

A young person must be able to talk to someone, and have someone to speak on their behalf, if this is what they want. This could be a parent, other relative or a public servant. It is worth finding out if someone like this is available to talk for the young person.

Remember that most criminal charges refer to offences that may be quite hard to understand. Explaining the charge is more important than just reading it out.

Taking a plea is also quite a frightening experience, and technical words are used in recording the plea. However what you need to really know is whether the young person agrees or not with the charge. Is it admitted? If it is, then that is sufficient to record a guilty plea.

Use of simple language is the best practice, in order to make a young person understand what is going on.

4 Not Guilty Plea – Defended Hearing

If the young person says that he or she is not guilty, then the case will proceed as if they he or she were an adult. In other words, a defended hearing will need to occur for you to determine guilt or innocence.

Ask the young person why they believe they are not guilty. Sometimes they do not understand that what they have done amounts to a crime. An example is theft where three young persons decided to steal some food, and one was given the task of being the lookout. Sometimes this person pleads not guilty, thinking that because he did not go inside, he has not actually committed the offence. But this may be quite wrong, as a matter of law.

Be conscious that it may be the first time that the young person has ever been in a court.

The Police should present their evidence in the usual fashion. But you may help a young person, in asking questions of the police or witnesses.

XI OTHER PROCEEDINGS

1 Alternative Dispute Resolution

The Crimes Rules recognise that it may be preferable to resolve disputes outside of court.

In criminal cases, the court may promote reconciliation and encourage and facilitate the settlement of some proceedings before or during trial.

The court may facilitate reconciliation only in relation to offences of a personal or private nature, such as assault (Rule 130(1) of the Crimes Rules). In such cases, the accused may agree to pay compensation or make amends in some other way. The court must approve the terms of the agreement (Rule 130(1) of the Crimes Rules).

Where a settlement of a criminal matter is approved by the court, the court must order that the proceedings be stayed. The accused is not discharged nor convicted. If the accused breaches the agreement he or she may be in contempt of court, and the criminal proceedings may resume.

In civil cases, the court must, so far as it is possible, promote reconciliation among the parties and encourage them to settle their dispute amicably (Rule 146 of the Crimes Rules).

2 Preliminary Enquiries

(i) General

A preliminary enquiry will be held if:

- before the commencement of a trial, the prosecution has made an application for the case to be tried in the High Court.

Preliminary Enquiries

- before, or during the course of a trial, it appears to the Commissioner that the case should be tried before the High Court (Rule 129(3) of the Crimes Rules).

In a criminal case, the purpose of a preliminary enquiry is for the Commissioner to determine whether there is sufficient evidence, and legal grounds, to put the accused on trial before the High Court.

In a preliminary hearing, the Commissioner should avoid:

- determining, or commenting on, the guilt or innocence of the accused in a criminal matter;
- believing or disbelieving a witness;
- excluding evidence.

The only question for the Commissioner is whether at trial a judge could convict the accused if the evidence of the prosecution was uncontradicted. If a judge could convict the accused, the case should proceed to the High Court. If a judge could not convict the accused, the Commissioner must discharge the accused.

(ii) Conduct of the Enquiry

The court clerk should explain the charge to the accused, and the purpose of the preliminary proceedings.

The accused must enter a plea.

Regardless of whether the accused pleads guilty, not guilty, or abstains from giving a plea, the Commissioner must:

- record, in writing and on oath, the statements of all witnesses. The accused may put questions to the prosecution witnesses. The answers to those questions become part of the evidence of the witness.
- receive all exhibits that the prosecution intends to show at trial.

Preliminary Enquiries

If the Commissioner has considered the evidence and it discloses sufficient grounds for committing the accused to trial, the Commissioner must:

- ensure the accused understands the charge;
- ask the accused if he or she wishes to make a statement in his or her defence;
- explain to the accused that he or she is not bound to make a statement but if he or she chooses to do so, the statement will become part of evidence at trial.
- ask the accused if he or she wishes to make the statement on oath once they have chosen to make a statement.

