

B:

JUDICIAL CONDUCT

This part sets out what being a Magistrate in the Island Court requires, and describes expected behaviour in and out of Court. It:

- sets out your judicial oath and describes the well-established ethical principles applying to all judicial officers;
- gives guidance on managing proceedings;
- outlines the roles of Chair and panel members.

1 Ethical Principles

As a Magistrate of the Island Court, you have sworn the following oath on appointment:

“I swear by Almighty God that I will well and truly serve Our Sovereign Lady Queen Elizabeth, her Heirs and Successors, as a Judicial Officer and I will do right to all manner of people after the laws and usages of Tuvalu, without fear or favour, affection or ill will. So help me God.”

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 Judges and Magistrates respect and comply with the law, and conduct themselves in a manner which will not bring themselves or their office into disrepute.

The Oath can be divided into parts to illustrate a number of well-established ethical principles of judicial conduct.

1.1 “Well and Truly Serve”

Diligence

You should be diligent in the performance of your judicial duties.

This means you should:

- devote your professional activity to your judicial duties, which include not only presiding and sitting in Court and making decisions, but other judicial tasks essential to the Court’s operation;
- bring to each case a high level of competence and be sufficiently informed to provide adequate reasons for each decision;
- 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 condone such conduct in colleagues.

Decisions should be delivered as quickly as circumstances permit. Always try to do this immediately. This means you must:

- be familiar with common offences, jurisdiction and procedure; and
- prepare before sitting in Court.

1.2 “Do Right”

Integrity

You should strive to conduct yourself with integrity so as to sustain and enhance public confidence in the Judiciary.

This means you should:

- make every effort to ensure that your conduct is above reproach in the view of reasonable, fair-minded and informed persons; and
- encourage and support your judicial colleagues to observe this high standard.

1.3 “All Manner of People”

Equality

You should conduct yourself and proceedings before you so as to ensure equality according to the law.

This means you should:

- carry out your duties with appropriate consideration for all persons (for example, parties, witnesses, Court personnel and judicial colleagues) without discrimination;
- strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnical background;
- avoid membership in any organisation that you know currently practices any form of discrimination that contravenes the law; and
- in the course of proceedings before you, disassociate yourself from and 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.

1.4 “After the Laws and Usages of Tuvalu”

Lawfulness

You should act within the authority of the law.

This means you should:

- not take into account irrelevant considerations when making your decisions - the exercise of judicial discretion should only be influenced by legally relevant considerations;
- not abdicate your discretionary powers to another person – it is for **you** to decide; and
- defend the constitutionally guaranteed rights of the Tuvaluan people.

1.5 “Without Fear or Favour, Affection or Ill Will”

Judicial independence

An independent Judiciary is indispensable to impartial justice under the law. You should therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

This means you must:

- 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;
- encourage and uphold arrangements and safeguards to maintain and enhance the independence of the Judiciary;
- exhibit and promote high standards of judicial conduct so as to reinforce public confidence, which is the cornerstone of judicial independence.

Impartiality

You must be, and should appear to be, impartial with respect to your decisions and decision making.

This means you should:

- strive to ensure that your conduct, both in and out of Court, maintains and enhances confidence in your impartiality and that of the Judiciary;
- not allow your decisions to be affected by:
 - ⇒ bias or prejudice;
 - ⇒ personal or business relationships; or
 - ⇒ personal or financial interests;
- as much as reasonably possible, conduct your personal and business affairs so as to minimise the occasions on which it will be necessary to be disqualified from hearing cases; and
- review all commercial, social and political groups you are a member of, or have an interest in, and ask yourself, “could this involvement compromise my position as Magistrate?”

You must not only be impartial, but you must be seen to be impartial. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair-minded and informed person.

This principle touches several different areas of your conduct.

a) Judicial demeanour

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.

b) Civic and charitable activity

You are free to participate in civic, charitable and religious activities, subject to the following considerations:

- Avoid any activity or association that could reflect adversely on your impartiality or interfere with the performance of your judicial duties.
- Do not solicit funds (except from judicial colleagues or for appropriate purposes) or lend the prestige of the judicial office to such solicitations.
- Avoid involvement in causes and organisations that are likely to be engaged in litigation.
- Do not give legal or investment advice.

c) Political activity

You should refrain from conduct which, in the mind of a reasonable, fair-minded and informed person, would undermine confidence in your impartiality with respect to issues that could come before the Courts.

All partisan political activity must cease upon appointment. You should refrain from conduct that, in the mind of a reasonable, fair-minded and informed person, could give rise to the appearance that you are engaged in political activity.

You should refrain from:

- membership in political parties and political fundraising;
- attendance at political gatherings and political fundraising events;
- contributing to political parties or campaigns;
- taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the Courts, the independence of the Judiciary or fundamental aspects of the administration of justice; and
- signing petitions to influence a political decision.

Members of your family have every right to be politically active. Sometimes this may adversely affect the public perception of your impartiality. In any case before the Court where there could reasonably be such a perception, you should not sit.

d) Conflict of interest

You must disqualify yourself in any case in which you believe that you will be unable to judge impartially.

You should also disqualify yourself if a reasonable, fair-minded and informed person would have a personal suspicion of conflict between your personal interest (or that of your immediate family or close friends or associates) and your duty.

Never preside over a case where the accused or witness:

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

In Tuvalu, family relationships are a major problem. Decide how closely that person is related to you. Kinship to first cousin and closer (for both you and your spouse) may provide a guideline.

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

- issues;
- witnesses; or
- parties.

For example, if you witness an accident, do not preside over any case arising out of that accident. You may prefer your recollection to the evidence produced in Court.

