Foreword

This bench book is intended to be a practical, user-friendly and informative guide for Justices to guide them in their work in the High Court. It comes in two parts: 1. **Quick guides for use on the bench**, which include process documents, checklists and templates; and 2. **The bench book**, which includes more detailed explanations, references to legislation and case law. Justices are encouraged to study and understand both parts, so they have the necessary knowledge to perform their functions.

I gratefully acknowledge the initiative and commitment on the part of the Pacific Justice Sector Programme (PJSP) to produce this bench book, and the financial backing by the New Zealand Government through the Ministry of Foreign Affairs and Trade.

I particularly commend the outstanding work of Justices of the Peace John Whitta and Tangianau Taoro, and the PJSP bench book team Katy Ford and Jordy Hermans. They collaborated tirelessly in true team spirit to prepare and produce this bench book.

I appreciate the valuable contributions of Hon. Justice Patrick Keene, Hon. Sir David Carruthers and Judge John Adams.

Comments are invited and should be referred to the Senior Justice of the Peace.

This joint effort has resulted in a bench book of which we can all be proud and which will go a long way towards improving the standards and quality of services provided by the Justices of the High Court to members of the public.

Hon. Sir Hugh Williams

Chief Justice

May 2022

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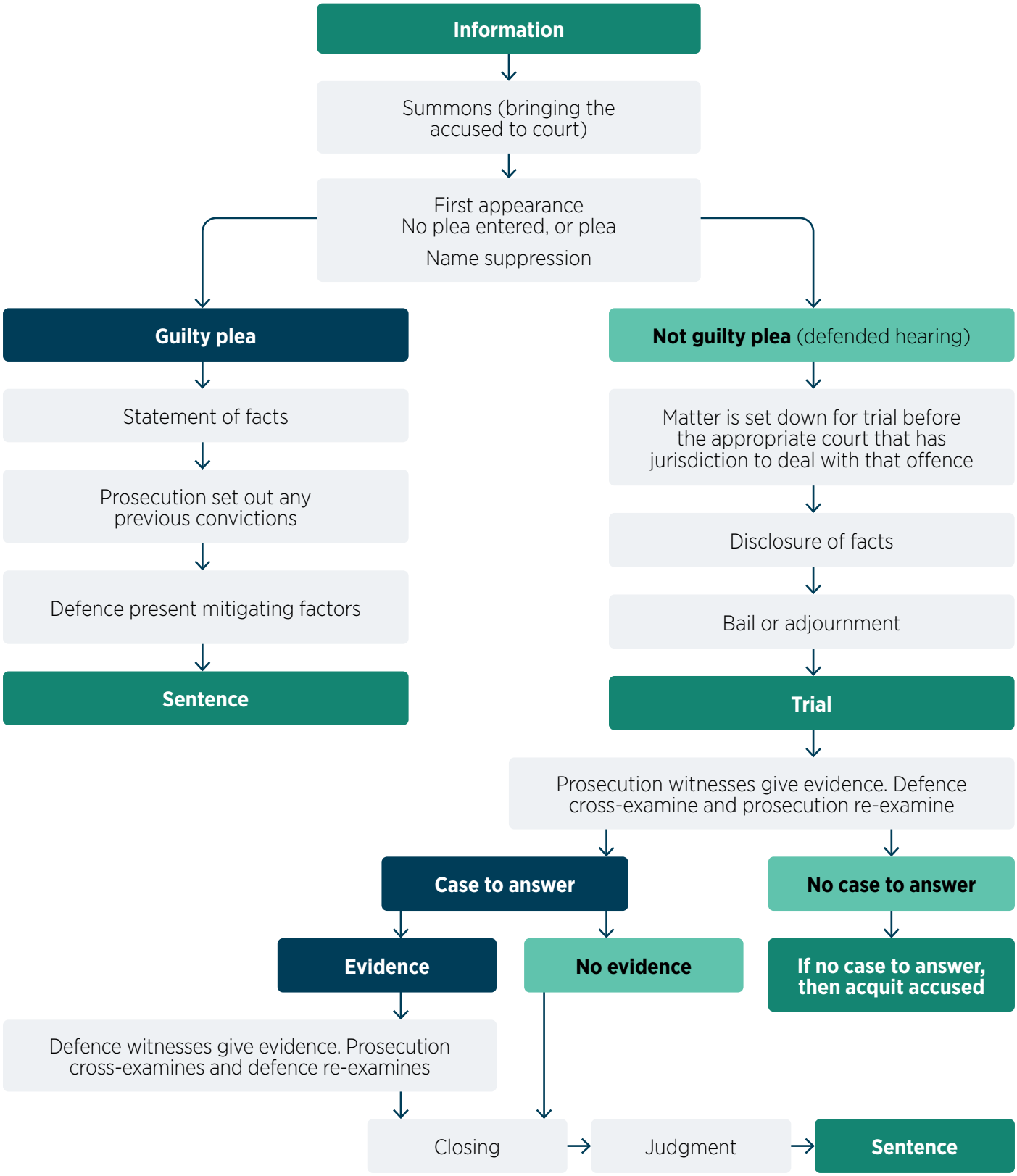
1. Outline of the criminal process



2. Bringing the accused to court

Information

Police have good cause to believe the defendant has committed an offence and file an Information detailing the charge(s) and identifying the defendant.

Summons

1. You, the Registrar or the Deputy Registrar issue a summons to compel the defendant to appear in court at a set time and date.
2. The Police, any officer of the court, or anyone else authorised by the Registrar or you may serve the summons.
3. The person serving the summons should file proof of service showing the fact, time and how the defendant was served by affidavit, or by endorsing a copy of the document that was served and signing that copy.

OR

Warrant to arrest

4. You, the Registrar or the Deputy Registrar may issue a warrant to arrest the defendant (for any offence where imprisonment is possible) and:
   a. you think it is necessary to compel the attendance of the accused; or
   b. a warrant is desirable due to the seriousness of the alleged offence and circumstances of the case.
5. Police may execute a warrant if they have good cause to suspect the defendant is at the address.

OR

Arrest without a warrant

1. If no Information has been laid and the prosecution have made an arrest without a warrant, they prepare a charge sheet to detail the charge(s) and identify the defendant. Check the charge sheet correctly identifies:
   a. an alleged criminal offence punishable by imprisonment of 3 months or more committed by the defendant (or suspected of committing); or
   b. an alleged offence against a section of the Transport Act 1966 and the defendant has either failed to give their name and address on demand; or after being warned to stop, persists in committing that offence; or
   c. the Police have good cause to believe the defendant has committed an alleged breach of the peace or the defendant is drunk in a public place and might cause harm to others or themselves as a result of the breach of the peace or drunkenness.

The defendant will then appear in court – see **First appearance and callover**

2.1 Relevant legislation

- Cook Islands Constitution, arts 64–65.
- Criminal Procedure Act 1980–81 (CPA), ss 6, 9–10, 22, 30, 80–85.
- Crimes Act 1969 (CA), ss 33–34, 36.

2.2 Commencing proceedings

- Every person who is arrested for any offence should be brought before the court as soon as possible, but in any case, no later than 48 hours after their arrest: s 9(5) CPA.
- The police will usually commence criminal proceedings by laying an Information in writing, except where the defendant has been arrested without a warrant: s 10(1) CPA.
- If an Information has been laid, check that it correctly discloses an alleged criminal offence in accordance with the relevant section of the Act being relied on: s 16 CPA. Wherever possible in advance, the Information will be given to the clerk to open a file and register the case in the court record.
- Occasionally the police will commence criminal proceedings using a Charge Sheet, where the person has been arrested without a warrant and no Information has been: s 10(2) CPA. This is used until an Information can be filed.

Note: Article 64(1)(a) of the Constitution also applies to all arrests and summons to uphold the right of the defendant not to be deprived of their liberty, and security except in accordance with the law.

See "Information" to find out more about the requirements for an Information.

