissible as it if were oral evidence where:

a) the maker cannot conveniently attend before the court; and

b) the statement has a declaration by that person that it is true to the best of their knowledge and belief and that they made the statement knowing they would be liable to prosecution if they wilfully stated in it anything which they knew to be false or did not believe to be true; and

c) before the trial, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and

d) none of the other parties, or their lawyers if any, within seven days from the service of the copy of the statement, serves on the party a notice objecting to the statement: s 146(1)-(2) CPA.

However, the conditions above do not apply if the parties agree before or during the hearing that the statement may be tendered: s 146(2) CPA.

Other conditions that also may apply include:

a) if the maker is under the age of twenty-one, the statement must give their age;

b) if the maker cannot read, the statement must be read to them before signing it with a declaration by the person who read the statement that this was done;

c) if another document is referred to it must be attached as an exhibit and translated if necessary; and

d) the statement may have to be translated into the accused's native language: s 146(3) CPA.

All or part of the admissible written statement must be read aloud at the hearing unless you direct otherwise, or an oral account of so much of any statement that is not read aloud: s 146(4) CPA.

Any document or object identified in the written statement is treated as if it had been produced as an exhibit and identified in court by the maker of the statement: 146(5) CPA.

Methods of service include: personal delivery, or to their lawyer; or addressed to them and left at their residence or place of business; or if a company or body corporate, by serving the document on their secretary, local manager or other principal officer or in such other manner as the court may direct: s 146(6) CPA.

5.4.3 Proof by formal admission

Any fact (if oral evidence may be given of this fact) may be admitted before or at the trial, by or on behalf of either the prosecution or accused and is admissible as conclusive evidence of the fact admitted: s 147(1) CPA. It is also admissible for any subsequent criminal proceedings related to that matter, retrial or any appeal: s 147(3) CPA.

If not made in court, then the admission must be in writing and signed by the accused or (by their counsel and countersigned), or by a director, manager or secretary if the accused is a body corporate: s 147(2) CPA.

The admission may be withdrawn with your leave: s 147(4) CPA.

5.5 General admissibility of a written hearsay statement

A hearsay statement is admissible in any proceeding, where the circumstances relating to the statement provides the reasonable assurance of the reliability of the statement and:

- the maker of the statement is unavailable to attend court to testify as a witness; or
- the court considers that undue expense and delay would be caused if the maker of the statement is required to attend as a witness to testify in court: s 147A(1) CPA.

This does not apply to a witness, whose unavailability is caused or occasioned by the party, which is seeking to adduce such statement: s 147A(6) CPA.

Hearsay statement means a written statement that:

- was made by a person other than a witness; and
- is offered in evidence at the proceeding to prove its contents: s 147A(2) CPA.

The party proposing to rely on the hearsay statement must give notice at least 14 days before the date fixed for trial to the other party of their intention to rely on the hearsay statement: s 147A(3)(a) CPA. This is essential to provide timely notice to the other party to be able to file any objection and for the court to rule on the matter if there is any objection filed.

The other party may object to the tendering of such statement by giving a notice of objection to the other party intending to rely on such statement; and if so, you have a residual discretion to admit such statement: s 147A(3)(b)-(c) CPA.

Circumstance in relation to the statement by a person who is not a witness, includes:

- its nature and contents and when the statement was made;
- the reasonable credibility of the statement; and
- any circumstance that relate to the accuracy of the observation of the person: s 147A(4) CPA.

A person is unavailable as a witness to attend court to testify in a proceeding if they are:

- deceased; or
- outside the Republic and it is not reasonably practicable for them to attend court as a witness or tender evidence in person through digital or electronic means including audio or visual links; or
- certified by a medical practitioner as unfit to give evidence due to age, physical or mental condition or impairment; or with reasonable diligence cannot be traced: s 147A(5) CPA.

You have a residual discretion to decide what weight to give to this evidence: s 147A(7) CPA. See *Republic v Bill* [2020] NRSC 35; Criminal Case 13 of 2017 (22 September 2020). The Supreme Court of Nauru considered sections 147 and 147A. The Court noted that the drawback of s 147 that once a fact is admitted it is conclusive evidence against that party, compared to s 147A which gives the court a discretion as to any weight to be given to that hearsay evidence.

The court referred to *R v Baker* [1989] 1NZLR 738 (Court of Appeal) per Cooke P said the question to ask is "whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards. Essentially the whole question is one of degree."

This approach was subsequently codified in section 18 of Evidence Act 2006 (NZ).

5.6 Real evidence

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

Documents can also be real evidence when:

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

The following facts about a person may also, in some circumstances, be regarded as real evidence:

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

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

5.7 Exhibits

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

5.7.1 Checklist for exhibits

Has:

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

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

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

5.8 Oral evidence

Oral evidence consists of statements or representations of fact. These statements may be 'in court' statements or 'out of court' statements.

'In court' statements are defined as those made by a witness who is giving testimony. This includes oral evidence provided a witness (or through an interpreter) who is overseas or a prisoner on remand or in custody who gives evidence by audio visual link without having to attend court in the Republic of Nauru: ss 149A and 149D CPA.

Otherwise, if a witness wants to mention in their testimony a statement which they or somebody else, made outside of the court, the witness is making an 'out of court' statement.

The difference between 'in court' statements and 'out of court' statements is important. If a witness wants to refer to 'out of court' statements in their testimony, you must decide whether it should be classified as hearsay or original evidence.

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

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

The value of oral evidence is that you can observe: the outward behaviour of the witness; their delivery, tone of voice, body language and attitude towards the parties.

Where any evidence is given in a language not understood by the accused it must be interpreted to them in open court into a language they understand: s 149(1) CPA.

Likewise, where documents are admitted these may need to be interpreted for the accused in whole or in part as you think necessary: s 149(2) CPA.

See also *Benjamin v Republic* [1975] NRSC 9; [1969-1982] NLR (D) 44 (25 November 1975). The Nauru Supreme Court held that oral evidence of a confession by the accused which has been made in Nauruan but recorded in English was "improper" if the interpreter able to record the confession in Nauruan. This appeal was allowed and the conviction quashed.

All oral evidence (or as much as you think is material) given before the District Court, is recorded in writing in the form of a narrative and not questions and answers: s 44(1)-(2) DCA. But you may in your discretion take down, or cause to be taken down, any specific question and answer: s 44(3) DCA.

Oral evidence includes evidence provided through audio visual link or any other electronic or digital form which the Registrar my keep securely so that it may not be edited, modified, erased or copied and is able to be retrieved and produced when required: s 44(4)-(5) & (8) DCA.

It is an offence for anyone else present including a party, legal representative or witness to make a record of any such virtual proceeding or allow someone else to do so and you may stop any such proceeding immediately if this happens: s 44(6)-(7) & (9) DCA.

Any breach of section 44 is a contempt of court under Section 8 of the Administration of Justice Act 2018: s 44(10) DCA.

5.9 Evidentiary issues relating to witness testimony

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

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

5.9.1 Competent and compellable witnesses

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

Compellability means that the court can require or compel a witness to testify once they have been found competent. You may compel a witness to give material evidence in a criminal trial, if it appears to be essential to the just decision of the case: s 100 CPA.

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

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

5.9.2 The defendant and co-defendant

The general rule is the defendant is not a competent or compellable witness for the prosecution: Articles 10(3)(a), 10(7) and 10(8) of the Constitution. This means that the defendant cannot be called by the prosecution to give evidence against themselves, nor can the court require the defendant to do so.

A defendant is a competent witness for the defence but cannot be compelled to give evidence in their defence at trial unless they choose to: s 1 CEA 1898. If they do choose to give evidence, then they may be cross-examined like any other witness, even if it might incriminate them.

A co-defendant is a competent witness for the prosecution or defence: s 1 CEA 1898 (UK). They are a compellable witness for the prosecution if:

- a nolle prosequi is entered, or

- a verdict of acquittal is given, or
- the co-defendant has pleaded guilty, or
- the co-defendant is tried separately from the persons with whom they are jointly indicted. See *Winsor v R* (1866) LR 1 QB 390, *Townsend v Strathern* 1923 SC (J) 66, and *R v Boal* [1965] 1 QB 402; [1964] 3 All ER 269.

5.9.3 Silence does not mean guilt

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

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

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

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

When a defendant refrains from giving evidence as a witness, this cannot be held against the defendant.

5.9.4 Spouses

A spouse is a competent and compellable witness for the defence and only the defendant may apply to call their spouse to give evidence: s 106(b) CPA.

The spouse of the defendant shall be a competent but not compellable witness for the prosecution, without the consent of the defendant, unless called to give evidence for various offences including:

- an offence under Chapter XXII or section 360 of the Criminal Code; or
- the defendant is charged with an offence affecting the person or property of the wife or husband of the accused or the children of either of them; or
- the law specifically provides for a spouse to be called without the consent of the defendant: s 105 CPA.

Note: no person is the wife or husband of any other person unless they are lawfully married to one another.

Section 106(c) CPA states that a spouse will not be compellable in any proceeding to disclose any communication made to each other during the marriage.

5.9.5 Children

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

Section 54 of the Child Protection and Welfare Act 2016 (CPWA) sets out the special rules that apply to investigations and inquiries involving children under the age of 18 years (s 3(1)). See *Republic v LD* [2020] NRSC 31; Criminal Case 5 of 2019 (20 October 2020). At all stages of the investigation or inquiry, the best interests of the child must be the primary consideration.

Section 55 sets out the rules that apply to proceedings involving children under the age of 18 years: Of these, the evidentiary rules include:

- promote and apply child-friendly court procedures, including alternative arrangements for giving testimony such as the use of screens, video-taped evidence and closed circuit television: s 55(1)(f);
- give children the right to effectively participate in any proceedings that affect them, to express their views, and to have those views given due weight: s 55(1)(h);
- no corroboration of a child's evidence in criminal proceedings for sexual assault is to be required: s 55(1)(k);
- expert evidence regarding patterns of disclosure or behaviour of children in cases involving sexual abuse is to be automatically admissible: s 55(1)(m).

See the chapter on Juvenile Crime to find out more.

In assessing the evidence of a child witness, you must be guided by two important considerations namely, the child's competency and their credibility. Refer to:

- Republic of Nauru v Namaduk [2018] NRSC 42; Criminal Case 29 of 2017 (22 August 2018).
- See also: *Republic v Kam* [2020] NRSC 18; Criminal Case 22 of 2019 (28 May 2020) where the Nauru Supreme Court noted that there are no special rules to be applied when considering the evidence of children.

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

See the chapter Juvenile Crime to find out more about the relevant requirements for child offenders and witnesses.

5.10 Examination of witnesses

5.10.1 Examination-in-chief

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

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

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

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

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

5.10.2 Cross-examination

The purpose of cross-examination is:

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

> **Note:** Browne v Dunn (1893) 6 R 67 (HL) applies as a rule of practice to allow a fair trial. It requires counsel to "put the case" of their client to the witnesses called by opposing counsel. If you are asking the tribunal of fact to disbelieve the evidence-in-chief of a witness, contradictory material, or at least the essence of it, normally had to be put to the witness so that they might have an opportunity of explaining the contradiction. Failure to do so might be held to imply acceptance of the evidence-in-chief.

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

- ensure fairness to the party and the witness whose evidence is contradicted; and
- promote accurate fact-finding by ensuring the trier of fact has the benefit of the witness's response. The duty is not intended to protect the interests of the party cross-examining the witness.

See *Republic v Jeremiah* - Judgment [2018] NRDC 1; Criminal Case 32 of 2018 (14 September 2018) – Nauru District Court.

5.10.3 Inconsistent statements by witnesses

A party producing a witness is not allowed to impeach their credit by general evidence of bad character. But they may if the witness proves adverse (hostile) in your opinion:

- contradict them by other evidence; or
- with your leave prove that the witness has made at other times a statement inconsistent with their present testimony; and
- if the witness after being given the circumstances of that statement does not admit that they made such statement, proof may be provided that they did in fact do so: ss 3 and 4 CPA UK.

A cross-examining party may seek to attack the witness' credibility by asking the witness if they made any prior statements inconsistent with present testimony without showing them the writing. If the witness after being given the circumstances of that statement does not admit that they made such statement, proof may be provided that they did in fact do so: s 5 CPA UK.

You may also at any time require the writing to be produced for inspection and make such use of it for the purposes of the trial as you think fit: s 5 CPA UK.

See *Republic v Thoma* [2020] NRSC 13; Criminal Case 17 of 2019 (8 May 2020).

5.10.4 Leading questions

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

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

Leading questions may be allowed in the following circumstances for:

- formal or introductory matters, for example, the name, address and occupation of the witness;
- facts which are not in dispute or introductory questions about facts which are in dispute; or
- the purpose of identifying a witness or object in court.

5.10.5 Refreshing memory

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

- by the witness or under their supervision; and
- at the time of the incident or almost immediately after the incident occurred.

The witness should not normally read from the notes but should use them only to refresh their memory. However, if the notes are lengthy and complex, then the only practicable course is to allow the witness to read them.

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

5.10.6 Lies

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

It does not necessarily mean, however, that the defendant is guilty.

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

5.10.7 Corroboration

Where corroboration is required (evidence must be backed up by at least one other source) you must look for it in the prosecution's evidence.

If, at the end of the hearing, you find that the complainant's evidence does not have support from another witness, but you were still convinced that the complainant was telling the truth, you may still convict the defendant.

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

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

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

See *Republic v Bill* [2021] NRSC 14; Criminal Case 13 of 2017 (15 April 2021) which cited *Davies v DPP* [1954] AC 378.

> "In a criminal trial, where a person who is an accomplice gives evidence on behalf of the prosecution it is the duty of the judge to warn (himself) that, although (he) may convict on his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, now has the force of a rule of law."

5.10.8 Self-incrimination

A witness may refuse to answer any question which may incriminate them: Art 10 (8) of the Constitution.

Be aware of self-incriminatory statements by a witness. If a question is asked of a witness, the answer to which could be self- incriminatory, you should:

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

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

5.10.9 Identification by a witness

The visual identification of the defendant by witnesses needs to be treated with some caution. Honest and genuine witnesses have made mistakes regarding the identity of defendants. The weight to be given to such evidence is determined by the circumstances under which the identification was made. See *R v Turnbull and Others* [1977] QB 224 where the UK Court made the following guidelines for visual identification:

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

5.11 Rules of evidence

5.11.1 Introduction

Rules of evidence have been established by both the common law and by statute. Rules relating to evidence in criminal trials can be found in the Criminal Procedure Act 1972 (CPA).

The important rules of evidence are generally:

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

5.11.2 Burden and standard of proof

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

5.11.3 Legal burden of proof

The legal burden is the burden imposed (or responsibility) on a party to prove a fact or facts in issue. The standard of proof required to discharge the legal burden varies according to whether the burden is borne by the prosecution or the defendant.

The burden of proof has a general rule that proof is adduced through oral or documentary evidence. It may also be established by conduct or statutory presumption or provisions such as judicial notice or admitted facts. See *Republic v Chen Jian Ping* - Judgment [2016] NRDC 19; Criminal Case 30 of 2015 (31 March 2016) – Nauru District Court.
The prosecution bears the legal burden of proving all the elements in the offence beyond reasonable doubt (the standard of proof): s 25(1) and (3) CA. They will do that by calling evidence from witnesses and using exhibits. The defendant does not have to prove they did not commit the offence.

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

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

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

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

If the legal burden is on the defendant, the standard of proof required is on the balance of probabilities. For example, if the defendant raises a defence of insanity, they have the onus/burden to establish the defence on the balance of probabilities.

The term balance of probabilities means that you must find that it is "more probable than not" that a contested fact exists. This standard of proof is lower than proof beyond reasonable doubt.

5.11.4 The evidential burden of proof

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

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

Where the defendant bears the legal burden of proving insanity or some other issue, due to an express statutory exception, they will also bear the evidential burden. However, in relation to some common law and statutory defences, once the defendant discharges their evidential burden, then the legal burden of disproving the defence will be on the prosecution: s 25(2) CA.

5.11.5 Judicial notice

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

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

Judicial notice without inquiry

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

Judicial notice without inquiry pursuant to statute

Judicial notice of a fact may be required by statute.
For example, s 3 of the Evidence Act 1845 (UK) & s 11 of the Evidence Act (1851) sets out a list of official documents that you may take judicial notice of (without having to provide evidence) including:

- any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, which is sealed or impressed with a stamp or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Act under which it is authorised: s 11 EA (1851) (UK); and
- examined or certified copies of public documents: s 14 EA (1851) (UK).

5.11.6 Admissibility of evidence

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

5.11.7 Relevance

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

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

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

Generally, a statement is only evidence if the person who, for example, saw the event makes a sworn statement as to its truth. And the same generally with a document – the person who made the document or signed the document must also swear the document produced in court is the document made or signed by them (exceptions dealt with later).
Relevance is a question of degree and will have to be determined by you, according to specific facts in the case at hand.

5.11.8 Weight

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

Once you are satisfied that evidence is truthful you will then need to decide if the evidence you have heard is reliable. Of course, a witness can be honest but the evidence they give can be unreliable. You will have to decide what weight you give evidence you have heard when you come to a decision. The more reliable the evidence is, the more weight you give it.

To decide what weight to attach to statements rendered admissible, you should consider:

- all the circumstances to decide on the accuracy of the statement;
- if the statement was made at the same time as the occurrence of the facts stated in the statement; and
- if the maker of the statement was given any incentive to conceal or misrepresent the facts.

Relevant credibility factors include:

- relationships between parties
- alcohol and/or drugs
- performance under cross-examination
- independent evidence
- maximise / minimise role
- statements made before / after / during the incident

- consistency / inconsistency with words or written material
- time between incident and hearing
- memory
- ability to see/observe the incident (lighting, distance etc)
- motive / anger / tension / revenue.

5.12 Summary of approach to admissibility

Ask yourself:

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

5.12.1 Discretion to exclude

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

5.12.2 The best evidence rule

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

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

5.12.3 The hearsay rule

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

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

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

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

- it would be hearsay and inadmissible if the object of the evidence would be to establish the truth of what is contained in the statement; but

- it would not be hearsay and would be admissible as evidence if, the statement is used to establish, not the truth of the statement itself, but the fact that it was made.

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

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

5.12.4 Exceptions to the hearsay rule

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

- confessions
- signed written statements of persons who are unavailable to give evidence at trial: s 146 CPA
- business and trade records: s 1 of the Criminal Evidence Act 1965 (CEA)
- proof by written statement: s 146 CPA (see Documentary evidence above)
- proof by formal admission: s 147 CPA (see Documentary evidence above)
- hearsay statements: s 147A CPA (see Documentary evidence above)
- discretion to allow admission of any evidence as you deem fit: s 176(5) CPA
- dying declarations
- res gestae (certain statements made during or soon after, a transaction that is the subject of the court's inquiry)
- telephone conversations.

Confessions are where the defendant has made a statement to another person out of court about the crime they are charged with. This statement is hearsay but it is admissible. The statement can be made to anyone – a police person, friend, relative, anyone. That person however must come to court and tell the court what the defendant has said to them. Sometimes what the defendant has to say will be in writing, for example, in a police statement. The confession can either admit or deny in whole, or in part, the charge. If the statement meets these conditions it will generally be admissible, even though it is a hearsay statement.

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

5.12.5 Opinion evidence

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

There are two exceptions to the rule on opinion evidence:

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

Expert witnesses may give opinion evidence if:

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

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

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

Examples of non-experts' opinion evidence:

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

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

5.13 Character evidence

5.13.1 Admissibility of evidence of bad character

The defendant:

Admissibility of evidence of bad character is not admissible if relates to the defendant. Police may not give evidence of the defendant's:

- previous convictions or previous misconduct
- bad character: s 106(e) CPA.

Exceptions:

But the defendant may in certain circumstances face cross-examination on their character where:

- the proof that they have committed or been convicted of another offence is admissible evidence to show that they are guilty of the offence they are currently charged with; or
- the defendant asked questions of any witness with a view to establishing their own good character; or has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the complainant or the witnesses for the prosecution; or
- the defendant has given evidence against any other person charged with the same offence: s 106(e) CPA.

Witnesses:

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

A witness may be questioned about prior conviction(s) and the cross examiner may call evidence to prove the conviction(s) if the witness denies, does not admit or is silent as to the conviction: s 6 CPA UK.

You must decide if a witness should be compelled to answer a question on cross-examination (not relevant to the case but goes to their credibility):

- proper if the truth of their allegations would seriously affect the credibility of the witness on the matters relevant to the issues; or
- improper if:
  - on matters so remote in time or of no importance; or
  - there is a large gap between the charge made against the witness's character and the importance of their evidence.

In exercising your discretion, you may decide that:

- such questions **are proper** if the truth of their allegations would seriously affect the opinion of the court as to the credibility of the witness on the matter they are giving evidence about.
- such questions **are improper** if:
  - they relate to matters so remote in time or are of such character that even if true they would not (or only slightly) affect the opinion of the court; or
  - there is a large gap between the importance of the charges made against the witness's character and the importance of their evidence.

5.13.2 Admissibility of evidence of good character

A defendant may provide evidence of good character but doing so puts their character in issue: s 106(e) CPA. The prosecution may then cross-examine witnesses or the defendant about their character and any previous convictions.

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

6. 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.

6.7.3 Courtroom conduct

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

- be courteous, patient and dignified
- be humble: if a mistake is made you should apologise
- continually remind yourself that a defendant is not simply a name on a piece of paper. They want to see justice administered fairly, objectively and impartially
- remember going to court is nerve-wracking for most people
- never make fun of a defendant or witness
- show appropriate concern for distressed parties and witnesses
- never state an opinion that some features of the law are unsatisfactory. If you believe that amendments are needed, discuss this with the Chief District Court Judge
- never say anything or display conduct that would indicate you have already made your decision before all parties are heard.

If sitting as a panel, do not discuss the case or any aspect of it outside of the panel. This includes other Justices who are not sitting on the case.

6.7.4 Maintaining dignity in the courtroom

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

- keeping order in court
- being polite and respectful.

Managing unruly defendants, parties, witnesses and spectators by:

- being decisive and firm
- dealing promptly with interruptions or rudeness
- clearing the court or adjourning if necessary.
- allowing a disaffected person to speak briefly before intervening.

Managing lawyers by:

- exercising your authority in the courtroom
- asking for an explanation from those who have caused delay
- ensuring that witnesses are not bullied
- dealing promptly with discourteous or unhelpful advocates.

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.

7. Principles of criminal responsibility

- Part 3 (ss 10-53) Crimes Act 2016

7.1 Introduction

In Nauru, every criminal offence is created by a statute, regulation or by-law but not the common law. The Crimes Act 2016 (CA) is the main statute that sets out acts or omissions regarded as criminal offences.
Part 3 of the CA sets out:

- the principles of criminal responsibility,
- the elements of an offence,
- the proof of criminal responsibility, and
- the circumstances where there is no criminal responsibility.

7.2 Principles of criminal law

7.2.1 Presumption of innocence

Article 10(3) Constitution

One of the most important principles in criminal law is that the defendant is presumed innocent until proved guilty according to law: Article 10(3) Constitution.

Unless and until the prosecution proves beyond reasonable doubt that the defendant is guilty of all the elements of the offence, they are innocent in the eyes of the law. Acting on this principle, you may, for example, grant defendants bail allowing them to remain in the community while they await trial (s 4 Bail Act 2018). See the chapter on Bail.

Silence is the right of the defendant. The defendant does not have to give or call any evidence and does not have to establish their innocence. It is for the prosecution to prove beyond reasonable doubt the defendant is guilty.

7.2.2 Defendant cannot be tried twice for the same offence

Clause 10(5) Constitution

Another important principle is that a person cannot be prosecuted and punished for the same crime more than once. This rule prohibits double punishment, but also protects individuals from repeated attempts by the State to prosecute them for the same offence: cl 10(5) Constitution.

7.2.3 Burden of proof

Sections 25-28 CA
The prosecution has the burden, or responsibility, of proving their case. They must prove all the elements of the offence, beyond reasonable doubt. If, at the end of the prosecution case, the prosecution has not provided evidence of all the elements of the offence, then there is no case to answer and the prosecution has failed: s 25.

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

The defendant has an evidential burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

The defendant also has an evidential burden in relation to any of the following that is provided by a written law creating an offence and on which the defendant wishes to rely:

(a) an exception;

(b) an exemption;

(c) an excuse;

(d) a qualification;

(e) a justification.

If evidence that discharges the burden is presented by the prosecution or the court, then the defendant no longer has the evidential burden.

The prosecution has the legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

If the defence wish to rely on an alibi in their defence the notice must provide details of the place they were at the time of offending and the names and addresses of witnesses. If the defendant does not furnish the prosecution with this notice, the evidence is admissible only with your leave: s 148 Criminal Procedure Act 1972.

If you have a reasonable doubt on any of the elements, after hearing the evidence of the defence (if any) or submissions without evidence, then the prosecution has failed, and the defendant should be found not guilty.

7.2.4 Standard of proof: beyond reasonable doubt

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

The standard of proof, on which the prosecution must satisfy you, is beyond reasonable doubt. Taking into account the evidence of the prosecution and the evidence (if any) of the defence and the submissions, you must be sure that the defendant is guilty. If you have a reasonable doubt about that then you must acquit the defendant.

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

7.2.5 What must be proved

Physical act (actus reus)

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

- which is not allowed by law; or
- where the result is not allowed by law.

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

See the chapter "Common Offences" for examples of the elements of some common offences.

Mental capacity (mens rea)

Most offences require the prosecution to prove the defendant had a particular state of mind in addition to the actus reus requirement. It is an essential element of every offence, unless specifically not required by the statute creating the offence.

The state of mind could be:

- Intention: the defendant means to do something, or desires a certain result (it can include deliberate or negligent acts or omissions).
- Recklessness: although the defendant does not intend the consequences, the defendant foresees the possible, or probable, consequences of their actions and takes the risk.
- Knowledge: knowing the essential circumstances which constitute the offence.
- Belief: mistaken conception of the essential circumstances of the offence.
- Negligence: the failure of the defendant to foresee a consequence that a reasonable person would have foreseen and avoided.

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

In most cases, proof that the defendant did the prohibited act is also sufficient on first impression (prima facie) of evidence of intention. You can infer intention from the fact that the defendant committed the essential act, presuming that individuals intend the natural consequences of their actions: see *R v Lemon* [1979] 1 All ER 898.

If the issue is whether an act was accidental, intentional or done with particular knowledge or intention, evidence may be given that the act formed part of a series of similar occurrences, in each of which the defendant was involved.

If, after hearing the defence evidence, you are not satisfied beyond reasonable doubt that the defendant had the necessary mens rea (intention, knowledge, recklessness, etc) then you must dismiss the charge.

