Foundations

1. Constitutional framework of the Cook Islands 3
1.1 The Cook Islands Constitution 3
1.2 Branches of government 4
1.3 The High Court 7
2. Sources of law 8
2.1 Introduction 8
2.2 The Constitution 8
2.3 Legislation 8
2.4 Common law 10
2.5 Customary law 10
3. The High Court 11
3.1 Relevant Acts 11
3.2 The Cook Islands Constitution 12
3.3 Overview of the courts 13
3.4 Jurisdiction of the courts and governing Acts 15
3.5 Judges 17
3.6 Justices of the peace 18
3.7 Transfer of cases to a Judge 19
3.8 Other officers of the court 19
4. Judicial conduct 22
4.1 Judicial conduct generally 22
4.2 The rule of law 22
4.3 Natural justice 22
4.4 The judicial oath 23
4.5 Conduct in the court 28
4.6 Working as a panel 34
4.7 Appeals 35
5. Evidence 36
5.1 Introduction 36
5.2 Classification of evidence 36
5.3 Documentary evidence 37
5.4 Real evidence 39

5.5 Exhibits 39
5.6 Oral evidence 40
5.7 Evidentiary issues relating to witness testimony 40
5.8 Rules of evidence 47
6. Human rights and criminal law 56
6.1 Introduction to fundamental rights and freedoms 56
6.2 Right to a fair and public hearing by an independent and impartial court 56
6.3 Presumption of innocence 57
6.4 Right to freedom from cruel or degrading treatment 58
6.5 Right to legal counsel 58
6.6 Right not to be convicted of any offence unless it is in breach of a law in force 59
6.7 Freedom from unlawful and arbitrary detention 59
7. Principles of criminal law and criminal responsibility 60
7.1 Introduction 60
7.2 Principles of criminal law 60
7.3 Rules relating to excuses or special circumstances 67
7.4 Other defences and statutory defences 69
7.5 Parties 70

1. Constitutional framework of the Cook Islands

1.1 The Cook Islands Constitution

The Cook Islands Constitution (the Constitution) came into effect in August 1965. The Constitution gives effect to three important constitutional principles:

1. the doctrine of the separation of powers;
2. the independence of the judiciary;
3. the rule of law.

1.1.1 The doctrine of the separation of powers

There are three distinct and separate branches of government:

1. The executive: makes policy and administers public policy and allocates funds;
2. The Parliament: makes the law (legislature);
3. The judiciary: legal system and the Judges and Justices who interpret the law.

Each branch of government checks the roles and functions of the other branches, so that the balance of power between the three branches is maintained. 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.

1.1.2 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;
- the immunity of Judges and Justices from civil actions.

1.1.3 The rule of law

This is the principle that all people and institutions are subject to and accountable to law that is fairly applied and enforced. 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 and provides checks and balances for the executive and legislative branches of government: art 64 Constitution.

1.2 Branches of government

1.2.1 The executive (government)

The role of the executive is to make and put into place government policy. 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 head of state;
- the Queen's Representative;
- the Prime Minister;
- the Cabinet of Ministers; and
- the Executive Council.

Head of state: See arts 2 and 12 of the Constitution.

- Her Majesty the Queen is the head of state and has the executive authority of the Cook Islands: arts 2, 12 Constitution.

The Queen's Representative: See arts 5 and 12(1) of the Constitution.

- The Queen's Representative exercises the executive authority of the Cook Islands either directly or through their officers. Her Majesty the Queen appoints the Queen's Representative who stays in office for a 3-year term: art 3 Constitution.
- Except as provided in the Constitution, the Queen's Representative shall act on the advice of Cabinet, the Prime Minister or the appropriate minister when performing their duties: art 5 Constitution.
- The Queen's Representative also grants assent to Bills acting on the Prime Minister's advice once passed by Parliament: art 44 Constitution.

Prime Minister: See art 2(6) of the Constitution Amendment (No. 9) Act, 11–74.

- The Prime Minister is the head of government, in charge of Cabinet and a Member of Parliament (MP): art 2 (6). When Parliament is in session, the Prime Minister is appointed by the Queen's Representative on the basis that they command the confidence of a majority of the MPs (if not in session, then is it based on whether they are likely to command the confidence of a majority of MPs).

Cabinet: See art 2 of the Constitution Amendment (No. 23) Act 1999.

- Cabinet is made up of the Prime Minister and 6 Ministers, being Members of Parliament (MPs) or will be MPs (if appointed after an election but before the first session). Five Ministers other than the Prime Minister are appointed by the Queen's Representative on the advice of the Prime Minister. The Cabinet sets the direction and oversees the executive government but is collectively responsible to Parliament.
- The Queen's Representative may appoint one minister who is not an MP (but is eligible to be an MP). This minister may attend and address meetings of Parliament and any committee but may not vote on any question before Parliament.

- The Prime Minister gives each minister responsibility for any government department or subject. This includes the minister that looks after the justice department and the judiciary.

Executive council: See arts 22(1), 25, 52, 54 of the Constitution.

- The Executive Council consists of the Queen's Representative and the members of Cabinet.
- At least three Ministers must be present at the meetings of the Executive Council.
- The council may:
  - consider any decision the Cabinet makes as recorded in the Cabinet minutes: art 25;
  - give advice on the appointment and removal of Judges: arts 52, 54.

1.2.2 Parliament

Art 27 of the Constitution.

Parliament (also known as the "House") consists of 24 members elected by secret ballot under a system of universal votes by electors from the various islands. The speaker, who is nominated by the Prime Minister, enforces the rules.

The House's role is to:

- provide members to form the government (executive);
- make new laws and update old laws;
- represent the people of the Cook Islands;
- examine and approve government taxes and spending;
- hold the government to account for its policies and actions.

Members of parliament vote on every issue, and any decisions made must be decided by a majority of the votes of the members present (and at least 12 MPs must be present), except when changes to the Constitution arise.

Every question before Parliament shall be decided by a majority of the votes of the members present (must be at least 12 not including the speaker), except for changes to the Constitution.

The Queen's Representative dissolves Parliament every 4 years unless it has been dissolved earlier.

See art 44 of the Constitution, which defines how Parliament makes law. Parliament has the power to make laws (known as Acts) for the peace, order and good government of the Cook Islands, subject to the Constitution. It introduces and passes Bills in accordance with the Constitution and with the standing orders of the Parliament.

Once a Bill has passed through all its parliamentary stages it can become an Act of Parliament, forming part of the law. Any Member of Parliament may introduce any Bill or propose any motion for debate in Parliament.

A Bill is not a law until it is signed by the Queen's Representative acting on the advice of the Prime Minister. This is called the "royal assent". The Queen's Representative may summon the Executive Council to consider amendments to a Bill when the Queen's Representative proposes changes or refuses to assent to the Bill. This must be done within 14 days after the Bill is presented to the Queen's Representative.

If the Executive Council decides that the Bill should be returned to Parliament to debate the proposed amendments or because the Queen's Representative refuses to assent to it, the Queen's Representative shall return the Bill to Parliament to reconsider.

If the Executive Council decides that the Bill should not be returned to Parliament to reconsider, or that the Queen's Representative should not refuse their assent to the Bill, then the Queen's Representative must declare their assent to the Bill.

At that point, either the Bill is passed with the proposed amendments, different amendments, or in its original form without any amendments, and then it goes back to the Queen's Representative who must declare their final assent.

Members of parliament (MPs): See art 36 of the Constitution.

- The Constitution gives immunity to MPs from civil or criminal proceedings when they are acting in their official capacity such as:
  - exercising their powers in government;
  - words said or any votes made in Parliament or in any committee of Parliament;
  - any publication of any report, paper, vote or proceeding by or under the authority of Parliament.
- MPs can be sued and prosecuted in respect of acts by them outside their official capacity.

House of arikis: See arts 8, 11 of the Constitution; House of Arikis Act 1966 (HAA).

- The House of Arikis consists of up to 14 Arikis (chiefs) appointed by the Queen's Representative (subject to the Constitution).
- The House of Arikis has the following members (art 8(2) Constitution (as amended in 2002):
  - four Arikis of the islands of Aitutaki and Manuae;
  - three Arikis of the island of Atiu;
  - one Ariki each from the islands of Mangaia, Manihiki, Rakahanga, Penrhyn;
  - three Arikis of the island of Mauke;
  - three Arikis of the island of Mitiaro;
  - the Ariki of the islands of Pukapuka and Nassau;
  - six Arikis of the island of Rarotonga.
- The House of Arikis meets at least once every 12 months in Rarotonga and eight members must attend the meeting: s 11 HAA.

- Their functions are to (s 8 HA):
  - consider any welfare issues relating to the people of the Cook Islands that Parliament submits and give an opinion and make recommendations to Parliament on these issues;
  - make recommendations together with their reasons on any issue affecting customs or traditions to the legislative assembly with the premier or their appointed representative invited to take part in the proceedings (if views are not unanimous an explanatory note must also state the minority views);
  - perform any other functions as prescribed by law, but they have no power to make laws: art 9(1).

1.2.3 The judiciary

The judiciary is an independent body that:

- interprets and applies the laws made by Parliament;
- develops and interprets case law;
- solves disputes of fact and law between individuals, and between individuals and the State.

1.3 The High Court

The High Court is an important part of the constitutional framework. It is described in detail in "High Court" below.

2. Sources of law

2.1 Introduction

The sources of law are:

- the Constitution;
- legislation, including Acts, ordinances and regulations;
- the common law (case law decided by the Courts);
- custom.

2.2 The Constitution

Arts 39, 41; Constitution.