2.3 Issuing a summons

Once an Information has been laid, you, the registrar or the deputy registrar should check that:

- ☐ The summons is in Form 4 (CPA Schedule): s 22 CPA.
- ☐ The defendant to whom it is directed is identified by name and address.
- ☐ The summons identifies when and where the defendant is required to appear at court.
- ☐ Proof of service of the summons is on file. Either:
  - ☐ a sworn affidavit from the person who personally served the document, showing the fact, time and mode of service with the summons attached; or
  - ☐ the person who personally served the document is to give evidence on oath at the hearing; or
  - ☐ a copy of the document, endorsing the fact, time and mode of service by a court/police officer and signed by an officer of the court/police is on file: s 30 CPA.

2.4 Issuing a warrant to arrest

Once an Information has been laid, and even if a summons has been issued or served, you, the registrar or deputy registrar may issue a warrant to arrest the defendant if the defendant is liable on conviction to imprisonment, and:

- a warrant is necessary to make sure the accused appears in court; or
- a warrant is desirable, having regard to the gravity of the alleged offence and the circumstances of the case: s 6(1)(b) CPA.

Before you issue a warrant check that:

- an Information has been laid;
- the warrant is issued using Form 2; and
- the warrant is correctly addressed either to a specific police officer by name, or the police generally: s 6(2) CPA.

Any warrant to arrest a defendant may be withdrawn by the person who issued it at any time before it is carried out: s 8 CPA.

Note: The police (or anyone assisting them) are protected from criminal responsibility if they arrest the wrong person, if they do so in good faith and on reasonable and probable grounds that the person arrested is the person named in the warrant: s 33 CA.

2.5 Arrest without a warrant

If the police have made an arrest without a warrant, check that the Charge Sheet correctly sets out the details of the charge(s) against the defendant: s 10(2) CPA.

Note: The Charge Sheet should be followed by an Information.

You may either:

- grant the defendant bail under ss 83–84 CPA; art 65(1)(f) of the Constitution; or
- remand the defendant in custody: s 85 CPA.

See "Bail" to find out more about bail.

Note: The police (and anyone assisting them) are justified in arresting someone without a warrant under any other statute that gives them the authority to do so under s 34 of the Crimes Act, or anyone else acting under statutory powers: s 36 CA.

3· Dealing with an Information

Filing an Information

1. Have the police filed a sworn written Information in the court closest to alleged offending (unless both parties agree to a different court)?
2. **There may be no Information** if the person has been arrested without a warrant and no Information has been laid. In this case, details of the charge will be set out in a charge sheet. An Information will follow.
3. Is the Information within the time limit – usually within 12 months – of offence? (Except where the specific statute states otherwise.)
4. Does the Information have enough detail to identify:
   - » the defendant
   - » the time and date of the offending
   - » person or thing against which the alleged offence was committed
   - » the offence (see relevant statute creating the offence)?

   If not, you may need to adjourn the case until you receive more detail from police.
5. Check the relevant statute for creating the offence and that you have jurisdiction to hear the case.
6. An Information must be for one offence only, unless the relevant statute creating the offence states otherwise.

Objections to the Information

7. Either party may object on the grounds the Information does not correctly state a criminal offence or provide enough details to fairly inform the defendant of the substance of the offence. Either party may seek to amend the Information or the defence may seek to quash the Information.
8. Before ruling on the sufficiency of an Information, you may adjourn the case to obtain further details from the informant or the police.
9. You may quash the Information or amend it. If you are amending the Information before or during the trial, you should explain the new Information to the defendant, including any differences, and ask the defendant how they plead.
10. When you are amending the Information during trial, if the defendant requests an adjournment, you will need to decide whether this is fair to allow them to properly prepare for their defence.
11. If the defendant chooses to proceed, then the amended or substituted offence replaces the original Information.
12. **Evidence of an amended charge.** In a defended hearing, any evidence already given is treated as if it had already been given for the purpose of the amended charge.
13. Both parties have the right to recall, examine, cross-examine or re-examine any witness who gave evidence already for the original charge. The overall principle to apply here is fairness to the defendant.

Application to withdraw an Information

14. The prosecution may apply to withdraw an Information at any time before conviction, dismissal of the charge or sentencing.
15. Where the withdrawal is made before the defence case, you may discharge the defendant.
16. The withdrawal of an Information shall not bar further or other proceedings against the same defendant with respect to the same offence.

Go to **First appearance and callover**

Charges in the alternative – application to amend or divide the Information

17. An Information may charge several different matters, acts or omissions in the alternative if the statute allows for this.
18. The defendant may apply to divide or amend the Information if it is framed in the alternative and unfairly disadvantages their defence.
19. If you are satisfied the Information will unfairly disadvantage the defendant's defence, you may:
    - amend or divide the Information; or
    - grant an adjournment to get further legal advice.
20. The Information will then be amended and you should explain the new Information to the defendant, including any differences, and ask the defendant how they plead.
21. The hearing will proceed and the amended Information replaces the original.

3.1 Introduction

An Information (in Form 3, First Schedule CPA) is a written sworn statement that the police suspect or have reasonable cause to suspect, that a specified criminal offence has been committed, unless the person has been arrested without a warrant: ss 10–13 CPA.

If the defendant has been arrested without a warrant, the police may initially use a Charge Sheet with the details of the charge: s 10(2) CPA.

3.2 Relevant legislation

- Criminal Procedure Act 1980–81 (CPA), ss 10–21, 46–47, 50.
- Judicature Act 1980–81 (JA), s 92.
- Crimes Act 1969.

3.3 Relevant case law

- *Allsworth v Puna* [2020] CKHC 1; CR 308–315 of 2020 (23 December 2020).
- *Moevao v Department of Labour* [1980] 1NZLR 464.
- *Fox v Attorney-General* [2002] 3NZLR 62.

3.4 Contents and procedure to file an Information

Check the Information:

- is in Form 3, First Schedule CPA, and sworn by the police (or other informant) before a registrar or justice: ss 10, 11, 13 CPA;
- has an endorsement or memorandum attached as proof that any leave, consent or certificate, if required, has been given by a judge or attorney-general: s 14 CPA;
- has been laid by the police within 12 months for any offence(s) liable to 3 months imprisonment and/or a $50 fine, except where a statute provides otherwise: s 12 CPA;
- has been filed by the police in the correct court closest to where the offence was alleged to have been committed, or where the informant believes that the defendant may be found, unless both parties agree to a different court: s 19(1) CPA

  Note: Even if not filed in accordance with s 19(1), this does not invalidate the proceedings: s 19(1) CPA. If there is more than one Information, they may be filed in the same court in which one of them could have been filed or has been filed: s 19(2) CPA);
- has sufficient details (including the date, time and sufficient details to identify the defendant) to show the defendant what the details of the charge are against them and that it discloses a criminal offence under the Act creating the offence: s 16 CPA.

If the Information does not have sufficient details:

- you may adjourn the case to get more details from the police: ss 17, 79(1) CPA; or

- the police may apply to withdraw the Information under s 46 CPA with your leave, but may then relay a new Information (see "Withdrawal of the Information" below).

3.5 Alternative charges, dividing or amending the Information

An Information is usually for a single offence but may charge in the alternative several different matters if these are stated in the alternative in the statute under which the charge is brought: s 15(1) CPA.

If the Information is framed in the alternative and the defendant applies to amend or divide the Information on the basis this would unfairly disadvantage their defence, you may:

- order the defendant to elect between the alternative charges, amend the Information and proceed to hear the case with the amended Information: s 15(3) CPA; or
- divide the Information into two or more charges in which case the hearing shall proceed as if an information had been laid for each charge: s 15(2)– (3) CPA; or
- adjourn the hearing if you are satisfied that the defendant would be unfairly disadvantaged in their defence because of the amendment: s 47 CPA.

Note: Where any Information is framed in the alternative and the defendant is convicted, you may, at their request, limit the conviction to one of the alternative charges: s 15(4) CPA.

Since every Information is divisible, the defendant may be convicted of any other offence or an attempt to commit any other offence that fits within the offence set out in the relevant Act or the Information: s 50 CPA.

3.6 Objections to the Information

The overall principle in deciding these applications is fairness.