The accused may call witnesses in his or her defence. The prosecution may put questions to those witnesses and any answers will be evidence.

The Commissioner must consider all the evidence and decide whether the case should be dismissed because there is no case to answer or whether the accused should be committed for trial.

There is no case to answer when:

- no evidence has been presented to support an essential element of the offence; or
- the evidence presented is insufficient for a judge to find the accused guilty of the offence beyond reasonable doubt.

If the accused is committed for trial, the accused will be given a copy of the testimony of the witnesses and of the record on the enquiry.

The procedure that follows committal for trial is set out in Rule 129 of the Crimes Rules.

3 *Commentary*

The commentary contains information about the identification of the accused, what the prosecution and the defence need to prove and to what standard. Generally, the defendant does not need to prove anything. However the evidence produced by the prosecution must be answered if a not guilty plea is to be sustained.

4 *Sentencing*

The sentencing section describes the maximum penalty for each offence.

Rule 8 of the Crimes Rules – Concealment of Birth

Description

Any person who disposes of the dead body of a child with intent to conceal the fact of its birth, whether the child died before, during, or after birth, commits an offence.

Elements of Offence

- (i) any person (accused)
- (ii) disposed of
- (iii) dead body of a child
- (iv) with intent to conceal the fact of its birth.

Commentary

(1) Identification

In court, the prosecution should identify the person charged by clearly pointing out that person in court.

The prosecution must provide evidence to prove that it was the accused who disposed of the dead body of a child with the intention of concealing its birth.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

(3) Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence.

The accused will have to establish a defence on the balance of probabilities (i.e more likely than not).

Maximum Sentence

3 penalty units or 3 months imprisonment.

Rule 9 of the Crimes Rules – Counselling suicide

Description

Any person who counsels or procures a person to commit suicide, or aids or abets a person in the commission of suicide commits an offence.

Elements of Offence

- 1** (i) any person (accused)
(ii) counselled (advised) or procured (persuaded)
(iii) a person to commit suicide

- 2** (i) a person (the accused)
(ii) aided (assist) or abetted (encouraged)
(iii) a person in the commission of suicide.

Commentary

(1) Identification

The prosecution should identify the person charged by clearly pointing out that person in court.

The prosecution must prove that it was the accused who counselled to commit suicide. The offence is the giving of the advice. It is not necessary for there to be a death.

Or

The accused procured the person to commit suicide. The offence is the persuading of suicide. It is not necessary for there to be a death.

Or

The accused must have done something to assist or encourage the person who was committing suicide. Suicide must have been attempted but it is not necessary for death to follow.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

(3) Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence.

The accused must establish the defence on the balance of probabilities (i.e more likely than not).

Maximum Sentence

3 penalty units or 3 months imprisonment.

Rule 12 of the Crimes Rules – Cruelty to a child

Description

A person who has the care or control of a child under the age of 16 years, and who intentionally ill-treats or intentionally neglects the child, or intentionally permits the child to be ill-treated or neglected, in a manner likely to cause the child unnecessary suffering, actual bodily harm, injury to health, or mental disorder, or to result in any other unnecessary physical or mental disability to the child, commits an offence.

Elements of Offence

- (i) a person (accused)
- (ii) had the care or control
- (iii) of a child under the age of 16
- (iv) intentionally ill-treated or neglected the child
- (v) in a way that is likely to cause the child
- (vi) unnecessary suffering or bodily harm or injury to health or mental disability.

This offence is also committed by a person who allows the ill-treating or any physical or mental disability of the child.

Commentary

(1) Identification

In court, the prosecution should identify the person charged by clearly pointing out that person in court.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

The accused is not guilty unless they intentionally mistreated or neglected or intentionally allowed the child to be mistreated or neglected. Carelessness is not enough.

(3) Defences

The accused must prove any defence on the balance of probabilities (i.e more likely than not).