The Constitution is the supreme law of the Cook Islands and all Acts of Parliament must not conflict with what the Constitution sets out. This means Judges and Justices must interpret and apply all other laws according to what the Constitution provides for: art 39(3). The Constitution itself may be interpreted and therefore is affected by developments in the common law.

The members of the Cook Islands Parliament can only change the Constitution by voting on any Bill to change or repeal any part of the Constitution as follows:

- at the vote before the final vote and at the final vote, the Bill must receive affirmative votes of not less than two-thirds of the membership (including vacancies) of Parliament and this final vote must take place at least 90 days after the reading that preceded it;
- no such Bill is to be presented to the Queen's Representative for assent unless it is accompanied by a certificate from the speaker of Parliament to that effect: art 41(1).

Likewise, no Bill to change or repeal any part of the Constitution shall be submitted to the Queen's Representative unless:

- it has been passed by Parliament according to article 41(1) of the Constitution;
- it has been submitted to a poll to persons who are entitled to vote as electors at a general election of members of Parliament;
- it has been supported by at least two-thirds of the valid votes cast in such a poll;
- it is accompanied by a certificate from the speaker of Parliament to that effect: art 41(2).

2.3 Legislation

Art 39 of the Constitution.

Parliament may make laws (Acts) for the peace, order, and good government of the Cook Islands: art 39(1). These laws then become legislation, unless they are inconsistent with the Constitution, in which case they can be declared void: art 39(3).

Judges and Justices must interpret and apply legislation, which is therefore affected by developments in the common law.

Legislation in the Cook Islands consists of:

- Acts (statutes);
- subordinate legislation, such as regulations and rules.

Statutes that apply in the Cook Islands are:

- Acts passed by the Parliament of the Cook Islands according to art 39 of the Constitution;
- Acts of the Parliament of New Zealand that are declared to apply in the Cook Islands, by the Parliament of the Cook Islands according to art 46 of the Constitution and the New Zealand Laws Act 1979.

Legislation can be found in the Consolidated Laws of the Cook Islands 1997, and in subsequent amendments. To see statutes online, go the Pacific Islands Legal Information Institute. Regulations and rules are made by the Queen's Representative by order of the Executive Council.

2.3.1 Understanding and applying legislation

Judges and Justices interpret and apply the law through the court system by hearing and deciding cases. If you are hearing a case where you must make a decision and the statute leaves this up to your discretion, you may look at earlier court decisions on similar cases. This is called case law.

Generally, the meaning of certain words and phrases in a statute are usually found in an interpretation or definition section at the beginning of each Act. If not, the word or phrase should be given its natural and ordinary meaning.

When interpreting a word or phrase, consider:

- definitions in the Act (if any);
- a legal dictionary;
- the context of how it has been used in the particular Act and section;
- the purpose of the Act.

When an Act says the court:

- 'may' do something, this means the power may or may not be exercised – it is at your discretion;
- 'shall' do something this means that you must exercise the power.

Take note of any amendments that have been made to the legislation. When an amendment comes into force, it will change particular sections in the relevant Act. It may also affect the operation of other legislation.

2.4 Common law

s 100 Judicature Act (JA); s 616 Cook Islands Act (CIA).

Common law is the law that is made and developed by higher courts. It is also called case law. Courts in the Cook Islands apply the rules of common law and equity, but if there is a conflict between them, the rules of equity come first: s 616 CIA; s 100 JA.

The higher courts make and develop case law:

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

The development of the common law does not mean that you can make arbitrary decisions. You must follow the 'doctrine of precedent' and give reasons for your decision.

The doctrine of precedent means you must follow decisions of the Judges in the High Court and the Court of Appeal, as the higher courts, unless the material facts in the case are different. This gives certainty to the law. It is through this process of making decisions based on previous decisions that the body of common law has been built up.

When there is no relevant Cook Islands decision, then cases from New Zealand, England or other common law jurisdictions may be considered as a guide.

2.5 Customary law

Art 66A of the Constitution.

Custom and usage shall have effect as part of the law of the Cook Islands. However, this shall not apply in respect of any custom, tradition, usage or value that is inconsistent with any articles in the Constitution or any Act.

Parliament may make laws giving effect to custom and usage of the local people of the Cook Islands. For example, the Cook Islands Act 1915 provides that where the court is asked to investigate title to customary land, interests in customary land are to be determined by custom: ss 421–422.

The opinion or decision of the Aronga Mana of the island or vaka as to the existence, extent or application of any custom or as to matters relating to custom, tradition and usage shall be final and conclusive and shall not be questioned in any court of law: art 66A(4).

3. The High Court

3.1 Relevant Acts

General	
The Constitution and the Cook Islands Constitution Act 1964 (Constitution)	Establishes the High Court and Court of Appeal and protects fundamental rights and freedoms
Judicature Act 1980–81 (JA) Relevant amendment Acts: ➢ Judicature Amendment Act 1986 (JAA 1986) (amends ss 19–20). ➢ Judicature Amendment (No. 2) Act 1986 (JAA No. 2 1986) (amends ss 19–20). ➢ Judicature Amendment Act 1991 (JAA 1991) (amends ss 2, 8, 15A, 16, 20, 21, 99, 102). ➢ Judicature Amendment Act 1998 (JAA 1998) (amends s 19). ➢ Judicature Amendment Act 2000 (JAA 2000) (amends s 19). ➢ Judicature Amendment Act 2011 (JAA 2011) (repeals ss 51–75).	Establishes the jurisdiction for Justices and Judges
Cook Islands Act 1915 (CIA)	Sets out the jurisdiction of the High Court and court procedures
House of Arikis Act 1966	Establishes the house of Arikis
Evidence Act 1968	Sets out the rules of evidence in civil and criminal cases
Criminal	
Crimes Act 1969 (CA) Relevant amendment Acts: ➢ Criminal Procedure Amendment Act 1998 (CPAA19) (adds s 79A) ➢ Criminal Procedure Amendment Act 2000 (CPAA20) (adds s 79B)	Establishes various criminal offences

Criminal Procedure Act 1981 (CPA)	Sets out the criminal process for hearing criminal cases
Criminal Justice Act 1967	Establishes the probation service in the criminal justice system
Transport Act 1966	Regulates motor vehicles and road traffic and establishes various related offences
Narcotics and Misuse of Drugs Act 2004	Establishes various drug offences
Harassment Act 2017	Establishes civil and criminal harassment orders and various related offences
Cook Islands Arms Ordinance 1954	Offences related to firearms and registration of firearms
Prevention of Juvenile Crime Act 1968	Establishes the Children's Court and the Juvenile Crime Prevention Committee
Victims of Offences Act 1999	Provides rules for better treatment of victims of crime
Family	
Family Protection and Support Act 2017	Sets out the law relating to family matters

3.2 The Cook Islands Constitution

The Cook Islands courts are structured like a pyramid. At the top is the Privy Council. Below it, in descending order, are:

- the Court of Appeal;
- the High Court.

This hierarchy is essential to the "doctrine of precedent" – that is, the principle that requires Judges to follow the rulings and determinations of Judges in higher courts, where a case involves similar facts and issues. A decision by a senior court is binding on a lower court. The Privy Council is the final appeal court, but it hears only a small number of cases. Decisions of the Privy Council are binding on all other courts.

If someone wants to appeal a decision made by a court, they can ask a senior court to review the decision from the lower court.

3.3 Overview of the courts

3.3.1 The Sovereign in Council (Privy Council)

Art 59(2) of the Constitution.

There is a right of appeal from decisions of the Court of Appeal to Her Majesty the Queen in Council with leave of:

- the Court of Appeal; or
- Her Majesty the Queen in Council, if leave is refused by the Court of Appeal subject to any conditions set out in the relevant Act.

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

3.3.2 The Court of Appeal

art 56–60 of the Constitution; ss 51–75 JA; ss 51–75 JAA.

The Court of Appeal is established under art 56 of the Constitution and sits as a panel of three Judges. Appeals are decided by a majority vote of the panel: art 57 of the Constitution. The Judge who heard and determined the case in the High Court cannot sit on the panel of Judges hearing the appeal as the Court of Appeal: art 58 of the Constitution. Some of the sittings of the Court of Appeal are in New Zealand.

The Court of Appeal's decision is final and binding on the High Court, unless a right of appeal with leave of the Court of Appeal is granted, or, if such leave is refused, with the leave of Her Majesty the Queen in Council: art 59 of the Constitution; ss 51, 58 JAA.

The Court of Appeal can hear and decide any appeal from a judgment of the High Court (subject to the relevant provisions of the Constitution): art 60(1); ss 59–60 JAA.

The Court of Appeal can hear appeals as of right including:

- if the High Court certifies that a case involves a substantial question of law to interpret or apply any article of the Constitution;
- against conviction by the High Court in its criminal jurisdiction, where the appellant has been sentenced to imprisonment for life or more than 6 months, or a fine of not less than $200, or any sentence (not fixed by law);
- when a civil matter in dispute on appeal is in respect of $4000 or more;
- from any judgment that interprets or applies any provision in Part IVA of the Constitution (fundamental human rights and freedoms).

All appeals to the Court of Appeal shall be by way of rehearing: s 74 JAA.

On any appeal from the High Court in a criminal matter (ss 67–69 JAA), the Court of Appeal may grant an appeal against conviction if it thinks the jury's verdict or a Judge's decision should be set aside based on the following grounds:

- the verdict or decision is unreasonable or cannot be supported by the evidence;
- the judgment is materially affected by a wrong decision of a question of law;
- there was a miscarriage of justice: s 69 JAA.

For every appeal the Court of Appeal refers to the evidence heard at trial for any question of fact, unless the Court of Appeal grants leave otherwise: s 61 JAA.

