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## **THE LEGAL CONTEXT**

This part generally describes the legal context in which you work. It:

- explains the Constitutional and Court structure in Tuvalu;
- describes the Island Court;
- describes the different types of law that you apply;
- outlines the types of evidence and important rules relating to evidence; and
- explains certain legal terms.



# 1 The Constitutional Framework of Tuvalu

## 1.1 Tuvalu's *Constitution*

The 1986 *Constitution* and the *Laws of Tuvalu Act 1987* state that:

- the *Constitution* is the supreme law of Tuvalu;
- any other law that is inconsistent with the *Constitution* is invalid, either in whole or in part to the extent of the inconsistency; and
- all other laws are to be interpreted and applied subject to the *Constitution* and, as far as practicable, in such a way as to conform with the *Constitution*.

The *Constitution* details the basic elements of Tuvalu's system of government by defining:

- fundamental human rights;
- the organisation and structure of the legal system; and
- the roles, responsibilities and powers of the Executive, Parliament and the Judiciary.

The *Constitution* is based on and gives effect to the doctrine of the Separation of Powers.

### **The doctrine of the separation of powers**

This doctrine states that there should be three distinct and separate branches of government:

1. the Executive: administrator and policy maker;
2. the Parliament (Legislature): law maker; and
3. the Judiciary: interpreter of 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 gain too much power. See *Kamuta Latasi v R, ex parte Attorney-General* (High Court 3/02) and *Kamuta Latasi v Attorney-General* (High Court 1/03), where the High Court ruled that Cabinet (the Executive) had acted unconstitutionally and *ultra vires* (outside the law) in making certain appointments and directives.

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.

### **Independence of the Judiciary**

Although Parliament makes laws and the Executive allocate funds, premises, supporting staff and services for the Judiciary, nevertheless the Judiciary must be independent and free from all political or other influence in carrying out its duties in making decisions.

The independence of the Judiciary is protected by:

- the *Constitution*;
- the Rule of Law;
- the process of appointment and removal of judicial officers, and their conditions of appointment; and
- immunity from civil actions.

### **Rule of law**

There are three principles:

- Society should be free from arbitrary power;
- All are equal before the law;
- The *Constitution* is part of the ordinary law of the land.

The Rule of Law provides checks and balances for the Executive and Legislative branches of government. A legal system with fair, transparent and effective judicial institutions is essential to the protection of citizens against the arbitrary use of state authority and for maintaining the Rule of Law.

## **1.2 The Branches of Government in Tuvalu**

### **The Head of State**

The Head of State is:

- Queen Elizabeth II of the United Kingdom;
- represented in Tuvalu by a Governor General.

The Governor General is:

- appointed by, and may be removed by, the Sovereign, acting with the advice of the Prime Minister. The Prime Minister is required to consult with Parliament about any such appointment or removal.

The Governor General must be:

- a citizen of Tuvalu;
- eligible to be elected a Member of Parliament; and
- at least 50 years old but not older than 65.

The Governor General has the power to summon, prorogue and dissolve Parliament.

No bill becomes law until assented to by the Governor General.

## **The Executive**

The role of the Executive is to formulate and implement government policy. The Executive effectively runs and controls the affairs of the country.

The Executive and Parliament are distinct even though they have many people and positions in common.

The Executive comprises:

- the Head of State (represented by the Governor General); and
- the Cabinet of Ministers.

The Cabinet:

- is headed by a Prime Minister, elected by the members of Parliament from among themselves;
- is collectively responsible to Parliament for the performance of the executive authority of government; and
- comprises a number of Ministers, as determined by the Head of State acting in accordance with the advice of the Prime Minister.

The Head of State (acting on the advice of the Prime Minister) allocates which government departments are looked after by each Minister. This includes the Minister that looks after the Justice Department and the Judiciary.

## **The Parliament (the Legislature)**

Parliament consists of a single chamber. It:

- has not less than 15 members elected by popular vote;
- serves a four year term; and
- must sit not less than once every 12 months.

Parliament's role is to make laws for the governance of Tuvalu. The laws may:

- have effect outside Tuvalu;
- apply retrospectively;
- define or detail any matter in the *Constitution*.

It is these laws that the Courts apply when dealing with charges, complaints and disputes that are brought before them.

The *Constitution* gives immunity to members of Parliament. No civil or criminal proceedings can be instituted against a member of Parliament for:

- words spoken in or included in a report to Parliament or a committee of Parliament; or
- any other matter or thing brought by the member of Parliament or a committee.