At any time before the hearing:

- the defendant may apply (or if self-represented, you may raise any issues) and you may:
  - amend or divide the Information if framed in the alternative, on the grounds that it is so framed as to prejudice their defence: s 15 CPA; or
  - if the Information does not in substance state an offence, amend the Information or quash the Information before the defendant has pleaded (but a substituted Information may still be possible under s 47), or (rarely) grant in arrest of judgment: s 18(1)– (2) CPA; and
  - adjourn the case if the defence needs time to prepare their defence if the charge is amended: s 79 CPA;
- the police may apply and you may:
  - amend the Information: s 18(1) CPA; and
  - adjourn the case if the defence needs time to prepare their defence if the charge is amended: s 79 CPA;

- withdraw the Information, and the police may relay another Information (see "Withdrawal of the Information" below): s 46 CPA.

During the hearing, you may:

- if the Information does not in substance state an offence, amend the Information or quash the information or (rarely) leave the objection to be taken in arrest of judgment: s 18(3) CPA;
- amend an Information, including substituting one charge for another: s 47(1) (2) CPA;
- state the charge as amended or substituted to the defendant and ask how they plead;
- continue as if the defendant had originally been charged with the amended or substituted offence, and any evidence already given shall be deemed to have been given in and for the purposes of the trial of the charge as amended or substituted, however:
  - either party shall have the right to recall and examine or cross-examine or re-examine any witness whose evidence has already been given in respect of the offence originally charged: s 47(3) CPA;
  - you should adjourn the case if the defence applies because they would be prejudiced in their defence due to any amendment or substitution made: s 47(4) CPA.

3.7 Withdrawal of the Information

With leave of the court, the police (or other informant) may withdraw an Information at any time:

- before the defendant has been convicted; or
- before the Information has been dismissed; or
- before they have been sentenced or otherwise dealt with, where the defendant has pleaded guilty: s 46(1) CPA.

You **must** discharge and release the defendant once leave to withdraw has been granted, unless a substituted Information is laid: s 46(3) CPA.

You may also award reasonable costs as you think fit where the Information is withdrawn: s 46(2) CPA, s 92 JA.

3.8 Information checklist

- ☐ Is the Information in the correct form?
- ☐ Is the defendant's name and address correctly stated?
- ☐ Is the place and date of the offence stated?
- ☐ Does the Information disclose an alleged criminal offence in accordance with the particular words of the relevant section of the Act?
- ☐ If the Information is in respect of a minor offence (less than 3 months imprisonment or a $50 fine), check the alleged offence did not occur more than 12 months before the date of the offence.
- ☐ Is the Information sworn?

3.9 Example of a completed Information

Section 13, Criminal Procedure Act 1980–81

I, [Full name], of [Address, occupation] say on oath that I have reasonable cause to suspect and do suspect that (*within the space of (12) months last past, namely) on the 20th day of March 2020, Mr David Rima, Tupapa, Carpenter drove carelessly on the Main Road at Nikao at 6pm.

Sections 30 and 31(1) and 124 of the Transport Act 1966.

.....
[Signature of Informant]

Sworn before me at this day of 2022
.....
Judge of the High Court
(or Justice of the Peace)
(or Registrar)
(or Deputy Registrar) (not being a constable)
[Delete if not applicable]

4. First appearance and callover

Preliminary matters – first appearance

1. Call the defendant's name.
2. If they do not appear, check the summons was served and date of service.

See **Adjournments** for non-appearance

3. Check charge(s) on the Information and if you have jurisdiction to hear the case.
4. If defendant appears, check:
   - » identity
   - » age
   - » address
   - » if they wish to have a lawyer for any serious charge(s).
5. If they are 16 years or under, transfer the case to the Children's Court.
6. Consider any issues relating to the Information:
   - » can it be relied on
   - » is there any objection to it by the prosecution or defence?
   - » have either the prosecution or defence applied to amend or divide the Information?

If YES, go to the **Information process**

7. Conflict of interest: If you are related to the defendant or in some relationship that may appear to create bias, you should not hear the case.

Non-appearance

8. Defendant:
   - » if only liable to a fine (and was duly summoned to appear), deal with it; or
   - » issue a bench warrant for defendant's arrest; or
   - » adjourn to time, place and conditions as you think fit.
9. Police:
   - » adjourn to a time and place you think fit; or
   - » dismiss the Information for want of prosecution (if the police have been plainly derelict). A dismissal for want of prosecution does not prevent further proceedings in the same matter.
10. Police and defendant:
    - » adjourn to time, place and conditions as you think fit; or
    - » dismiss the Information for want of prosecution.

Go to **Adjournments**

Bench warrants

Issuing a warrant for the defendant's arrest (bench warrant)

11. You may issue a bench warrant if the defendant fails to appear.

- » Step one: Check the date and time on the summons are correct, an affidavit should be on file with proof of service of the summons.
- » Step two: Stand down the case until the end of the list because the defendant could be late for good reason.

Defendant arrested and brought before you under a bench warrant

12. If the Court is not in session for the trial of criminal cases, you may:

- » grant the defendant bail at your discretion; or
- » remand the defendant in custody for them to attend the Court at the next sitting.

13. Cancel the bench warrant once the defendant has been brought before the Court.

Go to **Bail applications**

Explain process

14. If the defendant is self-represented, clearly explain the process. Consider any disabilities they may have and if they need help from others.

15. Read out the charges. Check the defendant understands the charges, and, if not, explain in simple terms or check if they need an interpreter.

Entering the plea

16. If satisfied the defendant understands the charge(s), ask them to enter a plea.

17. If the defendant is unable to do so, ask why not.

18. Is fitness to plead an issue? You may need to adjourn for a report.

19. If you adjourn the case to a set date for the callover, consider whether the defendant is remanded:

- » at large
- » on bail (with conditions)
- » in custody.

Go to the **Application for bail**

Guilty plea

20. If the defendant admits the charge:

» ask the prosecution to read a brief summary of the facts

» tell the defendant to listen carefully and explain that they will be asked if they agree with these facts

» following the summary reading, ask the defendant if they agree with the summary.

21. If the defendant disputes any of the facts, consider if these are relevant to the offence.

» If **YES**, or where defendant's comments may amount to a defence, you must enter a plea of not guilty for the defendant.

» If **NOT** relevant to the offence, enter a plea of guilty.

Note that a plea of guilty is a plea to the elements of the charge but may not be acceptance of the prosecution's summary of facts.

22. If you are satisfied the defendant understands the charge(s) you may:

» convict the defendant (find them guilty) or deal with them in any other manner authorised by law (eg. discharge without conviction)

» sentence them immediately if the charges relate to a simple matter

Go to the **Sentencing**

» adjourn for more complex matters, if sentencing or other reports are required. See step 19 to consider bail.

23. The defendant may withdraw a plea of guilty with your leave at any time before being sentenced or otherwise dealt with, in the interests of fairness.

Not guilty plea

24. Adjourn the case. See step 19 to consider bail. Try to set a trial date, taking into account availability of the Court, witnesses and so on.

For a defended hearing go to the **Defended hearing criminal process**

25. If election is required for certain offences, but has not been made, the defendant can elect to be heard by three Justices or a High Court Judge.

26. Consider any name suppression application.

Go to **Name Suppression**

Withdrawal of the charge

27. The prosecution can apply to withdraw the charge (Information) at any time with your leave:

» before you dismiss the case or convict the defendant; or

» if the defendant has pleaded guilty before they have been sentenced or otherwise dealt with by you.

Callover

28. Call the defendant to the dock, if they don't appear repeat the process in step 2.
29. If counsel are engaged, they must identify they are representing the defendant.
30. If no plea entered, ask defendant if they are in a position to enter a plea, and repeat the process for entering a plea from step 16 onwards.
31. You may extend or otherwise review bail, deal with interim name suppression (if any), or make other orders (each order expires on the following appearance date).
32. Set date for next appearance, callover, sentencing or trial.