When leave to appeal against conviction is granted by the High Court, the High Court may, if it thinks fit, release the appellant from custody on bail pending the hearing on appeal. Otherwise ss 83–95 CPA (relating to bail) apply as if the appellant were a defendant remanded in custody who had been granted bail: s 72 JAA.

For more details about the Court of Appeal procedures please refer to ss 63–75E JAA.

3.3.3 The High Court

arts 47–48 of the Constitution.

The High Court is the court where most people encounter the country's judicial system. The High Court of the Cook Islands is a Court of Record and has original jurisdiction to hear all criminal, civil and land matters.

The High Court has four divisions:

1. Criminal division;
2. Civil division;
3. Land division;
4. Children's Court.

Each of the four divisions of the High Court hear and determine:

- any proceedings authorized by the relevant statute;
- such other proceedings that may be determined by the chief justice, either in a particular case or classes of proceedings.

The Te Reo Maori Act 2003 specifies that there are two official languages of the Cook Islands: English and Māori. The current practice in court is that the defendant may choose which language they would like the case to be heard in. The Constitution also sets out the right to a fair hearing. This means that any proceedings should be carried out in a language that the defendant understands, or that an interpreter is supplied for the defendant.

3.4 Jurisdiction of the courts and governing Acts

Jurisdiction is the power and authority to hear or determine a particular matter. Courts may only act within their jurisdiction, as defined by law. The Constitution establishes the High Court, and the Judicature Act is the main Act that governs the High Court and its jurisdiction.

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. As a result, the decision and any orders made are not lawful and therefore invalid. So, it is important to check that you have authority to hear any matter before you before proceeding.

3.4.1 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. There are different categories of crime, and the category of crime determines which court has jurisdiction to hear and determine the matter. You should ensure that you know the relevant provisions of the Constitution and the Judicature Act.

Criminal prosecutions are generally brought by the state, represented by the police, against a person(s) who is alleged to have committed an offence. The Crimes Act is the main Act that sets out acts and omissions that are crimes in the Cook Islands.

Criminal jurisdiction to hear, determine, and pass sentence in any criminal matter	
One Justice of the Peace	**Three Justices sitting together**
s 19(a) JA	s 20(a) JA
An offence specified in Part I, Schedule 1 JA	An offence specified in Part II, Schedule 2 JA
Any offence other than those above, but only to take the defendant's plea	Where an Act creating the offence expressly provides that three Justices shall have jurisdiction to preside over the matter
Where the Act creating the offence expressly provides that a justice has jurisdiction to hear the matter	In any case where an election or its withdrawal is made under s15A JAA (1991)
Offences punishable by fine only or by a term of imprisonment not exceeding 3 years under the Transport Act 1966	

Sentencing	
s 21(1) JAA (1991)	s 21(2) JAA (1991)
You may only sentence a defendant to imprisonment for a maximum term of 2 years; or a maximum fine of $500; or both, and if an Act specifically states the maximum penalties (as above) then that is the maximum penalty you can impose	The three Justices may only sentence a defendant to imprisonment for a maximum term of 3 years; or a maximum fine of $1000; or both
If an Act provides a minimum penalty, you must sentence the defendant to at least that minimum penalty	If an Act provides a minimum penalty, the Justices must sentence the defendant to at least that minimum penalty

Note: The tables in "Common offences" show the offences under the Crimes Act 1969, Narcotics and Misuse of Drugs Act 2004 and the Transport Act 1966. They do not, however, provide a complete list of all criminal matters that may come before you under other Acts. In those situations, you should check the legislation to see whether you have jurisdiction to hear that matter.

3.4.2 Election

s 15A JAA (2019).

As long as ss 14–15 JA do not apply, a defendant can elect to have a trial before three Justices sitting together or before a Judge alone where the matter is to be tried under:

- Part X CA and the information is for a monetary value of up to $5000, with a possible sentence of 10 years or less;
- s 250 CA;
- s 119 Transport Act;
- the Ministry of Finance and Economic Management Act 1995–96;
- the Income Tax Act 1972; the Turnover Tax Act 1980; the Customs Act 1913 (NZ); the Import Levy Act 1972.

3.4.3 Civil and other jurisdictions

To hear and determine a civil action	
One Justice of the Peace	**Three Justices sitting together**
s 19(b) JAA (No 2 1986); s 19(b)(iii) JA	s 20(b)(i) JAA (No 2 1986); s 20(e) JA
For the recovery of any debt or damages not exceeding $1500	For the recovery of any debt or damages exceeding $1500 but not exceeding $3000

For the recovery of chattels not exceeding $1500 in value	For the recovery of chattels exceeding $1500 in value but not exceeding $3000 in value
Where any other Act expressly gives civil jurisdiction to a justice	Where any other Act expressly gives civil jurisdiction to three Justices sitting together
Other jurisdiction	
s 19 JA; s 19 JAA (2000)	s 20 JA
In any application for an order under s 141 CIA (judgment summonses)	In proceedings under Part VIII CIA relating to extradition
In proceeding under s 589 CIA relating to the custody of persons of unsound mind arrested under that section	In proceedings under the Fugitive Offenders Act
In proceeding under s10 JA relating to custody of a minor	To hear a case and commit a fugitive to prison to await his/her return in the manner prescribed in the Act

3.5 Judges

3.5.1 Appointment

Arts 49, 52 of the Constitution.

If only one Judge is appointed, they are the chief justice of the Cook Islands. If more than one Judge is appointed, then one will be chosen to be chief justice: art 49(2).

The Queen's Representative, acting on the Executive Council's advice given by the Prime Minister, appoints the chief justice of the High Court: art 52. Other Judges are also appointed in a similar way, but on the advice given by the chief justice of the High Court and the minister of justice.

To be qualified for appointment as a High Court Judge, the person must:

- be or have been a Judge of the New Zealand High Court, Court of Appeal or the Supreme Court or any equivalent office in any other part of the Commonwealth or in a designated country; or
- have been in practice as a barrister in New Zealand, or in any other part of the Commonwealth or in a designated country, or partly in both, for a period(s) of not less than 7 years: art 49.

3.5.2 Jurisdiction

Arts 47, 49 of the Constitution.

The Judicature Act sets out the jurisdiction and powers of Justices appointed under the Constitution. A Judge of the High Court may exercise any of the jurisdiction and powers of any division of the High Court. A Judge of the High Court or any two or more Judges, may in any part of the Cook Islands and at any time and place, exercise all the powers of the High Court.

3.5.3. Term of office

Art 53 of the Constitution.

A person of any age who is resident in the Cook Islands and who is qualified for appointment, may be appointed as the chief justice or other Judge of the High Court for a term of up to 3 years. They may be reappointed for one or more further terms if each term is not more than 3 years.

Non-resident persons of the Cook Islands who are qualified for appointment may be appointed to hold office as the chief justice or other Judge of the High Court for a term of not more than 3 years, but may be reappointed for one or more further terms, being in each case a term of not more than 3 years.

The chief justice or any other Judge of the High Court may resign by writing to the Queen's Representative.

3.5.4 Removal from office

Art 54 of the Constitution.

The Queen's Representative is the only person who can remove a chief justice or other Judge of the High Court. The only grounds for removal from office are the inability to discharge the functions of their office due to infirmity of mind, body, any other cause, or misconduct.

The Queen's Representative must first refer the matter to a tribunal (consisting of three persons qualified to be appointed as Judges) to inquire into the matter and report to the Queen's Representative with their recommendations. While the matter is being decided, the Queen's Representative acting on the advice of the Prime Minister may suspend the Judge in question for up to 1 month, and for another month if the matter has not been decided earlier.

3.6 Justices of the peace

3.6.1 Appointment and removal from office

Art 62 of the Constitution.

The Queen's Representative, acting on the advice of the Executive Council given by the minister of justice, appoints Justices of the Peace. If a justice decides to stand for election to Parliament they must stop acting in a judicial capacity before becoming a candidate, but this does not otherwise affect their status as a Justice of the Peace: art 62(2) of the Constitution Amendment (No. 17) Act 1994–95.

The Queen's Representative, acting on the advice of the chief justice may remove a Justice of the Peace from office.

3.6.2 Jurisdiction

The Judicature Act prescribes the jurisdiction and powers of Justices of the Peace appointed under art 62 of the Constitution.

3.7 Transfer of cases to a Judge

ss 22, 24 JA.

Under s 22 of the Judicature Act, you may take a plea for an offence for which only a Judge has jurisdiction. You may also:

- if they plead guilty, remand the defendant, with or without bail to appear before a Judge to enter any conviction or for sentencing; or
- if the defendant pleads not guilty, take an election under s 16 of this Act, if it is required, and remand the defendant, with or without bail, to appear in the High Court for trial by a Judge alone or a Judge sitting with a jury.

Under s 24 of the Judicature Act, where you have jurisdiction to deal with the matter (either before three Justices, or before one justice) you may:

- decline to deal any further with the matter, at any time before the defendant has been sentenced or otherwise dealt with and require that it shall be dealt with by a Judge of the High Court; and
- endorse on the Information a certificate stating the reasons for the decision to transfer the case: s 24(1) JA.

If a defendant has been convicted or has pleaded guilty, you must:

- remand them for conviction or sentence or both by a Judge;
- make an order to change the place of the hearing under s 37 CPA; and
- have the Information, a statement of the facts of the case, and the bail bond presented to the Judge as soon as is practical: s 24(2)(a) JA.

In all other cases the Judge shall deal with the information in all respects as a rehearing: s 24(2)(b) JA.