### **The Judiciary**

The Judiciary is the third branch of government in Tuvalu. It:

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

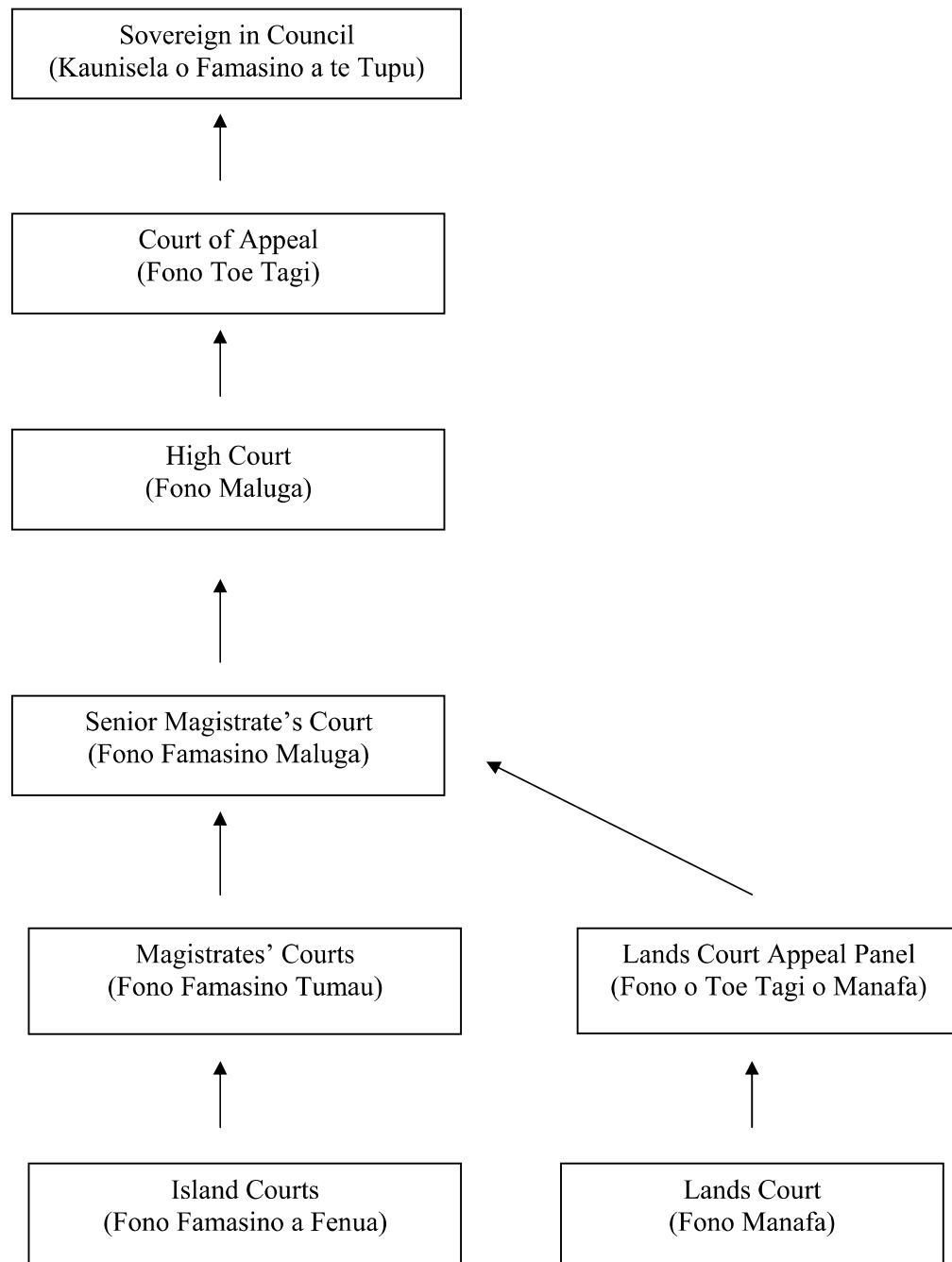
The Judiciary comprises:

- Island Courts Magistrates;
- Justices of the Lands Courts;
- members of the Lands Appeal Panel;
- Magistrates from the Magistrates' Courts;
- the Senior Magistrate;
- the Chief Justice;
- Justices of the Court of Appeal; and
- the Sovereign in Council (acting by and with the advice of the Judicial Committee of the Privy Council).

## 2 The Tuvalu Court System

### 2.1 The Structure of the Tuvalu Court System

Figure 1 The Structure of Tuvalu Courts



## 2.2 General Characteristics of the Tuvalu Court System

The Tuvalu Court system has **two branches** (see Figure 1).