4.1 Relevant legislation

- Cook Islands Constitution, arts 64–65.
- Criminal Procedure Act 1980–81 (CPA), ss 23–24, 30, 54–59, 60–68, 105–106.
- Judicature Act 1980 (JA), ss 19(a)–20(a); Judicature Amendment Act 1991 (JAA), s 15A.
- Cook Islands Act 1915 (CIA), ss 590–593.
- Prevention of Juvenile Crime Act 1968 (PJCA), ss 2, 20, 21, 24, 26, 30, 36, 41.
- Prevention of Juvenile Crime Amendment Act 2000 (PJCAA 2000) (amended s 20 and enacting s 20A).

4.2 Relevant case law

- *Samatua v Attorney General* [2015] CKHC 14; Plaint 5.2012 (3 June 2015).
- *Crown v NH* [2009] CsKHC 7; CRN 803, 815–819, 823–824 of 2008 (3 July 2009).
- *Cook Islands Police v Narsimulu* [2013] CKHC 68; JP Appeal 8.13 (27 November 2013).
- *Queen v Katoa* [2010] CKHC 12; CR 568 of 2009 (29 November 2010).

4.3 Key principles: Self-represented defendant

- It is important that the defendant understands the process at their first appearance.
- Every defendant may defend the proceedings personally or be represented by any person entitled to practise as a barrister or solicitor in the Cook Islands or, with the leave of the court (which may at any time be withdrawn), by any other agent: s 53(3) CPA.
- Where the defendant is representing themselves, consider their fundamental rights under art 64 and the principles in art 65 of the Constitution including:
  - their right to a fair hearing in accordance with principles of fundamental justice: art 65(1)(d) Constitution; and
  - the presumption of innocence until proven guilty according to law in a fair and public hearing by an independent and impartial court: art 65(1)(e) Constitution.

Note: The burden of proof is on the police to prove the charge(s) beyond reasonable doubt (see "Dealing with evidence".)

- Check whether you have jurisdiction under the Judicature Act to deal with the matter before you.
- Explain the process in a way that is appropriate to the defendant and their ability to understand what is going on in the court room. You will need to consider any disabilities, the need for a translator or assistance from a support person.
- Where possible be careful not to let the defendant incriminate themself. It is better for the defendant to get advice from others, for example, senior elders, family and so on.

- Allow the defendant to be present in court during the whole of their trial unless the defendant behaves so badly that attendance is impracticable: s 53(1) CPA.
- However, you may permit the defendant to be out of the court during the whole or any part of the proceedings on such terms as you think fit: s 53(2) CPA.

4.4 Procedural list matters

Consider the following immediate issues.

- Appearance or non-appearance by the parties and legal representation including:
  - whether the defendant has appeared, and if they are the right person (identification of the person charged);
  - if the defendant does not appear, whether the case should be adjourned (if the defendant has a good reason for non-appearance), or whether you should you issue a warrant;
  - if the defendant is unrepresented, whether they understand the charge.
- Whether the Information correctly sets out the defendant's personal details.
- Whether you have jurisdiction to hear the matter: ss19(a)–20(a) JA, s 15A JAA.
- If the matter is simple, you may put the charge to the defendant; or you may grant an adjournment to allow the defendant to get legal advice if it is more complex.
- Taking pleas:
  - IF the defendant pleads not guilty, you need to consider what directions you call for to set down the matter for trial.
  - If the defendant pleads guilty, consider what needs to be before the court when sentencing (for example, victim impact statement; and probation, psychiatric, psychological, and reparation reports).
- Any application for bail (if made) and whether you remand the defendant at large, on bail or in custody (see "Bail").
- Whether the defendant is seeking name suppression (see "Name suppression").

Note: At first appearance, the matter will generally be adjourned to a fixed date. This adjourned hearing is usually called a "callover".

4.5 Conflict of interest

If you consider there might be a "conflict of interest" because you are related to the defendant or in some other relationship that could mean that you might be biased, or could create the appearance of bias, you should not hear the case (see "Judicial conduct").

4.6 Legal representation

You should inform the defendant of their right to legal counsel once their name has been called in the list.

You may advise them not to enter a plea to any charge(s) before getting legal advice, depending on:

- the seriousness of the offence(s); or
- if it is not the defendant's first offence; or
- if the defendant looks unsure or afraid and/or does not understand the proceedings: s 53(3) CPA.

4.7 Non-appearance of the defendant

If the accused person has been duly summoned and does not appear you may:

- try the defendant and sentence them for that offence in their absence, if they are only liable to a fine, under s 56 CPA; or
- adjourn the trial to such time and place and on such conditions as you think fit: s 59 CPA; or
- issue a bench warrant under s 54 CPA if they fail to appear: to plead to an Information that has been laid; or for sentencing if they have been duly remanded.

4.8 Bench warrant

Check the date and time on the summons, or the date of a due remand for sentencing (as the case may be), and make sure that these are correct. Next, stand down the case until the end of the list, as they could be late for a good reason.

When exercising your discretion under s 54 CPA to issue a warrant for the defendant's arrest consider:

- the efforts the police made to serve the defendant – an affidavit of service should contain the date, time and mode of service and who carried out the service: s 30 CPA;
- how long after the alleged offence the summons was issued;
- whether the defendant has failed to appear previously without good reason.

When the defendant has been arrested, even if the court is not in session, you may:

- grant them bail, unless they are not bailable as of right if they have failed without reasonable excuse to attend according to their bond; or
- remand them in custody to attend the court at its next sitting: s 54(2) CPA;
- cancel the bench warrant once carried out.

See "Bail applications" to find out more about how to decide bail applications.

4.9 Non-appearance by the police

If the defendant appears but the police does not appear, you may either:

- adjourn the trial to a time and place you think fit – if the police have not been given adequate notice of the trial: s 55(a) CPA; or

- in any other case, where the police fail to appear or are not ready to proceed at a hearing:
  - adjourn the trial to a later date; or
  - dismiss the case: s 55(b) CPA.

See "Adjournments" to find out more about when to adjourn a case.

4.10 Neither party appears

Where neither the police nor the defendant appears, you may:

- adjourn the matter to such time and place, and on such conditions, as you think fit; or
- dismiss the Information for want of prosecution: s 57 CPA.

Note: A dismissal of an Information for want of prosecution under s 55 or s 57 CPA does not act as a bar to any further or other proceedings in the same matter.

As a dismissal for want of prosecution is deemed an acquittal, an application should not be granted too readily if delay is the only concern. Ask the registrar to make further inquiries including:

- the extent of the delay (whether the police have been guilty of serious delay);
- the reasons for it;
- the merits of the police's case, so far as they can be assessed;
- whether the delay has seriously prejudiced the defendant.

Ultimately you must always stand back and have regard to the interests of justice.

4.11 Identification of the accused

The defendant has been called by name and has been brought before you. You must first check who the defendant is (if you don't already know them). Either the court clerk or you should ask the defendant:

- their full name;
- occupation;
- age;
- any other relevant details.

Note: More than one person may share the same name and so the other details are important (or someone may have more than one name that they use).

Use the name on their passport or birth certificate if there is any conflict.

4.12 Children and young persons

A child under the age of 16 years or a young person under the age of 17 years (under ss 2, 30, 36 PJCA) should be referred to the Children's Court: ss 19, 21 PJCA.

If you are unsure of their age (insufficient evidence) you may fix their age (deemed to be their true age) for any matters under this Act: s 41 PJCA.

However, you may still make the following orders in closed court (s 24 PJCA):

- adjourn the case; and
- grant bail (a young defendant is treated differently if they are under the age of 21 years or under the age of 18 years under s 84 CPA); or
- remand the child or young person: s 20 PJCA.

See "Children's Court and Te Koro Akaau" to find out more about the special procedures that apply to children and young offenders.

4.13 Callovers (adjourned court sitting)

Where a defendant in your list enters and pleads guilty and the matter is within your jurisdiction, sentence immediately if you can.

You may first need to stand the matter down for a pre-sentence report and/or a reparation report. Adjourn for reports only if necessary.

If the offence is beyond your jurisdiction to sentence, then take the plea, order the probation report and adjourn to the next judge's sitting.