7.3 Criminal responsibility

A defendant may be exempt from criminal responsibility if any of the provisions of Division 3.6 (ss 40-53) CA apply (details of these offences are set out below). Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

All common law rules which provide for a justification, excuse or defence still apply to an offence under the CA, or under any other statute, unless they are altered by or are inconsistent with that statute or any other statute.

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

- The prosecution has not proved all the elements beyond reasonable doubt.
- They have a specific affirmative defence, specified in the actual offence (for example without lawful excuse, reasonable excuse, or reasonable cause or lawful justification).
- They were not criminally responsible under Division 3.6 of the CA or the common law.

In the case of a specific defence or lack of criminal responsibility under Division 3.6 of the CA or the common law, the defendant must provide some evidence in support of the defence. It is then the prosecution that must exclude that defence beyond reasonable doubt.

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

Exemptions from criminal responsibility in Division 3.6 of the CA or under the common law can be divided into two categories:

1. The defendant did not have the mental intent or was acting involuntarily. These defences include:
   - limited or no criminal liability of children,
   - mental impairment,
   - intoxication,
   - mistake or ignorance of fact, and
   - mistake or ignorance of law.

2. Excuses or circumstances which justify, in law, the conduct of the defendant. In these cases, the defence need only point to evidence in support and then the prosecution must disprove that defence beyond reasonable doubt. These include:
   - claim of right,
   - intervening events,
   - duress,
   - sudden or extraordinary emergency,

- self-defence,
- lawful authority,
- surgical operations and medical treatment,
- other statutory defences.

7.3.1 Children and criminal responsibility

Sections 40 and 41 CA

A child under the age of 10 years old is not criminally responsible for an offence. A child aged from 10 years to under 14 years old can only be criminally responsible for an offence if the child knows that their conduct is wrong.

The prosecution has the burden of proving that the child knows that their conduct is wrong. That is a question of fact. See *Republic v RD* [2019] NRSC 21 and *Republic v DG* [2019] NRSC 20: in both cases Khan J quoted the House of Lords decision in *C v DPP* [1999] 2 All ER 43:

> "The presumption that a child between the ages of 10 and 14 was doli incapax and the rules of the presumption could only be rebutted by clear positive evidence that the child knew that his act was seriously wrong, and that the evidence of the acts amounting to the offence itself was not sufficient to rebut the presumption, were still part of English Law."

In *Republic v TR* [2020] NRSC 36, Khan J summarised the test as follows:

> "a. The prosecution must rebut the presumption of doli incapax as an element of the prosecution case.
> b. The child knew that the act was seriously wrong as opposed to naughty.
> c. The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction.
> d. The evidence to prove the accused's guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however, horrifying or obviously wrong the act may be.
> e. The older the child is the easier it will be for the prosecution to prove guilty knowledge."

Capacity or understanding may be proven by:

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

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

Nauru's age of criminal responsibility, being age 10-13 is below international guidance. This means that to read the Crimes Act consistently with the CRC, magistrates should require the prosecution to provide a high standard of proof that children aged 10-13 had capacity to know they were doing wrong, through applying a strong presumption they did not have capacity to form the relevant intent.

It is also incumbent on magistrates to apply adapted, restorative approaches tailored to the circumstances of all children, including those aged between 10 and 13 years. This includes maximising diversion from prosecution and if the criminal matter does proceed, ensuring the child has legal representation and that the procedure and the sentence reflect the young age of the offender.

7.3.2 Mental impairment

Section 42 CA

Due to the requirements to prove the defendant's criminal state of mind, those who are unable to appreciate the quality or nature of their acts due to mental disease should not be held criminally liable for those acts.

No person is responsible for an act or omission that would otherwise be an offence, if at the time of the act or omission, the person was suffering from a mental impairment that had the effect that the person:

- did not know the nature and quality of the conduct,
- did not know that the conduct was wrong, or
- was unable to control the conduct.

A person is presumed not to have been suffering from a mental impairment. That presumption is displaced if it is proved on the balance of probabilities. The question whether the person was suffering from a mental impairment is one of fact.

If you are satisfied that a person is not criminally responsible for an offence only because of a mental impairment, then you must return a special verdict that the person is not guilty of the offence because of mental impairment.

This is explored in *Republic v Baguga* [2022] NRSC 10:

> "S.111 of the Criminal Procedure Act 1972 provides that if the court were to find that the accused committed the act but was not criminally responsible by virtue of the provisions of s.42 of the Act at the time then the court shall make a "special finding" that the accused is not guilty by "reason of insanity". Where such a "special finding" is made then the court shall report the case for the order of the President, and shall meanwhile order that the accused be kept in custody in such place and in such manner as the court shall direct. The President may order that the accused be confined in a hospital or in prison or other suitable place of safe custody.
> ...

> S.42 of the Act speaks about "mental impairment" whereas s.111 of the Criminal Procedure Act 1972 speaks of "by reason of insanity". For practical purposes both "mental impairment" and "insanity" mean the same thing."

The key guidance is to identify possible mental impairment as early as possible in the process and if necessary, order an assessment by an expert (either a psychiatrist or a psychologist) so that the court has the information it needs to decide whether, on the balance of probabilities, the person understood what they did, and that it was wrong.

These steps are important because people with mental impairments are heavily overrepresented in pre-trial detention and in prisons, highlighting how courts may not always properly take these conditions into account in criminal justice processes, resulting in unfairness and even unlawful discrimination against people due to their disabilities.

In any of these scenarios, the condition must so severely impair the defendant's mental faculties and lead them not to know the nature and quality of the act that they were doing, or that they did not know that what they were doing was wrong: see the *Rules in M'Naghten's case* (1843) 10Cl & F 200 at page 210; 8ER 718 at 722:

> "The jurors ought to be told that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."

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

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

The focus is on the state of mind of the defendant and whether they appreciated that what they were doing was wrong. See *R v Macmillan* [1966] NZLR 616 (CA).

7.3.3 Intoxication

Section 43 CA
A person is not criminally responsible for an offence if their conduct that constituted the offence was a result of intoxication that was not self-induced. Intoxication includes states produced by alcohol, drugs, or another substance.

Intoxication is "self-induced" unless it came about:

- involuntarily,
- because of fraud, sudden or extraordinary emergency, accident, reasonable but mistaken belief, duress or force,

- from the use of a drug for which a prescription is required and that was used in accordance with the directions of a medical practitioner or dentist who prescribed it, or
- from the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.

Evidence of self-induced intoxication cannot be considered in deciding whether a fault element of intention existed for a physical element that consists only of conduct. You can still consider evidence of self-intoxication in deciding whether conduct is voluntary.

7.3.4 Mistake or ignorance of fact

Sections 44 and 45 CA

A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:

- when engaging in the conduct making up the physical element, the person is under a reasonable but mistaken belief about, or ignorance of, the facts; and
- the existence of the mistaken belief or ignorance negates a fault element applying to the physical element.

If the offence has a physical element for which there is no fault required (strict liability), a person is not criminal responsible if

- when engaging in the conduct making up the physical element, the person:
  - considered whether or not facts existed; and
  - was under a reasonable but mistaken belief about, or ignorance of, the facts; and
- had the facts existed the conduct would not have been an offence.

Under the common law, if an ingredient of an offence includes (expressly or by implication) a requirement of intention, knowledge or subjective recklessness, the defendant is entitled to be acquitted if such a state of mind is absent at the time of the conduct. Even if this results from a mistake of fact which may not have been reasonable or based on reasonable grounds: *R v Wood* [1982] 2 NZLR 233 (CA) at 237, *R v Metuariki* [1986] 1 NZLR 488 (CA), *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) (cited in Robertson Finn (Ed) Adams on Criminal Law - 2013 Student Edition (Brookers, Wellington)) at pp 59 and 60.

This is so even though the defendant may have thought of the risk, but honestly concluded that it would not eventuate: *R v Hay* (1987) 3 CRNZ 419 (HC).

The conscious taking of a risk which is unreasonable will remain reckless even though the offender mistakenly believed that the degree of risk had been reduced: *Jefferson v Ministry of Agriculture and Fisheries* (High Court, Rotorua, M286/85, 12 August 1986, Barker J).

In all cases, the reasonableness or otherwise of a supposed mistake, or ignorance, will be relevant to the credibility of the claim, but reasonableness is not essential: *R v Metuariki* [1986] 1 NZLR 488 (CA).

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

- the prosecution must prove the unlawfulness of the defendant's action;
- the defendant must have been under an honest, but mistaken, belief as to the existence of any state of things;
- it does not matter that the mistake was unreasonable; and
- the offence must have been committed while holding that honest but mistaken belief.

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

Se *Republic v Quadina* [2023] NRSC 18 where the defendant was charged with rape and he claimed that he held "a reasonable and honest belief that [the victim] was consenting to sexual intercourse". Acting Chief Justice Khan explored the defence of "mistake of fact" in finding the defendant guilty of rape.

See 11 Halsbury's Laws of England, 4th Ed, para 21 and authorities there cited in *Director of Public Prosecutions v Morgan* [1976] AC 182; [1975] 2 All ER 347.

See also: *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 667 and 668, *R v Wood* [1982] 2 NZLR 233 (CA) at 237, and *R v Metuariki* [1986] 1 NZLR 488 (CA).

7.3.5 Mistake or ignorance of the law

Section 46 CA
The fact that a defendant is mistaken about, or ignorant of, the law is not an excuse. The prosecution does not have to prove the defendant's knowledge of the law to prove its case. However, you may take this into account when determining the appropriate sentence.

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

- the defendant may raise evidence that they did not know that their acts or omissions were against the law at the time of the offence; and
- the prosecution is required to prove beyond reasonable doubt that the defendant had such knowledge of the law.

7.3.6 Claim of right

Section 47 CA

Claim of right is based on a common law defence of an honest belief that the act was lawful. A person is not criminally responsible for an offence that has a physical element relating to property if:

- at the time of the conduct constituting the offence, the person is under an honest and reasona
- ble but mistaken belief about a proprietary or possessory right in relation to the property; and
- the existence of that right would negate a fault element for any physical element of the offence.

Claim of right does not negate criminal responsibility for an offence relating to the use of force against a person.

For example, this defence may be raised for the offence of theft. When successful, a claim of right means the conduct does not attract criminal (or civil) liability. A defendant may have a valid defence if they have an honest belief that they had a legal right to take the goods in question.

7.3.7 Intervening events

A person is not criminally responsible for an offence if:

- strict liability or absolute liability applies to all or any of the physical elements of the offence; and
- the physical element to which strict liability or absolute liability applies exists:
  - because another person over whom the person has no control engages in conduct constituting the physical element; or
  - because of an act or event over which the person has no control; and
- the person could not reasonably be expected to guard against the bringing about of the physical element.

7.3.8 Duress

Section 49 CA

If a person engages in conduct constituting an offence under duress, they are not criminally responsible for the offence.

A person is under duress if they reasonably believe that:

- a threat has been made that will be carried out unless the offence is committed, and
- there is no reasonable way that the threat can be rendered ineffective, and

- the conduct is a reasonable response to the threat.

"Duress" does not apply if the threat is made by, or on behalf of, a person with whom the person under duress is voluntarily associating for the purpose of engaging in conduct of the kind in fact carried out.

7.3.9 Sudden or extraordinary emergency

If a person engages in conduct constituting an offence in response to circumstances of sudden or extraordinary emergency, they are not criminally responsible for the offence.

This only applies if the person engaging in the conduct reasonably believes that:

- circumstances of sudden or extraordinary emergency exist, and
- committing the offence is the only reasonable way to deal with the emergency, and
- the conduct is a reasonable response to the emergency.

7.3.10 Self-defence and defence of property

Section 51 CA

If a person engages in conduct constituting an offence in self-defence, they are not criminally responsible for the offence.

Conduct is considered to be in "self-defence" only if the person believes the conduct is necessary to:

- defend the person or another person,
- prevent or end the unlawful imprisonment of the person or another person,
- protect property from unlawful appropriation, destruction, damage or interference,
- prevent unlawful entry to land or premises, or
- remove from land or premises a person who unlawfully entered; and
- also that the conduct is a reasonable response in the circumstances as the person perceives them.

For example, if a person was to strike another who was attempting to steal their property, they would not be guilty of assault. Any action taken in defence of person or property must be reasonable considering all the circumstances.

The defence must point to some evidence to raise the defence. The prosecution may then prove, beyond reasonable doubt, that the act was not done in self-defence or defence of property or another person (as the case may be) and/or that the force used was unreasonable.

The law has always recognised a reasonable right to self-defence as a form of lawful justification of force used: see *Beckford v The Queen* [1988] 1 AC 130. At page 144 his Lordship stated that:

> "[t]he test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in defence of himself or another".

Gendered aspects of the right to self-defence may also need to be considered, especially the requirement that the threat faced be imminent. Women's ability to act in the moment in self-defence may be limited where they are physically weaker than the abuser, or due to the coercive control the abuser exercises within the relationship.

A person is justified in using reasonable force in defence of their property, for instance in removing a trespasser or preventing entry or restraining another from taking or destroying their goods. No more force may be used than is necessary for the purpose.

7.3.11 Lawful authority

Section 52 CA

A person is not criminally responsible for an offence if the conduct constituting the offence is authorised, justified or excused by or under a law of Nauru.

7.3.12 Surgical operations and medical treatment

Section 53 CA

A person is not criminally responsible for an offence if the conduct constituting the offence involved performing a surgical operation on, or giving medical treatment to:

- a person for the person's benefit, or
- an unborn child for the preservation of the mother's life.

This applies where the operation or treatment was performed or given in good faith and with reasonable care and skill; and performing the operation or giving the treatment was reasonable, having regard to the patient's state at the time and all the circumstances of the case.

7.3.13 Other statutory defences

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

- "without reasonable excuse"
- "without reasonable cause"
- "without lawful justification"

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

7.4 Extensions of criminal responsibility

7.4.1 Aiding, abetting, counselling and procuring

Section 29 CA

A person commits an offence if their conduct aids, abets, counsels or procures the commission of an offence by another person (the 'other offender'), and that other offender in fact commits the offence. This applies where the person:

- intends the conduct to aid, abet, counsel or procure the commission of an offence of the type the other offender commits; or
- intends the conduct to aid, abet, counsel or procure the commission of an offence and the person is reckless about the commission of the particular offence that the other offender in fact commits.

The offence is punishable as if the person had committed the offence. However, a person is not guilty of the offence if, before the offence is committed, the person:

- terminates the person's involvement; and
- takes all reasonable steps to prevent the commission of the offence.

This applies regardless of whether the other offender or another person is prosecuted or found criminally responsible for the offence that the person aids, abets, counsels or procures.

7.4.2 Incitement

Section 30 CA

If a person urges an offence to be committed, and intends that the offence incited be committed, they have committed an offence. Even if it is impossible to commit the offence incited, the person may still be found guilty of an offence.

However, it is not an offence to incite the commission of the offences of incitement (s 30), conspiracy (s 31), or an attempt to commit an offence (s 34).

The penalty is the lesser of:

- half the penalty the person would have been liable for if the person had committed the offence incited; and
- 10 years imprisonment.

7.4.3 Conspiracy

Section 31 CA

A person commits an offence of conspiracy if they enter into an arrangement under which the person and at least one other party to the arrangement intend to commit an offence, and at least one party commits an overt act under the arrangement. The question whether an act is overt is one of fact.

A person may be found guilty of the offence even if it is impossible to commit the offence that the person conspired to commit. Further a person may be found guilty if each other party to the arrangement is a person:

- who is not criminally responsible; or
- for whose benefit or protection the offence exists.

Even if the person and each other party to the arrangement is a corporation, the person may be found guilty of the offence.

If all other parties to the arrangement are acquitted of the conspiracy, the person may still be found guilty of an offence (unless to find the person guilty would be inconsistent with their acquittal). The offence is punishable as if the person had committed the offence.

A person is not guilty of the offence if, before the offence is committed, the person withdraws from the arrangement, and takes all reasonable steps to prevent the commission of the offence.

You may dismiss a charge of conspiracy if you consider that the interests of justice require you to do so.

7.4.4 Joint commission

Section 32 CA

Joint commission exists where a person enters into an arrangement and the person and at least one other party to the arrangement intend to commit an offence and to assist one another to commit the offence; and either:

- an offence is committed in accordance with the arrangement; or
- an offence is committed in the course of carrying out the arrangement.

To prove that the parties to the arrangement intend to commit an offence, it is not necessary to prove that the parties intend to commit a particular offence.

An arrangement may consist of a non-verbal understanding; and may be entered into before, or at the same time as, the conduct making up any of the physical elements of the joint offence was engaged in.

An offence is committed in accordance with an arrangement if:

- the conduct of one or more parties in accordance with the arrangement makes up the conduct required for an offence (the 'joint offence') of the same type as the offence agreed to; and
- to the extent that a physical element of the joint offence consists of a result of conduct—the result arises from the conduct engaged in; and
- to the extent that a physical element of the joint offence consists of a circumstance—the conduct engaged in, or a result of the conduct engaged in, happened in the circumstance.

An offence is committed in the course of carrying out an arrangement if a person is reckless about the commission of an offence that another person in fact commits in the course of carrying out the arrangement.

The offence is punishable as if the person had committed the offence.

A person is not guilty of the offence if, before any offence is committed, the person:

- withdraws from the arrangement; and
- takes all reasonable steps to prevent the commission of an offence by the parties to the arrangement.

A person may be found guilty of the offence even if:

- another party to the arrangement is not prosecuted or found guilty; or
- the person was not present when any of the conduct making up the physical elements of the joint offence was engaged in.
- it is impossible to commit the offence the person intended to commit.

7.4.5 Commission by proxy

Section 33 CA

A person commits an offence if they procure someone else to engage in conduct that (whether or not together with conduct engaged in by the person) makes up the physical elements of the offence consisting of conduct, and when that person procures the other person to engage in the conduct, the person has a fault element applying to each physical element of the offence.

The term 'to procure' generally describes advice and assistance given before the offence is committed.
The offence is punishable as if the person had committed the offence.

7.4.6 Attempts

Section 34 CA

If a person attempts to commit an offence, that is an offence which is punishable as if the offence attempted had been committed.

The person's conduct must be more than merely preparatory to the commission of the offence. As to whether the conduct is more than merely preparatory, the question is one of fact.

A person may be found guilty of the offence even if:

- it is impossible to commit the offence attempted; or
- the person in fact commits the offence.

If a person is found guilty of attempting to commit an offence, the person cannot later be charged with committing the offence.

7.4.7 Accessory after the fact

Section 35 CA

A person commits an offence if they assist another person (the 'other offender') who commits an offence. This is where the person knows the other offender committed the offence; and the person assists the other offender in order to enable the other offender to escape punishment or to dispose of the proceeds of the offence.

The penalty for being an accessory after the fact is the lesser of:

- half the penalty the person would have been liable for if the person had committed the offence; and
- 10 years imprisonment.

7.4.8 Withdrawal

Sometimes there is a gap between the act of an accessory and the completion of the offence by the principal offender. An accessory may escape criminal responsibility for the offence, if they change their mind about participating and take steps to withdraw their participation in the offence before it is completed by the principal offender.

Under the common law withdrawal should be:

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

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

8. Management of proceedings

8.1 General organisation for court

Before you go to court:

- make sure that the clerk is present and ready for court to commence;
- if there is a need to have another court interpreter, then ensure that the person is duly sworn and his or her role is explained before the proceedings start;
- ensure that you have a police orderly for your court and that he or she is briefed about the order of proceedings;
- if there are chamber matters, they should not proceed beyond 9:30am.

When in court:

- start court on time and rise at the expected time. This is not only for your benefit but also for counsel, the prosecutors and court staff. General rising times are:
  - morning break: 11.30am - 11.45am
  - lunch: 1.00pm - 2.15pm
  - afternoon break: 3.30pm - 3.45pm
  - finish: 4.30pm.

8.2 The evidence sheet

8.2.1 General

- There will be an evidence sheet for each file against the defendant.
- The file will have the reference number of the case at the top right-hand corner.
- The colour of the file may indicate the type of case contained in the file:
  - blue for criminal cases;
  - brown for civil matters;
  - pink for traffic cases; and
  - orange for appeal matters.
- You must check that the information contained in the charge sheet is duly sworn and that the dates of the offence and appearance are correct.

8.2.2 Endorsing the criminal evidence sheet

Remember that those who follow you need to know what you have done. At the conclusion of the proceedings you should endorse each evidence sheet with:

- the action you have taken in court,

- the correct date, and
- your signature.

Do all of the above in court if that is possible.

Neatness, precision and full information are essential.

Standard information in the evidence sheet includes:

- Election if applicable,
- Right to counsel,
- Plea,
- Name of counsel,
- All remands or adjournments and conditions of such,
- Bail and bail conditions,
- Any amendment to the charge, fresh plea and election,
- Consent to amendment by the defendant,
- Name and evidence suppression and details,
- Service of disclosures,
- Witness numbers and hearing times,
- Interlocutory applications and rulings,
- The final disposal of the case whether it be:
  - the conviction of the defendant,
  - dismissal of the charge,
  - dismissal for want of prosecution,
  - withdrawal of the charge by leave, or
  - acquittal of the defendant,
- The sentence and details, and
- Any award of costs, the amount and by whom they are to be paid.

8.2.3 Common abbreviations

- RTC: Right to counsel
- CREU: Charge read, explained and understood
- RIC: Remand in custody
- F/B: Fresh bail
- B/E: Bail extended

- F/P: Formal proof
- PG: Plead guilty
- PNG: Plead not guilty
- F/S: Fresh service
- N/S: Not served
- N/A: No appearance
- NPS: No proof of service
- Adj: Adjourn
- B/W: Bench warrant
- BWE: Bench warrant extended
- M: Mention
- H: Hearing
- R: Ruling
- S: Sentencing
- J: Judgment
- S/D: Stood down

8.3 Order of calling cases

The following is a suggestion in the order of calling cases.

- Call through defended hearing cases to find out which are ready to proceed and stand down cases according to estimated time for hearing.
- Call cases where defendants are in custody to free up police and prison officers.
- Call adjourned cases and those that had defendants previously remanded.
- Deal with matters where counsel appear consecutively so they can get away.
- Deal with sentencing matters and judgments near the end of the list.
- Finally, deal with the balance of the list, which may include closed-court proceedings.

8.4 Disclosure

Defendants are entitled to know the evidence against them before they enter a plea to the charge. Counsel should know the evidence against their client before they advise them what to do: s[insert] Constitution.

Early disclosure of the police evidence is essential for the proper working of the case-flow management in criminal proceedings.

8.5 Adjournment in the District Court

s 154 Criminal Procedure Act 1972 (CPA)

On the date fixed for the commencement or continuation of a trial, you may not allow an adjournment to commence or continue with the trial on the application of the prosecution, without any good cause or reason: s 154(1) CPA. 'Good cause or reason' does not include multiple applications for adjournment by the prosecution.

Where you are satisfied that good cause or reason is shown for adjournment, you may adjourn the trial as you deem appropriate: s 154(3) CPA.

When you adjourn a trial, you may:

- where the accused person is on bail, extend the bail with or without varying the bail conditions;
- where the accused person is remanded, extend the period of remand or where it is permissible, grant bail with or without any conditions;
- where the accused person is a serving prisoner, issue an order for the prisoner to be brought to court at a later date; or
- make any other orders as you deem fit: s 154(4) CPA.

Where you dismiss an application for an adjournment by the prosecution, you should:

- order the prosecution to proceed with the trial; and
- where the prosecution is unable to proceed with the trial, may order the accused person be discharged or acquitted: s 154(5) CPA.

8.5.1 Non-attendance of parties after adjournment

ss 155 - 157 CPA

Where the accused does not attend before the court at the time and place to which the trial or further trial of any criminal proceeding has been adjourned, and he or she has consented to the trial taking place in his or her absence, the court may, in its discretion proceed with the trial or further trial as if the accused were present. If the complainant does not attend, himself or herself or by his or her legal practitioner, the court may dismiss the charge as the court shall think fit.

Where the accused has not consented to the trial taking place in his or her absence or the court has in its discretion not proceeded with the trial or further trial, the court may issue a warrant for his or her arrest and for the accused to be brought before the court and should further adjourn the trial. If the District Court convicts the accused in his or her absence, it may set aside the conviction if it is satisfied that the absence was from causes over which the accused had no control and that he or she had a probable defence on the merits.

A sentence passed on a person under section 155 is deemed to commence from the date of his or her arrest in execution of the committal warrant, and the person making the arrest should endorse the date on the back of the warrant: s 157 CPA.

8.6 The mentally-ill defendant

The procedure in cases where the defendant is of unsound mind or otherwise incapacitated is provided for under the Criminal Procedure Act 1972 (CPA).

If at any time after a formal charge has been presented, you have reason to believe that the defendant may be of unsound mind so as to be incapable of making his or her defence, you may adjourn the case and make an order for a medical report or to make other enquiries as you deem necessary: s 109 CPA.

Upon receipt of such medical evidence, if you are of the opinion that the defendant is of unsound mind that he or she is incapable of making a defence, postpone further proceedings and make a report of the case to the President: s 109(2) CPA.

The President has the discretion to issue a committal warrant for the commitment of the defendant to a mental hospital or other suitable place of custody: s 109(4) CPA.

Where there is a postponement of proceedings, you may resume proceedings if you consider that the defendant is capable of making his or her defence. A certificate from the medical officer of the mental hospital would be sufficient evidence to confirm the same: ss 112 and 113 CPA.

Where the defendant raises the defence of insanity at trial and the evidence before the Court supports such contention, make a special finding to the effect that the defendant was not guilty by reason of insanity, and report the case to the President for a committal order: s 111 CPA.

8.7 Victims

Victims of crime are usually the main prosecution witnesses. There is no specific legislation dealing with victims, but Magistrates are expected to treat them with courtesy and compassion.
In particular, you should restrain defence lawyers from humiliating victims of crime in court.
Especially vulnerable witnesses, such as the very young, very old, or disabled, are entitled to special measures for the giving of evidence. Consider the use of screens, allowing people in wheelchairs to give evidence from the floor of the court instead of the witness box and ensuring that a family member or friend can sit with a child victim or elderly victim while giving evidence.

8.7.1 Checklist

1. Identify the victim/s.
2. At all times treat the victim/s with courtesy and compassion.
3. At all times respect the victim/s privacy and dignity.
4. If the victim and offender both want a meeting, encourage that to occur.
5. Consider the victim's views on a bail application.

6. Before sentencing, consider:
    - the impact on the victim;
    - giving the victim the opportunity to speak to the court;
    - receiving a victim impact report.

8.7.2 Judicial language and comment

Ensure that you acknowledge any statements by the victim in your sentencing remarks. A brief summary is appropriate.

Be careful about "blaming" the victim, for example, she was drunk, unless the victim's actions are clearly relevant to mitigate the offence and you are certain about the facts.