One branch deals specifically with customary matters, including:

- customary land disputes;
- customary wills;
- customary succession;
- customary adoption; and
- customary fishing rights.

The Courts in this branch are:

- The Lands Courts; and
- The Lands Court Appeal Panel.

The other branch deals with civil and criminal matters and matters relating to the *Constitution*.

The Courts in this branch are:

- The Island Courts;
- The Magistrates' Courts;
- The Senior Magistrate's Court;
- The High Court;
- The Court of Appeal; and
- The Sovereign in Council.

The Tuvalu Court system is **hierarchical** (see Figure 1):

- This hierarchy is essential to the **Doctrine of Precedent**, meaning that decisions of a Court higher in the hierarchy are binding on the lower Courts. See 4.4 below.
- The hierarchy also 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.



## 2.3 Jurisdiction

“Jurisdiction” is the power and authority to hear or determine a particular matter.

Each of Tuvalu’s Courts has its own jurisdiction. Courts may only act within their jurisdiction, as defined by law. For example, the sub-ordinate Courts, such as the Island Courts and Magistrates’ Courts, are only permitted by law under specific statutes to deal with certain cases at certain levels.

If a Court hears a case or makes a decision that it has no authority or power to make, then it acts outside its jurisdiction. Consequently, the decision and any orders it makes are not lawful and therefore invalid.

It is very important that the Court be satisfied that it has authority to hear the matter before it proceeds.

An example where a Court would be acting outside its power would be if the Island Court heard a case for murder. The Court that has jurisdiction to hear this type of case in Tuvalu is the High Court and not the Island Court.

The Courts derive their jurisdiction or authority from the *Constitution* and the following statutes:

The Sovereign in Council	<i>Constitution</i>
The Court of Appeal	<i>Constitution</i>
The High Court	<i>Constitution</i>
The Senior Magistrate’s Court	<i>Magistrates’ Courts Act (Cap 2)</i>
The Magistrates’ Courts	<i>Magistrates’ Courts Act (Cap 2)</i>
The Island Courts	<i>Island Courts Act (Cap 3)</i>
The Lands Court Appeal Panel	<i>Native Lands Act (Cap 22)</i>
The Lands Courts	<i>Native Lands Act (Cap 22)</i>

The Governor General, on the advice of the Chief Justice, may make such amendments as are necessary to the jurisdiction of:

- the Senior Magistrate’s Court;
- the Magistrates’ Courts; and
- the Island Courts.

## **2.4 A Brief Description of the Courts**

### **The Island Courts**

There are eight Island Courts, regulated by the *Island Courts Act (Cap 3)*.

The Island Courts are:

- sub-ordinate Courts;
- Courts of summary jurisdiction within the island on which each is situated;
- where most cases in Tuvalu are heard.

Each Island Court has three lay Magistrates sitting together, with the President and the Vice-President sitting with an ordinary member.

Every criminal and civil proceeding must be heard and determined by the three members sitting together. Decisions of the Court are by a majority.

See 3.5 below for a detailed description of the jurisdiction of the Island Courts.

### **The Land Courts/Land Court Appeals Panel**

A separate system of Land Courts has been established under the *Native Lands Act* to determine:

- customary land disputes;
- customary wills;
- customary succession;
- customary adoption; and
- customary fishing rights.

Each island has a Land Court, with six members.

Appeals from the decisions of a Land Court lie in the first instance to a Land Court Appeals Panel, with three members. Further appeals are heard by the Senior Magistrate's Court.

### **The Magistrates' Courts**

The Senior Magistrate's and Magistrates' Courts are established under the *Magistrates' Courts Act (Cap 2)*.

The Magistrates' Courts may hear and determine:

- all civil matters, except those under the jurisdiction of a Land Court;
- matrimonial proceedings that have not already been commenced in an Island Court;

- criminal offences for which the maximum penalty does not exceed imprisonment for one year, a fine of \$200, or both.

The Magistrates' Courts may review any judgment, sentence or order of any Island Court within the district in which the Magistrate's Court is situated.

The Senior Magistrate's Court may hear and determine:

- criminal offences for which the maximum punishment does not exceed 14 years' imprisonment or a fine of \$1,000, or both;
- appeals from civil and criminal decisions of a Magistrate's Court.

The Chief Justice has power under the *Magistrates' Courts Act (Cap 2)* to invest the Senior Magistrate's Court and any Magistrates' Courts with jurisdiction to try summarily any offence that would otherwise be beyond its jurisdiction.

### **The High Court**

The High Court is established under Part VII of the *Constitution* and consists of the Chief Justice.

The Head of State has power, upon the advice of Cabinet, to appoint additional Judges.