4.14 Court pronouncements

Unrepresented defendant enters a plea after the reading of the charge:

> "The charge was read and the defendant was advised of his/her right to seek legal representation before entering a plea. However, the defendant chose to enter a plea of [guilty/not guilty]."

A defendant enters a plea through counsel:

> "The defendant entered a plea of [guilty/not guilty] through counsel."

If a guilty plea is entered in either case above and sentencing is to be carried out immediately:

> "The defendant is convicted and sentenced as follows: [the defendant's sentence is read]."

If sentencing is to wait until a sentencing date and a probation report is required:

> "This matter is adjourned for sentencing before a [single JP/ three JPs] on [date]. A probation report is ordered to be available by [date 2 days before sentencing] with copies to be made available to prosecution and defence. The defendant is remanded [at large/on bail/in custody – if remanded on bail, enter conditions]."

If a not guilty plea is entered above (either by an unrepresented defendant or through counsel):

> "This matter is adjourned to a defended hearing on [date] before [a single JP/ three JPs]. The defendant is remanded [at large/on bail/in custody – if remanded on bail, enter conditions]."

If no plea is taken, perhaps on a first appearance, and the matter is adjourned to a callover:

> "No plea was taken and this matter is adjourned for a callover on [date]. The defendant is remanded [at large/on bail/in custody – if remanded on bail, enter conditions]."

For an election:

> "You are charged with an offence for which you are entitled, if you desire it, to be tried by three justices sitting together, or by a judge alone. Do you desire to be tried by three justices sitting together, or by a judge alone?"

5. Adjournments

General power to grant an adjournment

1. Three types of adjournment in a criminal case:
   a. pre-trial for procedural steps
   b. at the start of a defended hearing trial
   c. during the trial and before sentencing.
2. You may adjourn a trial before or after starting, based on fairness.

   Key principle: A trial should proceed continuously after it has started, unless you decide it's fair to grant an adjournment.

   The main reasons for granting an adjournment are either sickness (supported by a medical certificate) or the defence being taken by surprise with new evidence.
3. The party applying for an adjournment must show "good cause".

See **Specific reasons to grant an adjournment below**

4. In deciding whether to adjourn, consider:
   a. the reasons, including any fault of the applicant, causing the delay
   b. the effect on the parties
   c. when a new trial could be heard
   d. the "interests of justice", including:
      » the defendant's right to a fair trial
      » the public interest in ensuring efficient prosecutions.

Overall, if adjourning means the defendant gets a fair trial, then grant it.

Specific reasons to grant adjournment

Lack of jurisdiction – pre-trial

5. In this instance, adjourn for the case to be heard by the proper authority, usually a Judge.

Non-appearance – start of trial

6. **Police**

Check police had sufficient notice of time, date and place of trial. If sufficient notice was given and there is no good reason for non-appearance, you may:

» usually adjourn the case to a new time, date and place

» in extreme cases when the police have plainly been derelict, dismiss the case for want of prosecution (for serious charges, it is more likely you will consider adjournment rather than dismissal).

7. **Defendant**

   Check the police made reasonable efforts to serve the defendant with a summons showing time, date and place of hearing, and check when the summons was served. If sufficient notice was given and there is no good reason for non-appearance, you may:

   a. adjourn the trial so the defendant can be present

   b. if the only possible sentence is a fine, you may hear the case in the defendant's absence and give a sentence

   c. if imprisonment is a possibility, issue a warrant for the defendant's arrest if they failed to appear after being properly served.

8. **No parties appearing**

   You may adjourn the trial to a new date and time or dismiss the Information for want of prosecution.

   If proceedings are dismissed for want of prosecution the Police can still bring another case.

Witnesses – when to adjourn during trial

9. If defence taken by surprise because either:

   a. a new witness is called by the prosecution and the defence needs a chance to consider and respond to their evidence; or

   b. a written witness statement has not been made available to the defence in sufficient time to prepare; and

   c. that witness's evidence is likely to be prejudicial to their defence.

10. If you think a witness should be called in the interests of justice, you may:

    a. ask the police to make further enquiries

    b. adjourn the hearing to a future time and date.

Questions of law

11. If a question of law arises during trial, you may adjourn the case for retrial before a Judge, either at your own decision, or where the prosecution or defence applies.

Sentencing inquiries – end of trial or after a guilty plea

12. You may adjourn a case pre-sentencing to get further reports or make inquiries to inform sentencing options, especially for more serious offences.

Process of granting an adjournment

13. Every adjournment must be made for a specific time and date. Usually, hearing dates are fixed with the parties well in advance.

14. Before fixing the adjournment date:

    a. inform the defendant of their right to legal counsel (if unrepresented)

    b. advise the defendant to prepare for hearing their case

    c. set a date after considering the time needed for both parties to prepare their cases and consulting the Court diary.

15. Once you have adjourned a matter, either:

    a. remand the defendant in custody if not bailable as of right and there are good reasons not to grant bail; or

    b. release at large if bailable as of right; or

    c. if bailable at your discretion, consider if bail should be granted with appropriate conditions

    d. record all your decisions and reasons why on the Criminal Decision Sheet.

5.1 Relevant legislation

- Criminal Procedure Act 1980–81 (CPA), ss 55, 57, 59, 79-82, 101, 105.
- Criminal Procedure Amendment Act 1998 (CPAA), s 79A.

5.2 Relevant case law

- See *Condon v R* (2006) 22 CRNZ 755.

5.3 Key principles for adjournments

The basic overall principle is one of fairness. Usually a trial, after it has started, should proceed continuously, subject to the power of the court to adjourn it: s 79(1) CPA.

Either the defendant or the police can ask for an adjournment. Both parties should be heard on the application. The party applying for an adjournment must show "good cause". A lack of preparation by one of the parties is not sufficient.

"Good cause or reason" may not include multiple applications for adjournment by the prosecution.

However, a defendant must be given a reasonable chance to prepare a defence (for example, if presented with a new charge on an amended Information).

If no adjournment would mean that the defendant would not have a fair trial, then grant the adjournment.

5.4 When you might adjourn

There are three different times you may consider it necessary or advisable to adjourn a case.

1. Pre-trial

You may adjourn:

- to obtain further details for the Information if this is necessary for a fair trial under s 17 CPA (see "Information");
- to make further inquiries if you think fit, for the non-appearance of the accused: s 79(1) CPA;
- to allow the defendant time to find legal representation: s 79(1) CPA.

Note: You may issue a bench warrant for their arrest if the defendant does not appear (after being duly served or remanded):

- to plead to an Information that has been laid; or
- for sentencing after being remanded for sentencing: s 54(1) CPA.

2. At the start of a defended hearing trial

You may adjourn the trial:

- due to lack of jurisdiction: s 79(2) CPA;
- if the defence would be prejudiced in their defence because of any amendment or substitution made to the Information or charges (see "Information"): s 47(4) CPA;
- for the non-appearance of the police (informant) at the trial:
  - If the police have not had sufficient notice (in which case you **must** adjourn the case: s 55(a) CPA).
  - If sufficient notice was given:
    - usually adjourn the trial to such time and place and on such conditions as you think suitable for the police/informant to appear; or
    - in extreme cases if the police have been plainly derelict, dismiss the case for want of prosecution (which is not a bar to the police bringing another case later under s 58 CPA): s 55(b) CPA;
- for the non-appearance of the defendant at the trial: s 59 CPA;
- for the non-appearance of both parties or, alternatively, you may dismiss the Information for want of prosecution: s 57 CPA.

For non-appearance at trial by the defendant:

- if a fine is the only possible sentence on conviction, you may hear the case in their absence, try, convict and sentence the defendant: s 56 CPA; or
- if they are liable on conviction to a sentence of imprisonment, issue a warrant for their arrest in Form 7 (if the police have made reasonable efforts to serve the defendant with a summons and with sufficient notice): s 59 CPA; or
- issue a warrant to arrest the defendant (Form 7), if they are released on bail and do not attend personally at the time and place specified in the bond, or at any adjourned hearing: s 92 CPA.