8.7.3 Victims of sexual offences

Three factors that make sexual offence trials particularly distressing for victims are:

1. the nature of the crime;
2. the role of consent, with its focus on the credibility of the victim; and
3. the likelihood that the defendant and victim knew each other before the alleged offence took place.

Nature of the crime

The crime experienced by sexual offence victims is more than an assault. Due to the sexual nature of the acts and the physical invasion of the person, victims often experience feelings that are not present in other types of crimes.

The trial process adds to the difficulty that sexual offence victims experience because:

- they must face the defendant in open court,
- they are usually required to recount the offence against them in explicit detail in order to establish the elements of the offence and
- they may be subject to cross-examination by the defendant if there is no defence counsel, which can be a very traumatic experience.

Focus on the victim's credibility

The role of consent makes adult sexual offence trials different from most other criminal proceedings. Behaviour that is ordinarily legal (engaging in sexual activity with another adult) becomes illegal in the absence of consent.

When the alleged offence occurs in private, which is often the case, often the trial comes down to the word of the victim against the word of the defendant. Therefore, the trial often turns on whether the victim is a credible witness.

Due to the fact that the credibility of the victim is at issue, it is necessary for the defence to use cross-examination of the victim to try and discredit them. This may further victimise the victim. Overseas research shows that some victims find this to be like a second rape/sexual offence.

Relationship between the victim and defendant

Unlike some other types of crimes, it is often the case that the victim and defendant knew each other before the offence occurred. This can increase the distress and difficulty experienced by the victim because they have been betrayed by someone they trusted, and because family and other relationships usually mean on-going contact between the defendant and the victim.

Dealing with victims of sexual offences

In order to minimise the distress of victims of sexual offences, you should:

- conduct the trial and control the demeanour of those in the courtroom in a manner that reflects the serious nature of the crime;
- ensure the safety of the victim in the courtroom;
- ensure that court staff understands the danger and trauma the victim may feel;
- consider allowing an advocate of the victim to sit with them during the trial to offer support;
- enforce motions that protect the victim during testifying, such as closing the courtroom and providing a screen to block the victim's view of the defendant. This is especially important where the victim is a juvenile;
- know the evidentiary issues and rules that apply in sexual offence cases, such as corroboration, recent complaint and the inadmissibility of previous sexual history. This will enable you to rule on the admissibility of evidence and weigh its credibility;
- consider allowing a victim impact statement in sentencing.

8.8 Child witnesses

s 55 Child Protection and Welfare Act 2016 (CPWA)

Under the Convention on the Rights of the Child, the judiciary must give primary consideration to the interests of children.

The Child Protection and Welfare Act 2016 (CPWA) provides that court proceedings involving children should be undertaken in accordance with the following requirements:

- the hearing of the cases shall be expedited and prioritised as far as is practicable;
- measures shall be applied and enforced to protect the child's privacy, including closed court proceedings and bans on publishing the child's identity or any information leading to identification of the child;
- measures shall be applied and implemented to protect the safety of children and their families and to prevent intimidation and retaliation;
- appropriate facilities and support shall be provided to children with disabilities;

- children are entitled to have a parent, guardian, legal representative or other appropriate support person agreed to by the child, present with them at all stages of the court proceedings;
- child-friendly court procedures shall be promoted and applied, including alternative arrangements for giving testimony such as the use of screens, video-taped evidence and closed circuit television;
- social and legal counselling is to be provided where appropriate and children shall be given adequate information concerning the purpose and effect of the court processes;
- children shall be fully accorded the right to effectively participate in any proceedings that affect them, to express their views, and to have those views given due weight;
- police officers, prosecutors, lawyers and court officers are to receive specialised training in dealing with cases involving children;
- no proof of resistance to establish non-consent in sexual assault proceedings is to be required where the victim is a child;
- no corroboration of a child's evidence in criminal proceedings for sexual assault is to be required;
- the use of prior sexual conduct to establish non-consent in sexual assault proceedings involving a child is prohibited;
- expert evidence regarding patterns of disclosure or behaviour of children in cases involving sexual abuse is to be automatically admissible; and
- discriminatory provisions or processes applying to children are to be removed.

8.9 Unrepresented defendants

Because of the expensive cost of hiring lawyers to conduct proceedings, a significant number of defendants appear in the District Court on their own behalf. Most have little or no idea of court procedures and what is involved and rely on the system to assist to some extent.

If at all possible, every defendant charged with an offence carrying imprisonment terms should be legally represented. However, if legal representation is not available, then you are to ensure that he or she understands:

- the charge(s),
- that the Office of the Public Legal Defender is available to assist with legal representation, and
- that if found guilty, there is a probability of an imprisonment term.

To assist in the smooth running of any hearing, you should give an initial explanation outlining:

- the procedure,
- the obligation to put their case,
- the limitation of providing new evidence,

- the need to ask questions and not make statements, and
- any issues arising out of the evidence.

For an unrepresented defendant, before plea or election is entered:

- advise of the right to a lawyer,
- advise of the right to apply to the Office of the Public Legal Defender,
- put each charge and ask for election/plea.

See the Fijian cases of *Akuila Kuoutawa & R Labasa* Crim Appeal No. 2/75:

> "in the case of an unrepresented defendant, any statutory defence should be brought to his attention".

See also *Alipate Karikai v State Labasa Crim Appeal* No. 110 of 1999, HC of Fiji.

8.10 Disruption and misbehaviour

The defendant is entitled to be present in court during the whole of his or her trial, unless he or she interrupts the proceedings. The defendant's right is protected by the Constitution: Art 10(3)(f).

Where a defendant is required to appear in court, but fails to do so, you may:

- proceed with the trial as if the defendant was present, if he or she has consented (personally or by his or her legal practitioner): s 155(1) CPA,
- issue a warrant for his or her arrest: s 155(2) CPA,
- adjourn the proceedings to such time and conditions as you think fit, or
- where the maximum penalty is only 6 months and a fine not exceeding $200, proceed without the defendant: s 151 CPA

8.11 Contempt of court offences

Ss 7-11, and 15 Administration of Justice Act 2018 (AJA)

It is an offence to conduct or do any act which constitutes a contempt of court. A person who is convicted of contempt of court is liable to a fine not exceeding $20,000 or a term of imprisonment not exceeding two years or both.

Where an offence of contempt in the face of the court is committed (under section 8), you may order:

- the contemnor or alleged contemnor to be remanded in custody until the rising of the court; or
- any other orders you may deem fit.

The District Court has the power and jurisdiction to punish for contempt of court for any non-compliance with its judgment, decision, direction or order under the Domestic Violence and Family Protection Act 2017 or any other written law vesting such power.

The Supreme Court has its inherent jurisdiction in respect of contempt of court. Further, it has the power and jurisdiction to try and punish for contempt of the court in the form of scandalising the court (under s 7 AJA), in the face of the court (under s 8 AJA) and unauthorised audio and visual recording (under s 9 AJA).

8.11.1 Contempt in the face of the court

s 8 AJA

A person commits contempt in the face of the court where he or she:

- assaults, threatens, intimidates or wilfully insults a judicial officer, interpreter or a witness, during a sitting or attendance in a court. This also applies where this happens in going to or returning from the court to whom any relevant proceedings relate, or immediately after the delivery of a judgment, decision or order.
- wilfully interrupts or obstructs the proceeding of the court.
- wilfully disobeys an order or direction of the court.

8.12 Case management

The American Bar Association expresses the following in relation to case-flow management:

> "From the commencement of litigation to its resolution, any elapsed time other from reasonably required for pleadings, discovery and Court events is unacceptable and should be eliminated."

On the question of who controls litigation and judicial involvement it says:

> "To enable just and efficient resolution of cases, the Court, not the lawyers or litigants should control the pace of litigation. A strong judicial commitment is essential to reducing delay and once achieved, maintaining a current docket".

To make any case management system work requires judicial commitment.

8.12.1 Goals of case management

The goals of case management are:

- to ensure the just treatment of all litigants by the court,
- to promote the prompt and economic disposal of cases,
- to improve the quality of the litigation process,
- to maintain public confidence in the court, and
- to use efficiently the available judicial, legal and administrative resources.

The following quotes from the 1995 Report of the New Zealand Judiciary, at page 14, provides a good description of case-flow management:

> "It is essentially a management process and does not influence decisions on the substantive issues involved in a case. Case-flow management acknowledges that time and resources are not unlimited, and that unnecessary waste of either should be avoided".
>
> "The principles of case-flow management are based on the managing of cases through the Court system to ensure they are dealt with promptly and economically and that the sequence of events and their timing are more predictable. The progress of cases through the Courts is closely supervised to ensure agreed time standards are met, and the early disposition of cases that are not likely to go to trial is encouraged".

8.12.2 Principles

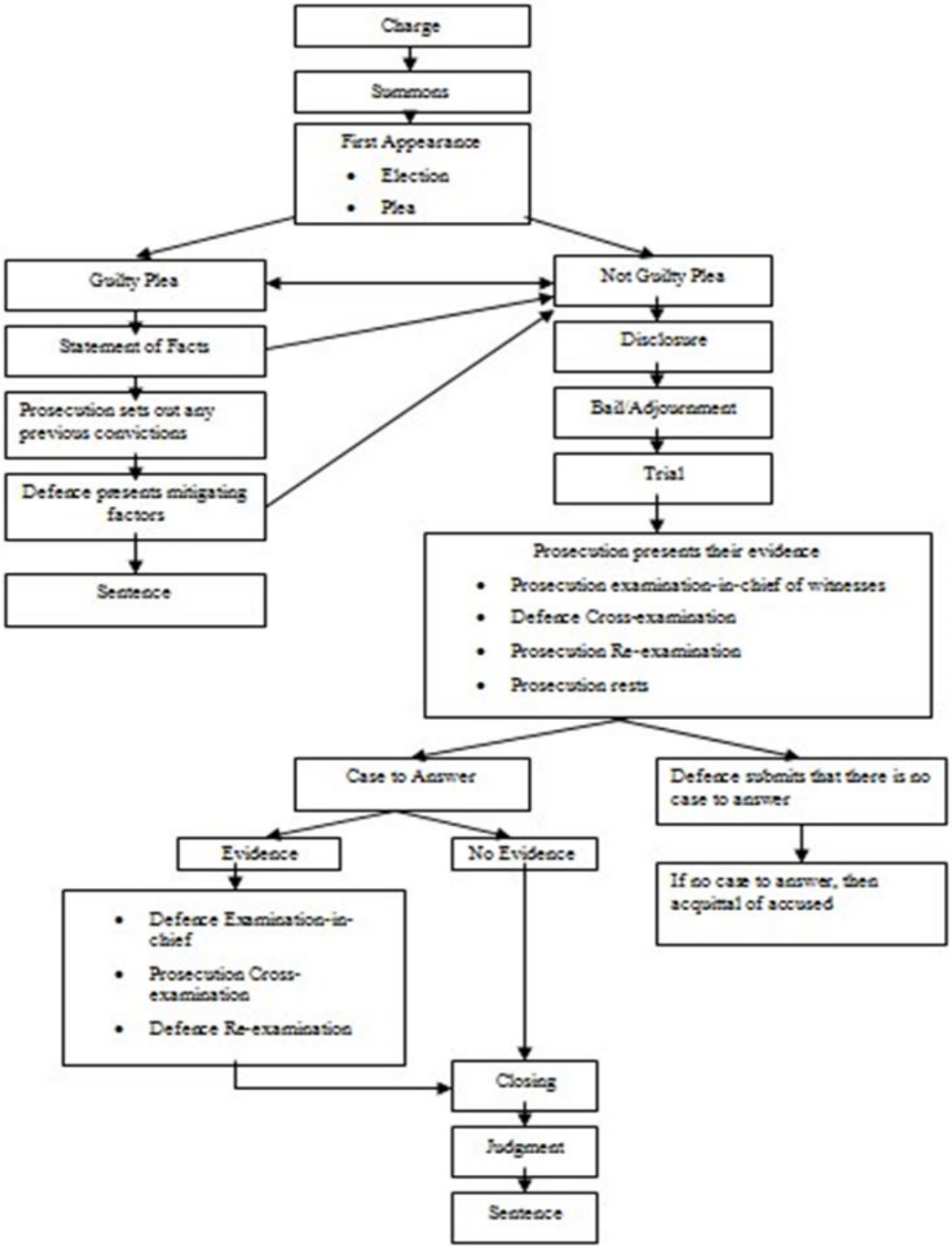
The principles of case-flow management are:

- Unnecessary delay should be eliminated.
- It is the responsibility of the court to supervise the progress of each case.
- The court has a responsibility to ensure litigants and lawyers are aware of their obligations.
- The system should be orderly, reliable and predictable and ensure certainty.
- Early settlement of disputes is a major aim.
- Procedures should be as simple and easily comprehensible as possible.

9. Pre-trial matters

9.1 The criminal process

The following diagram shows the general process of a criminal case from when it enters the Court:



Criminal proceedings may be instituted by either:

- making a complaint to the Magistrate, or
- bringing before the Magistrate a person believed to have committed an offence, who is under arrest without warrant: s 51(1) CPA.

Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint or bring the person before the magistrate: s 51(2) CPA.

A complaint may be made orally or in writing. If made orally, you should put it in writing. All complaints should be signed by the complainant and yourself: s 51(3) CPA.

If not already done so, you should draw up or ask the clerk to draw up, a formal charge containing a statement of the offence with which the defendant is charged, and sign it: s 51(4) CPA.

In most cases, the police will make the complaint, and they will present a signed formal charge, which is deemed to be a complaint: s 51(5) CPA.

9.1.1 Initial steps

How the defendant is dealt with by the Police will determine the steps that are taken by the court. The defendant may be:

- issued with a Police Notice, under s 53 CPA,
- charged and released on Police bail, or
- in Police custody.

Police notice to attend court: s 53 CPA

A police officer may personally serve a notice upon any person, who is reasonably suspected of having committed an offence, requiring him or her to:

- attend court at a specified time and place (not being less than 7 days from the date of such service), or
- appear by a legal practitioner, or enter a written plea of guilty (s 61 CPA).

The notice shall be regarded as a summons. If the person served fails to comply with the requirements of the notice, you may issue a warrant of arrest: s 53(2) CPA.

The copy of every notice issued should:

- be signed by the police officer issuing it,
- be directed to the person summoned, and
- be lodged with the Deputy Registrar within seven days of service of the notice: s 53(3) CPA.

This section applies to all offences punishable by:

- fine,

- imprisonment, with or without a fine, for a term not exceeding three months, and
- disqualification from holding or obtaining a drivers' licence.

9.2 The charge

9.2.1 General requirements

A formal charge is an accusation of the commission of an offence.

Every charge must contain:

- a statement of the specific offence or offences with which the defendant is charged; and
- such particulars as may be necessary for giving reasonable information as to the nature of the offence charged: s 90 CPA.

For case law on the elements of a charge, see *Mohammed Sahid v State* [1997] FJHC 154; (Fiji High Court, Labasa, Criminal Appeal 46/1997).

Generally, the charge should be set out in ordinary language and should avoid the use of technical terms, wherever possible.

The charge should include:

- a statement of offence. It is not necessary that all the essential elements of the offence be included,
- a reference to the section of the enactment creating the offence, and
- particulars of the offence, unless specifically not required by enactment.

Any offences may be charged together in the same charge or information if the offences charged:

- are founded on the same facts or form; or
- are part of, a series of offences of the same or similar character.

Where there is more than one offence charged, a description of each offence shall be set out in a separate paragraph of the charge called a count: s 91(2) CPA.

At any time, before or during trial, you may direct that a count or counts be tried separately. This is particularly desirable if you are of the opinion that the defendant will be embarrassed in his or her defence by the counts being tried together: s 91(3) CPA.

The following persons may be joined in one charge and maybe tried together:

- persons accused of the same offence committed in the course of the same transaction,
- persons accused of an offence and persons accused of abatement, or of an attempt to commit such offence,
- persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or similar character, and

- persons accused of different offences committed in the course of the same transaction: s 92 CPA.

The court may order separate trials where it is of the opinion that the interests of justice require that one or more of several accused included in the one charge be tried separately from the others. Separate trials should be held as ordered: s 92(2) CPA.

9.2.2 Validity of the charge

Check that the charge sheet:

- is sworn,
- is within time, and
- sets out the offence, section and particulars of the offence sufficiently.

Ensure that the charge sheet is accurately completed before you sign it.
If the charge is defective:

- return it to the prosecution without directing a case file be opened; or
- raise it with the prosecution at the first appearance, for amendment or withdrawal.

9.2.3 Duplicity

Check that the charge does not improperly charge more than one offence for the same action (duplicity), unless put in the alternative. For example, separate counts for common assault and assault causing actual bodily harm arising from the same set of facts would have to be put in the alternative. If not, the charge will be defective for duplicity and will have to be amended at the first appearance.

Note the exception as regards continuous offences where the defendant may be charged for a series of similar offences committed over a period of time: see *Hodgetts v Chiltern District Council* [1983] 2AC 120.

For a discussion on duplicity, see *Republic of Nauru v TT* [2023] NRCA 6 (Criminal Appeal 1 of 2021, 10 February 2023) and *Degia v Republic* [2021] NRSC 48; Criminal Case 2 of 2021 (19 November 2021).

For a discussion on procedure in alternative counts, see *Shell Fiji Ltd & Mobil Oil v State* Lautoka High Court Crim. App. No. HAA001/00L.

The charge need not go into any exceptions or exemptions to the offence.
Generally, people and property should be reasonably identified, although names need not be given where they are not known.

There is a time limit for laying a charge for certain summary offences in the District Court. Offences that carry a maximum penalty of 6 months imprisonment, or a fine of $200, or both, cannot be tried unless the charge is laid within 6 months from the date the alleged offence was committed: s 159 CPA.

9.3 Processes to compel the appearance of defendants

9.3.1 Summons

Under s 54 CPA, every summons issued under the CPA must:

- be in writing,
- be in duplicate,
- be signed by the presiding officer of the court,
- be directed to the person summoned,
- state the place, time and date in which the defendant is required to appear and answer the charge, and
- state the nature of the alleged offence.

Every summons shall, if practicable, be served personally on the person summoned: s 55 CPA.

Where the person summoned cannot be found, the summons may be served by leaving a copy of it with:

- some adult member of his or her family,
- his or her servant or employee residing with him or her, or
- his or her employer: s 56 CPA.

Alternatively, the summons can also be served by affixing a copy of it on a conspicuous part of the house in which the person ordinarily resides: s 57 CPA.

Under s 61 CPA, whenever you issue a summons in respect of any offence, other than a felony, you may dispense with the personal attendance of the defendant, provided that the defendant:

- has pleaded guilty in writing, or
- appears by his or her counsel.

If a fine is imposed on a defendant whose personal attendance has been dispensed with, you may issue a summons to show cause, at the expiry of the prescribed time for payment. If the person disobeys the summons, you may then issue a warrant and commit the person to prison: s 61(4) CPA.

Warrant of arrest

Notwithstanding the issue of a summons, a warrant may be issued at any time before or after the time appointed in the summons for the appearance of the defendant: s 62 CPA.

A warrant may be issued against a person who has disobeyed a summons from the court: s 63 CPA.

Under s 64 CPA, every warrant shall:

- be under the hand of the judge or magistrate,
- state the offence,

- name and describe the person the subject of the warrant,
- order the person or persons to whom it is directed to apprehend the person against whom it is issued, and
- be in force until it is executed or it is cancelled by the court which issued it.

You may direct that security be taken or the defendant executes a bond to ensure his or her attendance before the court at a specified time. Whenever security is taken, the officer to whom the warrant is directed shall forward the bond to the court: s 65 CPA.

A person arrested under warrant shall be brought before the court without delay: s 68 CPA.

Irregularities in the warrant either in substance or form shall not affect the validity of any subsequent proceedings unless it has deceived or misled the defendant: s 70 CPA.

Where the person, the subject of a warrant is in prison, you may issue an order to the officer in charge of such prison requiring him or her to produce the person named in the order before the court: s 73 CPA.

Defendant charged and released on bail and/or recognisance

The defendant may be released on his or her entering a recognisance, with or without sureties, for a reasonable amount to appear before the District Court at a time and place named in the recognisance where:

- a defendant is in custody without a warrant, and
- the alleged offence is not murder or treason, and
- the offence is not of a serious nature, and
- the person is prepared to give bail.

For a discussion of bail and bail procedures, see the chapter on Bail.

A signed copy of the notice will be kept by the police and forwarded to the court on the date on which the offence is to be heard.
When the clerk receives the charge, he or she will forward it to you for your direction.

Defendant is in police custody

Any person who is arrested or detained, without an order or warrant, and not released, must be brought before the court without undue delay and no later than 24 hours after the time of arrest or, if that is not reasonably possible, as soon as possible thereafter: Art 5(3) of the Constitution.

For an extensive description of the rights of arrested or detained persons, see Art 5 of the Constitution.

The police should have prepared a charge sheet. Wherever possible, this should be presented in advance to the clerk, and the clerk will open a file and register the case in the court record before putting it before you.

You should hear the matter at the earliest opportunity.

Occasionally, the charge will be put directly to you.

9.4 Transfer of charges and proceedings to the Supreme Court

Where any charge has been brought against a person of an offence not triable by the District Court or as to which the District Court is of the opinion that it ought to be tried by the Supreme Court, the District Court may transfer the charge and proceedings to the Supreme Court. An accused person may not be subject to a preliminary inquiry or to committal proceedings prior to the transfer of that person's case and proceedings to the Supreme Court: s 162 CPA.

10. First appearance

10.1 General

A defendant, on first appearance, will be present:

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

At the first hearing, you will be concerned with some or all of the following:

- the integrity of the charge (if not already considered)
- non-appearance, therefore summons and warrant,
- legal representation,
- plea, including fitness to plead,
- election,
- remands in custody,
- bail,
- adjournments.

It is your duty to explain the proceedings to the defendant and explain his or her rights to legal representation, prior to putting the charge. Where there is a need to obtain reports, then it is also incumbent upon you to explain the same to the defendant.

It is also incumbent to ask the defendant whether they wish to have legal representation. See the Fijian case of *Naceva v State* [2001] FLCA 8; AAU0014.1998 (24 May 2001).

Usually this appearance is fairly quick and informal. There is a need to make the defendant feel at ease, but not to the extent that he or she displays over-familiarity. A firm and steady directive should be the rule for Magistrates at this initial proceeding.

Urge an unrepresented defendant to see a lawyer. This will save time and ensure that he or she understands the charges, knows the penalties, and is aware of his or her rights. It will also help to identify if there is a need to order any relevant reports to assist you in your deliberations of the case.

If legal aid is sought, adjourn the matter to allow the defendant to liaise with the Office of the Public Legal Defender. However, the prosecution should disclose first phase documents to the defendant at this stage in order to assist the Defender's counsel to assess the defendant's application for assistance.

10.2 Non-appearance by the defendant

If the defendant does not appear, either in response to a summons, police bail or police notice, ask the prosecutor to provide you with evidence of service or bail bond. Note that an affidavit of service purporting to be made before a magistrate or Commissioner for Oaths that a summons has been served shall be admissible in evidence and the statements made therein shall be deemed to be correct unless and until the contrary is proved: s 60 CPA.

If service has been effected, you may:

- dispense with the attendance of the defendant in certain cases;
- issue a bench warrant to arrest the defendant; or
- ask the prosecution whether they are in a position to formally prove their case.

10.3 Power to dispense with personal attendance of defendant

s 61 CPA

Where a magistrate issues a summons, you may dispense with the personal attendance of the defendant if:

- the offence in the charge is not a felony; and
- you see reason to do so or the maximum punishment of the offence is a fine or imprisonment of three months or both; and
- and the defendant pleaded guilty in writing or appeared by advocate: s 61 CPA.

Every such summons should include a notice stating that any fine which may be imposed by the court will be paid within eight days of the date appointed in the summons for attendance. There should also be a warning that the defendant will not receive notification from the court as to any such fine but that it is his or her duty to make inquiry from the court.

If the defendant fails to pay the fine within that time or to apply within that time to the court for an extension of that time, he or she will be liable to be committed to prison: s 61(1) CPA. The court may issue a warrant for the arrest of the defendant and committal to prison to serve that sentence: s 61(4) CPA.

Where the District Court considers that it would be just to order disqualification of a defendant (not present in person before the court) under the provisions of the Motor Traffic Act 2014, it should order a summons to be served upon the defendant calling upon him or her to show cause why such disqualification should not be imposed. If the defendant does not attend upon the return of the summons or fails to show good cause why the disqualification should not be imposed, the court may order disqualification: s 61(5) CPA.

10.3.1 Warrants for arrest

Where a defendant, after proper service of a summons, does not attend at the time and place appointed in and by the summons, and his or her personal attendance has not been dispensed with under Section 61, the District Court may issue a warrant to arrest him or her and cause him or her to be brought before it: s 63 CPA.

The warrant of arrest should be signed by the magistrate issuing it and bear the seal of the District Court. It should state shortly the offence, and name or otherwise describe the defendant: s 64 CPA. It should normally be directed generally to all police officers but the District Court may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons and such person or persons shall execute it. Where a warrant is directed to more officers or persons than one, it may be executed by all or by any one or more of them: s 66 CPA. Every such warrant remains in force until it is either executed or cancelled by the District Court: s 64 CPA.

When issuing a warrant for the arrest of a person in respect of any offence other than murder or treason, the magistrate may direct by endorsement on the warrant that, if that person executes a bond with sufficient sureties for his or her attendance before the court at a specified time, the person to whom the warrant is directed shall take such security and release that person from custody: s 65(1) CPA. The endorsement should state:

- the number of sureties,
- the amount in which they and the person for whose arrest the warrant is issued are to be respectively bound, and
- the time at which he or she is to attend before the District Court: s 65(2) CPA.

Wherever security is taken, the person to whom the warrant is directed must forward the bond to the District Court: s 65(3) CPA.

10.4 Unrepresented defendant

See the chapter on "Management of Proceedings"

If possible, all defendants in need charged with criminal offences, should see the public legal defender (s 50C CPA). This may require an adjournment to another date for a plea to be taken.

Where the defendant insists on representing him or herself, be careful that you comply with Art 5 of the Constitution. This outlines the rights of defendants charged with criminal offences.

It is your duty to see that the hearing is fair.

10.4.1 Office of the Public Legal Defender

The Office of the Public Legal Defender was established in 2016 under the Criminal Procedure Act 1972. The Office aims to provide free legal representation to enable all Nauruans to have access to justice.

The Office of the Public Legal Defender is supervised by the Director of the Office of the Public Legal Defender (Director). The importance of the Office is reflected by the fact that the Director is appointed by His Excellency the President of the Republic of Nauru. The Office establishment consists of the Director, five barristers and solicitors and two pleaders. This comprises the team of legal practitioners in the Office. The administrative support is provided by one paralegal officer.