The High Court has jurisdiction:

- in relation to the fundamental rights guaranteed by Part II of the *Constitution*;
- in relation to questions as to membership of Parliament;
- in relation to the interpretation or application of the *Constitution*;
- to hear appeals from the lower Courts.

### **The Court of Appeal**

The Court of Appeal is established under *ss134 and 135* of the *Constitution*, and is to be regulated by an Act of Parliament. This has not yet been enacted. When it has, the Court of Appeal will hear appeals from decisions of the High Court.

### **The Sovereign in Council**

Appeals from decisions of the Court of Appeal may be made to the Sovereign in Council, but only:

- in cases involving the interpretation or application of the *Constitution*;
- appeals relating to the enforcement of the Bill of Rights; and
- final or interlocutory decisions of the Court of Appeal which, in the opinion of the Court of Appeal, are of public importance.

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

The Sovereign in Council is commonly called the “Privy Council”.

### **3 Tuvalu Island Courts**

The Island Court:

- is a the Court where most of justice is administered in Tuvalu; and
- is established under the *Island Courts Act (Cap 3)*.

#### **3.1 The Relevant Legislation**

##### **Procedures**

- *Island Courts Act (Cap 3)*;
- *Island Courts Regulations (Cap 3)*;
- *Criminal Procedure Code (Cap 7)*;
- *Rehabilitation of Offenders Act 1991*;
- *Enforcement of Judgments (Payments from Wages) Act (Cap 94)*.

##### **Criminal**

- *Penal Code (Cap 8)*;
- *Public Order Act (Cap 9)*;
- *Dogs Act (Cap 46)*;
- *Traffic Act (Cap 71)*;
- *Public Health Act (Cap 35)*;
- *Alcoholic Drinks Act (Cap 69)*;
- *Falekaupule Act 1997*.

## **Family**

- *Maintenance (Miscellaneous Provisions) Act (Cap 4);*
- *Marriage Act (Cap 29);*
- *Custody of Children Act (Cap 20);*
- *Matrimonial Proceedings Act (Cap 21).*

## **Civil**

- *Workers Compensation Ordinance (Cap 83);*
- *Sale of Goods Act 1991;*
- *Employment Act (Cap 84).*

### **3.2 Composition of the Court**

Island Courts have not more than 5 members: one will be President, one will be a Vice-President, and three other ordinary members.

Each Court sitting must have 3 members, with the President and Vice-President sitting together with an ordinary member: *s9 Island Courts Act (Cap 3).*

There is a Court Clerk attached to each Island Court, who attends all sittings. The Court Clerk's role is largely administrative, and his or her duties are to:

- record evidence and judgments, convictions and orders of the Court;
- complete all Court documentation for signing by the President;
- issue civil processes;
- receive fees, fines and penalties; and
- perform such other duties as may be required: *s12 Island Courts Act (Cap 3).*

### **3.3 Appointment**

The Governor General appoints “fit and proper persons” to be members of each Island Court:

- in accordance with the advice of the Public Service Commission; and
- subject to the approval of the Chief Justice or his or her representative: *s9(2) Island Courts Act (Cap 3).*

The following people may **not** be appointed Island Magistrates:

- a member of a Kaupule;
- a member of a Lands Court; or
- a member of the Lands Courts Appeal Panel.

### **3.4 Removal from Office**

The Governor General may remove an Island Magistrate from office:

- in accordance with the advice of the Public Service Commission; and
- subject to the approval of the Chief Justice or his or her representative: *s9(2A) Island Courts Act (Cap 3)*.

### **3.5 Jurisdiction**

The jurisdiction for Island Courts is provided for in *s5* and *Schedules 1 and 2 Island Courts Act (Cap 3)*.

#### **Territorial extent**

Every island of Tuvalu has its own Island Court, excluding Niulakita (which is administered by Niutao). An Island Court can hear any matter provided it arose on the island, or alternatively one of the parties is resident on the island.

#### **Criminal**

See *ss5 and 6* and *Schedule 2 Island Courts Act (Cap 3)*.

Island Courts can only hear and determine summary offences punishable by a maximum sentence of:

- 6 months imprisonment; or
- a fine of \$100; or
- both: *s6 Island Courts Act (Cap 3)*.

Additionally, Island Courts may hear and determine the specific offences listed in *Schedule 2*, provided that the sentence passed by the Island Court does not exceed:

- 6 months imprisonment; or
- a fine of \$100; or
- both: *s6 Island Courts Act (Cap 3)*.

## **Civil**

See *s5* and *Schedule 1 Island Courts Act (Cap 3)*.