3. During the trial and prior to sentencing

You may adjourn the trial:

- if the defence is unaware of a prosecution witness who would be prejudicial to their defence either because the witness did not make a written statement, or this was not disclosed to the defence: s 101(1) CPA;
- if you think a witness should have been called who has not been called by the police: s 101(2) CPA;
- if a new issue has been raised and a party needs time to prepare a response: s 79(1) CPA;
- if a complex question of law arises and either the police or the defendant requests an adjournment; or if you decide on an adjournment for retrial before a judge: s105 CPA;
- after conviction and prior to sentencing for sentencing reports: s 80 CPA.

5.5 Procedure for adjournments

Every adjournment must be made for a specific time and date. Usually hearing dates are fixed in consultation with the parties and well in advance.

Before fixing the date:

- inform the defendant of their right to legal counsel (if unrepresented);
- advise the defendant to prepare for hearing the case;
- consider both the time the parties need to prepare their cases and the court diary.

In the meantime, you must decide if the accused should:

- go at large;
- be remanded in custody;
- be granted bail (or have bail extended) with or without conditions;
- be released after entering a bail bond (recognisance), with or without sureties.

You may also make any other orders you think fit.

You must exercise your power to adjourn judicially, by weighing several competing considerations, which include:

- the interests of the accused in having a fair trial (this is paramount);
- when a new trial could be heard;
- the "interests of justice" including:
  - the right of the defendant to a fair trial; and
  - the interests of the public in ensuring efficient prosecutions;
- the reasons for the adjournment, including any fault causing the delay;
- the effect of the adjournment on the parties.

Note: Your discretionary power must be exercised in such a way as to ensure that the accused has a fair trial according to law.

5.6 Court pronouncement

If no plea is taken at a first or second appearance and the matter is adjourned to a callover, say:

> "No plea was taken and this matter is adjourned to a callover on [date]. The defendant is remanded [at large/on bail/in custody. If remanded on bail also enter and state the bail conditions]."

Note: You must enter reasons for the adjournment and for the remand in custody/at large/or on bail on the Criminal Decision Sheet.

6. Considering bail

Is the offence
- Treason?
- Communicating secrets?
- A drug offence?

Yes → Remand in custody until High Commissioner or Judge can hear

No

Does the offence
- Carry a maximum penalty of more than 2 years in prison?

Yes → Bailable at your discretion, consider bail and/or conditions **See next flow chart**

No

Has the defendant been previously convicted of an offence punishable by imprisonment and is now charged with another imprisonable offence?

Yes → (Bailable at your discretion, consider bail and/or conditions **See next flow chart**)

No

Does the offence fall under any specified offence* of the Crimes Act 1969?

Yes → Bail as of right (you must grant bail)

No

Is it a family violence offence?

Yes → **See temporary protection orders**

No

Is the defendant aged under 21?

Yes → **Must grant bail** unless that young person is charged with an offence for which they would not be bailable, except for their age, then you may remand them in custody, if, in all the circumstances, no other option is desirable

Is the defendant aged under 18?

Yes

MAY grant bail OR if you are not granting bail, they may be remanded into the care of a probation officer or other reputable adult, rather than prison

See Conditions of bail

No

Bail as of right (you must grant bail)

***Specified Offences**

s 122 False statements or declarations
s 171 Duty to provide the necessities of life
s172 Duty of parent or guardian to provide necessaries
s 173 Duty of employers to provide necessaries
s 174 Abandoning child under six
s 205 Female procuring her own miscarriage
s 210 Injuring by unlawful act
s 224 Setting traps, etc.
s 272 Acknowledging instrument in false name
s 285 Taking reward for recovery of stolen goods
s 303 Imitating authorised marks
s 304 Imitating customary marks

Conditions of bail

Are prosecution opposing bail?

No ↓ **Are prosecution seeking bail conditions?**

No → **Consider if you will grant bail, with or without conditions**

Yes ↓ **Is defence seeking bail?**

No ← **Remand into custody**

Yes ↓ **Is defence seeking bail?**

- → Hear arguments from prosecution.
- → Hear arguments from defence.
- → Consider victim's views (if available).

NOTES:

» The fundamental common law principles in favour of innocence and freedom apply.

» Prosecution have to provide reliable information to support an argument to remand the defendant in custody.

To refuse bail, you must be satisfied that there is a just and proper reason to do so, such as:

» defendant unlikely to appear in court on the appearance date

» defendant likely to interfere with witnesses or evidence against them

» defendant likely to commit an offence while on bail.

↓

Are you satisfied that bail conditions will address the risks?

Yes ↓ **Grant bail with conditions**

No ↓ **Remand into custody**

If the defendant is already on bail and seeking extension

Normally extend existing bail (+ conditions)

unless the prosecution are opposing bail or seeking new conditions

6.1 Relevant legislation

- Constitution of the Cook Islands, art 65(1)(f).
- Criminal Procedure Act 1980–81 (CPA), ss 83–95.
- Criminal Procedure Amendment Act 2007 (CPAA), s 87.
- Crimes Act 1969 (specific offences bailable as of right), ss 75, 80, 83, 122,172–173, 205, 210, 272, 285, 303, 304.
- Narcotics and Misuse of Drugs Act 2004, s 73.
- Judicature Act 1980–81 (JA), s 76(4), (5).

6.2 Relevant case law

- *Police v Tiatoa* [2004] CKHC 17; CR203.2004 (9 July 2004) citing *Hubbard v Police* [1986] 2 NZLR 738.
- *Tatira v Crown* [2013] CKHC 32; JP Appeal 4.13 (18 July 2013).

6.3 Key principles

You need to consider the defendant's fundamental rights under art 64 of the Constitution, and the principles in art 65 of the Constitution, including:

- the right to life, liberty, and security of the person, and the right not to be deprived of these rights except in accordance with the law: art 64(1)(a);
- the right of any person charged with an offence to reasonable bail, except for just cause: art 65(1)(f);
- the presumption of innocence until proven guilty according to law in a fair and public hearing by an independent and impartial court: art 65(1)(e).

If the defendant is not released on bail immediately, and no bail has been applied for, they have the right to be brought before a court to apply for bail: s 86 CPA.

The fundamental common law principle is in favour of freedom unless there is a just and proper reason to refuse bail.

6.4 Bailable as of right

The defendant is bailable as of right for offences with a maximum penalty under 2 years' imprisonment or certain specified offences listed in 6.1 of the Criminal chapter in The details): s 83(1)–(3) CPA.

But the defendant is **not** bailable as of right if:

- they have been previously convicted of an offence punishable by imprisonment; and
- they are now charged with an offence punishable by imprisonment: s 83(4) CPA.

6.5 No right to bail

There is no right to bail and you must remand the defendant in custody to go before a judge for drug offences and other offences that are against:

- s 80 (communicating secrets); and
- s 75 (treason) of the Crimes Act 1969: s 83(5) CPA.

6.6 Discretion to grant bail

You may:

- decide to grant bail to a person, even if they are not "bailable as of right" under ss 83(5) and 90(2) CPA (where bail is breached); and
- consider what bail conditions are suitable: s 87 CPAA.

This may involve the following situations:

- the police may not oppose bail but are seeking bail conditions; or
- the police are opposing bail; or
- the defendant does not ask for bail and agrees to be remanded in custody.

The following process applies where bail is opposed by the police:

- On all issues the burden of proof of each element lies on the police.
- Ask the police why they oppose bail and hear from them about what the evidence is in support. The grounds for refusing bail or imposing bail conditions are:
  - the defendant is likely not to appear in court at the next hearing date; or
  - they are likely to interfere with witnesses; or
  - they are likely to commit further offences if given bail: s 87 CPAA.
- Ask the defendant for their reply.
- Consider if the proposed bail conditions will address these risks. If so, then bail should be granted with appropriate bail conditions (see "Bail checklist" below).

Make sure you record your reasons for your bail decision on the Criminal Decision Sheet.