Maximum Sentence

3 penalty units or 3 months imprisonment.

Rule 14 of the Crimes Rules – Bodily Harm

Description

- (1) A person who intentionally and without lawful excuse causes bodily harm to another, commits an offence.
- (2) A person who causes bodily harm to another under such circumstances that, if death had been caused, the offence of manslaughter would have been committed, commits an offence.

Elements of Offence

Rule 14(1)

- (i) a person (accused)
- (ii) intentionally
- (iii) without lawful excuse
- (iv) caused bodily harm
- (v) to another.

Rule 14(2)

- (i) a person (accused)
- (ii) caused bodily harm to another
- (iii) where, if death had resulted, the elements of the offence to manslaughter would be satisfied.

Commentary

(1) Identification

The prosecution should identify the person charged by clearly pointing out that person in court.

The prosecution must prove that it was the accused who caused bodily harm to the other either intentionally and without lawful excuse or in the circumstances specified in paragraph (2).

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need not to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

(3) Defences

If the prosecution has proved the elements of the offence beyond reasonable doubt, the accused may still have a defence.

The accused will have to establish the defence on the balance of probabilities (i.e more likely than not).

Maximum Sentence

3 penalty units or 3 months imprisonment (Commissioner).

20 penalty units (\$1000) or 1 year imprisonment (High Court).

Rule 15 of the Crimes Rules – Assault

Description

A person who without lawful excuse assaults another commits an offence.

Elements of Offence

- (i) a person (accused)
- (ii) assaulted another
- (iii) without lawful excuse.

Commentary

(1) Identification

In court, the prosecution should identify the person charged by clearly pointing out that person in court.

The prosecution must provide evidence to prove that it was the accused committed the assault.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need not to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

(3) Definition of assault

The Rules define “assault” as follows:

- (i) the act of intentionally applying force to the person of another directly or indirectly; or
- (ii) threatening by anything said or done to apply force to the person of another if the person making the threat has or causes the other to believe on reasonable grounds that he or she has present ability to carry out the threat.

The context in which the alleged assault occurred is very important. Give careful consideration to:

- what the situation was; and
- where the alleged assault occurred.

(4) Lawful excuse

The prosecution must prove that there was no lawful reason for the assault.

Examples of lawful reasons are:

- Reasonable force for the discipline of a child or person voluntarily under the care of the accused is permitted (Rule 15(3) of the Crimes Rules.
- Reasonable force to prevent suicide, to prevent the commission of an offence likely to cause immediate and serious injury to person or property, or to prevent an act which would be likely to cause immediate and serious injury to person or property. (Rule 15(4) of the Crimes Rules).
- The use of force in sport played in accordance with the rules of that sport.

(5) Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence.

If the defence provides a reason for the assault (e.g. self defence), the court must consider if it has any merit.

The accused will have to establish the defence, on the balance of probabilities (i.e more likely than not).

Maximum Sentence

3 penalty units or 3 months imprisonment.

Rule 18 of the Crimes Rules – Incest

Description

- (1) Incest means sexual intercourse between —
 - (i) parent and child;
 - (ii) grandparent and grandchild;
 - (iii) brother and sister;
 - (iv) uncle and niece;
 - (v) aunt and nephew;
 - (vi) persons within the prohibited degrees of consanguinity as prescribed in the Marriage Rules 1986, where the person charged knows of the relationship between the parties.

- (2) A person who commits incest commits an offence.

Elements of Offence

- (i) a person (accused)
- (ii) had sexual intercourse
- (iii) with a person listed in paragraph (1)
- (iv) knew of the relationship between the parties.

Commentary

(1) Identification

The prosecution should identify the person charged by clearly pointing out that person in court.

The prosecution must prove that it was the accused had sexual intercourse with designated relative and knew of their relationship.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

The accused must know of the relationship.