Island Courts may hear claims in:

- contract (agreements made between two or more persons), including debts; and
- tort (civil wrongs to persons and property).

The value of the property, debt or damage claimed must be under \$60. An applicant may reduce the claim in order to bring it within the jurisdiction of the Island Court.

Claims may be brought by:

- private individuals;
- businesses; or
- Kaupule.

## **Family**

See *s5* and *Schedule 1 Island Courts Act (Cap 3)*.

Island Courts can consider:

- a petition for divorce under the *Matrimonial Proceedings Act 1984 (Cap 21)*;
- an application for custody under the *Custody of Children Act (Cap 20)*;
- an application for maintenance under the *Maintenance (Miscellaneous Provisions) Act (Cap 4)*;
- an application for a marriage licence: *s11 Marriage Act (Cap 29)*.

These must be brought by private individuals, one of whom must reside on the island.

## **No jurisdiction**

No Island Court can hear any case that should be heard by a Lands Court: *Schedule 1, para 2 Island Courts Act (Cap 3)*. This includes any claim concerning:

- money or compensation arising from use of the land; and
- paternity.

## **3.6 Procedures**

Procedures establish how:

- an offender is brought to Court;
- an individual brings his or her claim against another; and
- a case is dealt with.

For the Island Court, procedures are found in the *Island Courts Act (Cap 3)*, and the *Island Courts Regulations (Cap 3)*.

Where the Act or Regulations are silent on how something is done, refer to the *Criminal Procedure Code (Cap 7)*, which governs practice and procedure in the Magistrates' Courts and High Court.

## **3.7 Language**

The language of the Island Court is Tuvaluan. The process is in Tuvaluan and English. This is to make the Court accessible to all members of the public.

Where a witness or party speaks a different language, the Court may appoint any suitable person as an interpreter: *s15(2) Island Courts Act (Cap 3)*.

# **4 The Law**

## **4.1 Sources of Law in Tuvalu**

The laws of Tuvalu are found in:

- the *Constitution*;
- legislation;
- case law decided by the Courts (known as common law);
- applied laws; and
- customary law.



## 4.2 The *Constitution*

Effective from 1 October 1986, the *Constitution* is the **supreme law** of Tuvalu.

Any other law that is inconsistent with the *Constitution* is invalid, either in whole or in part, to the extent of the inconsistency.

All other laws are to be interpreted and applied subject to the *Constitution* and, as far as practicable, in such a way as to conform with the *Constitution*.

However, it is Judges who interpret or decide the meaning of certain provisions in the *Constitution*, so the *Constitution* is affected by developments in the common law.

The *Constitution* can only be amended by an Act that has been:

- approved by 2/3 of the total number of members of Parliament; and
- circulated to all Kaupules for consideration and comment before the final reading.

## 4.3 Legislation

Legislation is law passed or authorised by Parliament.

There are two types of legislation:

- Statutes, which are Acts of Parliament; and
- Delegated legislation, which is made by a body other than Parliament. Parliament must have given authority to that body. These may be called regulations, orders, notices, by-laws or rules.

If legislation is inconsistent with the *Constitution*, it can be declared void.

Legislation is interpreted by Judges and Magistrates, and may be affected by developments in the common law.

Statutes in Tuvalu are made by a majority of the members of Parliament present voting in favour of a bill. A bill becomes law after it has passed three readings in the Assembly and been assented to by the Head of State, on the advice of the Prime Minister.

Legislation can be found in the *Laws of Tuvalu Revised 1990* and, from 1991, in the statutes themselves.

Regulations made under statute are found in the *Laws of Tuvalu Revised 1990* after the relevant Act.

Any statute or regulation passed after 1990 will be available from the Office of the Parliament and published in the *Tuvalu Gazette*. Copies of the *Gazette* should be distributed to the Kaupules on each island annually. A copy should be made available to the Island Magistrates by the Clerk.

### **Understanding and interpreting legislation**

The Island Court interprets and applies legislation, such as the *Penal Code (Cap 8)*. All legislation is in English (and not Tuvaluan), which can make this difficult.

It is your job to interpret and apply the legislation. Generally, statutes contain a section at the start which defines the meaning of certain words and phrases. If the word or phrase is not defined, then it may be given its natural and ordinary meaning.

When interpreting a word or phrase, consider:

- definitions in the Act (if any);
- any relevant definitions in the *Interpretation Act*;
- a dictionary;
- how it has been used in the particular Act and section (i.e. the context it has been used in); and
- what purpose Parliament had in passing the law.

When an Act says the Court “may” do something, that means the power may be exercised or not, at your discretion.

When an Act says you “shall” do something, this means you must. You have no choice.