3.8 Other officers of the court

Other officers of the court include:

- the registrar;
- the deputy registrar;
- administrative officers.

3.8.1 Registrar

s 4 JA.

The registrar of the High Court is appointed under the Public Service Act (PSA) 1975 and can give valuable help and advice on procedure and the law.

The registrar:

- keeps the records of the Court;
- performs administrative duties of the Court that the chief justice directs;
- is, in effect, the sheriff of the Court: s 4 JA.

In addition to the general duties above, the relevant sections of the Criminal Procedure Act specify that the registrar may:

- issue summonses or arrest warrants for the defendant or witnesses;
- grant leave for an arrest warrant to be withdrawn;
- issue search warrants;
- take the oath for an Information to be substantiated;
- give leave for an Information to be withdrawn or amend an Information;
- take pleas and accept guilty pleas made in writing;
- adjourn the hearing of a charge;
- remand a defendant in custody;
- grant bail and accept bail bonds;
- prohibit the publication of names;
- take statements of dangerously ill witnesses;
- amend minutes or judgments or other records of the Court.

3.8.2 Deputy registrar

s 5 JA.

Deputy registrars of the High Court are appointed, as is necessary under the PSA and have the same powers and functions and duties as the registrar. Every reference to the registrar of the High Court, so far as applicable, extends and applies to a deputy registrar.

However, the deputy registrar does not, in practice, amend hearings, take pleas, adjourn the hearing of a charge under s 79 CPA, s 79A CPAA 2019, remand a defendant in custody under s 81 CPA, grant bail or prohibit the publication of names under s 79B CPAA 2020.

3.8.3 Administrative officers

s 6 JA.

Administrative officers are sheriffs, bailiffs, clerks, interpreters, or other officers needed for the High Court. Court administrative officers perform administrative duties as assigned to them by the registrar.

4. Judicial conduct

4.1 Judicial conduct generally

You must conduct yourselves to avoid both any compromise in carrying out your obligations, as well as giving 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 Justices of the Peace respect and comply with the law and conduct themselves in a manner that 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):

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

4.2 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.

4.3 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;
- 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;
- 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. The appearance to others 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.

4.4 The judicial oath

As a Justice of the Peace of the High Court, you have sworn the following oath on appointment:

> "I swear by Almighty God that I will well and truly serve Her Majesty as the Head of State of the Cook Islands, Her heirs and successors, in accordance with the Constitution and the law, in the office of Justice of the Peace; and I will do right to all manner of people, 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.

4.4.1 "Well and truly serve"

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.

4.4.2 Act "in accordance with the Constitution and the law"

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 Cook Islands people.

"Law" means any law for the time being in force in the Cook Islands; and includes this Constitution and any enactment: art 1(1) Interpretation; Constitution.

"Enactment" means any Act of the [Parliament] of the Cook Islands, any Ordinance, any Act of Parliament of New Zealand in force in the Cook Islands, and any proclamation, order, regulation, or rule, or any Island Council Ordinance or bylaw: art 1(1) Interpretation; Constitution.

4.4.3 "Do right to all manner of people"

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 that are prohibited by law.

Article 64(1)(b) also protects the right of the individual to equality before the law and to the protection of the law in the Cook Islands, without discrimination by reason of race, national origin, colour, religion, opinion, belief, 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.

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

Judicial independence is a part of the rule of law and it is intended 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 65(1)(e) of the Constitution also affirms the right of any person charged with an offence to be presumed innocent until they are proved guilty according to law in a fair and public hearing by an independent and impartial tribunal.

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 and suchlike;
- 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.

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).

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.

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 as long as 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.

Family members may be politically active, but if this negatively affects the public's view of your impartiality in any case you should not sit.

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: for example, an opportunity to gain personal advantage or economic or other benefits, or to avoid disadvantage;
- Family: for example, 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: for example, 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 the Cook Islands is a relatively small jurisdiction, you should also be careful not to let personal or local knowledge of individuals before you affect your judgment. 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 that 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 have to 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.

4.5 Conduct in the court

4.5.1 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; that is, the essential parts an offence. Each essential element must be proved beyond reasonable doubt by the prosecution before the charge is proven. See "Common criminal offences" to find out more about the elements for common offences.

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

4.5.2 The principle that "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.

If the defendant:

- 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,

they may be unable to put forward their side of the case. 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.

Relevant sections of the Criminal Procedure Act 1980–81 (CPA) also provide for prior notice, fair hearing and disclosure in criminal trials including:

- s 17 (further particulars for an Information);
- s 22 (issue of summons to defendant);
- s 23 (issue of summons or warrant for attendance of witnesses);
- s 25 (mode of service of documents on defendant);
- s 30 (proof of service);
- s 99 (pre-trial disclosure);
- s 101 (adjourn trial where the defence has been taken by surprise).

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, ensure you have 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 65(1)(d) of the Constitution protects the right of any person to a fair hearing, in accordance with the principles of fundamental justice, to determine their rights and obligations before any tribunal or authority having a duty to act judicially.

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. See *Samatua v Attorney General* [2015] CKHC 14; Plaint 5.2012 (3 June 2015).

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.

See *Cook Islands Police v Arioka* [2006] CKCA 6; CA 15 of 2005 (9 February 2006), which held that the obligation of further pre-trial disclosure beyond the provisions of s 99 of the Criminal Procedure Act must be assessed on a case-by-case basis. Failure to disclose documents may in some cases give rise to a breach of the Constitution. Before that can occur, however, there must have been an actual miscarriage of justice or a real risk of miscarriage of justice.

4.5.3 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 with other Justices who are not sitting on the case.

4.5.4 Maintaining the dignity of the court

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

- keeping order in court;
- being polite and respectful.

Manage 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.

Manage 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.

4.5.5 Communication in court

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.

Listening

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

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.

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.

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.

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 until an interpreter is available.

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.

4.6 Working as a panel

It is important for Justices on a panel to agree to a process for handling court hearings and out-of-court deliberations. Differences of opinion between panel members, whether personal or professional, should never be aired in the media or in court.

Since views from the bench should be seen to be as one, the accepted practice is for the panel who are sitting together to decide who will be the chair of the panel.

The role of the chair is to manage the proceedings. From the perspective of the public and those in the court, they oversee the courtroom. This includes structuring and guiding any panel discussions out of court, ensuring the discussions are purposeful and relevant and all members of the bench can be heard.

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

The role of the other members involves:

- listening attentively;
- appropriately drawing the chair's attention to matters of significance or procedure;
- undertaking tasks as required by the chair;
- working with the chair and other bench members to decide the case.

4.7 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.

5. Evidence

5.1 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.

The principal statute dealing with this area of law is the Evidence Act 1968 (EA) and its two amendments:

- Evidence Amendment (No. 2) Act 1986–87 (EAA No. 2)
- Evidence Amendment Act 1986–1987 (EAA).

You may either:

- admit evidence – accept and act on such evidence as you think sufficient, whether such evidence is or is not admissible or sufficient at common law: s 3 EA; 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: s 4 EA.

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).

5.2 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).

5.2.1 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 – this 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.

5.2.2 Classification by content

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

1. Direct evidence – this 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 – this 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, the individual components of which are insufficient to establish the facts in issue, but that when taken as a whole would be enough to do so.
3. Corroborating or collateral evidence – is evidence that 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 – for example, an analyst or medical report.

5.3 Documentary evidence

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

- public documents (statutes, parliamentary material, judicial documents of the Cook Islands and New Zealand);
- private and local Acts;
- plans, books, maps, drawings and photographs: s 21 EA;
- 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 an exception to the hearsay rule, or it will be admissible under s 22(1) of the Evidence Act.

In any civil or criminal proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document (on production of the original) and tending to establish that fact, is admissible as evidence of that fact if the maker of the statement:

- had personal knowledge of the matters dealt with by the statement; or
- where the document is or forms part of a continuous record, made the statement in the performance of a duty to record information;
- is called as a witness in the proceedings: s 22(1) EA.

However, you don't have to call the maker of the statement as a witness under s 22(1) of the Evidence Act if:

- that person:
  - has died;
  - is unfit by reason of bodily or mental condition;
  - is overseas and it is not reasonably practicable for them to attend;
  - has not been found having made all reasonable efforts; or
- the other party, who has a right to cross-examine the witness, does not require the person to be cross-examined.

You may, at any stage of the proceedings (even if the maker of the statement is available but not called as a witness):

- order that such a statement as is mentioned in s 22(1) is admissible as evidence; or
- admit such a statement in evidence without any order: s 22(2) EA.

Also, a certified true copy of the original document or of the material part of it may be produced if specified in the order or as the court may approve: s 22(2)(b) EA.

A statement in a document is not deemed to have been made by a person unless they wrote, made or produced the document (or most of it) or signed or initialed it or otherwise recognised it as accurate: s 22(3) EA.

In deciding on the admissibility of a document, you may draw any reasonable inference from the document's form or contents or any other circumstances: s 22(4) EA.

In deciding whether a person is fit to attend as a witness, you may act on a certificate of a medical officer: s 22(4) EA.

When you are deciding on the weight, if any, to be attached to a statement that 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 or around the same time as the occurrence or existence of the facts stated;

- whether the maker of the statement had any incentive to conceal or misrepresent the facts: s 23(1) EA.

5.4 Real evidence

Real evidence usually refers to material objects or items that 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;
- 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;
- 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.

5.5 Exhibits

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

5.5.1 Checklist for exhibits

Has:

- the witness seen the item;
- the witness been able to identify the item to the court;
- the party seeking 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.

5.6 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. If a witness wants to mention in their testimony a statement that 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 (demeanour);
- delivery;
- tone of voice;
- body language;
- attitude towards the parties.