The functions, responsibilities and duties of the Office are to provide legal aid, advice and assistance to people:

- who may be charged or have been charged with a criminal offence;
- who need aid, advice and assistance in respect of legal proceedings under any other Act; or
- where the Nauru Court of Appeal, Supreme Court of Nauru or District Court requests or is required under a written law to assign a legal representative to represent a person in a court proceeding.

The Director, after consultation with the Secretary for Justice, has issued guidelines setting out eligibility criteria for receiving legal aid, advice or assistance.

10.5 Putting the charge to the defendant

10.5.1 Identifying the defendant

When a defendant is brought before you, you must first ascertain who he or she is. Ask for his or her:

- full name,
- occupation, and
- age

This is very important. More than one person may share the same name. The defendant might be a juvenile and you would need to treat a juvenile defendant differently to adults.

10.5.2 Explaining the charge to the defendant

You must clearly explain the nature of the offence to the defendant. This involves explaining the elements.

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

10.5.3 Check for understanding

Check whether the defendant understands the charge. When you are sure he or she understands the full nature of the offence charged, then asks how he or she pleads to the charge. Never take for granted that the defendant might have understood your explanation without his or her confirmation.

10.6 Reconciliation

S 123 CPA

A court may promote reconciliation and encourage and facilitate settlement in an amicable way, on terms of payment of compensation or other terms approved by it.

This applies for all proceedings for common assault or for any other offence of a personal or private nature for which a fine or sentence of imprisonment for a term not exceeding one year may be imposed. The court may then order the proceedings to be stayed or terminated.

The complainant/victim must agree – you cannot impose this on parties. You may only encourage and facilitate reconciliation.

It is a good idea to adjourn the proceedings to give the defendant time to carry out the terms of the settlement. When you are satisfied that the terms have been satisfied, you may order that the proceedings be stayed or terminated.

10.7 Pleas

10.7.1 Pleas generally

A defendant can either plead "guilty" or "not guilty" to a charge: s 190 CPA

The defendant may, with leave of the court, change a not guilty plea to guilty at any time.

The defendant may also, with leave of the court, change a guilty plea to not guilty at any time, but before sentencing.

For pleas generally, see *Deidenang v Republic* [1971] NRSC 3; [1969-1982] NLR (D) 1 (19 February 1971), *Daragouw v Republic* [1972] NRSC 7; [1969-1982] NLR (D) 10 (11 September 1972), *Republic v Debao* [2021] NRSC 30; Criminal Appeal 12 of 2020 (24 August 2021), *Mwaradaga v Republic* [1977] NRSC 7; [1969-1982] NLR (D) 58 (29 September 1977) – plea of a juvenile.

10.7.2 Taking the plea

After you are sure that the defendant understands the charge, take a plea. See s 190 CPA.

Ask the defendant whether the charge is true or not. If the defendant says it is true:

- ask the prosecution to read a brief summary of the facts,
- tell the defendant to listen very carefully to this. Explain that he or she will be asked at the end whether the facts are true,
- after the prosecution has read the facts, ask the defendant whether they are true or not.

If the defendant admits the truth of the facts, this will suffice as a plea of guilty. You then:

- record his or her admission as nearly as possible in the words used by him or her,

- convict him or her, and
- pass sentence or make an order against him or her (either immediately or at a later date).

If the defendant admits the truth of the charge, but makes some remarks or comments, listen carefully because sometimes those remarks or comments indicate a possible defence. You need to be particularly alert to this if the defendant is unrepresented.

If the defendant disputes any of the facts read out by the prosecution, consider whether the disputed facts are relevant to the elements of the offence. Note that a plea of guilty is a plea to the elements of the charge, not necessarily acceptance of the Police summary of facts. If the facts in dispute are not relevant to the elements, enter a plea of guilty.

If the disputed facts are relevant to any of the elements, or where any remarks or comments made by the defendant may amount to a defence, you must enter a plea of not guilty for the defendant. For example, on a charge of malicious damage, one of the elements is actual damage to property. If the defendant pleads guilty but disputes the amount of damage (eg: the prosecution alleges 10 glasses were damaged and the defendant says only three were damaged), then the element of damage is not disputed, just the amount. That is relevant to sentence, not guilt, and you should enter a plea of guilty.

On a charge of drunk and disorderly, one of the elements is that the behaviour must be in a public place. If the defendant admits to being drunk and disorderly, but says it was in his friend's backyard, that is relevant and you should enter a plea of not guilty for the defendant. It is then up to the prosecution to prove he was in a public place.

Where the defendant refuses to plead, a plea of not guilty should be entered: s 190(6) CPA.

Where the defendant is represented, a plea by counsel is acceptable.

10.7.3 Fitness to plead

You will need to be conscious in particular cases whether the defendant is fit to plead. A defendant is under a disability if he or she cannot:

- plead,
- understand the nature of proceedings, or
- instruct counsel.

In these situations, it would be better to ascertain the nature of the problem first than to allow proceedings to continue. Relevant reports may have to ordered, if necessary, and the matter may have to be adjourned to another date.

A finding of disability can result in:

- the defendant's detention in a hospital or psychiatric facility, or
- the defendant's immediate release.

10.7.4 Guilty plea

If the defendant admits the truth of the charge, record the admission, convict the defendant and pass sentence or make an order against him or her: s 190(3) and (4) CPA.

Where there is an unequivocal plea, you should ask the following, "Has any person in authority, Police or otherwise, given you any inducement or made any offer or promise of any benefit to you to persuade you to enter a plea of guilty to these charges?" See *Vilikesa Balecala v State* Crim App No. HAA0062 of 1996.

Entering conviction

The defendant's admission of the truth of the charge should be recorded as nearly as possible in the words used by him or her: s 190(2) CPA.

You should never sentence a person without convicting him or her first.
You may:

- sentence immediately,
- stand down the matter to consider the appropriate sentence, or
- adjourn the matter to allow for relevant reports to be compiled, and remand the defendant.

If you are adjourning, consider bail/remand.

Sentencing

If there is a dispute as to facts, the prosecution should be offered the opportunity to prove them. If the prosecution elects to forfeit this chance, the defendant's version must be accepted for sentencing.

If the defendant disputes the list of previous convictions, the onus is on the prosecution to prove it. If the list is unchallenged, you should note the list accordingly.

Where a person is charged with any offence and can lawfully be convicted on such charge of some other offence not included in the charge, he or she may plead not guilty of the offence charged, but guilty of the other offence: s 194 CPA.

See the chapter on "Sentencing".

10.7.5 Not guilty plea

If the defendant denies the charge, ie: pleads not guilty, or if you enter a plea of not guilty for him or her, then:

- proceed with the trial if all parties are ready and the matter can be dealt with quickly, or
- ascertain the number of witness the parties intended to call at the trial, so as to know the probable duration of the trial, and set a date for the trial,
- deal with bail/remand in custody, and summonses for witnesses if necessary, and

- adjourn the matter.

Immediate hearing

If all parties are ready to proceed with a defended hearing (including witnesses), proceed to hear the matter immediately or adjourn the case to later in the day to hear it. See chapter on "Defended Hearings".

Hearing at a later date

You should fix a suitable hearing date after all disclosures have been served and the parties have ample time to summon and get their witnesses to court.

Remands / bail after plea

If a plea of not guilty is entered you may:

- remand the defendant and obtain an estimate of hearing time (ascertained from the prosecutor, the defendant's counsel and your court diary), or
- release the defendant on bail on such condition or conditions that he or she attends trial at the date and time scheduled, and
- record all of the above.

If bail is granted, the terms, if any, should be noted carefully on the Evidence Sheet.

Reasons must be given for refusing bail. See the chapter on "Bail".

Ensure all warrants of commitment (remands in custody) are completed before you leave the court for the day.

Any instructions to the prison should be recorded on the warrant. For example, the defendant is to be kept apart from adult prisoners, a need for medication or risk of self-harm.

Disclosure

Check whether the prosecution is ready to serve any disclosures.

Warrants/summons for witnesses to attend

On your own motion or on the application of a party, you may issue a summons for any person to appear as a witness, or to appear and produce any material evidence: s 100 CPA.

If you are satisfied by evidence on oath that a person will not attend unless compelled to, you may issue a warrant to ensure their attendance: see Part 8 of the District Court Act 2018 "Witnesses".

11. Defended hearings

11.1 Magistrate's notes

A suggestion is to note each element of the charge on a separate piece of paper. As evidence is given, note it as it relates to each of these elements. This method can provide a helpful framework for your decision.

A starting point is the list of common offences in chapter 19. You may peruse the elements of the offence which are the subject of the charge before you, and note the evidence presented to satisfy each of the elements.

11.2 Hearing outline and procedure

11.2.1 Appearance/ non-appearance of parties

Only the defendant appears: s 150 CPA

If the complainant has had notice of the time and place appointed for hearing, and does not appear, either in person or by his or her counsel, dismiss the charge unless you think it proper to adjourn the hearing to another date.
You may:

- release the defendant on bail,
- remand him or her in custody, or
- post such security for his or her appearance as you think fit.

Only the complainant appears: s 151 CPA

Where the defendant was summoned, and the offence charged is punishable with a term of imprisonment for a term not exceeding six months and/or a fine not exceeding $200, you may, upon proof of service, proceed with the hearing in the absence of the defendant.

If the offence charged amounts to a felony and you are satisfied that the defendant has failed to obey the summons or breached his or her bail conditions, you may order a warrant for his or her arrest and adjourn the hearing. See the chapter on "Bail".

In a summons case, if there is no proof that the summons has been served at a reasonable time before the hearing, then adjourn for a reasonable time to allow the prosecution to serve, or to prove service.

If a defendant has been arrested and bailed by Police, check the Police bail form to ensure that the defendant signed the bail form and was bailed to the appropriate date before continuing.

Appearance of both parties: s 152 CPA

If, at the time appointed for hearing the case, both the complainant and the defendant appear, proceed to hear the case.

Non-appearance of parties after adjournment: s 155 CPA

If the defendant does not appear before the court after an adjournment, you may, unless the defendant is charged with a felony, proceed with the hearing. If the defendant is charged with a felony, issue a warrant of apprehension.

If the complainant does not appear, you may dismiss the charge, with or without costs.

11.2.2 Part-heard applications

At times there will be applications, first by the prosecution and subsequently by the defence, to have the case heard then adjourned because all the evidence needed for the case is not available on the date of hearing. It is advisable for you to hear the application in full and ask for the other party to respond before ruling.

Some counsel may deliberately make this application in order to prolong or delay matters. Remember that the discretion to grant or not to grant the adjournment rests with you.

Usually hearing dates are fixed by the court, in consultation with the parties and well in advance. Therefore, unless there are compelling reasons, you should grant adjournments on part-heard applications sparingly.

11.2.3 Admission of facts

A defendant, or his or her counsel, may admit any fact or any element of the offence and that admission will constitute sufficient proof of the fact or element: s 147 CPA.

Every admission is to be in writing and signed by:

- the defendant or his or her counsel, and
- the Magistrate.

11.2.4 Plea of guilty to other offence

Where a person is charged with any offence and can be lawfully be convicted on that charge, of some other offence not included in the charge, he or she may plead not guilty of the offence charged, but guilty of some other offence: s 194 CPA.

11.3 Unrepresented defendant at trial

The following outline applies where the defendant is unrepresented. With necessary modifications, however, it also applies when the defendant is represented.

Take care to fully advise the defendant of the procedure to be followed and to accurately record the advice given to the defendant. The following steps should be followed:

- Inform the defendant that proceedings are going to be conducted in English: s 35(1) DCA.
- Confirm the defendant's plea and ensure this is recorded on the Evidence Sheet.

- Ask the witnesses to leave the court room.
- Ask the defendant whether he or she prefers to have the proceedings interpreted and arrange for an interpreter for him or her: s 35(2) DCA.
- Provide the defendant with a brief explanation of:
  - the procedure to be followed,
  - the right to cross-examine,
  - the right to give and call evidence, and
  - the obligation to put his or her case to any witness.
- After each witness has given evidence, excuse the witness from further attendance and warn the witness not to discuss the evidence with other witnesses who have yet to give evidence.
- If there are several unrepresented defendants, have them identify themselves to you at the outset.
- If you ask any questions of a witness after re-examination has concluded, you should ask the prosecutor and the defendant if there are any further matters raised by your questions, which they wish to put to the witness.

Without overdoing it, you are expected to help the defendant from time to time during the hearing. After the prosecution case is concluded, you make a finding whether there is a case to answer.

Next, you may address the defendant on his or her options in the following manner:

> "You have three options:
> (1) You have the right to give evidence yourself by giving evidence on oath, in the witness box. If you do, you may be cross-examined by the prosecutor. It is entirely a matter for you to decide. You also have the right to call witnesses to give evidence on your behalf. Again, if they give evidence, they may be cross-examined by the prosecutor. You are not obliged to call witnesses - it is entirely a matter for you to decide. Do you understand this?
> (2) You have the right to make a statement from the witness box and will not be cross-examined by the prosecutor.
> (3) You have the right to remain silent and since you have heard what the prosecution have said against you it is again up to you whether you wish to exercise this right".

You must ensure that the defendant fully understands the choices open to him or her before electing the one that he or she prefers. Once the defendant has indicated his or her preference, record it on the Evidence Sheet.

You may then ask the defendant to give you his or her version of the events. It may be helpful to lead the defendant through the preliminary matters to help provide confidence for him or her to give their own account of the crucial event.

If reference to damaging evidence given by the prosecution is omitted, draw attention to it and enquire if the defendant wishes to comment on it.

After the defendant has been cross examined, ask:

> "Is there any further evidence you wish to give arising out of the questions just put to you by the prosecutor?"

A defendant may not make an unsworn statement, but may make submissions on the law at any time.

After hearing all submissions on the law and the evidence, then either deliver your judgment or fix a date to deliver it.

11.4 No case to answer

The following applies whether the defendant is represented or not. Remember that the standard of proof required at this preliminary stage is one of a "prima-facie" case.

At the close of the prosecution case, if there is a submission that there is no case to answer, you should give the prosecution the opportunity to reply.

A convenient test is found in *Practice Note* [1962] 1 All ER 448:

> "A submission that there is no case to answer may properly be made and upheld: when there has been no evidence to prove an essential element in the alleged offence, when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it … if a submission is made that there is no case to answer the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it there is a case to answer".

If you decide that there is a case to answer announce:

> "I find that there is a case to answer".

Sometimes brief reasons are appropriate. Care should be taken to ensure that the defendant does not feel that the case is already decided against him or her.

If you find that there is no case to answer, you should give a ruling detailing why, dismiss the information and acquit the defendant: s 201(a) CPA.

11.5 Evidential matters

11.5.1 Warning to a witness against self-incrimination

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

- warn the witness to pause before answering the question,

- explain that any evidence the witness gives in court that is self-incriminating could be used to prosecute them for a crime,
- explain that the witness may refuse to answer the question.

In most cases, it would be wise to stand the witness down to see a lawyer to explain the consequences.

11.5.2 Identification

There is a need for caution in considering evidence of identity.

It is notorious that honest and genuine witnesses sometimes make mistakes. A convincing witness may nonetheless be a mistaken witness.

In summary hearings, you must bear in mind the need for caution before convicting a defendant in reliance on the correctness of identification evidence and, in particular, the possibility that the witness may be mistaken. See *R v Turnbull & Others* [1976] 3 All ER 549.

You should state and record this.

11.5.3 Evidence of defendant and spouse in criminal cases

The defendant and his or her spouse (married) are competent but not compellable witnesses for and against each other. See the chapter on Evidence.

If the spouse of the defendant refuses to give evidence, then there is little you can do.

11.5.4 Defendants charged jointly

Nothing that a defendant says in a statement to the police or anyone else which incriminates a co-defendant can be evidence against the co-defendant, unless the co-defendant expressly or impliedly accepts what has been said.

11.5.5 Corroboration

Where corroboration is required as a matter of practice, you must look for it in the prosecution evidence. Where you are unable to find corroboration in the evidence but you were nevertheless satisfied beyond reasonable doubt of the defendant's guilt, you must warn yourself of the danger of convicting on the evidence. You may then convict. You must endorse on your judgment that you have warned yourself of the danger.

11.5.6 Lies

If it is established that the defendant has lied, as opposed to making a genuine error, the fact that the defendant has lied goes to credibility.

A lie does not necessarily mean the defendant is guilty, as a lie can be told for a number of reasons and not always to avoid guilt.

Consider the remaining evidence to ascertain if the prosecution has proved its case.

Only consider a deliberate lie as part of the prosecution case if the lie was clearly stated when an innocent explanation could have been expected to be given.

11.6 Amending the charge

11.6.1 General

The court has wide powers to alter any charge by substituting a lesser, or indeed a more serious, charge. You may alter the substance or the form of the charge either by way of:

- amendment,
- substitution, or
- the addition of a new charge.

The amendment can be made at any time during the hearing before the close of the case for the prosecution.

If any amendment is made to the charge, the amended charge must be put to the defendant, as he or she is required to plead to the amended charge.

The defendant may also demand that the witnesses be recalled to give fresh evidence and be cross-examined. The prosecution will have the right to re-examination.

11.6.2 Procedure

The proposed amendment must be stated with clarity. Explain the difference in the essential ingredients of the former charge and the amended charge to the defendant who is unrepresented. After you have received an application from the prosecution to amend, the following procedure is suggested:

- Ask counsel for the defence or the defendant (if unrepresented): "Do you consent to this application to amend or do you oppose it?"
- If the amendment is not opposed and the defendant is represented, the amendment would ordinarily be granted.
- Hear defence submissions.
- Give the prosecution opportunity to reply.
- Decide whether to grant the application or not.
- Then amend the Evidence Sheet as appropriate and endorse and sign it: "Amended as above during the hearing" or "Amended in Court - defendant present".
- Have your reasons recorded or note them briefly.
- Announce that the amended charge replaces the original charge.

- Put the amended charge to the defendant and take a plea. It is necessary to endorse the Evidence Sheet that the amended charge has been read to the defendant.
- Ensure that everything said in connection with the amendment is recorded.

11.6.3 Procedure if prosecution amends the

s 191A CPA

The prosecution may apply to the court to amend an information at any time before the close of the prosecution's case. Such an application may be made orally or in writing and must state the particulars of the proposed amendment.

In considering the application to amend, you may:

- grant the application,
- dismiss the application,
- where you grant the application you may adjourn the proceedings for such time as you deem appropriate for the accused person to prepare his or her defence, or
- make such orders as you deem necessary.

Where you order for an information to be amended:

- the amended information should be read to the accused person, and
- the accused person should plead to the amended information.

The accused person or his or her legal representative may apply for an adjournment to allow the accused person to prepare his or her defence.

If there is no adjournment, ask the parties:

> "Are there any further questions you wish to put to any witness who has already given evidence?"

If so, then the witness or witnesses must be recalled and the hearing continued on the amended or substituted charge.

Where the original or amended information contains more than one count, on an application by the prosecution or accused person, you may order that any count be tried separately if you deem that:

- an accused person may be prejudiced because he or she is charged with more than one count in such information, or
- a trial with another accused person will prejudice the fair trial of the accused person.

Where an order for a separate trial is made, the procedure is the same as if the count had been set out in a separate information.

11.7 Exhibits

11.7.1 Production

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, etc. and defence exhibits are letters A, B, C, etc. An exhibit produced by a prosecution witness in cross examination is a defence exhibit.

11.7.2 Marking of exhibits by witness

Often parties pass exhibits, such as plans and photos, to witnesses quite indiscriminately and invite them to mark some point, eg: the impact point in a collision. If such a situation occurs, care must be exercised to ensure clarity.

Ensure that the witness marks all photos (or plans, or maps) with, ideally, a differently coloured pen and your notes should clearly describe it.

If, however, by marking a plan or photograph, it is possible that a later witness may be influenced by such marking, it may be preferable to have a copy of the exhibit marked and produced as a separate exhibit with the original being kept in an unmarked state.

11.8 Application for change of plea

A defendant may change his or her plea from "not guilty" to "guilty" on application.

Credible grounds for such application must be provided.

The right of the defendant to change or her plea exists until sentence.

Note that there is no special right given to the defendant to apply for a change of election. It is suggested that, if a change by virtue of an amendment reduces a felony to a non-electable offence, then it follows that trial would be conducted summarily. On the other hand, if the amendment changes the nature of the charge to an electable offence, then an election should be put to the defendant before a plea is taken on the amended charge.

11.9 Withdrawal of complaint

The prosecutor may withdraw a complaint, with the consent of the court, before a final order is passed: s 153 CPA.

Where the withdrawal is made after the defence case, acquit the defendant.
Where the withdrawal is made before the defence case, you may:

- acquit the defendant, or
- discharge the defendant.

An order of discharge is not a bar to subsequent proceedings on account of the same facts.

11.10 Order of acquittal bar to further procedure

An order of acquittal shall without other proof, be a bar to any subsequent information or complaint for the same matter against the same defendant: see s 94 CPA.

12. Bail

12.1 Introduction

The Constitution of Nauru and Bail Act 2018 (BA) sets out the law relating to bail.

This chapter focuses on the court's role and all statutory references are to the Bail Act 2018, unless stated otherwise.

12.2 Jurisdiction

Ss 4(2), 13-14 BA and article 5 of the Nauru Constitution has provided jurisdiction for bail.
In addition the police may grant bail as of right (subject any other provisions in the Bail Act set out in ss 9-12).

A Resident Magistrate, a Judge, or a Justice of Appeal may grant bail at any time to a person who is:

- accused of an offence and is brought or appearing before them,
- an appellant under the Supreme Court Act 2018, the Nauru Court of Appeal Act 2018, or any other written law: s 13(1) BA.

The Registrar of Courts may only exercise the jurisdiction under this Act, where a Resident Magistrate, Judge or a Justice of Appeal is unable to exercise their powers to grant bail: s 13(2) BA.

Lay Magistrates are empowered to grant bail for defendants charged with offences where the maximum penalty is less than 12 months: s 6(2)b District Court Act 2018.

If bail has been refused:

- any adjournment to hear the case should not be for more than 14 days except with the person's consent; and
- any further adjournment should **not** be for more than 48 hours and should be to a court available to deal with the case: s 14(2) BA.

However, that does not apply if the accused is already in custody in connection with another offence, or if the court is satisfied that there are reasonable grounds for a longer period of adjournment and that bail should continue to be refused: s 14(3) BA.

If the accused has been in custody for over two years, and the trial of the accused has not begun, the court should release the person on bail subject to bail conditions the court thinks fit to impose. This applies unless the trial has begun and bail has been refused or the accused is already serving a sentence for another offence: s 14(4) and (5) BA.

A court may determine an application for bail by an accused person: s 4(2) BA.

An "accused person" means a person who has been charged with an offence and:

(a) who is awaiting trial before the District Court or the Supreme Court;

(b) whose trial has commenced and adjourned for continuation, judgment, decision or order or for sentencing: s 3(1) BA.

A court that grants bail to an accused person may dispense with the requirements for bail. If no specific order or direction is made in respect of bail during the appearance of an accused person, the court is deemed to have dispensed with any requirement for bail: s 7 BA.

12.3 Applications for bail

An accused person may make any number of applications to court for bail: s 15(1) BA.

An application to a court for bail must be dealt with as soon as reasonably practicable after it is made: s 15(2) BA.

A court may refuse to entertain an application for bail if it is satisfied that the application is frivolous or vexatious: s 15(3) BA.

An accused person is entitled to have legal representation for an application for bail, or for review of bail. You should explain this to an unrepresented accused person and refer them to the Office of the Public Legal Defender (see para 10.4.1).

12.4 Considering bail applications

12.4.1 Right to bail

Sections 4-6 and 18-19 BA

Every accused person has the right to be released on bail: s 4(1) BA. This reflects the common law and constitutional presumption under Article 10 ,that an accused is innocent until proved guilty and, therefore, an accused is prima facie entitled to bail.

This presumption may be rebutted by a prosecutor or any other person, where the interests of justice so requires: s 4(3) BA. Section 18 sets out the grounds for any submissions opposing bail and s 19 sets out the various reasons where the court or the police may refuse bail for the accused (see the paragraph on relevant factors below).

You shall not grant bail to a person where they (s 4A BA):

- are charged with an offence:
  - of murder, treason, or sedition,
  - under Part 7, Divisions 7.2 and 7.3 and Part 8 of the Crimes Act 2016,
  - under Part 3 of the Counter Terrorism and Transnational Crime Act 2004,
  - under the Illicit Drugs Control Act 2004.

- have previously breached a bail undertaking or condition,
- are arrested under the Extradition Act 1973,
- have been convicted of murder, treason or sedition and are appealing such conviction.

The court shall also not grant bail, except in exceptional circumstances proven by the accused, where:

- the person is charged with any of the following offences:
  - attempt to murder or manslaughter
  - assaulting a police officer in the execution of their duties
  - intimidating or threatening a police officer in the execution of their duties
  - contempt of court under the Administration of Justice Act 2018
- an accused person is incapacitated by intoxication, injury or use of drugs or is otherwise in danger of physical injury, self-harm or in need of protection; s 4B(1) BA.

But section 4B(1) does not apply to an accused person who has been previously convicted by a court for one or more of those offences.

See also: *Temaki v Republic* [2020] NRSC 49; Criminal Case 21 of 2020 (24 November 2020) which emphasized when assessing whether bail should be granted under section 4B BAA, the issue is:

> "whether viewed as a whole, the circumstances can be regarded as exceptional to the extent that, taking into account the very serious nature of the charge to which they are applicable, the making of an order admitting the person to bail would be justified."

If an accused person is remanded in custody under section 4B, you shall direct the parties to ensure the hearing is carried out efficiently and without delay. But where the trial has not commenced within 3 months of the date on which the information or charge was filed in court, then the an accused person, who is remanded in custody, may apply for bail on any grounds or reasons, other than exceptional circumstances: s 4B(5) BA.

An accused person who is in custody for an offence and who has been granted bail is entitled to be released, after giving a bail undertaking (subject to section 26), and to remain at liberty until required to appear before a court. This applies unless they are in custody for some other offence or reason for which the person is not entitled to be at liberty, whether under this Act or otherwise.

For anyone accused of any summary offences that are not punishable by imprisonment (set out in the regulations) you may grant bail unconditionally or subject to bail conditions (that the Police or you consider reasonable and appropriate), unless the person:

- has previously breached a bail undertaking or bail condition,
- is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury, self-harm, or in need of protection,
- stands convicted of the offence or the person's conviction for the offence is stayed, or
- the requirement for bail is dispensed with under section 7,

- is in custody serving a sentence of imprisonment in connection with some other offence: s 6 BA.

12.4.2 Dispensing with bail

ss 7 and 8 BA

The court may dispense with the requirements for bail unless the accused is in custody for some other offence or reason (but the accused must advise their residential address under s 16): s 7 BA.