## **4.4 Common Law**

Common law is the law that is made and developed by the higher Courts. It is also called case law.

The higher Courts can make and develop law:

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

Judges will often uphold or reject certain provisions in existing legislation when determining a case.

The development of the common law does not mean that Judges can make arbitrary decisions. They must follow the **Doctrine of precedent** and give reasons for their decision.

### **Doctrine of precedent**

Judges and Magistrates must follow decisions of higher Courts, unless the material facts in the case are different. This means cases of similar type should be decided in the same way, making the law certain.

It is through this process of making decisions based on previous decisions that the body of common law has been built up.

The Island Court is bound to follow decisions of the Resident Magistrate, Senior Magistrate, High Court and Appeal Courts.

The Chief Justice and the Senior Magistrate will, from time to time, issue Practice Directions that explain how the law is to be applied in particular cases. These bind the Island Courts.

As there is little developed case law in Tuvalu, this makes it difficult for the Island Courts to know what decisions to follow. If in doubt, guidance should be sought from the Resident Magistrate, and the Senior Magistrate.

Some cases have been included in Appendix 4.

When there is no relevant Tuvaluan decision, then English cases may be considered. You might do this if the wording of the legislation you are considering is the same or similar to legislation that English cases have considered. This is common for offences under the *Penal Code (Cap 8)*.

## **4.5 Applied Laws**

Applied laws are defined in the *Laws of Tuvalu Act 1987* as “those imperial enactments which have effect as part of the law of Tuvalu”. The Attorney General may effect amendments to any applied law that appear necessary or expedient for bringing the law into conformity with the *Constitution*, and Act of Parliament or customary law.

## **4.6 Customary Law**

See *s5* and *Schedule 1* of the *Laws of Tuvalu Act 1987*.

Custom is the customs and usages of the natives of Tuvalu.

The principles of the *Constitution*, which are set out in the Preamble, specifically refer to the Tuvaluan values and culture, and the need to respect and preserve these.

Custom shall have effect as part of the law of Tuvalu, except to the extent that it is inconsistent with an Act or Regulations: *s5 Laws of Tuvalu Act 1987*. So where an Act says something that is different from custom, then the Act prevails.

Customs must be taken into consideration in every case before the Court. They must be considered in criminal, civil and family matters, and must be assessed by the Island Court on the facts of each and every case. However, if enforcing customary law will result in injustice or is not in the public interest, do not enforce it.

Different rules apply to the recognition of customary law in criminal and civil/family cases. See *Schedule 1 of the Laws of Tuvalu Act 1987*, which details where customary law applies in relation to various cases.

### **How customary law is determined**

*Schedule 1 Laws of Tuvalu Act 1987* sets out how customary law is determined and recognised. It is up to the Court to determine the existence and nature of customary law in relation to a matter, and how it is applied in any particular case.

Consider any submissions by the parties. You may also make any inquiries into the question, by adjourning to find out more, if necessary. Any inquiries you make will be part of the proceedings. You are not bound to observe strict legal procedure or apply technical rules of evidence and you can call any evidence or opinions as you think fit.

If the Court has discussed customary practice then this should form part of the decision.

## **5 Evidence**

### **5.1 What is Evidence?**

Evidence is the facts placed before the Court to prove or disprove the allegation at issue.

Rules have been established to assist the Court as to what is evidence and what the Court may (or may not) consider.

### **5.2 Types of Evidence**

#### **Oral evidence**

This is evidence that is made by the parties and witnesses in front of you. Oral evidence should be given on oath.

### **Documentary or written evidence**

This is evidence in writing or on paper or tape, such as:

- receipts and invoices;
- photographs;
- agreements;
- tape recordings;
- maps;
- licenses; and
- drawings.

The original should be produced, wherever possible.

### **Real evidence**

These are material objects or items, such as:

- a knife;
- pieces of clothing;
- damaged bicycle; and
- alcoholic drink.

### **Exhibits**

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

You should ensure that:

- the witness has seen the item and is able to identify it to the Court;
- the party introducing the item asks the Court that it becomes an exhibit; and
- the exhibit is clearly marked. Usually, prosecution exhibits are numbered 1, 2, 3 etc and defence exhibits are letters A, B, C, etc.

Once the item has become an exhibit, the Court has the responsibility to preserve and retain it until the trial is over.

The Court must ensure that:

- proper care is taken to keep the exhibit safe from loss or damage; and
- if the Police are entrusted to keep the item, the defence is given reasonable access to it for inspection.