5.7 Evidentiary issues relating to witness testimony

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

- 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 of evidence by witnesses.

5.7.1 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, subject to just exceptions: s 77(2) 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.

Under s 9 of the Evidence Act the following persons have a privilege:

- a minister must not disclose any confession made to them in their professional character, except with that person's consent; or
- a physician or surgeon must not, without their patient's consent, disclose in any civil proceeding (unless the sanity of the patient is in issue) any communication made to them by the patient whilst acting in their professional capacity and that is necessary in order to prescribe or act for that patient.

However, this privilege does not apply to protect:

- any communication made for any criminal purpose; or
- prejudice the right to give in evidence any statement or representation at any time made to or by a physician or surgeon relating to the patient taking out life insurance.

The defendant and co-defendant

s 6 EA; s 75 CPA.

The general rule is that the defendant is not a competent or compellable witness for the prosecution. 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 75 CPA. 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 can only be a competent and compellable witness for prosecution, without the consent of the other person, or for the defence if any of the following apply:

- the proceedings against the co-defendant have been stayed;
- the information for a summary conviction has been withdrawn or dismissed;

- the co-defendant has been acquitted of the offence;
- the co-defendant has pleaded guilty to the offence;
- the co-defendant is being tried separately from the other defendant: s 6(5) EA.

Where two or more persons are jointly charged with any offence, the evidence of any person called as a witness for either party may be received as evidence either for or against any of the co-defendants: s 6(2) EA.

Silence does not mean guilt

Sometimes before or after a defendant is charged with a crime, they are asked by the police (and sometimes by friends or family) what they have to say in response to the charge. Some defendants reply and what they have to say – 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 that 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 to 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."

Note the warning – the suspect does not have to say anything – and so it would be unfair to use the suspect's refusal to say anything as an indication of guilt.

When a defendant refrains from giving evidence as a witness, this cannot be held against the defendant: s 75(1) Criminal Procedure Act 1980–1981 (CPA).

Spouses

ss 6(2)(b), 6(3) EA.

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 6(2)(b) EA.

The spouse of the defendant shall be a competent but not compellable witness for the prosecution, without the consent of the defendant, in any case where:

- the offence is against the wife or husband (or may affect them or their liberty) whether the marriage took place before or after the time of the alleged offence;
- the defendant is charged with bigamy;
- the defendant is charged and the law specifically provides for a spouse to be called without the consent of the defendant;

- the defendant is charged with an offence against s 215 (cruelty to a child) Crimes Act 1969: s 6(3) EA;
- the person who the offence is alleged to have been committed against is a woman or child under 21 years of age and is the daughter, granddaughter, son, grandson of the defendant or the wife of the defendant (even if not legally married); or
- at the time of the alleged offence, the person was under the care and protection of the defendant or his wife; and
- the offence is an offence, or attempt to commit an offence, under ss 141– 148, or ss 153–155 of the Crimes Act 1969: s 6(4) EA.

Section 7 of the Evidence Act states that a spouse will not be compellable in any proceeding to disclose any communication made to each other during the marriage.

Children

Great care should be taken with child witnesses to ensure that, if possible, they tell the court all the relevant information they have.

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

Every witness in any criminal matter is required to be examined upon oath under s 332 Cook Islands Act 1915 (CIA) except for children under 12 years of age: s 331 CIA. You may ask them to make the following declaration instead:

> "I promise to speak the truth, the whole truth, and nothing but the truth" (or a declaration to the like effect): s 331 CIA.

You will need to satisfy yourself by questioning the child that they understand what a promise is and that they understand what telling the truth is. You might prepare a series of simple questions for the child designed to see if the child understands a "promise" and "the truth".

Once you have satisfied yourself the child can give evidence, then you need to carefully control how the child gives evidence:

- if it is possible the child is scared of the defendant, consider whether to screen the child from the defendant so that the child cannot see the defendant when giving evidence;
- make sure the questioning of the child uses simple words that can be easily understood;
- you should not allow a child witness to be harassed or bullied;
- take regular court breaks to help the child's concentration, and if the child becomes upset, take a break;
- if the child's parents or another support person wants to sit beside the child when giving evidence, you should allow this. Make sure that the parent or support person does not prompt the child.

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

5.7.2 Examination of witnesses

Either party may apply to you or the registrar at any time to obtain a summons calling on any person to appear as a witness at a hearing: s 23(1) CPA.

It is offence for a witness who has been served with a summons to refuse or neglect to appear in court, or to bring the required evidence to court, without a just excuse. They are liable to a fine not exceeding $40; alternatively you may deal with them through contempt of court.

However, the witness may have a just excuse if they prove:

- there was no summons served on them;
- they did not have the means to travel to the court; or
- they would not be able to recover the cost of travelling and attending court from the party calling them: s 23(4) CPA.

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 manner that 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;
- refreshing memory may be permitted (see below).

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;
- to draw questions, in appropriate circumstances, 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. 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.

Inconsistent statements by witnesses

A cross-examining party (or a party in the examination-in-chief) may seek to attack the witness's credibility by asking the witness if they made any prior statements that are inconsistent with present testimony in any civil or criminal trial. 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 11 EA.

Normally a witness may be cross-examined on written statements without showing these, but if it is intended to contradict such witness then the cross-examining party must make the witness aware of those parts that are being relied on: s 12(1) EA.

You may also at any time during the trial require the writing to be produced for inspection and any use you think fit relevant to the trial: s 12(2) EA.

5.7.3 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 that either:

- suggests to the witness the answer that should be given;
- assumes the existence of facts that 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 that are not in dispute or introductory questions about facts that are in dispute;
- the purpose of identifying a witness or object in court.

5.7.4 Refreshing memory

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

- the notes have been made by the witness or under their supervision; and
- the notes were made 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.

5.7.5 Lies

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

However, it does not necessarily mean 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.

5.7.6 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 Judgement 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.

Also, any documentary evidence admissible under s 23(1) of the Evidence Act as an exception to the hearsay rule is not corroboration of evidence given by the maker of the statement for the purpose of any rule of law or practice requiring evidence to be corroborated or regulating how uncorroborated evidence is to be treated: s 23(2) EA.

5.7.7 The warning to a witness against self-incrimination

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;
- explain that any evidence the witness gives in court that is self- incriminating could be used to prosecute them for a crime.

A witness may refuse to answer any question that may incriminate them: s 20 EA.

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.

5.7.8 Identification evidence 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 United Kingdom Court of Appeal made the following guidelines for visual identification:

- How long did the witness observe the defendant?
- At what distance, and in what light, did the witness observe the defendant?
- Was the witness's view blocked in any way (for example, by passing traffic or a crowd)?
- Had the witness ever seen the defendant before?
- How often had the witness seen the defendant and, if only occasionally, had they any special reason for remembering the defendant?
- How long was the time between 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?

In *Police v Ruaporo* [1985] High Court of the Cook Islands, Roper J adopted *R v Turnbull & Others* in his reasoning to apply these principles in the Cook Islands.

5.8 Rules of evidence

5.8.1 Introduction

Rules of evidence have been established by both the common law and by statute. Rules relating to evidence can be found in the Evidence Act 1968 (EA) and the Criminal Procedure Act 1980–81 (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;

- 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.

5.8.2 Burden and standard of proof

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

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.

Usually in criminal cases the prosecution bears the legal burden of proving all the elements in the offence beyond reasonable doubt (the standard of proof). 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.

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.

5.8.3 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 High 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.

Part 3 of the Evidence Act sets out a list of official documents that you may take judicial notice of (without having to provide evidence) including:

- the Public Seal of New Zealand: s 24 EA;
- any seal or stamp is authorised to be used by any court, officer or body corporate: s 25 EA;
- all public Acts: s 26 EA.

Admissions

The defence may during the trial admit any fact alleged against the defendant and no proof is required of that fact: s 69 CPA.

5.8.4 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.

However, if there are objections to the admissibility of evidence, you should refer the matter to a Judge pursuant to s 106 CPA ("Reservation by Justice of question of law for determination by Judge") as the submissions will likely deal with a question of law. Please see "Appeals, retrials and reservations".

Relevance

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

All evidence that 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. The same generally applies to 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.

What weight (importance) should be given to evidence

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. For example, their memory of a conversation may be poor, or an identification of an event may be too far away or too dark to reliably describe what happened.

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 must consider:

- all the circumstances to decide on the accuracy of the statement;
- if the statement was made at or nearly 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: s 23(1) EA.

Relevant credibility factors include:

- relationships between parties ;
- alcohol and/or drugs;
- performance under cross-examination;

- independent evidence;
- offender's attempts to maximise/minimise their role in the offending;
- 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 and suchlike);
- motive/anger/tension/revenue.

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?

Discretion to exclude

Section 4 of the Evidence Act gives you the discretion to refuse to receive any evidence, whether admissible or not at common law, if you consider the evidence to be:

- irrelevant or needless;
- unsatisfactory as being hearsay or other secondary evidence.

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.

5.8.5 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.

5.8.6 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.

Hearsay evidence is generally not admissible because:

- when a person gives evidence of what another person has said that other person's statement is not given on oath; and
- the other person cannot be cross-examined.

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 the statement 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.

Exceptions to the hearsay rule

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

- confessions;
- evidence of persons about to leave the Cook Islands that is taken before a Judge or justice: s 32 CPA;
- dying declarations: s 33 CPA;
- 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.

A confession made after a promise, threat, or other inducement (not being the exercise of violence or force or other form of compulsion) does not have to be automatically rejected on those grounds if you are satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made: s 19 EA.

The statement can be made to anyone – a police officer, 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 s 4 of the Evidence Act.