(3) Defences

If the prosecution has proved the elements of the offence beyond reasonable doubt, the accused may still have a defence.

The accused will have to establish the defence on the balance of probabilities (i.e more likely than not).

Maximum Sentence

3 penalty units or 3 months imprisonment (Commissioner).

20 penalty units (\$1,000) or 1 year imprisonment (High Court).

Rule 19 of the Crimes Rules – Unlawful carnal knowledge

Description

- (1) A person who has carnal knowledge of another —
 - (i) (I) if the victim is at least 16 years of age, without the consent of the victim;
(II) if the victim is under the age of 16 years, whether the victim consented or not;
 - (ii) with consent extorted by threats or of bodily harm;
 - (iii) with consent obtained by personating the spouse of that other;
 - (iv) with consent obtained by false representations as to the nature of the act,
commits an offence.
- (2) The belief of the offender as to the age of victim is irrelevant to a conviction for unlawful carnal knowledge.

Elements of Offence

Rule 19(1)(i)

- 1** (i) a person (accused)
 - (ii) had sexual intercourse
 - (iii) with a person of at least 16 years of age without the consent of the victim OR with a person under 16 years of age regardless of consent.

Rule 19(1)(ii)(iii)(iv)

- 2** (i) a person (accused)
 - (ii) had sexual intercourse with another
 - (iii) with consent obtained by threats or fear of bodily harm or obtained or personating the spouse OR by false representation of the nature of the act.

Commentary

(1) Identification

The prosecution should identify the person charged by clearly pointing out that person in court.

The prosecution must prove that it was the accused who had sexual intercourse with the victim in the listed circumstances. This offence includes rape and non-consensual intercourse during marriage.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need not to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

“Without consent” encompasses consent due to threats of bodily harm, pretending to be the victim’s spouse, and lying to the victim about the nature of the act.

(3) Defences

If the prosecution has proved the elements of the offence beyond reasonable doubt, the accused may still have a defence.

The accused will have to establish the defence on the balance of probabilities (i.e more likely than not).

Maximum Sentence

3 penalty units or 3 months imprisonment (Commissioner).

20 penalty units (\$1,000) or 1 year imprisonment (High Court).

Rule 20 of the Crimes Rules – Sexual intercourse with mental defective

Description

A person who has sexual intercourse with a person of unsound mind knowing or having good reason for knowing that person is of unsound mind, commits an offence.

Elements of Offence

- (i) a person (accused)
- (ii) had sexual intercourse
- (iii) with a person of unsound mind
- (iv) knowing or having good reason to know that the other person was of unsound mind.

Commentary

(1) Identification

The prosecution should identify the person charged by clearly pointing out that person in court.

The prosecution must prove that it was the accused who had sexual intercourse with the person of unsound mind.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need not to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

(3) Defences

If the prosecution has proved the elements of the offence beyond reasonable doubt, the accused may still have a defence.

The accused will have to establish the defence on the balance of probabilities (i.e more likely than not).

Maximum Sentence

3 penalty units or 3 months imprisonment.

Rule 21 of the Crimes Rules – Indecent Assault

Description

- (1) A person who indecently assaults another commits an offence.
- (2) Where the victim is a mental defective or under the age of 16 years it is no defence to a charge under this rule that the person consented to the offence, or that the person charged believed that the person assaulted was sane or not under the age of 16 years as the case may be.

Elements of Offence

- (i) a person (accused)
- (ii) assaulted a person
- (iii) indecently.

Commentary

(1) Identification

The prosecution should identify the person charged by clearly pointing out that person in court.

The prosecution must prove that it was the accused who had assaulted another indecently.

“Indecent” means the assault or the circumstances accompanying had a sexual overtone. The incident is one which would be considered sexually inappropriate by a right-thinking member of a community.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need not to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

In a case involving a mental defective or a person under the age of 16 years of age, there is no defence.

(3) Defences

If the prosecution has proved the elements of the offence beyond reasonable doubt, the accused may still have a defence.