6.7 Bail for youth defendants

- If the defendant is under the age of 21, you **must** grant bail subject to such conditions as you think fit: s 84 CPA.
- If they are under the age of 18, you **may** remand them into the custody of a probation officer or any reputable adult: s 84 CPA.
- Where the youth defendant would not be bailable as of right except for s 84 CPA, you **may** order that they are remanded into custody if you think no other course is desirable, having regard to all the circumstances: s 84 CPA.

6.8 Bail for family violence defendants

Family violence offending has a unique risk profile, and conditions of bail may be crucial in managing the risk of future family violence occurring.

You have the power to hear criminal cases for breaches under s 138(2) of the Family Protection and Support Act 2017 (FPSA). This is for an offence against:

- s 51 (failure to notify);
- s 113(2) (failure to remain at place detained by police);
- s 118(1) (breach of protection order or police safety order).

Also, three justices have criminal jurisdiction for an offence against:

- s 118(3) (subsequent breach of protection order or police safety order);
- s 133 (taking child out of the Cook Islands).

See "Temporary protection orders".

6.9 Police bail

The police may grant the defendant bail under s 95 CPA if:

- the offence is punishable by up to 5 years' imprisonment;
- the defendant has been arrested without a warrant and is in police custody; and
- the defendant can't immediately be brought before the court to apply for bail.

The police may impose any condition that may be imposed by you or the registrar under s 87 CPAA.

6.10 Refusal of bail and remand in custody

Bail may only be refused in certain circumstances and for just cause. On adjournment after a defendant has been arrested and brought before the court, you may:

- remand the defendant in custody (subject to their right to apply for bail under ss 83 and 84 CPA); or
- allow the defendant to go at large: s 81 CPA
- where a long remand in custody is likely, remand the defendant to appear as soon as possible before a judge (because this is not in the interests of justice).

If the defendant is remanded in custody on any charge:

- they may be brought before the court at any time to deal with that charge, even if the period of their remand has not expired: s 94 CPA;
- you must issue a warrant in Form 9 for their detention in custody for the period of the adjournment; and

- you must record your reasons carefully for refusing bail on the Criminal Decision Sheet attached to the Information: s 87 CPA.

An order refusing bail is subject to review/re-trial by a judge of the High Court under s 102(1) CPA.

6.11 Granting bail

If you decide to grant bail you must:

- consider what conditions may apply under s 87 CPAA;
- certify, in writing, that bail has been granted in the form of a bail bond, including the amount of the bail bond, and whether it is with or without sureties;
- sign the bail bond in court (or the registrar may do this);
- if the defendant is remanded in custody and is granted bail and not released immediately, issue a warrant in Form 9 for their detention in custody for the period of the adjournment and certify on the back of the warrant:
  - your consent to bail;
  - the number of sureties (if any) to be required and the sum(s) fixed;
  - the conditions (if any) imposed;
- send the bail bond to the superintendent of the prison where the defendant is detained: s 85(2) CPA.

6.12 Bail conditions

The police will suggest what conditions should be imposed on the bail. All bail conditions must relate to the concerns about granting bail: s 87 CPAA.

State what conditions apply. These bail conditions should be kept at a minimum and simple so that the defendant can understand and comply with them.

If a defendant is granted bail, the defendant must attend personally at the time and place to which the hearing is adjourned: s 87(1) CPAA.

Section 87(2)(a) CPAA sets out the specific bail condition that the defendant report to the police at the time and place that the court directs.

Section 87(3) CPAA allows you to impose any other condition that you think is reasonably necessary to ensure that the defendant:

- appears in court on the date to which they have been remanded;
- does not interfere with any witnesses or any evidence;
- does not commit any offence whilst on bail.

Section 87(4) CPAA sets out further bail conditions that you may consider imposing if they are reasonably necessary in the circumstances of a particular case, including that the defendant must:

- remain in the Cook Islands or on any specified island within the Cook Islands;
- surrender their passport to the registrar of the High Court to be held by the registrar pending further order of the court;
- not purchase or consume alcohol, or enter licensed premises when alcohol is sold or consumed;
- not be at large (free to move around) during such hours as the court may specify (usually the hours of darkness);
- reside where directed by the court; or
- not associate with such persons as the court may specify.

Use the bail bond form in the Schedule of the CPAA: s 89 CPAA. Record these conditions on the Criminal Decision Sheet attached to the Information.

The order to give is:

> "The matter is adjourned to [date and place] and bail is granted with the following conditions:
>
> - [list the conditions]."

6.13 Release of the defendant on bail

The defendant will be released when:

- all the parties have entered into the bond; and
- notice has been given by the registrar or the superintendent; and
- you endorse on the remand warrant a certificate that all the parties to the bond have entered into it and the defendant is to be released: s 89(3) CPA.

6.14 Variation of conditions of bail and renewal (new grant) of bail

Bail expires each time a defendant is brought back to court.

You must re-grant bail and issue a new bail bond each time the defendant is required to appear even if the new grant is on the same terms as the previous one(s).

Bail would usually be re-granted unless there are new reasons to amend the bail conditions or revoke bail.

If a defendant applies to vary the conditions of bail, you may make an order:

- changing the terms on which bail has been granted; or

- varying the conditions of any bail bond entered into; or
- revoking any conditions of bail: s 88 CPA.

If sureties are required for the bail bond, they continue until the parties consent in writing or a new bail bond is entered into.

Record your reasons and decision on the Criminal Decision Sheet attached to the Information.

6.15 Process when bail is breached

The registrar may issue a warrant of arrest (Form 13) for a defendant released on bail where the registrar is satisfied that the defendant has:

- absconded or is about to abscond to evade justice;
- breached a condition of bail that they report to police as required; or
- not personally attended the hearing at the time and place specified in the bond: s 90(1) CPA.

After the person is arrested and brought before you, if you are satisfied that the defendant had absconded or was about to abscond, you may:

- remand the defendant in custody (subject to their right to apply for bail); or
- grant bail: s 90(2) CPA.

Forfeiture of a bail bond

Where you are satisfied that the defendant has breached a bail condition:

- certify this on the back of the bail bond;
- the registrar sets a time and place to estreat the bail bond (forfeiting if already paid into court or if the subject of an undertaking to pay, becoming liable to pay into court);
- the registrar serves a notice on the defendant (if they can be found) within 7 days, and on any surety that they will lose the bail bond, unless any person bound by the bond can prove otherwise): s 93(1) CPA.

At the hearing, if no sufficient cause is shown as to why a condition of bail has not been performed, you may make an order for the court to take the bond for such an amount as you think fit: s 93(2) CPA.

If the defendant cannot be found, you may make this order against the defendant, even though that notice has not been served on them: s 93(2) CPA.

6.16 Bail pending an appeal

An appellant may be released on bail pending an appeal: s 76(4) JA.

You may issue a warrant of arrest and have an appellant appear before a justice or judge, where:

- they have been released on bail pending an appeal; and

- a person has testified on oath that the appellant has absconded or is about to abscond for the purpose of evading justice: s 128 CPA.

On their arrest and appearance, you may remand the appellant in custody if you are satisfied that the appellant has absconded or was about to abscond, until their appeal is heard.

If they surrender themselves and apply for the discharge of their bail bond you may issue a warrant for the defendant's arrest to serve the rest of the original sentence in custody: s 129 CPA.
Record the reasons and your decision on the Criminal Decision Sheet attached to the Information.

6.17 Bail checklist

For your discretion to grant bail and bail conditions

Consider the following legal factors for your discretion to grant bail and whether suitable bail conditions would address:

- the risks that the defendant appears in court on the date they have been remanded; and
- the public interest so that the defendant:
  - does not interfere with any witnesses or evidence against the defendant;
  - does not commit any offence while on bail: s 87 CPA.

Note: The defendant is presumed innocent, unless otherwise proven guilty, and their freedom is an important principle when making your assessment.

Risk of the defendant's flight or failing to appear

Factors to consider include:

- the circumstances, nature and seriousness of the offence (is this serious offending of its kind);
- the severity of the likely penalty if the defendant is found guilty;
- the defendant's background and community ties, for example, residence, employment, family situation and previous criminal history;
- any specific indications **against** granting bail (such as prior failure to surrender to custody or to observe bail conditions) and **for** granting bail (such as voluntary surrender to the police at the time of arrest);
- any other circumstances relevant to whether the defendant is likely to appear.