5.8.7 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.

For example, a witness in a case of alleged assault gives evidence they saw one man strike another. This evidence is relevant to the assault charge and is admissible. In the same case another witness says they are sure the defendant is guilty because he is a bad man. This evidence does not go to proving an assault – it is simply the opinion of one person of the character of another and so the evidence is irrelevant and it is not admissible.

There are two exceptions to the rule on opinion evidence:

- expert opinion evidence on matters within their expertise;
- non-expert's 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-expert's opinion evidence:

- the identity of an object;
- the handwriting of someone with whom 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 the 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.

5.8.8 Character evidence

Admissibility of evidence of bad character

The defendant: Generally, the prosecution may not introduce evidence of the bad character of the defendant in any form. This includes any:

- previous convictions of the defendant;
- previous misconduct by the defendant;
- attitudes towards wrongdoing or immorality;
- bad reputation of the defendant in the community in which they live.

There are some exceptions to this rule at common law that apply if:

- evidence of other misconduct forming part of the same transaction of the offence charged is admissible at common law;
- the defendant puts their character in issue, evidence of bad character may be admitted at common law;
- the defendant gives evidence, they may in certain circumstances face cross-examination on their character.

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.

You may decide if a witness should be compelled to answer a question on cross-examination that is not relevant to the case but does affect the witness's credit by injuring their character: s 16(1) EA.

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: s 16 EA.

A witness may be questioned as to whether they have been convicted of any offence. The cross-examiner may call evidence to prove the conviction if the witness:

- denies having been so convicted;
- does not admit a conviction; or
- refuses to answer: s 13 EA.

The proof of previous convictions of a witness can be by fingerprints under s 14 of the Evidence Act or by certificate signed by the registrar or officer of the court where the person was convicted: s 15(1) EA.

Admissibility of evidence of good character

A defendant may introduce evidence to show that they are of good character. But by doing this, they also put their character in issue and the prosecutor may cross-examine witnesses, or sometimes the defendant, about their character and about 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. Human rights and criminal law

6.1 Introduction to fundamental rights and freedoms

Equality and fairness are the two key principles which underpin human rights law but these principles continue to be challenged by many factors in society today.

The Cook Islands are parties to several international human rights treaties including:

- the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979; and
- the UN Convention on the Rights of the Child (CRC) (1989).

The CRC relevant to the court system protects the rights of the child including:

- the right to be accompanied by a responsible adult or parent;
- the right not to be detained without a court order;
- the right to be brought before the court as soon as possible after arrest.

This helps to ensure human rights in these areas are enshrined in law, policies and a range of other actions such as court decisions.

It is important for you to have an understanding of human rights as it has a direct bearing on your work in upholding human rights as set out in the Constitution and in human rights instruments.

Part IVA of the Constitution sets out the fundamental rights and freedoms that are protected in the Cook Islands.

The rights and freedoms set out in art 64(1)(b) and art 65 are particularly important for conducting criminal trials. These rights and freedoms are discussed below.

6.2 Right to a fair and public hearing by an independent and impartial court

Art 65(1)(e) of the Constitution.

Every person is entitled a fair and public hearing by an independent and impartial court: art 65(1)(e). Remember you are exercising a public function that must always be in open court, unless special circumstances apply.

In *John Michael Collier & Anor v The Attorney-General* [2001] NZCA 328[2002] NZAR 257, the New Zealand Court of Appeal stated that individuals have the right to be tried by an impartial tribunal and set out the test for determining whether judicial bias, or the appearance of bias, exists. Their reasoning is highly persuasive in the Cook Islands.

The Court stated, in paragraph 21 and 22 of the judgment:

> "It goes without saying that in the determination of rights and liabilities everyone is entitled to a fair hearing by an impartial tribunal. Where actual bias is shown or effectively presumed, the Judge is disqualified.
>
> Where the focus is on the appearance of bias, the test is whether there was a real danger of bias on the part of the Judicial Officer in question in the sense that the Judicial Officer might unfairly regard (or have unfairly regarded) with favour or disfavour the case of a party to the issues under consideration by the judicial officer.
>
> The test is objective, in this case viewed through the eyes of the reasonable observer aware of all the relevant circumstances. It is not the subjective perception of the particular litigant …".

See also "Judicial conduct".

6.3 Presumption of innocence

Art 65(1)(e) of the Constitution.

Every person is entitled to the presumption of innocence until proven guilty according to law: art 65(1)(e).

You must ensure that:

- you do not base your finding of guilty on previous knowledge of the accused; and
- the prosecution bears the burden of proving the accused's guilt, beyond reasonable doubt.

In *Frances Neale v Cook Islands Police Department* [1992] CR NO 228 (High Court), Quilliam J stated:

> "… suspicion is not enough. The case had to be proved beyond reasonable doubt."

Sometimes before or after a defendant is charged with a crime, they are asked by the police (and sometimes by friends or family) what they have to say in response to the charge. Some defendants reply and what they have to say – if 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.

Silence is the right of the accused. There is no onus on the defendant at any stage to prove their innocence. The presumption of innocence means that 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. There is no obligation for the defendant to give an explanation to prove their innocence.

For the right to silence see ss 71, 75 of the Criminal Procedure Act 1980–81 (CPA):

- before the prosecution evidence is given at trial you must caution a defendant who is not legally represented that they are not obliged to give or call evidence and, if they do not, that fact will not be allowed to be the subject of any comment: s 71 CPA;
- no adverse comment may be made where the defendant refrains from giving evidence as a witness: s 75 CPA.

In most countries this approach is also shown by police, who are obliged to give a warning to a person suspected of a crime when the police ask the suspect to 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."

6.4 Right to freedom from cruel or degrading treatment

Art 65(1)(b) of the Constitution.

Article 65(1)(b) of the Constitution protects the right to freedom from cruel or degrading treatment.

In *Re Metuavaine Miri* [1995] CKHC 7 (9 May 1995), Chief Justice Quillam stated that the punishment that had been inflicted upon the defendant was seriously in breach of the human rights provision of the Constitution and especially art 65(1)(b) of the Constitution, the right to freedom from cruel or degrading treatment.

The defendant, who had escaped from prison several times and was up for sentencing after committing several offences while at large, had been previously confined for 14 months in a cell with no bedding and equipment, in solitary confinement and in total darkness except for half an hour a day.

The Chief Justice set out the conditions that the prisoner had to endure in his sentencing reasons:

> "... in the hope that never again in [the Cook Islands], should such treatment be given to any prisoner ..."

6.5 Right to legal counsel

Art 65(1)(c)(ii).

Article 65(1)(c)(ii) of the Constitution protects the right of any person who is arrested or detained, wherever practicable, to retain and instruct a barrister or solicitor without delay.

In many cases, it will be important for a defendant to have legal representation, or at least the advice of a lawyer, in order to understand the charges against them and to be able to defend themselves against those charges.

The court should ensure that a defendant is given time to meet with a legal representative if they so choose.

The right to retain and instruct a barrister or solicitor, was canvassed in *Police v Ngametua Tutakiau* [2002] NZAR 520 (19 November 2001). In this case, defence counsel challenged the admissibility of a statement by the defendant, taken by the police, on the grounds that the police had not informed the defendant of his right to a lawyer before he made the statement.

The Chief Justice said:

> "[the defendant] was arrested [and] … not informed of his right to a lawyer, but he was entitled to be informed of his right to a lawyer … It was too late to do it at the end of the interview and the obtaining of the full statement. In those circumstances, then I rule that the written statement is inadmissible."

6.6 Right not to be convicted of any offence unless it is in breach of a law in force

Art 65(1)(g) of the Constitution.

Article 65(1)(g) protects the right of any person not to be convicted of any offence except for the breach of a law in force at the time of the act or omission.

This right also prevents a person from being tried for an act or omission they committed before the legislation making it unlawful came into existence.

6.7 Freedom from unlawful and arbitrary detention

Art 65(1)(c)(iii) of the Constitution.

Article 65(1)(c)(iii) protects the right of any person who is arrested and detained to apply, by themselves or by someone on their behalf, for a writ of habeas corpus to determine the validity of their detention and to be released if their detention was unlawful.

Habeas corpus is an ancient court petition that orders that a person who is being detained be brought before the court for a hearing to decide whether the detention is lawful. A writ of habeas corpus ensures an individual's right against unlawful and arbitrary detention.

Section 11 of the Judicature Act reinforces the right to apply for a writ of habeas corpus. It provides that on application, the High Court may make an order:

- for the release of any person from unlawful imprisonment or detention; or
- for the production before the court of any person alleged to be unlawfully imprisoned or detained; and
- that every person who disobeys such order shall be guilty of contempt of the High Court.

7. Principles of criminal law and criminal responsibility

7.1 Introduction

In the Cook Islands, every criminal offence is created by a statute, regulation or by-law and not the common law, under s 8 of the Crimes Act. The Crimes Act 1969 (CA) is the main statute that sets out those acts or omissions that should be regarded as a criminal offence in the Cook Islands.

This section will discuss:

- the important principles of the criminal laws that govern criminal proceedings;
- defences that can be raised that excuse a defendant from criminal responsibility;
- party(s) which will be held criminally responsible for those acts or omissions.

7.2 Principles of criminal law

7.2.1 Innocent until proved guilty

One of the most important principles in criminal law is that the defendant is innocent until proved guilty: art 65(1)(e) of the 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, for example, you may grant alleged offenders bail allowing them to remain in the community while they await trial. See "Bail".

Silence is the right of the accused. 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. See also ss 71 and 75 of the Criminal Procedure Act 198–81 (CPA). See also "Human rights and criminal law" to find out more about the presumption of innocence.