This means that the accused is entitled to remain at large until required to appear before a court for the offence (subject to s 26 "accused person absconding or breaching conditions of bail"): s 8 BA.

If you make no specific order or direction for bail when the accused appears then bail is deemed to be dispensed with (unless bail is being continued under s 30 "continuation of bail").

12.4.3 Presumption in favour of bail

The Bail Act 2018 makes it clear that subject to its provisions there is a presumption in favour of granting bail.

Every accused person has a right to be released on bail unless it is not in the interests of justice that bail should be granted: s 4(1) BA. The "interests of justice" will vary from case to case.

The presumption in favour of granting bail can be rebutted where:

- the accused person:
  - has previously breached a bail undertaking or bail condition, or
  - has been convicted and has appealed against the conviction: s 3(3) BA.

12.4.4 Case against the presumption of bail

A person making submissions against the presumption in favour of bail must deal with:

- the likelihood of the accused person surrendering to custody and appearing in court,
- the interests of the accused person, and
- the public interest and the protection of the community.

12.4.5 Primary consideration

Relevant factors for bail applications

ss 17-20 BA

The primary consideration in deciding whether to grant bail to a defendant is the likelihood of the defendant appearing in court to answer the charges laid against him or her: s 17(2) BA.
When considering bail, you should take into account the time the person may have to spend in custody before trial if bail is not granted: s 17(1) BA.

You or the police (as the case may be) must grant bail to an accused person unless you think that:

- the accused person is unlikely to surrender to custody and appear in court to answer the charges laid,
- the interests of the accused person will not be served through the granting of bail,
- granting bail to the accused person would endanger the public interest or make the protection of the community more difficult: s 19(1) BA.

Table of relevant factors for deciding if bail conditions are necessary		
Risk of the defendant not appearing: s 19(2)(a) BA	The interests of the accused person: s 19(2)(b) BA	The public interest and protecting the community: s 19(2)(c) BA
The accused person's background and community ties (including residence, employment, family situation, previous criminal history).	The length of time the person is likely to have to remain in custody before the case is heard.	Any previous failure by the accused to surrender to custody or to observe bail conditions.
The conditions of that custody.	The likelihood of the accused interfering with evidence, witnesses or assessors or any specially affected person.	The circumstances, nature and seriousness of the offence.
The strength of the prosecution case.	The need for the person to obtain legal advice and to prepare a defence.	The likelihood of the accused committing an arrestable offence while on bail.
The severity of the likely penalty if the person is found guilty.	The need for the person to be at liberty for other lawful purposes (such as employment, education, care of dependants).	Whether the person is a minor (in which case section 4C applies).
Any specific indications (such as that the person voluntarily surrendered to the police at the time of arrest, or, as a contrary indication, was arrested trying to flee the country)	Whether the person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection	

12.4.6 Process for bail applications for defendants

Ss 4-8, 15, 20 and 31 BA

At a defendant's first appearance, you may adjourn the matter and you may:

- allow the accused to go at large,
- grant the accused bail,
- remand the accused in custody for the period of the adjournment (see 12.13, Refusal of bail).

An accused person may make any number of applications to a court for bail, unless you refuse to hear the review or application if you are satisfied that:

- the application for bail is frivolous or vexatious: s 15(3) BA,
- there are no special facts or circumstances that justify a review, or the making of a fresh application: s 31(5) BA.

You should deal with an application for bail as soon as reasonably practicable after it is made.

Ask the police whether they wish to oppose bail. Hear from the prosecution first, then the accused. Evidence may be called if necessary.

If you refuse bail, you must give reasons (see Refusal of bail below). Ensure that your reasons are recorded: s 20 BA.

An order refusing bail by the police or you is subject to review/appeal by another Resident Magistrate, or a Judge of the Court of Appeal or the Supreme Court, depending on who or which court refused bail: s 31 BA.

12.4.7 Other statutory considerations

The court must take into account the time the accused person may have to spend in custody before trial if bail is not granted: s 17(1).

An accused person must be granted bail unless in the opinion of the court:

- the accused person is unlikely to surrender to custody and appear in court to answer the charges laid,
- the interests of the accused person will not be served through the granting of bail, or
- granting bail would endanger the public interest or make the protection of the community more difficult: s 19(1).

You must have regard to all the relevant circumstances. The following particular factors are listed in s 19(2):

Likelihood of surrender to custody

- The accused's person's background and community ties (including residence, employment, family situation and previous criminal history).
- Any previous failure by the person to surrender to custody or to observe bail conditions.
- The circumstances, nature and seriousness of the offence.
- The strength of the prosecution case.
- The severity of the likely penalty if the person is found guilty.
- Any specific indications (such as that the person voluntarily surrendered to the Police at the time of arrest or, on the contrary, was arrested trying to flee the country).

The interests of the accused person

- The length of time the accused person is likely to have to remain in custody before the case is heard.
- The conditions of that custody.
- The need for the accused person to obtain legal advice and to prepare a defence.
- The need for the accused person to be at liberty for other lawful purposes (such as employment, education, case for dependants).
- Whether the accused person is under the age of 18 years).
- Whether the accused person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection.

The public interest and the protection of the community

- Any previous failure by the accused person to surrender to custody or to observe bail conditions.
- The likelihood of the accused person interfering with evidence, witnesses or assessors or any specially affected person.
- The likelihood of the accused person committing an arrestable offence while on bail.

12.5 Bail applications for minors

Section 4C BA

For a defendant who is a minor (under 18 years), you must grant bail unless:

- the person has a previous criminal conviction
- the person has previously breached a bail undertaking or bail condition

- the person is charged with a serious offence referred to in s 4A
- the person is incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury, self-harm or in need of protection.

The Cabinet may designate a place for the remanding of a child in custody.

12.6 Police bail

Ss 4-6, ss 9-12, and ss 17-23 BA

The police may grant bail to a defendant who is arrested for a cognisable offence (as defined in section 10 CPA to include any offence with a term of imprisonment of 5 years or more) and taken to the police station: s 9(1) BA.

But a police officer **shall not** grant bail to the defendant if:

- the court has already made a determination concerning bail on the same offence,
- the person has been charged for an offence of contempt of court
- the offence is a serious one.

The police may also release a person arrested on suspicion that they have committed an offence where, after due police enquiry, insufficient evidence is disclosed: s 9(3) BA.

The police shall determine bail after they lay any charge(s) and the accused is in custody. They must:

- give the accused information in writing in a language or any other means the person understands about their right to bail: s 10 BA
- inform the accused about their right to consult with a lawyer or representative and if so, provide them with reasonable facilities to consult in private: s 11 BA
- grant bail (if authorised under section 9) to the accused or have them brought before a court within 24 hours after the accused has been charged: s 10 BA
- if not authorised to grant bail under section 9 or if bail is refused, bring the person before a court as soon as practicable and in any event within 24 hours: ss 10 and 12 BA.

The police may grant bail without or without any bail conditions they consider reasonable and appropriate: s 6(2)(b).

A "serious offence" is any offence for which the maximum penalty includes imprisonment for three years or more: s 3 BA.

12.7 Accused appealing against conviction or sentence

Where the court is considering granting bail to a person who has appealed against conviction or sentence, the court must take into account:

- the likelihood of success in the appeal;
- the likely time before the appeal hearing;
- the proportion of the sentence which will have been served when the appeal is heard: s 17(3) BA.

12.8 Accused in custody for two years or more

If an accused person has been custody for two years or more and his or her trial has not begun, the court must release him or her on bail: s 14(4) BA.

Note that this is not the case where:

- the trial has begun and the court has refused bail;
- the accused person is serving a sentence for another offence: s 14(5) BA.

The period of two years does not include any period of delay caused by the fault of the accused person: s 14(6) BA.

"Trial" means the trial proper of the accused person in respect of the offence which he or she has been charged with and does not include:

- committal proceedings; or
- the determination of any preliminary or interlocutory application: s 14(7).

12.9 Case law

See the following cases:

- *Republic v SF* [2021] NRSC 32 (SC) (appeal from *Republic v SF* [2021] NRDC 11)
- *Republic v Denuga* [2021] NRDC 10 (DC)
- *Uddin v Republic of Nauru* [2023] NRCA 10 (CA)
- *Republic v Agir* [2020] NRSC 40 (SC)
- *Scotty v Republic of Nauru* [2022] NRDC 2 (DC)

12.10 Granting bail and release

Ss 5, 21, 22 and 30 BA, Criminal Procedure (Forms) Rules 1972

A person may be released on bail when:

- they give a written undertaking to:

- a police officer, to surrender into the custody of a court specified in the undertaking and on a day and at a place so specified,
- to a court, to appear before the court on a day and at a place specified in the bail undertaking,
- if bail is continued by a court, to appear at the time and place at which the proceedings in respect of the offence will be continued, as specified in the bail undertaking or a notice to be sent to the person: s 21(1) BA.

➢ if deemed necessary, they swear under oath their ability as the accused person or the surety to provide the security,

➢ notice has been given by the registrar, you, or the police officer (as the case may be),

➢ you endorse on the remand warrant a certificate that all the parties to the bail undertaking have entered into it and the defendant is to be released.

A bail undertaking should be given in the form prescribed by the regulations: s 21(2) BA.

An accused person who is granted bail shall appear in person before a court in accordance with the person's bail undertaking: s 21(3) BA.

Once bail is granted and they have completed a written bail undertaking, the accused is entitled to be released and remain at liberty until required to appear before a court in accordance with the bail undertaking: s 5 BA.

The undertaking can include the amount of a security/bond, and whether it is with or without bail conditions or sureties at your discretion: s 22 BA. The court staff will print this out and give it to you, to sign in court, or to the Registrar.

12.11 Bail conditions

Ss 22 and 23 BA, Criminal Procedure (Forms) Rules 1972

You or a police officer may:

➢ impose such conditions as are necessary when granting bail, or

➢ release the accused on bail without any conditions: s 22(1) BA.

You or the police officer must grant bail unconditionally, unless or you or they consider that one or more of the conditions in section 22 should be imposed for the purpose of:

➢ ensuring the accused person's surrender into custody and appearance in court,

➢ protecting the welfare of the community, or

➢ protecting the welfare of any specially affected person: s 23(1) BA.

You must only impose conditions for those purposes and if they are required by the circumstances of the accused person: s 23(2) BA.

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.

Section 22(3) sets out different bail conditions that you may impose if necessary. These include that the accused:

- surrender any passports or travel documents in their possession to an authorised officer,
- be barred from applying for or obtaining any passport or travel documents,
- not commit an offence while released on bail,
- provide one or more sureties who acknowledge that they know the accused and regards them as a responsible person who is likely to comply with a bail undertaking,
- not interfere with witnesses, and
- such other conditions as you may deem fit.

If security by an accused person or surety is considered necessary, you or the police officer (as the case may be) must:

- find out under oath if necessary, the ability of the accused person or the surety to provide the security,
- set the security within the capacity of the accused or other acceptable person to meet the obligation,
- not impose the security if it creates an unreasonable barrier to granting bail,
- any acknowledgement or agreement (can be for one offence or more) referred to section 22 shall be given:
  - if by the accused, in the bail undertaking
  - if by a surety, in the form prescribed by regulations: s 22 BA.

An accused person and any person offering himself or herself as a surety may appeal to the Supreme Court or Court of Appeal if a police officer or court refuses to accept a person as surety or any proposed security: s 22 BA.

Use the bail undertaking form in the Criminal Procedure (Forms) Rules 1972.

The parties will enter into the bond/surety before the Registrar, Magistrate or Police Officer.

12.12 Refusal of bail

Ss 4-6, ss 14, 17 – 20, 31 BA

You may refuse bail in certain circumstances (set out in sections 4-6 BA above) or for just cause (below).

If you are refusing bail one or more of the following three reasons must apply:

1. the person is unlikely to surrender to custody and appear in court
2. the person's interests are not at risk by this refusal
3. the person endangers the public interest or the protection of the community: s 19 BA.

See *Republic v Dabwido [2019]* NRSC 30; Criminal Case 13 of 2019 (14 October 2019).

If the police or anyone else wishes to oppose bail, they must make submissions based on any or all these reasons: s 18(1) BA.

You must then give a written ruling on each of the criteria in section 18(1), dealing with submissions made on each one.

If you (or a police officer as the case may be) refuse to grant bail to a defendant, you must:

- record your reasons in a written ruling addressing any submissions: s 20(1) BA,
- state the reasons for refusing bail to the defendant in a way they can understand as soon as practical but no longer than 24 hours after the decision: s 20(2) BA,
- remand the accused person in custody to re-appear before that or another court for trial or review of bail within 14 days from the date of refusal or review: s 18(4) BA,
- inform the accused person of the procedure for review of bail under section 31: s 20(3) BA,
- not adjourn the hearing of the case for more than 14 days except with the person's consent: s 14(2)(b) BA, and
- after that if a further adjournment is sought, only adjourn the case for a further period not exceeding 48 hours and to a court available to deal with the case: s 14(2)(b) BA.

The time limits for adjournments in s 14(2) do not apply to:

- an accused person who is in custody in connection with another offence, or
- if you are satisfied that there are reasonable grounds for a longer period of adjournment and that bail should continue to be refused: s 14(3) BA.

A court may refuse to entertain an application for bail if it is satisfied that the application is frivolous or vexatious: s 15(3) BA.

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

If a defendant has been in custody for over two years and the trial of the person has not begun, the court shall release the person on bail subject to bail conditions: s 14(4) BA. This does not apply where:

- the trial of the person has begun and the court has refused to grant bail or the person is serving a sentence for another offence: s 14(5) BA

- any period of delay was caused by the fault of the defendant: s 14(6) BA.

12.13 Variation and re-granting new or continued bail

Ss 22 and 30 BA

Bail expires each time a defendant is brought back to court. So, if a defendant who has been granted bail is now before you, then on that second (or next) court date, then the original grant of bail has expired.

If a bail undertaking includes an undertaking to appear at any time and place, you may continue bail each time the defendant is required to appear subsequently in court (on adjournment, committal, appeal against conviction or sentence or otherwise): s 30(1) and (5) BA.

Each time bail is re-granted a new bail undertaking is also required, even if it is only to change the court date. This is because, if a new undertaking 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 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 on the same bail undertaking and conditions, unless there are new reasons to amend the bail conditions or revoke bail: s 30(2) BA.

If you make no specific direction regarding bail upon adjournment or committal, continued bail is deemed to have been continued on the same conditions which applied immediately before the person's appearance in court: s 30(3) BA.

If bail is applied for, you may make a fresh bail decision (where a bail undertaking does not include the undertaking to appear at any time and place) if:

- the case is adjourned, or the accused person is committed for trial or sentence: s 30(4) BA,
- an accused person has been convicted and is appealing against conviction or sentence: s 30(5) BA.

You have jurisdiction to review the conditions of bail where an accused person:

- breaches the conditions of the bail undertaking,
- is charged with or convicted or sentenced for a separate offence,
- seeks variation for personal, humane, compassionate or health reasons: s 22(2) BA.

The court also has jurisdiction to review bail conditions if circumstances exist, which in the view of the Resident Magistrate, a Judge or Justice of Appeal, justifies a review: s 22(3) BA.

If you receive such an application, you may make an order changing:

- the terms on which bail has been granted,
- the conditions of any bail security entered into,

- revoking any conditions of bail.

If sureties are required for the bail security, they shall continue in force and the order varying the conditions will not take effect until the parties' consent in writing or a new security is entered into.

See also *Republic v Qun Hui Ma* [2018] NRDC 8; Criminal Case 15-28 & 29 of 2018 (13 November 2018).

12.14 Breach of bail

Ss 22, 26-27 BA

Where the conditions of bail are breached, and without limiting the right of the Republic to charge an accused person for a breach of bail condition, you may:

- revoke bail
- grant such other orders you think fit: s 22(10) BA.

The Registrar may issue a warrant of arrest for a defendant released on bail where the Court is satisfied that the defendant has:

- failed to surrender to custody
- breached a condition of bail
- absconded from the court without the court's leave at any time after they surrendered to custody
- given a false residential address: s 26(1) BA.

A person who has been released on bail may be arrested without warrant if a police officer reasonably suspects the accused person is unlikely to surrender to custody; or likely to break or has broken any of their bail conditions: s 26(2) BA, s 87 CPA.

That person who is arrested shall (except where arrested 24 hours immediately before their next court date) be brought before that court as soon as practicable and in any event within 24 hours after their arrest: s 87 CPA.

After the person is arrested and brought before you, if you are satisfied that the defendant has breached their bail conditions without reasonable cause, you may:

- remand the defendant in custody for up to 12 months imprisonment (subject to their right to apply for bail), or order a fine of $2000 or both, or
- grant bail subject to conditions either the same or different from the original grant of bail at your discretion; s 26(3), 27(1) BA, s 87 CPA.

Similar penalties apply if the defendant absconds or gives a false residential address without reasonable cause: s 27(1) BA. The burden is on the accused person to prove that they had reasonable cause for failing to surrender to custody or for a breach of their bail conditions: s 27(2) BA. An offence under this section is an offence of strict liability: s 27(3) BA.

If, through mistake, fraud or otherwise, insufficient or unfit sureties have been accepted, or if they afterwards become insufficient or unfit, you may:

- issue a summons or a warrant of arrest, directing that the person released on bail come or be brought before you,
- order the person to find sufficient and fit sureties, and if they fail to do so may commit them to prison: s 84 CPA.

12.15 Forfeiture of a bail bond

Section 28 BA

Where you are satisfied that the defendant without reasonable cause fails to surrender to custody or has breached a bail condition, you may set a time and place to consider enforcing the forfeiture of the bail security (estreating the bail bond).

If you decide to enforce the forfeiture of bail security, you may:

- order that the whole or any part of the money deposited, or security given by the person or given by a surety be forfeited to the Courts Trust Fund,
- order any sum to be paid under section 28 to be enforced as if it were a fine and as if the order were a sentence for an offence,
- direct that the surety be discharged from the defendant's liability, unless satisfied it would be unjust,
- impose further conditions on the grant of bail and may commit the accused person to prison until those conditions are complied with.

You need to certify this on the Bail undertaking/surety.

You may grant forfeiture of bail security unless reasonable cause is shown to the contrary within a period the court directs. At the hearing, if no sufficient cause is shown as to why a condition of bail has not been performed, you may make an order to forfeit the security, to such an amount as you think fit.

12.16 Bail pending an appeal

Ss 13, 17 and 30 BA

A person who appeals (an appellant) may be released on newly granted or continued bail pending an appeal. You may grant bail to a person who is an appellant under the provisions of the Supreme Court Act 2018, the Nauru Court of Appeal Act 2018 or any other written law: s 13(b) BA.

When considering bail for a person who has appealed against conviction or sentence, you must take into account:

- the likelihood of success in the appeal

- the likely time before the appeal hearing
- the proportion of the original sentence which will have been served by the applicant when the appeal is heard: s 17(3) BA.

You may continue bail if the appellant has given a written undertaking to appear at any time and place at for the appeal, or otherwise grant a fresh bail determination if the appellant applies: s 30(5) BA. If accused appears and no directions are made specifically as to bail it is deemed to be continued on the same conditions as it was granted at the previous adjournment; s 30(3) BA.

Use the forms prescribed by regulations when granting bail on an appeal or on committal for sentence.

See: *Kepae v Republic* [2019] NRSC 37; Criminal Appeal 14 of 2019 (20 September 2019).

12.17 Remanding into custody

Ss 4-5, s 14, ss 17-19 BA

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) or allow the defendant to go at large.

This does not apply to an accused person who is in custody in connection with another offence, or if the court is satisfied that there are reasonable grounds for a longer period of adjournment and that bail should continue to be refused.

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 offence.

In the interests of justice, 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.

12.18 Review or appeal of bail determination

Ss 31 and 32 BA

You may review any bail decision made by a police officer or by another Resident Magistrate: s 31 BA.

The Supreme Court may review any decision made by it, by a Resident Magistrate or by a police officer in relation to bail. The Court of Appeal may review any decision made by it in relation to bail. The power to review a decision under this Part in relation to an accused person may be exercised only at the request of the following:

- accused person,

- police officer who instituted the proceedings for the offence of which the person is accused,
- Secretary for Justice,
- Director of Public Prosecutions, or
- victim of the offence: s 31(6) BA.

You may also refuse to hear the review or a fresh application for bail under section 15(1), if you are not satisfied that there are special facts or circumstances that justify a review, or the making of a fresh application: s 31(5) BA.

The power to review a decision under this Part includes the power to confirm, reverse or vary the decision. The review shall be by way of a rehearing, and evidence or information given or obtained on the making of the decision may be given or obtained on review: s 31(7)-(8) BA.

The Director of Public Prosecutions or the person granted or refused bail may apply to appeal to the Supreme Court or the Court of Appeal, any grants or refusals of bail and all orders, conditions or limitations made or imposed under this Act: s 32(1) BA.

The Supreme Court may:

- in its original jurisdiction grant or refuse bail upon such terms as it considers just; or
- on an appeal, confirm, reverse or vary the decision appealed from: s 32(2) BA.

The Court of Appeal may:

- confirm, reserve or vary the decision appealed from; and
- grant or refuse bail pending trial upon such terms as it deems fit: s 32(3) BA.

13. Judgment

13.1 Structured approach to defended criminal cases

Decision making is a process of applying particular facts to the relevant law over the issues concerned.

The court must adopt a judicial approach, which will divert you from reaching conclusions before all the evidence and arguments have been placed before the court.

The way to do this is to employ a structured approach. There are three tasks:

1. To be clear what the defendant is charged with and all the essential elements of the offence/s:

   For the defendant to be found guilty, every element of the offence must be proven beyond reasonable doubt. It is vital that the court is clear about the elements that must be proved.

2. To determine what the facts of the case are - what happened, what did not happen:

   The defendant is presumed to be innocent and the prosecution must prove that he or she is guilty. This is done by reference to the evidence produced.

   This may involve assessment of the credibility of witnesses and the reliability of their evidence.

3. To make your decision:

This is done by applying the facts to the law.

You must make an independent subjective decision. Under no circumstances should you ask anyone else to decide the matter.

13.2 Note taking

A suggestion is to note each element of the charge on a separate sheet of paper. As the evidence is given, note it as it relates to each of these elements. This method can provide a helpful framework for your decision.

13.3 Delivering your judgment

The court must deliver its judgment in every trial in open Court, either immediately after the termination of the trial or at some subsequent time. The adjudicator may simply explain the substance of the judgment, unless either party requests the whole judgment to be read out.

If the court reserve decision to a later date, it be must notify to the parties when the judgment will be delivered: Ss-207 Criminal Procedure Act 1972.

The defendant should be present when deliver the judgment. Every judgment must be written in English and contain:

- the offence of which, and section of the Crimes Act 2016 or other Act such as Motor Traffic Act etc under which, the defendant is charged;

- the point or points for determination (the issues);
- the decision on each of those points; and
- the reasons for the decision.

In the case of an acquittal, the court must direct that the defendant be set at liberty.

In the case of a conviction, include the sentence either at the same time or at a later date, as appropriate.

Sign and date the judgment in open court at the time of deliver it.

Note, however, that if the defendant pleads guilty, the judgment need only contain the finding and sentence or other final order.

13.3.1 Judgment format

The format below is a useful format for making and delivering the decision. This must be applied to each charge.

It is a good idea to have the 'losing' party in mind when giving reasons – make sure to address all their evidence and submissions thoroughly.

1 The law

   What must be proved beyond reasonable doubt. The elements of the offence.

2 The facts not in dispute

   The facts that are accepted by the defence. The elements that those accepted facts prove.

3 The facts in dispute

   The facts that are disputed by the defence. These are usually the issues (points for determination) in the case. Your finding of the facts, with reasons. Which evidence you prefer and why.

4 Apply the facts to the law

   Apply the facts as you have found them to the elements of the offence. Do the facts prove all the essential elements?

5 Deliver your judgment

   This will be conviction or acquittal. Structure your judgment before delivering it. Make sure you give adequate reasons and that the parties understand.

6 Orders

   Pronounce any orders as to costs, return of exhibits, etc.

14 Sentencing

14.1 Introduction

At the end of a trial, after you have heard and considered all the relevant evidence, you may sentence the offender to an appropriate sentence without delay if straightforward or adjourn the case to make inquiries and receive reports as required.

"Sentence" includes an order following conviction for which provision is made in Division 15.3 of the Crimes Act 2016 or in Motor Traffic Act 2014: s 2 CPA. .

Remember that a person charged and found guilty of an offence has the right to be sentenced to a punishment that is appropriate to the circumstances of the offending.

Both the District and Supreme Court may pass any sentence (and combine any two or more of the sentences) and make any order, authorised by law under the Crimes Act 2016 or any other written law.

14.2 Jurisdiction

14.2.1 Jurisdiction for sentencing-District Court

ss 7, s 7A, and 8, 9 CPA

You must not exceed your sentencing jurisdiction.

The District Court may pass any sentence authorized by the Crimes Act 2016 or in any other written law except for:

- a sentence of death
- a term of imprisonment exceeding five years in respect of any one offence
- a fine in an amount exceeding $50,000 in respect of any one offence
- any written law which expressly provides that the District Court has no jurisdiction; or the Supreme Court has the original jurisdiction over the criminal cause or matter: s 7 CPA
- any person who has, on at least 2 previous occasions been convicted of any sexual offence (whether similar or not) shall be declared a habitual sexual offender and shall be sentenced to life imprisonment without eligibility for parole: s 7A CPA.

You may pass any lawful sentence combining any two or more of the sentences which the District Court is authorised by law to pass, subject to the provisions of the Crimes Act 2016 and of any other written law: s 8(1) CPA.

In determining the extent of the jurisdiction of the District Court under section 7 of this Act, any term of imprisonment which is, or may be imposed in default of payment of a fine, costs or compensation shall be deemed not to be a sentence of imprisonment passed in respect of the offence for which the fine was imposed: s 8(2) CPA.

Where a person is convicted at one trial of two or more offences you must pass sentence separately in respect of each offence. If a sentence of imprisonment is passed for either of these offences, the sentences shall run consecutively in such order as the Court directs, unless that Court directs that they run concurrently: s 9(1) and (2) CPA.

The maximum aggregate sentences of imprisonment and fine which you may impose on any one person at trial are:

- imprisonment for 10 years
- fines up to $75,000 dollars in total: s 9(3) CPA.

For deciding if there is a right of appeal, the aggregate of fines imposed on one person at one trial shall be deemed to be a single sentence: s 9(4) CPA.

14.2.3 Lay magistrates

s 6 DCA

A lay magistrate is any magistrate other than the Resident Magistrate. Lay magistrates have jurisdiction to hear and determine bail applications for offences for which the maximum term of imprisonment is 12 months, in which case the court should be composed of three lay magistrates. Lay magistrates also have jurisdiction to hear and determine family matters for which jurisdiction is vested in the District Court.