### 5.3 The Important Rules of Evidence

The important rules of evidence are:

- evidence must be **relevant** to the issues before the Court;
- the **best** evidence must be produced;
- **hearsay** evidence is not admissible; and
- statements of **opinion** cannot be given unless that person is an expert.

#### **Evidence must be relevant**

As a general rule, only evidence of the facts in issue between the parties is admissible.

In criminal cases, they are those facts which the prosecution must prove to obtain a conviction or which the accused must deny or prove to obtain an acquittal.

In civil and family cases, they are those matters relevant to the particular claim.

#### **Best evidence**

This rule relates to documents and means that:

- the original document must be produced, and explained by the person who created it, if possible;
- if the original has been lost or destroyed, a copy may be produced as that is the best evidence available.

#### **Hearsay evidence**

Evidence given by a person who did not see or hear the original matter is called hearsay evidence.

An example of hearsay evidence would be a witness telling the Court what his friend told him about what she saw the accused do. The witness did not see the accused do anything. It was his friend who saw it, and who should give evidence.

Hearsay evidence is generally inadmissible because:

- when a person gives evidence of what another person told them, the evidence is not what they saw or heard directly, but what someone else saw or heard;
- the other person's statement is not given on oath; and
- the other person cannot be cross-examined.

### **Statements of opinion**

The opinion of a witness is irrelevant. Their duty is to tell what was seen, heard and done. They must only state the facts, not what they think or believe.

The exception is where an expert is giving evidence on things within their expertise. An expert is a person who has acquired a skill in a particular subject by training, experience or study.

## **5.4 Refreshing Memory**

In certain criminal cases a Police officer may refer to notes taken at the time of the incident. For example, by looking at his or her notebook, but only if the Police officer wrote down what took place immediately at the time of going to the incident.

On outer islands, this may cause a problem given the role of the Police officer as Prosecutor in criminal cases. This may create a conflict.

In civil cases, a witness may refer to a document that he or she has made or verified and which has been produced to the other party in advance.

## **5.5 Evidence from Children**

If a young child is a witness, or a party to an action, the Court must decide if he or she is capable of giving evidence. Such evidence can be sworn on oath or not.

The general rule is that the younger the child, the less likely it will be that they can give evidence. Any evidence that they give should be in the presence of their parent(s).

The Court has to decide the level of understanding of the child and what reliance (if any) is to be placed on what they said.

## **5.6 Evidence of a Spouse**

In criminal cases, an accused's husband or wife:

- may give evidence for the prosecution, but does not have to;
- may give evidence for the defence.

## **5.7 Self – Incrimination**

A witness cannot be asked a question which, if they answer it, may result in them admitting that they committed an offence.

For example, X has been prohibited from drinking alcohol for 6 months. If his best friend A has been charged for possession of an alcoholic drink and X is called as a witness to say he was drinking with A, then by admitting that, X would admit possession, and be guilty of the same offence.

## **5.8 Jointly Charged Accused**

Anything that an accused says to the Police or anyone else that incriminates a co-accused cannot be used as evidence unless accepted by the co-accused.

## **5.9 Identification of the Accused**

Proof of identification of an accused as the person who committed the crime alleged is an essential element in every prosecution.

Failure to satisfactorily identify the accused as the offender must result in an acquittal.

For example, if the accused disputes that it was him the witness saw commit the particular offence, and the prosecution is unable to prove it beyond reasonable doubt, then the prosecution fails.

Sometimes the accused does not dispute identification and accepts it has been proved.

The Court must be sure that any eye-witness evidence identifying the accused as the person who committed the offence is accurate and reliable. Mistakes have been made by honest and genuine witnesses.

Always examine the circumstances in which the identification was made, particularly:

- How long did the witness observe the accused?
- At what distance?
- In what light?
- Was there anything that might make observation difficult, e.g. passing traffic or many people?
- Had the witness ever seen the accused before? How often?
- If the witness did not know the accused, was there any special reason for remembering him or her?



## **5.10 Credibility and Reliability**

Credibility and reliability in a witness is the quality of deserving to have his or her evidence believed. Factors affecting this are the witness’:

- knowledge of the facts;
- apparent honesty – were they genuinely trying, in your view, to tell the truth; and
- apparent reliability – you might ask how good and reliable is their memory of events.

When considering oral evidence, take into account not only what has been said but also how it has been said. How you assess the demeanour of a witness can be a valuable aid in judging his or her credibility and reliability.

You may accept parts of the evidence of a witness and reject other parts.

A witness may be cross-examined for the sake of disproving his or her credibility.

## **5.11 Lies**

### **Accused lies**

If it is established that an accused has lied, then that is relevant to his or her credibility as a witness. It does not necessarily mean that they are guilty of the offence charged. Lies can be told for a variety of reasons and not necessarily to avoid a guilty verdict.