7.2.2 Double jeopardy

Another important principle is that a person cannot be prosecuted, and punished, for the same crime more than once. There are two parts to this rule: it prohibits not only double punishment, but also protects individuals from repeated attempts by the state to prosecute them for the same offence. See *Police v Ngau* [1992] CKHC 3; CR 727–730.1991 & 757.1991 (24 June 1992).

7.2.3 Burden and standard of proof

Burden

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 produced evidence of all the elements of the offence, then there is no case to answer and the prosecution has failed.

If the prosecution has succeeded at producing 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 defence does not have to prove anything unless they raise an affirmative defence. This could be insanity, for example, or a statutory defence where it is an element of the defence itself, for example that the defendant acted "without reasonable excuse" (which they must prove on the balance of probabilities).

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.

Standard: Beyond reasonable doubt

You decide the guilt or innocence of the accused by reason and not by emotion.
The standard of proof, on which the prosecution must satisfy you, is beyond reasonable doubt.
Taking account of the prosecution evidence and the evidence (if any) of the defence and the submissions, you must be sure that the accused is guilty. If you have a reasonable doubt about that then you must acquit the accused.

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

7.2.4 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.

Mental capacity (mens rea)

Most offences require the prosecution to prove the defendant had a particular state of mind in addition to the act and its consequences.

The state of mind could be:

- intention – the defendant means to do something, or desires a certain result (this 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 his/her actions and takes the risk;
- knowledge – knowing the essential circumstances that 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 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 – it is for the prosecution to prove there was an intention 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 – that is, you can presume that individuals intend the natural consequences of their actions.

If, after hearing the defence evidence, you are not satisfied beyond reasonable doubt that the defendant had the necessary intention, then you must dismiss the charge.

7.2.5 Criminal responsibility

Part III of the Crimes Act provides for statutory justifications or excuses in the case of all charges to which they apply: s 23(2) CA. Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

All common law rules that provide for a justification, excuse or defence to any charge, still apply to an offence under the Crimes Act or under any other statute, unless they are altered by or are inconsistent with the Crimes Act or any other statute: s 23(1) CA.

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 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 Part III of the Crimes Act or the common law.

In the case of a specific defence or lack of criminal responsibility under Part III of the Crimes Act or the common law, the defendant must provide some evidence in support of the defence. Then, it is 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.

The rules in Part III of the Crimes Act can be divided into two categories:

1. Those rules that relate to the defence that the defendant did not have the mental intent or was acting involuntarily. These include:
   - ignorance of the law;
   - negligence, involuntary actions and accidents;

- mistake of fact;
- intoxication;
- insanity;
- infancy.

2. Some of the rules that relate to excuses or circumstances that justify, in law, the conduct of the defendant are:
   - compulsion;
   - self defence or defence of person;
   - defence of property;
   - claim of right.

7.2.6 Ignorance of the law

The fact that an offender is ignorant of the law is not an excuse for any offence committed by them: s 28 CA. 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.

7.2.7 Negligence, involuntary acts and accidents

A person is generally not criminally responsible for an act or omission that occurs independently of the exercise of their will or for an event that occurs by accident unless a statute expressly states otherwise for negligent actions and omissions.

Negligent acts or omissions

Criminal negligence is where the defendant's act or omission, which constitutes the offence, does not comply with the standards of a reasonable person. Therefore, a person can be found criminally negligent for something, even if it is an accident, if a reasonable person would have been aware of the risks of that behaviour in the same situation.

For example: Robert balances a 10-litre bucket of paint on top of the partly open front door of his busy café during normal opening hours without putting up any signs to warn customers not to use the door.

Involuntary actions

Most criminal offences require that the defendant's actions or omissions be 'willed' or 'voluntary'. A defendant will not be criminally responsible for acts or omissions that are involuntary.

For example: Robert was thrown through his café shop window by an irate customer and landed on a car bonnet. Robert would not be criminally responsible for the damage to the car because it was not Robert's voluntary action that led to the damage of the car.

Automatism

Automatism is a common law defence when a defendant is not consciously in control of their own mind and body. It must a total loss of voluntary control. Impaired or reduced control is not enough.

The defence of automatism may be invalid when the defendant is at fault for falling into the condition in the first place. The prosecution would have to prove the defendant was reckless as to what would happen if they fell into the condition.

The state of automatism can arise from: concussion; sleep disorders; acute stress; some forms of epilepsy and some neurological and physical ailments. Expert medical evidence is usually required.

The prosecution must prove that the actions of the defendant were voluntary and that the defence of automatism does not apply. However, the defendant must give sufficient evidence to raise the defence that their actions were involuntary: *Bratty v Attorney-General for Northern Ireland* [1961] 3 All ER 523.

Accidents

A person is generally not criminally responsible for an event that occurs by accident and was not intended. You must ask yourself, "would such an event have been easily foreseen by an ordinary person in the same circumstances?"

The prosecution must prove that the act or omission was not an accident, beyond a reasonable doubt. However, the defendant must supply some evidence to support the defence of accident if they raise this.

7.2.8 Mistake of fact

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

- the defendant must have been under an honest, but mistaken, belief as to the existence of any state of things; 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?

The common law rules for an honest but mistaken belief are:

- the prosecution must prove the unlawfulness of the defendant's action;
- if the defendant has been labouring under a mistake as to the facts, they must be Judged according to their mistaken view of the facts; and

- if the defendant was or may have been mistaken as to the facts, it is does not matter that the mistake was unreasonable.

7.2.9 Intoxication

Intoxication or being drunk is not itself a defence to a crime. But instead goes to the state of mind of the defendant: see, for example, R v Kamipeli [1975] 2 NZLR 610 (CA) and R v Clarke [1992] 1 NZLR 147 (CA).

People may do things when intoxicated that they would not do when sober. But the law holds people responsible for their intentional acts, even if they are drunk at the time. However, if you think it is a reasonable possibility that the defendant was so grossly intoxicated that they did not form any conscious intent at all, then the prosecution has not proved intent to the required standard. See R v Hagen CA162/02 4 December 2002.

7.2.10 Insanity

Every person is presumed to be sane at the time of doing or omitting any act until it is proven otherwise: s 26(1) Crimes Act 1969 (CA). However, s 26(2) CA then provides the test for insanity as a defence to criminal responsibility. You must be satisfied on the balance of probabilities that:

- the defendant suffered from "natural imbecility" or a "disease of the mind"; and
- the defendant was so affected by it that:
  - they were incapable of understanding the nature and quality of their act; or
  - they were incapable of knowing that what they did was morally wrong, in light of commonly accepted standards of right and wrong: s 26(2) CA.

Insanity before or after the time of acting, and insane delusions, though only partial, may be evidence that the offender was at the time in such a condition of mind as to render them irresponsible for the act or omission: s 26(3) CA.

It is the defendant who has the onus of proof for a defence of insanity, on the balance of probabilities.

"Disease of the mind"

The first question is whether there is proof that the defendant suffered from a "disease of the mind" or "natural imbecility" at the time of the offending. This requires a disease or disorder of the mental faculties affecting the ability to understand and think rationally. The mind refers to the mental faculties of reason, memory and understanding, in the ordinary sense. It need not be a permanent condition and it is irrelevant whether the disease is curable.

The defendant should have medical evidence that points to their mental incapacity, to plead insanity. But ultimately the meaning of "disease of the mind" is a legal question for you to decide rather than a medical question, even though medical evidence may be required.

The disease must so severely impair these mental faculties and lead the defendant 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.

Even if the disease is shown to have affected the defendant's mind, it is not enough. They must show, on the balance of probabilities, that the disease deprived them of the capacity to know or the capacity to understand.

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.

In these cases, the defendant may not be excused from criminal responsibility, although there are difficult borderline cases.

"Incapable of understanding the nature and quality of their actions"

The next question is whether, if the disorder existed, it rendered the defendant incapable of understanding the "nature and quality" of their actions. The "nature" of the act means its physical characteristics. The "quality" of an act refers to its consequences. For example, a person might understand that they are holding someone's head under water (the nature), but may not understand, in terms of the quality of the act, that doing so will cause that person to drown.

"Incapable of knowing what they did was morally wrong"

Alternatively, the issue is if the disorder existed has it been proven that the defendant was incapable of knowing that what they did was morally wrong. This is Judged by the commonly accepted standards of right and wrong.

"Morally wrong" is defined according to the everyday standards of reasonable people. The focus is on the state of mind of the accused and whether they appreciated that what they were doing was wrong. See *R v Macmillan* [1966] NZLR 616 (CA).

7.2.11 Children and criminal responsibility

No person shall be convicted of an offence, by reason of any action or omission, when the person is under the age of 10: s 24(1) CA. In cases where the defence of "immature age" is raised, evidence as to the child's age should be given.

Capacity to know and understand for children between 10 and 14 years

Children aged between 10 and 14 shall not be convicted of an offence by reason of any act done or omitted by them when of the age of 10 but under the age of 14 years, unless they knew either that the act or omission was wrong or that it was contrary to law: s 25(1) CA.

It is for the prosecution to prove, beyond reasonable doubt, that when committing the offence, the child knew that their act was seriously wrong or contrary to law. This is distinct from an act of mere naughtiness or childish mischief: *R v Sheldon* [1996] 2 Cr App R 50.

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 (for example, 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?

7.3 Rules relating to excuses or special circumstances

7.3.1 Compulsion (or duress)

A person who commits an offence will not be held criminally responsible for the offence if they:

- commit the offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed; and
- believe that the threats will be carried out; and
- are not party to any association or conspiracy whereby they are made subject to compulsion: s 27(1) CA.