14.3 Sentencing principles

s 278 CA

Consider which of these sentencing purposes are relevant when deciding on an appropriate sentence:

- **Punishment** - the accused is adequately punished
- **Deterrence** - to prevent crime by deterring the offender and other people from committing similar offences
- **Rehabilitation** - change the defendant's behaviour so they do not reoffend
- **Protection** - to protect the community
- **Accountability** - of the defendant for their actions and to punish the offender for their criminal behaviour
- **Denunciation** - of criminal conduct
- **Reparation** -recognize harm to the victim and community

14.4 Sentencing discretion

ss 282 and 282A CA

If under this Act, an offender is liable to imprisonment for life or a stated term, you may still impose a sentence of imprisonment for a lesser term and likewise a lower amount for fines: s 282 CA.

> **Note:** This section does not limit any sentencing discretion you have otherwise. The level of sentence in each case is a matter for you to decide but it must be just and correct in principle. This requires you to balance:
>
> - the gravity of the offence, and
> - the needs of the society, and
> - an expedient and just disposal of the case.

In determining the final term of imprisonment, you must not discount any period served in remand pending or prior to a trial, for offences under Part 7 of the Crimes Act 2016 (Sexual offences): s 282A CA.

It is important to ensure that sentences are consistent, otherwise this leads to individual injustice. A means of ensuring consistency is to seek continuity in the approach to sentencing.

On sentencing, either the accused or counsel may make submissions, but not both.

14.4.1 General sentencing considerations

s 279 CA

Although, there is no set or fixed formula in applying the principles, you may have to consider and assess the following factors when selecting the most appropriate penalty or sentence:

- the purpose of the legislation
- the nature and circumstances of the offence
- the personal circumstances of the offender including their character, antecedents, age, means, physical or mental condition
- the welfare of the community
- any other offences and if the offence forms part of a course of conduct
- any injury, loss or damage resulting from the offence
- the personal circumstances, effect of the offence of any victim (any victim impact statement available)
- the degree to which the person has shown remorse by making reparations for any injury, loss or damage resulting from the offence or in another way
- if the person pleaded guilty

- the degree to which the person cooperated in the investigation of the offence
- the deterrent effect of any sentence or order may have
- ensuring that the person is adequately punished for the offence
- the prospects of the person's rehabilitation
- the effect that any sentence may have on any of the person's family or dependants
- if the offence was committed by an adult in front of a child (other than another offender or a victim of the offence)—those circumstances.

14.5 Structured approach to sentencing

14.5.1 Starting point

Identify the range within which sentences have been imposed for that offence.

The court may also find the suitable range by referring to:

- guideline judgments from superior Courts
- sentences from other Magistrates' Courts for the same offence
- sentences for similar offences from overseas jurisdictions.

Then consider 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 personal circumstances? Likewise, are there any good personal circumstances that would justify decreasing the start sentence? Be specific on how these affect the starting sentence.

The statutory maximum sentence is usually specified in the Crimes Act 2016 or the relevant legislation.

14.5.2 Aggravating and mitigating factors

The Crimes Act 2016 may set out aggravating circumstances for specific offences. For example, see section 79, for assault offences:

- is, or pretends to be, armed with an offensive weapon,
- is in company with 1 or more people,
- intends to commit another offence,
- intends to avoid the lawful arrest or detention of any person.

Aggravating factors include:

- the use of violence,
- persistent offending,

- serious damage to property,
- age and vulnerability of victim,
- value of property stolen,
- premeditated acts,
- danger to the public, and
- prevalence.

Mitigating factors include:

- (early) guilty plea (but you cannot penalise an offender for exercising their right to plead not guilty),
- genuine remorse and steps taken to restore the damage or make reparation payments to the victim(s) for the harm done,
- reconciliation (having made peace with/friendly relationships with the victims),
- young offender,
- first offender,
- provocation, and
- no harm or minimal harm to person or property.

There are also factors that float between these two categories, depending on the circumstances. In these cases, you need to evaluate their weight to decide on an appropriate sentence.

Factors in between include:

- previous good character
- family ties and custom ties
- the defendant's responsible position
- the defendant played a minor role.

14.5.3 Scaling to the appropriate sentence

Scaling means increasing the sentence to reflect aggravating circumstances, and decreasing it to reflect mitigating circumstances. This involves your own moral judgement, and you may use your own knowledge and experience of affairs in deciding the issue.

Any discounts you give for certain factors are at your discretion but must be reasonable and justifiable. You may consider reasonable reductions for the following:

- time spent in custody (if allowed by law),
- punishment meted out by other tribunals,
- traditional or customary penalties, and
- guilty plea.

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, eg: if guilty pleas one to two days before trial then perhaps only 10% to 15%. State this percentage for a guilty plea.

14.5.4 Totality principle

This is the final analysis stage of sentencing. When impose a sentence, the court must review the aggregate to ensure that the overall effect is just.

The totality principle requires to look at the overall sentence and ask whether the total sentence reflects the totality of the offending. Some obvious considerations include:

- multiple counts,
- serving prisoner,
- concurrent /consecutive terms,
- avoiding excessive lengths, and
- suspending the sentence.

If conduct constitutes an offence under 2 or more Acts or 2 or more provisions under the same Act, the defendant may be prosecuted under any of those Acts or provisions but is not liable to be punished more than once for the same conduct: s 272 CA.

Having considered all the relevant mitigating and aggravating factors of the offending and the offender, and after determining the overall sentencing principles that you wish to apply.
You will then have a final sentence. Ask yourself if this is a fair sentence overall for this offence and this offender?

It is good practice to give reasons for all decisions, and this is particularly important if the sentence you arrive at is substantially more or less than the normal sentence.

See *Jeremiah v Republic* [2018] NRCA 1; Criminal Appeal Case 1 of 2018 (7 December 2018).

14.6 Sentencing checklist

Sentencing is one of the most difficult areas of judicial discretion, so it is important to develop a systematic method of working. The following checklist provides a working guide and is not exhaustive:

14.6.1 Sentencing checklist

Ensure that you have the fullest information:

- ☐ full summary of facts;
- ☐ latest record of previous convictions;
- ☐ any special reports if applicable (welfare/medical/psychiatrist).

Do not sentence on important disputed facts:

- ☐ if the dispute is over material issues, arrange a hearing of facts for sentencing purposes;
- ☐ if the offender declines to have such a hearing, record this before proceeding further.

Analyse the information relating to the offence:

- ☐ the nature of the charge including the maximum penalty;
- ☐ the gravity of the particular facts of the case;
- ☐ aggravating factors;
- ☐ mitigating factors.

Consider the views of the victims and any public concerns as a reflection of the final decision taken:

- ☐ account for any specific provisions relevant to the offender (juvenile/elderly/ handicapped).

Account for principles or guidelines issued by superior courts:

- ☐ guideline judgments;
- ☐ circular memoranda issued by the Chief Justice.

Determine which sentencing principle(s) apply/ies:

- ☐ deterrence/prevention/rehabilitation/punishment/restoration.

Account for any mitigating or aggravating factors in respect of the offender and the offending.

Consider the totality of sentence imposed.

Deliver the sentence, with reasons. Using the Sentencing Format below will ensure adequate justification for the sentence.

14.7 Sentencing format

It is suggested that you use the format following when delivering sentence:

- ☐ The charge.
- ☐ The facts of the particular offending:
- ☐ If there was a defended hearing, refer to the evidence.
- ☐ If there was a guilty plea, refer to the prosecution summary of facts.
- ☐ The defence submissions or comments on the facts of the offending.
- ☐ Comment on the offence, if relevant:
- ☐ The seriousness of the particular type of offending.
- ☐ Whether it is a prevalent offence.
- ☐ Its impact upon the victim.
- ☐ Note any statutory indications as to the type of penalty to be imposed.
- ☐ Identify the tariff and pick the starting point.
- ☐ The personal circumstances of the offender.
- ☐ Note any prior offending if relevant.
- ☐ How many offences?
- ☐ How serious?
- ☐ When committed?
- ☐ Of the same kind?
- ☐ Is there a current suspended sentence?
- ☐ The offender's response to sentences in the past.
- ☐ Defence submission and any evidence called by the defence.
- ☐ The contents of any reports submitted to the Court
- ☐ Your views summarising the mitigating and aggravating features.
- ☐ Scale, then consider the totality of the sentence.
- ☐ Pronounce sentence.

14.8 Types of sentence

s 277 CA

If you find a person guilty of an offence, you may, (subject to any particular provision for that offence and this Act) do any of the following:

- record a conviction and order that the offender serve a term of imprisonment
- with or without recording a conviction, order the offender to pay a fine
- record a conviction and order the discharge of the offender (and s 190(4) CPA)
- without recording a conviction, order the dismissal of the charge for the offence
- impose any other sentence or make any order that is authorised by this or any other law of Nauru.

> **Note**: Nauru does not recognise any form of corporal punishment.

14.8.1 Discharge of accused

s 171 CPA

Where, at the close of the case for the prosecution or after receiving any evidence in defence, you consider that the evidence against the accused is not sufficient to put the accused on trial, you must order the accused to be discharged as to the charge(s) under inquiry: s 201 CPA.

Such discharge is not be a bar to any subsequent charge in respect of the same facts.

You may still investigate any other charge(s) that the accused may have been summoned or otherwise brought before you or which it may appear that the accused has committed.

14.8.2 Quashing of information

s 192 CPA

Where any information does not state, and cannot by any alteration under section 191, be made to state, any offence, it shall be quashed and the defendant shall be discharged.

See the chapter on Defended Hearings to find out more about amending an information.

14.8.3 Imprisonment

ss 274, 280 and 282 CA, s 9 CPA

A sentence of imprisonment may be imposed on a person only if you think that any of the following factors apply:

- the person has shown a tendency to violence towards other people

- the person is likely to commit a serious offence if allowed to go at large
- the person has previously been convicted of an offence punishable by imprisonment
- any other sentence would be inappropriate due to the gravity or circumstances of the offence
- the protection of the community requires this
- a sentence of imprisonment is necessary to give proper effect to sections 278 and 279 CA (above): s 280 CA.

You must impose a definite term of imprisonment that is not more than the maximum term given in the statute creating the offence and your maximum jurisdiction.
But you may impose a sentence of imprisonment that is less than the maximum penalty: s 282(2) CA.

An offender liable to imprisonment maybe sentenced to pay a fine up to $3000 in addition to or instead of imprisonment: s 274 CA.

Sentences of imprisonment for two or more offences should run consecutively, unless the court orders the sentences to be concurrent: s 9(2) CPA. The maximum aggregate sentences of imprisonment and fine which may be imposed by the District Court on any one person at one trial are:

(a) imprisonment for 10 years; and

(b) fines totalling $75,000.

Ideally, imprisonment should only be considered when no other sentence is appropriate.

14.8.4 Fines

ss 275, 281 CA

Subject to sections 278 (sentencing purposes) and 279 (general principles), if you decide to fine a person you must take into account (you may still fine even if you cannot find these matters out):

- the means of the person
- the extent to which payment of the fine will be a burden on the person: s 281 CA.

As a penalty, fines are sometimes regarded as a sufficient or convenient punishment for less serious offences. Also they can be regarded as an appropriate penalty for offences that are criminal more in form than in nature.

You have a discretion to fix a fine, but such fine cannot be more than the stipulated maximum. Of course, lesser fines than the maximum may be imposed: s 282(3) CA.

If there is no stated maximum penalty for an offence, the fine you impose should not be excessive and must be within your sentencing jurisdiction.

You may order a term of imprisonment if an offender defaults on payment of a fine for a term not exceeding the lower of the following:

- 1 day for each 80 cents of the fine remaining unpaid; or
- 6 months: s 275 CA.

14.8.5 Compensation

s 121 and 123 CPA

You may order the whole or any part of any fine imposed or money in the possession of any person convicted of an offence to be put towards:

- compensation to any person injured by their offending in addition to or in substitution for any other punishment or to offset that compensation
- compensation to any person for any loss they sustained from the offending for the restitution or disposal of any property or items
- offsetting the costs or expenses properly incurred in the prosecution: s 121 CPA.

In deciding if you should impose a fine and how much, you may consider if an order for compensation is appropriate but also the means of the accused to pay: s 121(2) CPA.

If a case is on appeal no compensation payment shall be made before the presentation period for the appeal has elapsed or, if an appeal is presented, before it is decided: s 121(3) CPA.

You may promote reconciliation and facilitate an amicable settlement of all proceedings for common assault or any other offence where a fine or sentence of imprisonment of up to one year may be imposed, and order the proceedings to be stayed or ended: s 123 CPA.

14.8.6 Probation

ss 7-17 Criminal Justice Act (CJA)

Where a person is convicted of an offence punishable by imprisonment you may, instead of sentencing the accused to imprisonment, make a probation order:

- releasing the person on probation for a period between one and three years
- for a period, up to one year after their release from custody, if the penalty is imprisonment for less than one year: s 7(1) CJA.

You may also sentence that person to pay a fine authorised by law: s 7(2) CJA.

You may also make a probation order for up to one year (at the same time as a community service order), starting on either the start or finish that community service order: s 8 CJA.

The Registrar of the Court must notify the Secretary for Justice.

Every probationer should be under the supervision of a probation officer during their probation period: s 10 CJA.

Section 11 sets out the mandatory conditions of a probation order.

A probationer who breaches their probation is guilty of an offence and is liable to imprisonment for a term not exceeding three months or to a fine not exceeding $100: s 15(1) CJA.

You may in addition to or instead of sentencing the probationer:

- extend the probation period for a probation order under section 7 for up to 3 years after the starting date; or under section 8 for up to 1 year after their community service expires
- vary or add any conditions of their probation order
- if an application is made under section 16 - sentence the probationer accordingly: s 15(2) CJA.

A probation officer may apply to you to sentence the defendant for the offence for which they were released on probation where they are:

- convicted of another offence committed during the period of probation; or
- charged with a breach of their probation order: s 16 CJA.

If the defendant is sentenced for an offence of imprisonment for:

- life or for a term of one year or more, their probation order expires: s 17(1) CJA;
- less than one year, their probation continues while they are in custody, and on their release, they stay on probation for the remainder of that time, unless discharged sooner: s 17(2) CJA.

14.8.7 Community service

ss 19-27 CJA

Section 19 CJA establishes or revokes community service groups.

You must not make a community service order in respect of any person until you have considered a probation officer's report on their character, personal history and any other relevant circumstances: s 24(1) CJA.

A community service order is not invalid even if such a report was not made or considered by the court but the prosecutor or their legal counsel may at any time apply to have the sentence reviewed: s 24(2) and (3) CJA.

You may make a community service order (and/or impose a fine or other monetary penalty but no other sentence) for a person aged 13 years of age or more who is found guilty of an offence punishable by imprisonment (whether or not convicted) for a period up to 12 months: s 22(1)-(3) CJA.

You may also make a community service order (subject to section 16) in any case where an order for the imprisonment of any person for non-payment of a fine may be imposed (even if not punishable by imprisonment) and after considering a probation officer's report, for a period not exceeding 12 months: s 23(1) CJA.

On doing so, the remainder of the offender's original sentence shall be deemed to be cancelled in respect of any part of the fine unpaid when the order was made: s 23(3) CJA.

The offender may apply to vary, suspend, or cancel any such order made under section 23, within 7 days of the service of the order on them. Where a court receives suchan application, the order shall be suspended until final determination of the application has been made by the Court: s 23(5) and (6) CJA.

Section 26 sets out the mandatory conditions of work under a community service order.

The offender, the Chief Controller, or a probation officer (if a probation order applies concurrently) may apply to vary or cancel a community service order at any time. You may vary or cancel the community service order if there has been a change of circumstances since the order was made or, cancel the order if you think that continuing the order is no longer necessary in the interests of the community or the offender: s 27(1)-(2) CJA.

14.8.8 Power to award costs

s 32 DCA

You have the discretion to award such costs in a cause or matter you think fit and just.

14.8.9 Appeals to the Supreme Court from the District Court

s 38 SCA

The Supreme Court Act 2018 provides for appeals from the District Court to the High Court in criminal cases against conviction or sentence or both: s 38 SCA.

See the chapter on Appeals to find out more about appeals in criminal cases.

15 Appeals/revisions/cases stated

15.1 Introduction

Part 10 of the Supreme Court Act 2018 provides for appeals from the District Court in criminal causes and matters.

15.2 Appeals to the Supreme Court from the District Court

s 38 SCA

The Supreme Court Act provides for appeals from the District Court to the Supreme Court in criminal cases against conviction or sentence or both: s 38 SCA.

The Director of Public Prosecutions may appeal any decisions or orders of the District Court to acquit an accused person; against the sentence or any order to pay costs or compensation: s 38 SCA.

An appeal to the Supreme Court may be on a question of law, facts, or of mixed law and facts. For an appeal, the extent of a sentence is deemed to be a matter of law and the Director of Public Prosecutions (DPP) is deemed to be a party to any criminal matter carried on by a public prosecutor.

15.3 Appeal to be by way of notice of appeal

ss 41 and 42 SCA

A person who seeks to appeal a judgment, decision or order of the District Court shall file a notice of appeal in the Supreme Court or a summons for leave to appeal if they are seeking leave to appeal: s 41 SCA.

Subject to section 55, an appellant may not allege or give evidence on, any ground of appeal not included in the notice of appeal or in the additional grounds at the appeal hearing without the prior leave of the Supreme Court.

A notice of appeal must contain concise:

- grounds upon which it is alleged that the District Court has erred; and
- relief sought from the Supreme Court: s 43(1) SCA.

If two or more persons have been jointly tried and convicted and their interests do not conflict, a notice of appeal may be presented on their behalf and the Supreme Court may hear the appeals separately or together as it deems just: s 43(2) SCA.

If leave to appeal is required, the grant of leave to appeal must be endorsed on the notice of appeal: s 43(3) SCA.

15.4 Respondent's notice

ss 43 and 44 SCA

If the Director of Public Prosecutions (the respondent) wishes to appeal the judgment, decision or order of the District Court, they must give notice to that effect if they did not otherwise appeal themselves and file it within 14 days of the service of the notice of appeal to the respondent.

The respondent's notice must specify:

- the grounds of that contention and the precise form of the order which they are claiming,
- if the grounds are not those relied upon by the Supreme Court, they must give notice to that effect specifying the grounds of that contention: s 43 SCA.

If they fail to specify those grounds in the notice, then the respondent will not be able to raise those grounds or any other relief claimed.

Also the provisions relating to the notice of appeal apply to the respondent's notice: s 44 SCA.

15.5 Amendment to the notice of appeal and respondent's notice

s 45 SCA

A notice of appeal or respondent's notice by way of supplementary notice of appeal or respondent's notice may be amended and served:

- without the leave of the Supreme Court at any time before 14 days of the date fixed for the hearing of the appeal; or
- with the leave of the Supreme Court at any time less than 14 days of the date fixed for the hearing of the appeal.

15.6 Who may prepare the notice of appeal

s 46 SCA

If the appellant is not legally represented the notice of appeal may be prepared:

- by the Office of the Public Legal Defender,
- if in custody, under the supervision of the Chief Correctional Officer and filed in the Supreme Court.

In preparing the appeal, they may review the original record of the proceedings at such time as the Registrar or the Resident Magistrate may allow.

15.7 Extension of time

s 47 SCA

The Supreme Court may extend the time for filing a notice of appeal beyond the 21 days if:

- if the intended appellant is able to show good cause for such an order to be granted;
- where the legal representative engaged by the appellant was not present at the District Court hearing and requires further time to prepare the notice of appeal; or
- where there is an error of law.

15.8 Bail and suspension of sentence pending appeal

s 48 SCA

On notice of an appeal the Supreme Court under the relevant provisions of the Bail Act 2018:

- grants the appellant bail pending the appeal with or without sureties (which is not included in the time to be served for any custodial sentence); or
- refuses bail but the appellant may, at their own request, be treated as if they were a prisoner awaiting trial.

See the chapter on Bail to find out more about bail considerations.

15.9 Suspension of order for restoration or payment of compensation and expenses

s 49 SCA

Any order of the District Court for compensation, restoring property to any person, or re-vesting of any property to the original owner of any stolen property will be stayed until the expiry of 21 days from the date of the conviction or where a notice of appeal or leave to appeal is given within 14 days after the date of the conviction until the determination of the appeal.

If on appeal, the judgment, decision or order of the District Court is affirmed by the Supreme Court, they will take immediate effect.

If on appeal the judgment, decision or order of the District Court is reversed or varied, the Supreme Court shall make appropriate orders for:

- the payment of compensation
- the restoration of any property to any person; or
- the re-vesting of any property to the original owner of any stolen property by operation of any written law.

15.10 Notice of hearing

s 50 SCA

The Registrar must:

- enter the appeal for hearing within 42 days of the notice of appeal being filed and record of the proceedings provided by the District Court; and
- serve on the parties a notice setting out the date and time of the hearing of the appeal.

15.11 Costs

s 51 SCA

No costs shall be awarded by the Supreme Court for any criminal cause or matter on appeal.

15.12 Discontinuance of appeal

s 52 SCA

An appellant may discontinue their appeal at any time before the date of the hearing by giving written notice to the Registrar who will send the respondent a copy of the notice of discontinuance. The District Court may proceed to enforce the decision appealed from.

15.13 Powers of the Supreme Court on appeal in ordinary cases

ss 53 and 58 SCA

At the hearing of an appeal the Supreme Court shall hear the appellant or their legal representative and the respondent or their legal representative.

An appellant, who is in custody, is entitled to be present at the hearing of the appeal if they wish: s 58 SCA.

For an appeal against a conviction, the Supreme Court shall allow the appeal and set aside the conviction if:

- the conviction in all the circumstances of the case is inconsistent with the finding of facts;
- the judgment, decision or order was a consequence of an error of law; or
- a substantial miscarriage of justice has occurred: s 53(2) SCA.

If the appeal is successful, the Supreme Court must quash the conviction and either:

- direct a judgment and verdict of acquittal to be entered; or
- where the interest of justice requires, remit the cause or matter to the District Court for retrial s 53(3) SCA.

For an appeal against sentence, if the Supreme Court determines that a different sentence ought to have been passed, the Supreme Court shall:

- quash the sentence passed at the trial; and
- pass such other sentence in substitution: s 53(4) SCA.

The Supreme Court on an appeal against acquittal shall allow the appeal if it deems that the verdict should be set aside on the ground that:

a) the proven facts from the District Court trial establish the offence charged or any other offence of which the accused person could have been convicted on the trial of that charge;

b) on the evidence before it the District Court could not properly have decided that on those facts that any such offence had not been proved;

c) the District Court wrongly excluded prosecution evidence which, if admitted and believed by the Court, would have been likely to result in the Court finding facts proved as is referred to in paragraph (a);

d) the District Court wrongly decided at the close of the case for the prosecution that a case had not been made against the respondent sufficiently to require them to make a defence in respect of the charge or any count of the charge; or

e) the District Court wrongly decided that the charge was defective and did not record its findings of the facts.

In any other case it shall dismiss the appeal: s 53(5) SCA.

The Supreme Court must where the appeal is allowed under:

- subsection (5)(a) or (b), enter a conviction on the charge that has been proved (that also was available in the District Court), unless it is proper for the charge to be dismissed or the accused person to be discharged under any written law: s 53(6) SCA
- subsection (5) (c), order that a new trial be held before the District Court: s 53(7) SCA
- subsection (5) (d) or (e), order if the trial was not commenced, that the charge be tried or if the trial was commenced, that the trial be continued and completed in the District Court. If for any reason the Resident Magistrate or any of the magistrates who presided at the trial are not available for the continued trial, order a new trial in the District Court: s 53(8) SCA.

Where under subsection (5) the Supreme Court has set aside a verdict of acquittal and entered a conviction, it must sentence on the person and such sentence is deemed to have been passed by the District Court, with no further right of appeal: s 53(9) SCA.

15.14 Powers of the Supreme Court on appeal in special cases

s 54 SCA

The Supreme Court may where they determine in an appeal that a person:

- should not have been properly convicted on some counts or part of the charge but has been convicted properly on other counts or parts, for the former counts or parts of the charge, either affirm the sentence passed by the District Court or substitute another sentence: s 54(1) SCA,
- is convicted of an offence but based on the findings of the District Court the Supreme Court is satisfied that the facts prove them guilty of another offence, substitute a conviction for that other offence and pass sentence accordingly: s 54(2) SCA.

15.15 Powers of the Supreme Court to adduce fresh evidence

s 55 SCA
The Supreme Court in the interests of justice may order:

- production of any document, exhibit or any necessary matters connected to the proceedings
- any witnesses who have been compellable witnesses at the trial:
  - to attend and be examined whether they were called at the trial; or
  - to be examined according to the rules of the Court or if none, the Supreme Court may direct the Resident Magistrate to take depositions of that evidence
- receive the evidence of any witness who is a competent but not compellable witness, including their spouse if the appellant applies, in cases where the evidence of the spouse could not have been given at the trial except on such application
- the referral of any question requiring thorough examination of documents, accounts or any scientific or local investigation, to a special commissioner appointed by the Supreme Court and to act upon the report of any such commissioner as far as they think fit to adopt it
- any person with special expert knowledge to act as an assessor to the Supreme Court where it appears to the Supreme Court that special knowledge is required.

The Supreme Court shall not increase any sentence by reason of or in consideration of any evidence adduced before it under this section but was not adduced at the trial.

15.16 No appeal on point of form or matter of variance unless raised in the District Court

s 56 SCA

No District Court finding, sentence or order shall be reversed or altered on appeal or revision, (except if the appellant was not legally represented at the District Court hearing) because of:

- any objection to any Information, complaint, charge, summons or warrant for any alleged defect in the cause or matter or substance or form; or
- any variance between such Information, complaint, charge, summons or warrant and the evidence adduced, unless such objection was raised before the District Court and the appellant had been deceived or misled by such variance as the District Court refused to adjourn the hearing.

15.17 Supreme Court order on appeal to be certified to the District Court

s 57 SCA

The Registrar must certify the Supreme Court's judgment, decision or order to the District Court who then makes and if necessary, enforces the same judgment, decision or order.

15.18 Revisionary power of the Supreme Court

ss 59-64 SCA
The Supreme Court may call for and examine the record of any District Court criminal matter to review the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the District Court: s 59 SCA.

The Resident Magistrate may do the same for any criminal matter of the District Court constituted by three lay magistrates for the same purposes. If the Resident Magistrate thinks that any finding, sentence or order is illegal or improper or the proceedings are irregular, they must forward the record, with their remarks to the Supreme Court: s 60 SCA.

No party may apply for proceedings by way of revision nor be heard personally or by a legal representative before the Supreme Court during this process of revision s: s 61(1) & (5) SCA.
But the Supreme Court may require any party personally or by a legal representative to be heard: s 62(2) SCA.