### **Witness lies**

Where it is shown that a witness has lied, this is relevant to their credibility.

## **6 Legal Terms**

The table on the following pages gives basic definitions for some legal terms you will encounter.

<b>Term</b>	<b>Meaning</b>
Adjournment	When a case is put off to another date.
Balance of probabilities	This is the standard of proof required in civil and family cases. The person bringing the claim has to prove the case on the balance of probabilities. This means whatever is being claimed happened “more likely than not”.
Beyond reasonable doubt	This is the standard of proof required in criminal cases. The prosecution has to prove all the elements of the offence beyond reasonable doubt. This means you are left in no real doubt at all that the person is guilty.
Burden of proof	This means who has the responsibility to prove something. In a criminal case, the prosecution has the burden of proving the accused is guilty, beyond reasonable doubt. In a civil case, it is the person bringing a claim who must prove it, on the balance of probabilities.
Cause of action	In civil cases, the ‘cause of action’ is the type of claim brought by a person against another person, and which explains why that other person should pay money or do something.
Charge	In a criminal case, this is the allegation which the Police make against the accused.
Child	Someone aged under 14.
Civil wrong	An act or omission which gives rise to a dispute between individuals or companies. Not a crime.
Common law	Law developed by the Courts through their decisions.

Contested or defended hearing	<p>In a criminal case, a hearing in front of a Magistrate, where the prosecution tries to prove the accused is guilty. A defended hearing follows on from a not guilty plea.</p> <p>In a civil case, a hearing in front of a Magistrate, where the applicant tries to prove their claim. It follows on from the other party not admitting the claim.</p>
Contract	An agreement between two or more people. It can be oral or written.
Crime	An act forbidden by the laws of Tuvalu.
Custody of a child	In a family case, means an order you may make, saying who is to care for a child.
Customary law	Cultural practice which is relevant to an issue before you.
Decision	The formal process of saying, at the end of the case, what the result is, and what your reasons are.
Discharge	When someone is guilty of a charge, but you do not want to enter a conviction.
Divorce	A formal order you may make, declaring that a marriage is at an end.
Fine	A sum of money you may order an offender to pay in a criminal case, and this must not be more than \$100 on a particular charge.
Hearsay evidence	Indirect, usually second hand evidence.
Identification	The formal process of showing that the person before the Court is the correct person.

Impartial/Impartiality	Being free of any interest or bias in a case.
Interim hearing	Usually in a family case, is the first time you make an order, with a view to making another order later.
Jurisdiction	The lawful power to hear a case, and act.
Lawful justification or excuse	A defence to having done a crime, which is allowed for in statute or the common law.
Legislation	Law passed by Parliament, called statutory law, Acts, or Statutes.
Litigant	A person who is involved as a party to the case before you.
Maintenance	In a family case, means money you order a parent to pay for a child, or the other parent.
Matrimonial property	This is the property that a husband or a wife own, as a result of their marriage, and which you may divide.
Pecuniary interest	A financial interest.
Plea	In a criminal case, the formal statement as to whether the person admits or denies the charge. Will be either guilty or not guilty.
Plea in mitigation	The speech given before sentence, by an offender, or by the offender's lawyer, in which they will give reasons to try to justify a lesser sentence.
Precedent	Previous decisions of the higher Courts which are binding.

Previous convictions	When, at an earlier time, an offender has been found guilty <b>and</b> been convicted of a charge.
Regulations	These are passed by Ministers with the authority of Cabinet, and are binding in much the same way as legislation.
Right of appeal	In any case you hear, and after your decision has been given, the right a person has to come before a higher Court and have the matter reconsidered.
Sentence, and sentencing	The penalty that an offender must pay or do. You pass sentence after you have either found someone guilty, or that person has pleaded guilty. Usually a fine or imprisonment.
Special licence	In family cases, when you are asked to permit marriage to occur.
Standard of proof	In criminal cases, the standard of proof is beyond reasonable doubt.  In civil cases, the standard of proof is on the balance of probabilities (more likely than not).
Statutory law	Law passed by Parliament.
Summary offences	Lower type of offences, usually heard by Island Courts.
Summons	A formal document advising someone to come to Court.
To convict	The formal process of recording the guilt of the accused after either a guilty plea or decision of guilt by you.

Tort	A wrong committed by one person toward another, where they are responsible for it and other person may make a claim for damages.
Writ of summons	In civil cases, is the way in which a person who is taken to Court is told about it.
Young person	In a criminal case, a person aged 14 years or above, but under 17.