A defendant cannot use the excuse of compulsion to avoid criminal responsibility where the offence is: aiding or abetting rape; treason (s 75) or communicating secrets (s 80); sabotage(s 81); piracy (s 103) or piratical acts (s 104); murder (ss 187–188) or attempt to murder (s 193); wounding with intent (s 208); injuring with intent to cause grievous bodily harm (s 209(1)); abduction (s 230) or kidnapping (s 231); robbery (s 256) or arson (s 317).

A defence of compulsion may be available where the defendant intentionally committed the crime but acted under threat of immediate death or grievous bodily harm from a person present when the offence was committed. The threat of harm can be to the defendant or to another person.

In *Hay v R* [2015] NZCA 329, the New Zealand Court of Appeal confirmed that the elements of the defence (similar statutory wording under s 24 of their Crimes Act to the Cook Islands) are:

a) The existence of a threat to kill or cause grievous bodily harm.

b) The threat must be to kill or cause grievous bodily harm immediately upon refusal to comply.

c) The person making the threat must be present during the commission of the offence.

d) The defendant must commit the offence in the belief that the threat will be carried out immediately.

Once the defence has been raised, the onus is on the prosecution to disprove compulsion if the defence is supported by credible evidence.

Where a married woman commits an offence, the fact that her husband was present at the commission of the offence shall not raise the presumption of compulsion: s 27(3) CA.

7.3.2 Defence of person

There are three defences in the Crimes Act where a person is justified in using force in defending themself or another person. These are:

- self defence against an unprovoked assault: s 50 CA;
- self-defence against provoked assault (provocation may be by blows, words or gestures under s 52 CA): s 51 CA;
- in defence of a person under their protection against an assault, if the defendant uses no more force than is necessary to prevent the assault or the repetition of it: s 53 CA.
- For the force to be justified for self defence under s 50 CA it must be:
- not meant to cause death or grievous bodily harm; and
- no more than is necessary for the purpose of self-defence.

If the defendant does in fact cause death or grievous bodily harm, this is still justified if the defendant:

- does so due to a reasonable fear of death or grievous bodily harm from the violence of the original assault by the attacker; and
- believes, on reasonable grounds, that they cannot otherwise preserve themself from death or grievous bodily harm: s 50(2) CA.

For self defence under s 51 CA this is justified if the defendant:

- used the force due to a reasonable fear of death or grievous bodily harm from the violence of the party first assaulted or provoked and believing on reasonable grounds, that it was necessary to save themself from death or grievous bodily harm; and
- did not begin the assault with intent to kill or do grievous bodily harm and did not try at any time to kill or do grievous bodily harm before they had to save themself; and
- declined further conflict and quitted or retreated from it as far as was practicable before the force was used: s 51 CA.

The defence must point to some evidence of this defence to be raised. The prosecution must then show that the act was not done in self defence or defence of another under their protection and/or that the force used was unreasonable: see *R v Bridger* [2003] 1 NZLR 428.

7.3.3 Defence of property

There are several defences in the Crimes Act where a person with peaceable possession of any property is entitled to use reasonable force to defend their property. These include defence of:

- movable property against trespassers: s 54(1) CA;
- movable property with claim of right: s 55(1) CA;
- a dwelling house: s 57 CA;
- land or buildings: s 58(1) CA.

Peaceable entry to assert your lawful right to any land or buildings is justified under s 59(1) CA, but you must have peaceable possession of that land or building with a claim of right: s 59(2) CA.

Likewise, any person is justified in peaceably entering on the land to exercise any right of way, other easement or profit, to exercise that right of way, easement, or profit: s 60 CA.

The defendant has an evidentiary burden to raise this as a defence, which the prosecution must refute "beyond reasonable doubt": *R v Gorrie* [2007] NZCA 144.

Excess of force: But even though any person may be legally allowed to use force, if they use excessive force they are still criminally responsible according to the nature and quality of the act that makes up the excessive force: s 64 CA.

7.4 Other defences and statutory defences

7.4.1 Claim of right

This is an honest belief that the act was lawful. The test is subjective. This is only a defence where the definition of an offence requires the prosecution to prove absence of claim of right. When successful, a claim of right means the conduct does not attract criminal (or civil) liability. For example, this defence may be raised for the offence of theft. An accused may have a valid defence if they have an honest belief that they had a legal right to take the goods in question.

7.4.2 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"; or
- "without reasonable cause"; or
- "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.

7.5 Parties

The law recognises that there can be more than one person connected to a criminal offence. This includes:

- those who actually commit the offence (principal offenders);
- those who somehow contribute to the commission of the offence through encouragement, advice or assistance (accessories);
- those who conspire to commit an offence;
- those who aid an offender after the commission of the offence (accessories after the fact).

7.5.1 Principal offenders

A principal offender is the person(s) whose conduct comes within the definition of the particular offence in question. Section 68(1)(a) of the Crimes Act states that everyone is a party to and guilty of an offence who commits the offence. In cases where there is only one person who is involved in the offence, they will be the principal offender.

7.5.2 Parties

Every person is a party to and guilty of an offence who:

- does or omits an act for the purpose of aiding any person to commit the offences: s 68(1)(b); or
- abets any person in the commission of the offence s 68(1)(c); or
- incites, counsels, or procures any person to commit the offence: s 68(1)(d) CA.

An accessory or party is a person who aids, abets, or counsels or procures the commission of an offence under s 68(1)(b)–(d) CA. Although an accessory is not a principal offender, they are charged and can be convicted of the actual offence as if they had been the principal offender. An accessory may be found criminally responsible for all offences unless it is expressly excluded by Statute.

"Aiding or abetting"

The physical acts of aiding, abetting and the offence itself are required for being liable as a party to that offence. Aiding means "assisting, helping, or giving support to" at the time of offence or "encouraging": see *R v Curtis* [1988] 1 NZLR 734 (CA).

The key elements are:

- an offence must have been committed by the principal;
- the defendant was acting in concert with the principal offender (providing encouragement in one form or another); and
- there was some sort of mental link or meeting of the minds between the secondary party and the principal offender regarding the offence.

"Inciting, counselling or procuring"

Inciting means "encouraging, rousing, stimulating, urging or spurring on, or stirring up": see *R v Tamatea* (2003) 20 CRNZ 363 (HC); or to "persuade, pressure or threaten: see *Race Relations Board v Applin* [1973] QB 815.

The elements for inciting are:

- an offence must have been committed by the principal;
- the defendant incited the principal to commit an offence; and
- the defendant intends or assumes that the person they incite will act with the intention or state of mind required for that offence.

The term, "to counsel or procure", generally describes advice and assistance given before the offence is committed.

Counselling means "advising, recommending or instigating": see *R v Tamatea*; or to "incite, solicit, instruct or authorise".

The elements for counselling are:

- an offence must have been committed by the principal;
- the defendant counselled the principal to commit an offence; and
- the principal acted within the scope of their authority: R v Calhaem [1985] 2 All ER 267.

It does not matter that:

- the principal offender would have committed the offence anyway, even without the encouragement of the counsellor;
- the offence actually committed is the same as the one that was counselled or a different one; or
- the offence is committed in the way counselled or in a different way.

To procure means to bring about or to cause something or to acquire, provide for, or obtain for another. It requires effort. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening: see *Cardin Laurant Ltd v Commerce Commission* [1990] 3 NZLR 563 (HC).

The elements for procuring are:

- an offence must have been committed by the principal;
- the defendant procured the principal to commit an offence; and
- there is a causal link between the procuring and the offence committed.

Withdrawal

A party 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 committed.

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.

7.5.3 Accessories after the fact

A person is an accessory after the fact when they:

- know that a person is a party to an offence; and
- receives, comforts, or assists another, or tampers with or actively suppresses evidence against them, so that they are able to avoid arrest or conviction, or escape after arrest: s 73(1) CA.

But a married person does not become an accessory after the fact for the offence of the spouse if they do any of the acts stated in s 73(1) to assist their spouse (or their spouse and any other person) to avoid arrest: s 73(2) CA.

The elements for accessories after the fact are:

- the principal offender was guilty of an offence punishable by imprisonment;
- the defendant knew that they were a party to the offence;
- the defendant received or assisted or comforted the principal offender to the offence, or tampered with or suppressed evidence; and
- the defendant did so, to enable the principal offender to avoid arrest or conviction or escape after arrest.

7.5.4 Conspiracy

Conspiracy requires two or more people to agree to commit an unlawful act with the intention of carrying it out. A spouse is capable of conspiring with their spouse (or their spouse and any other person): s 68 CA.

The elements of conspiracy are:

- there must be a firm agreement between at least two people; and
- there must be an intention to carry out an unlawful act.

See *R v Morris (Lee)* [2001] 3 NZLR 759 (CA) at [15], where the Court said:

> "A conspiracy is a conscious common design of two or more persons to do an unlawful act or to do a lawful act by unlawful means."

The offence of conspiracy is committed when the agreement is made: *R v Simmonds & Others* (1967) 51 CrAppR 316; *R v Gemmell* [1985] 2 NZLR 740 (CA) at 743.

As long as the agreement continues, others may become conspirators by joining the agreement: see *R v Harris* CA121/06, 27 September 2006.

They may be liable on conviction to imprisonment for a term not exceeding 7 years if the maximum punishment for that offence exceeds 7 years imprisonment; or the same punishment as if they had committed that offence; or the punishment for conspiracy expressly set out in the Crimes Act or any other enactment: s 333 CA.

Knowledge of the relevant law that makes the proposed conduct illegal need not be proved: *R v Broad* [1997] Crim LR 666.