Given that individual islands are so small, you should also be careful not to let person or local knowledge affect your judgment.

Disqualification is not appropriate if:

- the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification;
- no other Magistrates are available to constitute a Court to deal with the case; or
- because of urgent circumstances, failure to act could lead to a miscarriage of justice.

2 Conduct in Court

2.1 Preparing for a Case

Ensure you have studied and understood the files you will be dealing with.

Make sure you have the relevant legislation at hand.

Criminal

Consider the offences – make sure you know what elements must be proved.

Civil/family

Study the file, affidavits, etc.

Identify the issues in dispute and the relief sought.

2.2 Principle that Affected Parties have the Right to be Heard

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

This principle focuses on the *procedural* steps implemented by the Court. The purpose of the principle is to ensure that you consider all relevant information before making a decision.

To give effect to this principle, you have to consider what has to be done to allow a person to be heard. This extends to allowing the person sufficient notice to prepare their submissions, to collect evidence to support their submissions and to rebut or contradict the other party's submissions.

Note that a person may be heard but the view they have expressed does not have to prevail. You are entitled to reject it for what might be a good reason. The relevance and weight of the information is to be determined by you.

There are three aspects to the principle:

Prior notice

- You should be satisfied that adequate notice has been given, as prescribed by law.
- 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.
- Notice must be sufficient to allow the person to prepare their case. Where you are not satisfied that a party has been given sufficient notice for this, adjourn the matter to allow them more time.

Fair hearing

- 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.
- It always requires you to ensure you have all the relevant facts and materials before deciding.

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 propose to take into account.

Before a hearing is concluded, you should ask yourself, “has each party had a fair opportunity to state his or her case?”

2.3 Courtroom Conduct

You should exhibit a high standard of conduct in Court so as to reinforce public confidence in the Judiciary:

- Be courteous and patient.
- Be dignified.
- Be humble:
 - ⇒ If a mistake is made you should apologise - there is no place on the Bench for arrogance.
- Continually remind yourself that a party is not simply a name on a piece of paper:
 - ⇒ The parties are looking to the Court to see justice is administered objectively, fairly, diligently, impartially, and with unquestionable integrity.

- Never make fun of a party or witness:
 - ⇒ A matter which may seem minor to you, may be very important to a party or witness.
 - ⇒ Remember there are no unimportant cases.
- Show appropriate concern for distressed parties and witnesses.
- Never state an opinion from the Bench that criticises features of the law:
 - ⇒ Your duty is to uphold and administer the law, not to criticise it.
 - ⇒ If you believe that amendments should be made, discuss the matter with either the Senior Magistrate or Chief Justice, who may be able to help you.
- Never say anything or display conduct that would indicate you have already made your decision before all parties are heard.
- Do not discuss the case or any aspect of it outside of the panel. This includes other Magistrates who are not sitting on the case.

2.4 Maintaining the Dignity of the Court

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

- keeping order in Court; and
- being polite and respectful and expecting the same from them.

Deal effectively with unruly defendants, parties, witnesses and spectators by:

- decisiveness and firmness;
- dealing promptly with interruptions or rudeness; and
- clearing the Court or adjourning if necessary.

2.5 Communication in Court

Speaking

- Use simple language without jargon.
- Make sure you know what to say before you say it.
- Avoid a patronising and 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; and
 - ⇒ the public in the Courtroom are able to hear what is being said.

Listening actively

- Be attentive and be seen to be attentive in Court.
- Make accurate notes.
- Maintain eye contact with the speaker.

Questioning

Criminal

- The criminal justice system is based on an adversarial procedure, which requires the prosecution to prove the case. Your role is not to conduct the case for them, but to listen and determine.
- 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 attempt to clarify any ambiguities appearing 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 and family

- 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.

Dealing with parties who do not understand

You may frequently be confronted with unrepresented defendants and parties who do not appear to understand what the proceedings are about.

It is your responsibility to ensure that the defendant or parties understand:

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

Criminal

When dealing with unrepresented defendants, 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 he or she is appearing in Court;
- what his or her rights are;
- what the Court is doing; and
- why the Court is following that course.

Civil and Family

You may need to be more 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; and
- to an applicant that they have to tell you what they want and why.

Dealing with language problems

Ideally, an interpreter should be obtained and sworn in when there is a language problem. 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 to enable an interpreter to be obtained.

3 Working as a Panel

Each Court sitting must have three members, with the President and Vice-President sitting together with an ordinary member. Decisions are by agreement and, if there is no agreement, by majority (2 out of 3): *s10 Island Courts Act (Cap 3)*.

The President

The role of the President is to manage the proceedings. From the perspective of the public and all before the Court, he or she is in charge of the Courtroom. This involves:

- handling all procedures;
- issuing all summonses, warrants, orders, convictions and recognisances;
- making all pronouncements;
- recording the evidence if the Court Clerk is not present;
- ensuring all before the Court understand what is going on and are treated with respect;
- structuring and guiding any panel discussions out of Court, and ensuring the discussions are purposeful and relevant; and
- ensuring that all other members of the Bench have the opportunity to be heard in panel discussions.

The President should know the members' strengths and weaknesses and make the most of their strengths and expertise whenever possible. He or she should ask the opinions of each member, listen to them and treat each contribution as important.

The President may ask other members to undertake specific tasks, for example:

- note taking;
- referring to legislation and this benchbook;
- ensuring observation of the rules of evidence.

Other members

The role of the other members involves:

- appropriately drawing the President's attention to particular matters of significance or procedure;
- listening attentively;
- undertaking tasks as required by the President; and
- working in partnership with the Chair and other Bench members to decide the case.