All such proceedings before the Supreme Court for its revisional jurisdiction may be heard and any judgment, decision or order may be made or passed by a Judge sitting in chambers: s 63(1) SCA.

For section 62(2), the Supreme Court may sit in an open court: s 63(2) SCA.

The Supreme Court may:

- in the case of a conviction, exercise any of the powers conferred on it as an appellate court and may increase the sentence; and

- in the case of any other order, other than an order of acquittal, alter or reverse such order: s 61(1) SCA.

Subject to section 62, no order shall be made to the prejudice of an accused unless they have had an opportunity of being heard either personally or by a legal representative in their defence: s 61(2) SCA.

Where the Supreme Court quashes the sentence passed by the District Court and passes sentence, such sentence shall, for the purposes of this Act, be deemed to be a sentence passed by the District Court, save that no further appeal shall lie thereon to the Supreme Court: s 61(3) SCA. However, section 61 does not authorise the Supreme Court to convert a finding of acquittal into one of conviction: s 61(4) SCA.

Where the record of any criminal cause or matter has been called for under section 59, or sent to the Supreme Court under section 60, the Resident Magistrate, a Judge or the Registrar may, in the interests of justice:

- suspend any sentence imposed or order made in that cause or matter upon such terms and for any period they think fit;
- where a sentence of imprisonment is suspended, order any person be admitted to bail, with or without sureties; and
- in any such case the time during which that person is at large after being so released shall be excluded in computing the term of the sentence: s 61(6) SCA.

When Supreme Court makes a revision, the Registrar shall certify its judgment, decision or order to the District Court to make such orders to comply with and take any necessary steps to enforce the Supreme Court's judgment, decision or order: s 64(1) and (2) SCA.

16 Juvenile justice

16.1 Introduction

The Child Protection and Welfare Act 2016 (CPWA) provides for the welfare, care and protection of all children in Nauru and for the enforcement of their rights of children in compliance with international conventions, norms and standards, while taking account of Nauruan culture, traditions and values.

For any law which relates to the rights of children, or which provides for processes relevant to dealing with children in any manner and in any context, if there is any inconsistency between the CPWA and that other law, the CPWA takes precedence: s 6 CPWA.

16.2 Definitions

A child is legally defined under the CPWA as any person being below 18 years of age: s 3 CPWA.

The use of terms such as "infant", "young person" and any other expression referable to a child is to be read as a reference to "child" or "children", as the case may be.

There is currently no Children's Court but if one is established, it will be presided over by the Resident Magistrate. When children are involved in criminal matters, the court is closed and the principles applicable for a child accused or witness are applied, including the provisions of sections 54 and 55 of the CPWA.

16.3 Guiding principles

s 5 CPWA

The core principle for administering this Act is that the safety, wellbeing and best interests of a child are paramount. This Act must be enforced in accordance with Nauruan tradition, culture and community values, except where in conflict with the rights of children provided in this Act.

When interpreting or applying this Act, and when exercising any power, duty or function related to the protection of a child or the promotion of the welfare of children, the following principles apply:

1 a child has a right to be protected from harm or risk of harm;

2 a child's family has the primary responsibility for the child's upbringing, protection and development;

3 the preferred way of ensuring a child's safety and wellbeing is through supporting the child's family;

4 if a child does not have a parent who is able and willing to protect the child, the Government is responsible for protecting the child;

5 in protecting a child, the Government should only take action that is warranted in the circumstances

6 if a child is removed from the child's family, support should be given to the child and their family to allow the child to return to the child's family, if that is in the child's best interests;

7 if a child does not have a parent who is able and willing to give the child ongoing protection in the foreseeable future, the child should have long-term alternative care;

8 if a child is removed from the child's family, as a first option, the child should be placed in the care of relatives as is consistent with Nauruan custom and tradition;

9 if a child is removed from the child's family, the child should be placed with the child's siblings, to the extent possible;

10 a child should only be placed in the care of a parent or other person who has the capacity and is willing to care for the child (with assistance or support);

11 a child should have stable living arrangements that provide:

11.1 for a stable connection with the child's family and community, to the extent that is in the child's best interests; and

11.2 for the child's developmental, educational, emotional, spiritual, health, intellectual and physical needs to be met;

12 a child should be able to maintain relationships with the child's parents and relatives, if appropriate for the child;

13 a child should be able to know, explore and maintain the child's identity and values, including their cultural, ethnic and religious identity and values;

14 a delay in making a decision in relation to a child should be avoided, unless appropriate for the child.

16.4 Investigations with children

s 54 CPWA

Whenever an investigation or inquiry is undertaken in relation to a child by a police officer or an authorised officer, or person (despite any other laws to the contrary) they must:

1 consider the best interests of the child at all stages of the investigation or inquiry;

2 recognise and protect the rights and interests of the child at all stages of the justice process, and reduce trauma and secondary traumatisation;

3 promptly notify and refer the matter to other relevant agencies to promote and protect the welfare of the child, and their rights;

4 take any action to permit the child to fully state their views, take into account the child's views in accordance with their age and maturity, and respect the child's right to privacy;

5 use child-friendly interview environments and interview techniques

6 apply special procedures to reduce the number and length of interviews for children;

7 provide special facilities and apply appropriate processes where the child has a disability to ensure the other requirements are met under this section;

8 allow a parent, guardian, legal representative or other appropriate support person agreed to by the child, to be present with them at all stages of the investigation and trial proceedings;

9 ensure children are protected from direct confrontation with persons accused of violating their rights, and not be subjected to hostile, insensitive or repetitive questioning or interrogation;

10 conduct all investigations and court proceedings expeditiously;

11 use investigators who have received special training in relation to dealing with cases involving children in the process, if available: s 54 CPWA.

16.5 Court proceedings with children

s 55 CPWA

When cross-examination of the child is conducted, you must be sensitive to the child's special vulnerability in deciding if you should allow the questions to be asked, as under the UN Convention of the Rights of the Child, you must give primary consideration to the interests of children.

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

Whenever any court proceedings are undertaken in relation to a child (despite any other laws to the contrary) they must:

1 prioritize and expedite the hearing of the cases as far as practicable;

2 apply and enforce measures to protect the child's privacy, including closed court proceedings and bans on publishing the child's identity or any information leading to identifying the child;

3 applied and implement measures to protect the safety of children and their families, and to prevent intimidation and retaliation;

4 provide appropriate facilities and support provided to children with disabilities;

5 allow a parent, guardian, legal representative or other appropriate support person agreed to by the child, to be present with them at all stages of the court proceedings;

6 promote and apply child-friendly court procedures, including alternative arrangements for giving testimony such as the use of screens, video-taped evidence and closed circuit television;

7 provide social and legal counselling where appropriate, and give children adequate information concerning the purpose and effect of the court processes;

8 give children the right to effectively participate in any proceedings that affect them, to express their views, and to have those views given due weight;

9 ensure that police officers, prosecutors, lawyers and court officers receive specialised training in dealing with cases involving children;

10 not require any proof of resistance to establish non-consent in sexual assault where the victim is a child;

11 not require corroboration of a child's evidence in criminal proceedings for sexual assault;

12 not use prior sexual conduct to establish non-consent in sexual assault proceedings involving a child;

13 allow automatically any expert evidence regarding patterns of disclosure or behaviour of children in cases involving sexual abuse;

14 remove all discriminatory provisions or processes applying to children: s 55 CPWA.

All rules of court are to be read and applied subject to the above requirements, and necessary modifications to make such rules consistent with this section made as soon as is practicable.

16.6 Sentencing of juvenile offenders

Section 48 CPWA states that in any criminal proceeding against a child, you must not impose a sentence of death or imprisonment for life under any Act, and a sentence of imprisonment is only imposed as a last resort.

Below are some useful summaries of sentencing decisions involving children.

- *Republic of Nauru v AD* (Juvenile) [2019] NRSC 1; Criminal Case 19 of 2018 (2 February 2019)

A juvenile offender of 16 years of age had pleaded guilty to the offence of indecent acts against a child under 16 years old under s 117 of the Crimes Act. The victim his younger brother, was 12 years old.

Sentencing in this case requires a balancing act of ss 277 – 280 of the Crimes Act including mitigating factors, such as the defendant's age and Article 37(b) Convention on the Rights of the Child with aggravating factors for the victim and similar previous offending.

> The Supreme Court noted (amongst other matters) that in sentencing the defendant the following factors applied:[57] "The court is mindful in arriving at this conclusion with the guiding principles set out under Article 37(b) of the UN Convention on the Rights of the Child and reflected under section 48 of Nauru's Child Protection and Welfare Act 2016 that, inter alia, states, at section 48(b), that in criminal proceedings against a child:
>
> "(b) a sentence of imprisonment may only be imposed against a child as a sentencing option of the last resort."
>
> Decision: [58] "It is clear to the court that there is no other option available to it, other than impose a term of imprisonment as the only suitable punishment. In terms of the sentencing considerations for imprisonment under section 280, the defendant clearly is showing a propensity to commit similar offences in the future if he is released into the community."
>
> "[61] In all the circumstances, I am satisfied that a sentence of 18 months of imprisonment is the most appropriate in this case."

- *Republic of Nauru v Kepae* [2019] NRDC 2; Criminal Case 91 of 2017 (2 May 2019)

This matter included sentencing of a juvenile defendant in the District Court who pleaded guilty to:

- one count of Burglary contrary to section 419(1) of the Criminal Code 1899; and
- one count of Theft contrary to section 398 and IV of the Criminal Code of Queensland 1899 (Adopted).

The charge of burglary carries a maximum sentence of 14 years imprisonment and the second count carries a maximum sentence of 7 years imprisonment.

In this case there was an unexplained pre-trial delay of 2 years before the charges were laid and post-trial delay of 16 months before the defendant appeared in court for the first time.

Relevant legal principles

The Resident Magistrate cited the Victorian Court of Appeal in *R v Mills* [1998] 4 VR 235, page 241:

1. Youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises.
2. In the case of a youthful offender rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualized treatment focusing on rehabilitation is preferred. (Rehabilitation benefits the community as well as the offender.)
3. A youthful offender is not to be sent to an adult prison if such a disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality. The benchmark for what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender; and where an offender has not previously been incarcerated, a shorter period of imprisonment may be justified.
4. Section 48(b) of the Child Welfare and Protection Act provides "a sentence of imprisonment may only be imposed against a child as a sentencing option of last resort."

Decision

> "[23] I consider because you were a child of 15 years at the time of the offending, that a custodial sentence is not necessary. You are not employed and you are unlikely to be able to pay a fine. Because of the long delay, the court will have to exercise greater leniency than would otherwise."
> [24] I convict you of the offence charged and I sentence you to 1 years' probation for count 1 and 1 years' probation consecutive on count 2 under the Criminal Justice Act 1999."

16.7 Rights of the juvenile defendant

1 CRC- UN Convention on the Rights of the Child

2 Beijing Rules – UN Standard Minimum Rules for the Administration of Juvenile Justice

3 ICCPR – International Covenant on Civil and Political Rights

4 In addition to rights provided under the Constitution, juveniles charged with offences have further rights and protection under International Conventions.

These rights and protections include:

- the right to be presumed innocent until proven guilty according to law: Art 40(2)(b)(i) CRC;
- the right not to be compelled to give evidence or to confess to guilt: Art 40(2)(b) (iv) CRC;
- right to bail absolutely unless any of the adverse qualifications apply: s 4 Bail Act;
- the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment: Art 37(a) CRC;
- the right to have his or her privacy fully respected at all stages of the proceedings in order to avoid harm being caused to him or her by undue publicity or by process of labelling: Art 8 Beijing Rules;
- the right not to be deprived of his or her liberty unlawfully or arbitrarily: Art 37(b) CRC;
- the right not to be detained or deprived of personal liberty except with the consent of his or her parents or guardians, or upon an order made by the Court: Principle 16(3) Protection of All Persons under any form of Detention 1988;
- right not to have capital punishment or life imprisonment imposed on children/juveniles without possibility of release for offences committed by them: Art 37(a) CRC;
- the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time: Art 37(b) CRC;
- every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so: Art 37(c) CRC;
- every child deprived of his/her liberty shall have the right to prompt access to legal and other assistance: Art 37(d) CRC;
- when making decisions concerning children, the best interest of the child shall be a primary consideration: Art 3(1) CRC;
- whenever appropriate and desirable, other measures will be taken for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected: Art 40(2)(b) CRC;
- where juvenile offenders are concerned, the procedure shall be such so as to take account of their age and the desirability of promoting their rehabilitation: Art 14(4) ICCPR; and
- a variety of dispositions, such as care, guidance and supervision orders; counselling; probation foster care; education and vocational training programs; community work and other alternatives to institutional care should be considered by the Courts to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence: Art 40(3)(b) CRC.

17 Domestic Violence and Family Protection Act 2017

17.1 Introduction

The Domestic Violence and Family Protection Act 2017 (the "Act") came into force on 1 June 2017. The objectives of the Act include the following (s 3):

- Provide for the safety, protection and welfare of domestic violence victims,
- Prevent and reduce domestic violence incidents,
- Create measures for rehabilitation and family mediation, and
- Foster peaceful and lasting domestic relationships.

Part 6 of the Act creates duties for the following public office holders: health practitioners, police officers and Child Protection officers.

The Criminal Procedure Act 1972 applies to all proceedings under the Act (s 38).

17.2 Definitions

17.2.1 Domestic relationship

A domestic relationship under s 5 exists where:

- the parties are spouses or partners,
- the parties are family members,
- the parties normally share a household,
- one party is dependent on the other for regular support due to disability, illness or impairment, or
- the parties have a close personal relationship.

Having a landlord-tenant, or employer-employee, relationship does not count as sharing a household and therefore does not meet the definition of domestic relationship. Occupying a common dwelling house also is not sufficient to meet the definition of being in a domestic relationship.

In determining whether a domestic relationship exists, the court must consider the duration of the relationship and the nature and intensity of the relationship. This includes the amount of time spent together, the places where those involved ordinarily spend time together, and how that time is usually spent.

17.2.2 Domestic violence

Under s 6, domestic violence is defined by threats or acts of the following, against someone they are in a domestic relationship with:

- assault,

- coercive control,
- economic and financial abuse,
- sexual violence,
- stalking,
- damage to property, or
- consistently being abusive, cruel, inhumane, degrading, provocative or offensive.

The Act provides further definitions of the above under s 4.

Domestic violence can be a single act, or a number of acts that form a pattern of behaviour. A person also engages in domestic violence if they incite another person to conduct any of the acts outlined above (s 6(3)).

17.2.3 Coercion and coercive control

To coerce a person means to compel or force them to do, or refrain from doing, a particular act. This includes by acts or threats of violence, and humiliation or intimidation. Coercive control includes a pattern of behaviour that causes physical or psychological harm, punishment or fear to a victim.

17.3 Rights protected

The objectives under s 3 of the Act include having regard to the Constitution of Nauru, specifically the rights to equality, freedom and security.

When determining each case you must also consider the Republic's obligations under the United Nations Convention on the Elimination of all forms of Discrimination against Women ("CEDAW") and the United Nations Convention on the Rights of the Child ("CRC").

The Human Rights Council considered the Report of the Working Group on the 3rd cycle Universal Periodic Review ("UPR") of the Republic of Nauru on 2 February 2021 (A/HRC/47/17). As part of these proceedings, the government acknowledged that addressing domestic violence was a priority (at [92]). All recommendations in the UPR on women and children were accepted (A/HRC/47/17/Add.1 at parts K and L).

17.4 Cultural context

The concluding observations on the combined initial and second periodic reports of Nauru by the Committee on the Elimination of Discrimination against Women were delivered on 22 November 2017 (CEDAW/C/NRU/CO/1-2). At [18], the Committee noted concerns about the social stereotype that primary roles for women are considered to be wife and homemaker, and that men assert control over women by dictating their clothing, mobility and behaviour. This lack of autonomy is considered an underlying cause of gender-based violence against women, and the Committee was concerned that the Republic of Nauru had not adequately addressed this issue.

The case of *Republic of Nauru v Buraman* [2020] NRDC 19 (7 August 2020) discussed the common law right of parental discipline of children, which creates a defence to criminal charges of common assault on the basis that the discipline was justified. The court held that this right applied to members of extended families, in this case the grand-uncle of the eight year old complainant. It was determined that the defendant's actions in disciplining the boy were also in line with the Republic's international law obligations under the CRC, on the basis that it was in the best interests of the boy that he be taught good behaviour to ensure his future safety and wellbeing (at [26]). This case demonstrates that physical discipline of children is an accepted part of Nauruan custom, and is not considered domestic violence.

17.5 Family Protection Coordination Committee

The Family Protection Coordination Committee (the "Committee") was established by s 7 of the Act, and its functions and membership are explained under Part 2. The Director of Women is the Chairperson of the Committee, and other members are appointed by Cabinet (s 8(1)). Section 11 requires that an annual report be provided to the Minister each year by October, which is then tabled in Parliament.

The Committee provides advice and recommendations to the Minister on a number of matters, including the following:

- proposing amendments to the Act;
- efficient collaboration of support services for victims of domestic violence;
- training, education and awareness programmes;
- developing a national plan of action for prevention of domestic violence; and
- the implementation of Government policies regarding prevention of domestic violence, and assistance for victims.

17.6 Safety orders

Safety orders are governed by Part 3 of the Act. An individual can apply to the police who may issue a safety order for the purpose of protecting victims of domestic violence. To issue a safety order, a police officer must believe on reasonable grounds that (s 13(1)):

- the victim is in a domestic relationship with the respondent,
- the respondent has, or is likely to, commit domestic violence against the victim, and
- the order is necessary for the protection of the victim.

An order must be issued in line with Form 1 of the Schedule to the Act. A safety order can be issued without the consent of the victim, provided the above grounds are met. An order can include others if the police officer believes they are also at risk of domestic violence.

A safety order prohibits the respondent from attempting to, or committing, any of the following:

- entering or remaining at a specified place, or going within a certain distance of that place,
- approaching the victim within a specified distance or at a specific place,

- contacting the victim,
- engaging in any behaviour that is likely to lead to domestic violence against the victim,
- possessing weapons, or
- engaging or inciting another person to do any of the above.

The police officer will serve a copy of the safety order on the respondent, explain the purpose, effect and duration of the order, and explain the consequences of breaching an order (s 14). If an order is breached, the police may arrest the respondent and hold them in custody for a period not exceeding 24 hours (s 16(2)).

A safety order will expire after 7 days from service, unless the victim applies to the court for an interim protection order, which must be done within 5 days of service of the safety order (s 15).

17.7 Protection orders

Permanent and interim protection orders are governed by Part 4 of the Act. A protection order will prohibit the respondent from:

- approaching the victim, and any other person included in the order,
- contacting or communicating with the victim by any means (except to make arrangements for children),
- being in or near a specified location where the victim lives, works or frequents, even if the respondent has a personal or proprietary interest in the premises,
- damaging property belonging to the victim,
- engaging or inciting another person to carry out any of the above, and
- possessing a weapon.

You may impose any other conditions necessary in the circumstances, or desirable in the interests of the victim or children (s 17(4)). If it is in the best interests of the children, you may impose conditions that grant custody of them to the victim, and direct the respondent to pay maintenance (s 17(3)). The court can also impose further conditions relating to property under s 17(2), and the court may order the respondent to pay compensation to the victim for property damage or financial loss (s 25).

If someone is convicted of an offence arising from domestic violence or in a domestic relationship under the Crimes Act 2016, or any other law, you may grant a protection order on your own initiative (s 20).

> **Note:** The Supreme Court has inherent jurisdiction, and jurisdiction under the Constitution, to impose protection orders. In *Republic v DD* [2019] NRSC 35 (29 August 2019), a permanent order was sought. However, as the complaint was withdrawn and nothing was proven in court, an order under s 17 was made instead on the basis of the Supreme Court's inherent jurisdiction.

17.7.1 Procedure

An application for a protection order can be made by a victim, complainant, another interested person, or a person prescribed by law (s 22). The application may be made in person, in writing, electronically, or by telephone, but where an initial application is not made in writing a formal application must subsequently be filed in court with a copy served on the respondent (s 23).

Where an application is made under s 17, you must either summon the respondent to appear or issue a warrant for their arrest (s 39(1)). An arrest warrant should be issued if you have concerns that the personal safety of the victim may be adversely affected unless the respondent is brought into custody. If the respondent fails to appear at the time and date stipulated, the court may issue a warrant for their arrest, and proceed to determine the application for a protection order (s 40).

You may consider any evidence you deem necessary to make a determination, regardless of whether that evidence is normally admissible by law (s 42(1)). Where no procedure is specified, the court may apply such procedure as it "deems best calculated to promote the ends of justice" (s 42(2)).

You must decide any question of fact on the balance of probabilities, except for when you are determining whether or not an offence has been committed (s 24).

Protection order hearings are closed to the public (s 44). Section 45 creates restrictions on publication of proceedings, and an offence and penalty for breaching these restrictions.

Under s 21, the court may vary or revoke a protection order on application by the complainant, victim, respondent, or any other person who the order applies to. A hearing must be held for the variation or revocation of a protection order, so summons must be served on the parties involved.

The court must direct police to serve a copy of the varied or revoked order on both the victim and respondent (s 21(6)(b)).

17.7.2 Interim protection order

You may grant an interim order if you are satisfied that the respondent is likely to commit, or has committed, domestic violence against the victim. You must determine an application for an interim protection order on the same day that it is brought before the court. An interim order must be reviewed by the court on a fortnightly basis, and extended as the court deems necessary (s 18(7)).

Neither the victim or respondent are required to be present in order for an interim protection order to be granted (s 18(4)). An interim order may not be refused on the basis that other legal proceedings involving the same parties are ongoing.

A lay magistrate has jurisdiction to hear and grant interim protection orders (s 18(3)).

17.7.3 Permanent protection order

A permanent protection order may be granted if (s 19(1)):

- the respondent has habitually committed acts of domestic violence against the victim,

- the respondent is likely to commit further acts of domestic violence against the victim,
- the respondent has breached a safety or interim protection order or orders, or
- a report from a counsellor under Part 5 concludes that the parties cannot reconcile.

You must take into account the protection of the victim from domestic violence, the welfare of the victim and children, and the welfare of other family members (s 19(2)). A permanent protection order remains in force until it is varied or revoked by the court.

Any other person in the domestic relationship may be included in a permanent protection order if you are satisfied that the respondent has committed, or is likely to commit, domestic violence against the other person (s 19(3)).

In *Republic of Nauru v JA* [2022] NRDC 3 (17 November 2022), the defendant pleaded guilty to one count of threatening to kill and one count of damage to property, the victim being his grandaunt. As part of sentencing, the court made a Permanent Domestic Violence Restraining Order, which included the condition that the defendant stay away from the victim's address until he reached 18 years of age (he was 17 at the time of sentencing).

In *Republic of Nauru v Bagaga* [2023] NRDC 21 (4 August 2023), the defendant pleaded guilty to one charge of threatening to kill his spouse. The sentence imposed included a permanent protection order with one condition, that "the Defendant must not molest the victim mentally or physically".

The defendant was sentenced to two years' imprisonment, and ordered to serve one year of that sentence. The remaining year was suspended for three years, and would be imposed upon any breach of the protection order.

17.7.4 Mandatory counselling

When a protection order is granted, you must make a supplementary order directing the parties, either jointly or severally, to attend mandatory counselling (s 26(1)). Failure to attend mandatory counselling without reasonable cause will be deemed contempt of court, and that person is liable to a term of imprisonment not exceeding one month.

The counsellor must provide reports to the court on a fortnightly basis, or as otherwise directed by the court (s 27). The Director of Women, in consultation with the Minister, has the power to register counsellors for the purposes of this Act (s 28), and the Director must keep a register of counsellors (s 29).

17.8 Appeals

Appeals are governed by Part 9 of the Act. A decision to make a permanent protection order, or refusal to make, vary or revoke a permanent protection order, may be appealed to the Supreme Court. Appeals may be against the law or facts, and can be made by the complainant or respondent within 14 days from the delivery of the decision which is being appealed (s 43(2)). Unless a stay is granted by the Supreme Court, the order being appealed will remain in force.

17.9 Offences and penalties

The Act creates the following offences and penalties under Part 7:

- Breach of a protection order is deemed to be contempt of court, and the offender is liable to a term of imprisonment not exceeding 12 months (s 34).
- Obstruction of a service provider is an offence punishable by a term of imprisonment not exceeding 12 months (s 35).
- Wilfully evading the service of safety and protection orders, or wilfully withholding information, assisting or conspiring with the respondent to evade the service of orders, is an offence punishable by a term of imprisonment not exceeding one month (s 36).

When dealing with a breach of a protection order, the court may vary the order of its own initiative (s 21(4)).

The first case dealing with a breach of a protection order under s 34 was *Republic of Nauru v Amram* [2020] NRDC 16 (11 September 2020). The offender breached an interim protection order by calling the victim, his sister, on her mobile phone while he was intoxicated. The court determined that the seriousness of the offending was close to but below the midpoint on the spectrum. Considering previous cases from Fiji, Australia and New Zealand for guidance, a starting point of three months' imprisonment was imposed and the accused was given a final custodial sentence.

18 Mental Health Act 1963

18.1 Introduction

The Mental Health Act 1963 (MHA) was significantly amended in 2016.

18.2 Persons who are not to be regarded as mentally disordered

Section 4A MHA

A person is not to be regarded as mentally disordered by reason only that he or she expresses or refuses or fails to express a particular political or religious opinion or belief, or a particular philosophy or cultural belief, or a particular sexual preference or sexual orientation.

Further a person is not to be considered mentally disordered if he or she engages in or refuses or fails to engage in a particular political activity.

If a person takes or has taken alcohol or any other drug, volatile substance or other substances capable of inducing intoxication or an altered state of mind, he or she is not to be regarded as mentally disordered for that reason alone. This does not exclude where a mental disorder is induced through the temporary or permanent effect of alcohol or any other drug, volatile substance or other substance.

18.3 Designated mental health facilities

Section 4B MHA

The Minister for Health and Medical Services may declare certain places to be designated mental health facilities for the purpose of this Act, including a public hospital, a health centre or clinic, or any other place the Minister considers appropriate. The Minister makes this declaration by Order in the Government Gazette.

18.4 Authorised officers: appointment and powers

Section 4C MHA

18.4.1 Appointment of authorised officers

The Secretary for Health and Medical Services may appoint persons or a class of persons as authorised officers in accordance with this Act where the Secretary is satisfied the person:

- is competent to exercise the powers conferred on an authorised officer under this Act, and
- is a fit and proper person to exercise those powers, having regard to character, honesty and integrity, and
- has undergone any training required by the Secretary, and
- has agreed in writing to the exercise of those powers.