The accused will have to establish the defence on the balance of probabilities (i.e more likely than not).

Maximum Sentence

3 penalty units or 3 months imprisonment.

Rule 22 of the Crimes Rules – Adultery and fornication

Description

Any one who has sexual intercourse with another to whom he or she is not married commits an offence.

Elements of Offence

- (i) a person (accused)
- (ii) had sexual intercourse
- (iii) with a person not their spouse.

Commentary

(1) Identification

The prosecution should identify the person charged by clearly pointing out that person in court.

The prosecution must prove that it was the accused who had sexual intercourse with a person not his or her spouse.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need not to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

(3) Defences

If the prosecution has proved the elements of the offence beyond reasonable doubt, the accused may still have a defence.

The accused will have to establish the defence on the balance of probabilities (i.e more likely than not).

Maximum Sentence

3 penalty units or 3 months imprisonment.

Rule 23 of the Crimes Rules – Unmarried Persons

Description

Where a man and a woman live together as man and wife but are not married to each other they each commit an offence.

Elements of Offence

- (i) a man or woman (the accused)
- (ii) live together as a husband and wife
- (iii) not married to each other.

Commentary

(1) Identification

In court, the prosecution should identify the person charged by clearly pointing out that person in court.

The prosecution must prove that it was the accused who lived with a person of the opposite sex as if married but without being married to each other.

It is necessary to establish that the accused persons were living together as if married.

It is necessary to prove that the accused persons had not gone through a valid form of marriage in Tokelau.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

(3) Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence.

The accused will have to establish the defence on the balance of probabilities (i.e more likely than not). An important defence would be to prove that the two persons are married by production of a certificate of their marriage.

Maximum Sentence

3 penalty units or 3 months imprisonment.

Rule 24 of the Crimes Rules – Miscarriage

Description

- (1) A person who without lawful excuse does anything with intent to procure the miscarriage of a woman or girl, whether pregnant or not, commits an offence.
- (2) A woman who, whether pregnant or not, unlawfully administers to herself or permits to be administered to her a poison or a drug or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means, with intent to procure miscarriage commits an offence.
- (3) A person who supplies or procures anything, knowing that it is intended to be unlawfully used with intent to procure the miscarriage of a woman or girl commits an offence.

Elements of Offence

Rule 24(1)

- (i) person (accused)
- (ii) intended to procure the miscarriage
- (iii) of a woman or girl
- (iv) no lawful excuse.

Rule 24(2)

- 1** (i) a woman (accused)
- (ii) administered to herself or permitted someone to administer to her
- (iii) a poison or drug or other noxious thing to cause her miscarriage
- (iv) no lawful excuse.

Rule 24(2)

- 2** (i) a woman (the accused)
- (ii) used instruments or other means or permitted another to use an instrument or other means on her

- (iii) unlawfully
- (iv) intending to cause miscarriage
- (v) no lawful excuse.

Rule 24(3)

- (i) person (accused)
- (ii) supplied or obtained something
- (iii) knowing
- (iv) that it is intended to be used to procure a miscarriage
- (v) no lawful excuse.

Commentary

(1) Identification

In court, the prosecution should identify the person charged by clearly pointing out that person in court.

The prosecution must provide evidence to prove that it was the accused who without lawful excuse procured the miscarriage, or administered the poison or other thing with intent to cause her miscarriage.

“Without lawful excuse” or “unlawfully” in this rule usually means without medical reason. The woman concerned does not have to be pregnant. The important element is the intention to cause a miscarriage.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

The defence does not need not to prove anything, however if the defence establishes that there is a reasonable doubt, then the accused is not guilty and the case must be dismissed.

(3) Defences

If the prosecution has proved the elements of the offence beyond reasonable doubt, the accused may still have a defence.

The accused will have to establish the defence on the balance of probabilities (i.e more likely than not).

Maximum Sentence

3 penalty units or 3 months imprisonment.