18.4.2 Powers of authorised officers

The powers of an authorised officer include the authority to:

- stop a person from harming himself or herself or others,
- stop a person from damaging property,
- seize any items (according to section 4E),
- restrain a person for the purpose of having treatment administered,
- stop a person who is being involuntarily assessed or detained from leaving a designated mental health facility without authorisation,
- return a person who is being involuntarily assessed or detained and who has left without proper authorisation to a designated mental health facility,
- search persons (according to section 4D).

18.5 Involuntary assessments

Section 6A MHA

Where a health practitioner reasonably believes that the person may be a mentally disordered person they may make a request for assessment and transfer (using Form 1 of the Schedule).

The transfer must be carried out by the Nauru Police Force as soon as possible, with the assistance of an authorised officer where available. The person may be assessed at a hospital or a designated mental health facility and must be assessed within 24 hours of arrival.

An assessment under this section may only be carried out by an authorised medical practitioner and in accordance with any prescribed requirements. During the assessment process, treatment may be given if this is necessary, in the opinion of a medical practitioner, to reduce the person's risk to themselves or others.

Following an assessment, the medical practitioner must either compel the person to undergo further assessment or release the person.

The person should be compelled to undergo further assessment by completing Form 2 of the Schedule "Request for Assessment by Second Medical Practitioner", if the medical practitioner is of the opinion that the person assessed:

- appears to have a mental disorder; and
- appears to require care, support treatment or protection:
  - for the protection, safety, health and welfare of that person, or
  - to protect another person or persons, or
  - as the person appears to pose a significant risk to the general community, and
- is unwilling or unable to consent to further treatment.

The person should be released if the medical practitioner is of the opinion that the person:

- does not appear to have a mental disorder, or
- does not appear to require care, support, treatment or protection in the interests of the person or to protect another person.

If a request is made for an assessment by a second medical practitioner, this must be conducted within 48 hours of the arrival of the person to the designated mental health facility.

Following an assessment, the second medical practitioner must either:

- compel the person to undergo a further period of assessment by completing Form 3 of the Schedule "Request for a Further Period of Assessment" if the second medical practitioner is of the opinion that the person assessed:
  - appears to have a mental disorder,
  - appears to require care, support treatment or protection:
    - for the protection, safety, health and welfare of that person, or
    - to protect another person or persons, or
    - as the person appears to pose a significant risk to the general community, and
  - the person is unable or unwilling to consent to further treatment; or
- release the person if the second medical practitioner is of the opinion that the person assessed:
  - does not appear to have a mental disorder, or
  - does not appear to require care, support, treatment or protection in the interests of the person or to protect another person, or
  - is able to be treated voluntarily.

The further period of assessment runs for a period of five days from the time of completion of the assessment by the second medical practitioner.

18.6 Detention for assessment

Section 6B MHA

A person may be detained for assessment in a hospital or designated mental health facility only:

- for the purposes of an involuntary assessment in accordance with section 6A; or
- on the order of a magistrate in accordance with section 6E.

A health practitioner or medical practitioner requesting transfer or involuntary assessment (in accordance with section 6A) must not be the primary carer or near relative of the person or have any other interest in relation to the person that might affect the practitioner's professional judgement or give rise to a real or perceived conflict of interest.

18.7 Review of person by a Magistrate

Section 6E, 6E(A) MHA

At the conclusion of the five day period from the time of completion of the assessment by the second medical practitioner (under section 6A(10)), or earlier if necessary, the person must be released, or the Director of Medical Services must make an application for an inpatient treatment order and file it in the District Court. The Director must submit all relevant assessment documents made with regard to that person.

A person may only be detained for a maximum of 14 days from the date of filing of the application until the application is determined; so applications should be prioritised by the court in scheduling. If you are of the opinion that it would be unreasonable to bring a person before the court, you may interview the person at an alternative location in order to explain to the person the nature of the examination and inquiry. An alternative location may be the person's place of residence, the hospital, a mental health facility or other place where the person is undergoing involuntary assessment; or where that is not practicable, at the nearest practicable place.

18.7.1 The interview of the subject person

Before and during the interview you must do the following things as appropriate and practicable:

- identify yourself to the person, and
- explain to the person the purpose of the visit, and
- discuss with the person the situation, the proposed course of assessment and treatment and seek the person's views on these matters.

You may consult with the responsible health practitioner and at least one other health professional involved in the case and may consult with other persons as you think fit, concerning the person's condition.

You must ensure that a note of the interview is placed on the record of any proceedings regarding the person.

You may reverse the order if, following the interview with the person, you are of the opinion that the person may be released from medical detention.

If you are of the opinion that it is advisable to remand the person further and make an inpatient treatment order, then you may issue an order for a period not exceeding three months. At or before the expiration of the period specified in the order, the person to whom the order relates must be brought before a Magistrate so that the examination and inquiry may be completed.

Inpatient treatment will continue during any period of appeal against the order unless otherwise determined by the court.

18.8 Appeal against decision under ss 6A or 6E

Section 6E(B) MHA

When a decision has been made to detain and assess a person, that person may appeal that decision by:

- providing notice in writing to the District Court, if appealing against a request for assessment and transfer or request for assessment by health practitioner under section 6A; or
- petition to the Supreme Court, if appealing against an inpatient treatment order made under section 6E.

The District Court or Supreme Court may appoint a barrister or solicitor or pleader to assist or to represent the person despite an appeal under this Act.

The appeal may be made any time during the duration of the detainment or the duration of an inpatient treatment order.

On appeal the Supreme Court may:

- revoke the order if the person can sufficiently demonstrate to the Court that he or she is not suffering from a mental disorder that requires an inpatient treatment order; or
- affirm the order if the person cannot sufficiently demonstrate to the Court that he or she does not require an inpatient treatment order for a mental disorder.

Notice of proceedings must be served by the person bringing the proceedings on:

- the health practitioner concerned,
- the District Court Registry, if appeal is being made to the Supreme Court,
- the Director of Medical Services, and
- any other person identified by the Supreme Court.

18.9 Rights of persons admitted to mental health facility

Section 6E(C) MHA

A person who is admitted to a mental health facility under this Act:

- must be dealt with in a manner that respects their cultural identity,
- must receive an explanation of the expected effects of any treatment offered, including the expected benefits and likely side effects, before the treatment is commenced,
- must be informed and must give their prior informed consent where there is intention to make or use a recording whether audio or visual and if they are unable to give consent then the next of kin present may give consent,
- is entitled to seek independent psychiatric advice from a medical professional of their choice in order to get a second opinion,

- is entitled to seek independent legal advice on his or her status as a patient or potential patient,
- is entitled to the confidentiality afforded to all persons undergoing any type of medical treatment, whether for mental illness or not, and
- is entitled to have access to his or her personal records concerning his or her treatment.

18.10 Making of inpatient treatment orders

Section 6F MHA

In considering whether to make an inpatient treatment order you should consider the following criteria:

- the person has a mental disorder,
- as a result of the mental disorder the person requires care, support, treatment or protection:
  - in the interests of the person, or
  - to protect the safety, health and welfare of another person or persons,
- the care, support, treatment, or protection cannot be provided in a less restrictive manner than by inpatient treatment,
- such treatment is available in Nauru, and
- the person has been assessed by a medical practitioner who has certified that the person requires the inpatient treatment.

18.11 Terms of an inpatient treatment order

Section 6G MHA

The terms and conditions attached to an inpatient treatment order must only be such as are, in the opinion of the medical practitioner, in the best interests of the mental health of the person who is subject to the order.

An inpatient treatment order may require the person subject to the order:

- to be detained and remain an inpatient at a hospital or designated mental health facility,
- to be absent only if leave is approved from the inpatient unit by order of the treating medical practitioner,
- to receive the care, support, treatment or protection that a medical practitioner determines from time to time,
- after release from the hospital or designated mental health facility, to attend at:
  - a specified medical, health care or rehabilitation service,
  - a specified therapist or place of therapy, or
  - some other specified activity, service, person or body, and

- to comply with all other terms and conditions imposed in writing by a medical practitioner.

Where a health practitioner responsible for the care and treatment of a patient is of the opinion that the patient no longer requires an inpatient treatment order, the health practitioner may:

- revoke the relevant order by using Part B of Form 4,
- discharge the patient, and
- within seven days of that decision, forward a copy of the discharge papers to the District Court registry.

18.11.1 Removal of involuntary inpatients from treatment centre

If a person, without lawful excuse, removes an involuntary inpatient from a treatment centre, or helps them to leave, they will be subject to a maximum penalty of $2000 or imprisonment for one year.

18.12 Right to be given order, statement and explanation of rights

Section 6I MHA

Where a person is made subject to an inpatient treatment order, the health practitioner who applied to the Resident Magistrate under section 6E must within 72 hours of making the order or application give the person:

- a copy of the order,
- a copy of any application for review,
- an explanation in a language, style and manner that the person is readily able to understand of:
  - the order;
  - the reasons the order has been made;
  - what the order requires of the person;
  - the person's rights under this Act; and
  - the person's right to consult a lawyer.

The documents must also be given to the person's primary carer and the person's lawyer if the health practitioner considers it to be in the best interest of the person, or if the person so requests.

18.13 Assistance of interpreters

Section 6H MHA

Where the person to be examined or assessed is unable to communicate adequately in the English or Nauruan language and can communicate in another language, or if the person requests an interpreter, the health care professionals or medical practitioner must take all reasonable steps to have an appropriate interpreter present.

If it is not reasonably practicable to arrange for an interpreter to be present within 24 hours the medical examination or assessment may proceed; but the consequences and results of the examination must be interpreted to the person or his or her primary carer as soon as reasonably practicable.

18.14 Emergency medical treatment or surgery for involuntary patients

Section 6J MHA

A medical practitioner may in writing authorise the administering of medical treatment or the performance of a surgical operation (except sterilisation or a surgical operation upon an unborn child) on an involuntary patient if the medical practitioner is of the opinion that:

- the patient is incapable of giving informed consent; or is capable of giving consent but refuses to give that consent or neither gives nor refuses to give that consent, and
- it is necessary, as a matter of urgency, to administer such medical treatment or perform a surgical operation on the patient in order:
  - to save the patient's life;
  - to prevent serious, potentially irreversible damage to the patient's health; or
  - to prevent the patient from suffering or continuing to suffer significant pain or distress.

The medical practitioner must have taken all reasonable steps to obtain informed consent of the primary carer of the patient to the treatment or the operation, and may proceed as if the patient had consented only if the primary carer:

- is not readily available, or
- does not give consent to the treatment or operation.

Where sterilisation or a surgical operation upon an unborn child is indicated as a medical emergency an application must be made to the District Court for its direction, and the court may make such order relating to the matter as it thinks proper.

19. Common offences

19.1 Introduction

The purpose of this chapter is to assist you in dealing with common offences.

Each offence contains:

- a reference and description of the offence itself;
- the elements of the offence, which the prosecution is required to prove;
- a commentary, which provides useful information you will need to consider; and
- a maximum sentence you may pass if the defendant is found guilty.

19.2 Description

At the top of each offence there is a reference to where the offence is found in legislation and a description of what the offence is.

19.3 Elements

The elements section lists all the general elements needed to prove any offence, and the specific elements required for the particular offence.

The elements section is very helpful as it provides a guide or method for you to make sure the prosecution has proved all that is required before a person can be found guilty. You should take careful notice that all the elements are proved by the prosecution.

The elements contained in these offences are intended for use as a handy reference on the bench and they do not replace careful study of the legislation itself.

When you are hearing an offence which is not listed here, you will need to list your own elements before hearing the case. By checking the legislation and considering what has been done here, you will develop the ability to identify the elements of any offence yourself.

19.4 Commentary

Where appropriate, useful case law and other commentary has been added to guide you further. It contains information about the identification of the defendant, what the prosecution and the defence need to prove, and to what standard.

Generally, the defence does not need to prove anything. Occasionally, the legislation requires the defence to specifically prove something. Where possible, definitions have been provided.

19.5 Sentencing

The sentencing section describes the maximum sentence for each offence. You do not have to pass the maximum sentence—that is reserved for the most serious breaches of the particular offence. Imprisonment should be used only for the most serious breaches and where an alternative sentence is not appropriate.

See the chapter "Sentencing".

19.6 Common criminal offences

Crimes Act 2016 (CA)

- Causing serious harm, ss 71 – 73
- Causing harm, ss 74 and 75
- Causing harm to public official, s 76
- Common assault, s 78

Illicit Drugs Control Act 2004 (IDCA)

- Unlawful import or export of illicit drugs, ss 4 and 5
- Unlawful possession, manufacture, cultivation and supply, s 6
- Controlled chemicals and equipment, s 7

Motor Traffic Act 2014 (MTA)

- Driving under the influence of alcohol, ss 69 and 81

19.7 Traffic infringement notices

- Motor Traffic (Traffic Infringement Notices) Regulations 2018
- Motor Traffic Act 2014

19.8 Causing serious harm	
Causing serious harm intentionally, recklessly, or negligently: ss 71-73 CA	Any person is guilty of an offence who: ➢ intentionally engages in conduct, ➢ where the conduct causes serious harm to another person, and ➢ the person intends to, or is reckless about, or is negligent about cause harm to that or any other person by the conduct.
Elements of causing serious harm	Every element below must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the causing serious harm is alleged to have taken place. ➢ A place where the causing serious harm was alleged to have been committed. **Specific** ➢ The defendant intentionally engaged in conduct. ➢ The conduct caused serious harm to another person. ➢ The defendant either intended to cause serious harm to that or any other person by the conduct, **OR** ➢ The defendant was reckless about causing serious harm to that or any other person by the conduct, **OR** ➢ The defendant was negligent about causing serious harm to that or any other person by the conduct. **Serious harm** means harm (including the cumulative effect of any harm) whether or not treatment is, or could have been, available: ➢ that endangers, or is likely to endanger, a person's life, or ➢ that is or is likely to be significant and longstanding.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court.

	The prosecution must provide evidence to prove that it was the defendant who intentionally engaged in the conduct. **Context** The context in which the causing of harm occurred is very important and you will need to give careful consideration to: ➢ what the situation was, and ➢ where the causing of harm occurred.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defendant has an evidential burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. The prosecution must then rebut this beyond reasonable doubt, eg: they must show that the act was not done in self-defence or defence of property or another person (as the case may be) and/or that the force used was unreasonable.
Sentence	The maximum sentence for intentionally causing serious harm is: ➢ 20 years imprisonment if aggravating circumstances apply, ➢ 15 years imprisonment in any other case. The maximum sentence for recklessly causing serious harm is: ➢ 15 years imprisonment if aggravating circumstances apply, ➢ 12 years imprisonment in any other case. The maximum sentence for negligently causing serious harm is: ➢ 13 years imprisonment if aggravating circumstances apply, ➢ 10 years imprisonment in any other case. Aggravating circumstances apply where the offence occurs in any of the following circumstances (s 79): ➢ the defendant is, or pretends to be, armed with an offensive weapon, ➢ the defendant is in company with one or more other people, ➢ the defendant intends to commit another offence, or ➢ the defendant intends to avoid the lawful arrest or detention of a person.

19.9 Causing harm	
Causing harm intentionally or recklessly: ss 74-75 CA	Any person is guilty of an offence who: ➢ intentionally engages in conduct, ➢ where the conduct causes harm to another person without that person's consent, and ➢ the person intends to, or is reckless about, cause harm to that or any other person by the conduct.
Elements of causing harm	Every element below must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the causing harm is alleged to have taken place. ➢ A place where the causing harm was alleged to have been committed. **Specific** ➢ The defendant intentionally engaged in conduct. ➢ The conduct caused harm to another person. ➢ The other person did not consent ('consent' is defined in s 9 as the free and voluntary agreement by a person with the cognitive capacity to give that agreement). ➢ The defendant either intended to cause harm to that or any other person by the conduct **OR** ➢ The defendant was reckless about causing harm to that or any other person by the conduct.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who intentionally engaged in the conduct.

	Context The context in which the causing of harm occurred is very important and you will need to give careful consideration to: ➢ what the situation was, and ➢ where the causing of harm occurred.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defendant has an evidential burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. The prosecution must then rebut this beyond reasonable doubt, eg: they must show that the act was not done in self-defence or defence of property or another person (as the case may be) and/or that the force used was unreasonable.
Sentence	The maximum sentence for intentionally causing harm is: ➢ nine years imprisonment if aggravating circumstances apply, ➢ seven years imprisonment in any other case. The maximum sentence for recklessly causing harm is: ➢ seven years imprisonment if aggravating circumstances apply, ➢ five years imprisonment in any other case. Aggravating circumstances apply where the offence occurs in any of the following circumstances (s 79): ➢ the defendant is, or pretends to be, armed with an offensive weapon, ➢ the defendant is in company with one or more other people, ➢ the defendant intends to commit another offence, or ➢ the defendant intends to avoid the lawful arrest or detention of a person.

19.10 Causing harm to public official

Causing harm intentionally or recklessly: ss 76 CA	Any person is guilty of an offence who: ➢ intentionally engages in conduct, ➢ where the conduct causes harm to another person without that person's consent, and ➢ the person intends to cause harm to that other person because the person believes the other person is a public official, and ➢ the person is in fact a public official.
Elements of causing harm	Every element below must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the causing harm is alleged to have taken place. ➢ A place where the causing harm was alleged to have been committed. **Specific** ➢ The defendant intentionally engaged in conduct. ➢ The conduct caused harm to another person. ➢ The other person did not consent ('consent' is defined in s 9 as the free and voluntary agreement by a person with the cognitive capacity to give that agreement). ➢ The defendant intended to cause harm to that other person by the conduct. ➢ The defendant believed the other person was a public official. ➢ And the other person was a public official.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who intentionally engaged in the conduct.

	Context The context in which the causing of harm occurred is very important and you will need to give careful consideration to: ➢ what the situation was, and ➢ where the causing of harm occurred.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defendant has an evidential burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. The prosecution must then rebut this beyond reasonable doubt, eg: they must show that the act was not done in self-defence or defence of property or another person (as the case may be) and/or that the force used was unreasonable.
Sentence	The maximum sentence for intentionally causing harm to a public official is: ➢ Ten years imprisonment if aggravating circumstances apply, ➢ Eight years imprisonment in any other case. Aggravating circumstances apply where the offence occurs in any of the following circumstances (s 79): ➢ the defendant is, or pretends to be, armed with an offensive weapon, ➢ the defendant is in company with one or more other people, ➢ the defendant intends to commit another offence, or ➢ the defendant intends to avoid the lawful arrest or detention of a person.

19.11 Common assault	
Common assault: ss 78 CA	Any person is guilty of an offence who intentionally: ➢ engages in conduct that results in a direct or indirect application of force to another person, or ➢ makes physical contact, directly or indirectly, with another person knowing that the person might reasonably object to the contact in the circumstances, whether or not the person was aware of the contact at the time, or ➢ makes a threat to another person of a direct or indirect application of force that: AND ➢ the other person does not consent, or consents because of a dishonest representation by the defendant, to the conduct, contact or threat.
Elements of common assault	Every element below must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the conduct is alleged to have taken place. ➢ A place where the conduct was alleged to have been committed. **Specific** ➢ The defendant intentionally engaged in conduct. ➢ The conduct caused harm to another person. ➢ The other person did not consent ('consent' is defined in s 9 as the free and voluntary agreement by a person with the cognitive capacity to give that agreement). ➢ The defendant intended to do that conduct.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court.

	The prosecution must provide evidence to prove that it was the defendant who intentionally engaged in the conduct. **Context** The context in which the common assault occurred is very important and you will need to give careful consideration to: ➢ what the situation was, and ➢ where the causing of harm occurred. Conduct that is within the limits of what would be acceptable to a reasonable person as incidental to social interaction or community life cannot amount to an offence under this section.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defendant has an evidential burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. The prosecution must then rebut this beyond reasonable doubt, eg: they must show that the act was not done in self-defence or defence of property or another person (as the case may be) and/or that the force used was unreasonable.
Sentence	The maximum sentence for common assault is: ➢ two years imprisonment if aggravating circumstances apply, ➢ twelve months imprisonment in any other case. Aggravating circumstances apply where the offence occurs in any of the following circumstances (s 79): ➢ the defendant is, or pretends to be, armed with an offensive weapon, ➢ the defendant is in company with one or more other people, ➢ the defendant intends to commit another offence, or ➢ the defendant intends to avoid the lawful arrest or detention of a person.

19.12 Unlawful import and export of illicit drugs	
Unlawful import and export of illicit drugs: ss 4 and 5 Illicit Drugs Control Act 2004 (IDCA)	Any person is guilty of an offence who, without authority: ➢ imports an illicit drug into Nauru, or ➢ exports an illicit drug from Nauru.
Elements of unlawful import and export of illicit drugs	Every element below must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the conduct is alleged to have taken place. ➢ A place where the conduct was alleged to have been committed. **Specific** ➢ The defendant imported an illicit drug into Nauru, **OR** ➢ The defendant exported an illicit drug from Nauru. ➢ "Illicit drug" is any drug listed in Schedule 1. ➢ "Import" means to bring or cause to be brought, into Nauru and is a continuing process until any item reaches the intended recipient. ➢ "Export" means to take, or cause to be taken, out of Nauru.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. The defendant has the burden of proving that he or she had the lawful authority to import or export the illicit drug. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who intentionally engaged in the conduct.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

	The defendant has an evidential burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. The prosecution must then rebut this beyond reasonable doubt.
Sentence	The maximum sentence for importing or exporting illicit drugs is: ➢ ten years imprisonment, and ➢ a fine not exceeding $50,000.

19.13 Unlawful possession, manufacture, cultivation and supply of illicit drugs

Unlawful possession, manufacture, cultivation and supply of any illicit drugs: s 6 IDCA	Any person is guilty of an offence who, without lawful authority: ➢ acquires, sells, supplies, possesses, produces, manufactures, cultivates, uses or administers any illicit drug, or ➢ engages in any dealing with any other person for the transfer, transport, supply, use, manufacture, offer, sell, agree to sell, offer for sale or have possession for sale, import or export of any illicit drug.
Elements of unlawful possession, manufacture, cultivation and supply of any illicit drugs	Every element below must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the conduct is alleged to have taken place. ➢ A place where the conduct was alleged to have been committed. **Specific** ➢ The defendant acquired, sold, supplied, possessed, produced, manufactured, cultivated, used or administered any illicit drug, **OR** ➢ The defendant engaged in any dealing with another person for the transfer, transport, supply, use, manufacture, offer, sale, agreement to sell, offer for sale or have possession for sale, import or export of any illicit drug. ➢ "Illicit drug" is any drug listed in Schedule 1. ➢ "cultivate" includes planting, sowing, scattering the seed, growing, nurturing, tending or harvesting and also includes the separating of opium, coca leaves, cannabis and its extracts from the plants from which they are obtained. ➢ "manufacture" means to carry out any process by which an illicit drug or controlled chemical is produced, and includes extracting, refining, formulating, preparing, mixing, compounding, transforming it into another drug or chemical, making an illicit drug or controlled chemical into dosage form, and packing. ➢ "supply" includes distribute, give, sell and offer to supply.

Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who intentionally engaged in the conduct.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defendant has an evidential burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. The prosecution must then rebut this beyond reasonable doubt.
Sentence	The maximum sentence for importing or exporting illicit drugs is: ➢ ten years imprisonment, and ➢ a fine not exceeding $50,000.

19.14 Dealing with controlled chemicals and equipment

Dealing with controlled chemicals and equipment: s 6 IDCA	Any person is guilty of an offence who, without lawful authority: ➢ imports, exports, manufactures, possesses, or supplies any controlled chemical or controlled equipment, ➢ knowing, or being reckless as to whether, that chemical or equipment is to be used in, or for, the commission of an offence of the unlawful possession, manufacture, cultivation and supply of illicit drugs (under section 6).
Elements of dealing with controlled chemicals and equipment	Every element below must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the conduct is alleged to have taken place. ➢ A place where the conduct was alleged to have been committed. **Specific** ➢ The defendant imported, exported, manufactured, possessed, or supplied any controlled chemical or controlled equipment, ➢ either: • knowing that chemical or equipment is to be used in, or for, the commission of an offence of the unlawful possession, manufacture, cultivation and supply of illicit drugs (under section 6), OR • being reckless as to whether that chemical or equipment is to be used in, or for, the commission of an offence of the unlawful possession, manufacture, cultivation and supply of illicit drugs (under section 6). ➢ "controlled chemical" means controlled chemicals listed in Schedule 2. ➢ "controlled equipment" means the equipment listed in Schedule 3. ➢ "export" means to take, or cause to be taken, out of the Republic. ➢ "Illicit drug" is any drug listed in Schedule 1.

	➢ "import" means to bring or cause to be brought, into the Republic and is a continuing process until any item reaches the intended recipient. ➢ "manufacture" means to carry out any process by which an illicit drug or controlled chemical is produced, and includes extracting, refining, formulating, preparing, mixing, compounding, transforming it into another drug or chemical, making an illicit drug or controlled chemical into dosage form, and packing. ➢ "supply" includes distribute, give, sell and offer to supply.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who intentionally engaged in the conduct.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defendant has an evidential burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. The prosecution must then rebut this beyond reasonable doubt.
Sentence	The maximum sentence for dealing with controlled chemicals and equipment is: ➢ Ten years imprisonment, and ➢ A fine not exceeding $50,000.

19.15 Driving under the influence of alcohol	
Driving under the influence of alcohol: s 69 MTA	Any person commits an offence who is in charge of, or drives, a motor vehicle while the percentage of alcohol in his or her blood exceeds the prescribed limit.
Elements of driving under the influence of alcohol	Every element below must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the conduct is alleged to have taken place. ➢ A place where the conduct was alleged to have been committed. **Specific** ➢ The defendant was in charge of, or driving, a motor vehicle. ➢ The percentage of alcohol in the defendant's blood exceeded the prescribed limit. ➢ "The prescribed limit" means a percentage of 0.05 per cent of alcohol present in the blood, that is to say 50 milligrammes of alcohol in 100 millilitres of blood.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who intentionally engaged in the conduct. **Medical examination** A person arrested for this offence is entitled, upon request, to be examined by a medical practitioner nominated by him or her. Where any such request is made, the arresting officer should provide reasonable facilities for holding the examination.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defendant has an evidential burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

	The prosecution must then rebut this beyond reasonable doubt.
Sentence	Any person who is convicted of driving under the influence of alcohol is liable to: ➢ for a first offence: • mandatory suspension of his or her driver's licence for six months, and • a maximum fine of $1,000, or • imprisonment for six months; ➢ for a second offence: • mandatory suspension of his or her driver's licence for 12 months, or • a maximum fine of $3,000, or • imprisonment for 12 months; and ➢ for a third offence: • mandatory suspension of his or her driver's licence for five years, and • a maximum fine of $10,000, or • imprisonment for three years.