Public interest

Factors to consider include:

- length of time before a hearing (for example, if the hearing is several months away, this may weigh against custody);
- whether the defendant has previously failed to surrender to custody or to observe bail conditions;

- whether there is a risk of the defendant tampering with police witnesses, evidence or the alleged victim;
- whether there is a risk that the defendant may re-offend while on bail;
- any possible prejudice to the defendant in preparing for their defence;
- any other matters relevant to the public interest.

Bail conditions: s 87 CPA

Questions to consider include:

- Are the condition(s) reasonable and necessary to address the bail concerns?
- Are the condition(s) proportionate to the offence?
- Is it reasonably practicable for the defendant to comply with the condition(s)?
- Would the bail condition(s) unreasonably interfere with the defendant's home life, work, or their right to act or move freely, other than appearing in court?
- Would the bail bond/surety cause the defendant financial hardship, or their guarantor hardship?

If the concern is that the defendant will not turn up to court, then consider the following conditions:

- Report to the police station (maybe once or twice a week).
- Remain in the Cook Islands or any specified island within the Cook Islands.
- Not to leave their village and live at a particular address or town where the court directs.
- Surrender their passport to the registrar of the High Court.

Other conditions will depend on the nature of the offence.

- If the offence was a night burglary, the condition may be a curfew.
- If the offence was an assault, the condition may be that the defendant stay away from a specified person.
- If the offence was for driving offences, the conditions may be that the accused not drive a motor vehicle.
- Not consume alcohol or use an illegal drug.

You may impose any other condition that you think appropriate relating to the conduct of the accused.

In addition to these conditions, a defendant must enter into a bail bond, with or without surety for such sum as you fix. A surety is seldom used; however, when it is, it usually involves quite large sums. It is used for people who would like to travel overseas pending a continuation of their proceedings.

Youth specific factors (not already addressed above)

- Age.

- Adult supervision.
- Supervision in the community.
- Supervised work.
- Residence.
- Family support.
- Previous appearances in court.

Bail decision if bail is opposed

Your decision should contain:

- the charges faced by the accused and the fact that police oppose bail;
- a summary of the grounds of police opposition to bail;
- a summary of defence submissions as to the grounds in favour of bail being granted;
- the law on bail;
- a brief summary of the facts relevant to the case at hand;
- a conclusion as to whether bail is granted or refused.

6.18 Template for bail applications when police oppose bail

Bail decision

Name of defendant: Date:
Age of defendant*:

The defendant (bail applicant) faces the following charges:

*If the defendant is under the age of 21, you must grant bail subject to such conditions as you think fit. If under the age of 18, he or she may be remanded into the custody of a probation officer or any reputable adult.

Brief summary of facts of the charges and plea (guilty or not guilty) if any
Alleged facts:

Plea: ☐ No plea ☐ Not guilty ☐ Guilty

Summary of police reasons for opposing bail

Note: The defendant is presumed innocent unless proven guilty. The onus is on the police to show just cause for the defendant's continued detention.

The police position, as to the risk(s) the defendant poses if bailed, is/are:

- the likelihood of the defendant failing to appear at the next court date;
- the seriousness of the offending;
- the likelihood of offending while on bail;
- the risks of interference with witnesses or evidence against the defendant.

Summary of defence reasons for granting bail and any conditions

Interests of the defendant:

- The length of time the defendant is likely to have to remain in custody before the case is heard.
- The need for the defendant to obtain legal advice and to prepare a defence.
- The need for the defendant to be at liberty for other lawful purposes, such as employment, education, care for dependants.

Relevant law

Apply the facts stated by both parties to the law. Consider the relevant legal tests to grant or refuse bail and any relevant case law (use the "Bail checklist" below for legal and factual criteria). Deciding whether to grant bail is something of a balancing act.

Summary of reasons for refusing or granting bail

If you refuse bail, ask yourself:

- Is there a just and proper reason to refuse bail?
- Am I satisfied that bail conditions would not address the risks?

Note: No person who is charged with or convicted of a drug dealing offence shall be granted bail, except by order of a judge.

If you grant bail, ask yourself:

- What are the appropriate bail conditions and bail bond?

7. Name suppression

1. Name suppression may be applied for by the defence at the start of proceedings, or you may grant at your discretion.
2. Name suppression prevents anyone from publishing:
   a. the defendant's name (unless previously convicted of any offence punishable by imprisonment)
   b. any other person's name including those not taking part in the actual proceedings.

Making your decision

3. A defendant's name or other case details should be published, especially for criminal cases, unless compelling circumstances make it inappropriate.
4. Be guided by the key principle of "open justice": criminal prosecutions are conducted in courts open to the public and media. This applies other than in special circumstances.
5. The applicant must satisfy you it is in the proper interests of justice that name suppression is granted.
6. When deciding, ask:

   "Is it likely the possible harm to the person from publishing their name outweighs the requirement that justice be open to the public in all respects?"

7. Identify and weigh the relevant public and private interests. There must be damage disproportionate to open justice for name suppression to be granted.
8. If you grant interim name suppression, you must provide reasons for your decision (permanent name suppression is rare).
9. **Your reasoning can weigh up competing public and private interests, including:**
   a. adverse impact on the defendant's personal, financial and professional interests – this must be extraordinary to displace open justice
   b. possible identification of the victim particularly for child victims.
10. **A name suppression order** covers any name or details likely to identify the person.

Power to clear the Court

11. You may exclude any persons for all or part of the proceedings if you think it is in the interests of:
    a. justice or public morality
    b. the reputation of any victims of alleged sexual offences or extortion.

    Note: All matters under the Family Protection and Support Act 2017 are heard in closed court.

12. Your power to clear the Court does not give you power to exclude:
    a. the police or defendant or their agents or lawyers
    b. any accredited news media reporter.

Prevent reporting of the case

13. You may also make an order forbidding the publication of any report, or account of the whole or part of the evidence presented.
14. You may deal with a breach of this order as contempt of court and order a penalty of a fine up to $100.

    This does not limit your power to prohibit the publication of any name.

7.1 Relevant legislation

- Criminal Justice Act 1967, s 25.
- Criminal Procedure Act 1980–81 (CPA), s 76.
- Family Protection and Support Act 2017 (FPSA).

7.2 Relevant case law

- *Cook Islands Police v Rakanui* [2013] CKHC 63; JP Appeal 2.13 (9 May 2013).
- *Police v Quarter – Sentence* [2011] CKHC 39; CR137.2009 (8 April 2011).
- *Queen v Arlander* [2011] CKHC 44 (25 May 2011).
- *Lewis v Wilson & Horton Ltd* [2003] NZLR 546(CA).

7.3 Key principles

The basic principle of open justice is fundamental, so that (other than in special circumstances) criminal prosecutions are conducted in courts that are open to the public and to the media.

Permanent name suppression will be rare and almost unheard of initially. Even if an interim order is made, permanent name suppression does automatically follow.

See "Checklist of factors for discretion to grant name suppression" below.

7.4 Closed court hearings

In certain circumstances you may exclude all or some persons from the court hearing. You may decide to do so in the interests of:

- justice;
- protecting public decency;
- protecting the reputation of any victims of alleged sexual offences or extortion: s 76 CPA.

Note: All matters under the Family Protection and Support Act 2017 are heard in closed court.

7.5 Name suppression

- The starting point is that a defendant's name or other details of the case should be published, especially for criminal prosecutions, unless circumstances show that it is inappropriate.
- If the defendant has been previously convicted of any offence punishable by imprisonment, you **must not** grant them name suppression: s 25 CJA.
- You have a discretion to grant a name suppression order to prevent anyone publishing:
  - the defendant's name in any proceedings connected to the offence; or

- any other person's name connected with the proceedings (including a complainant and other witnesses, or any other person connected to the case but who is not taking part in the actual proceedings): s 25 CJA.

➢ Provide reasons for your decision regarding interim name suppression.

7.6 Checklist of factors for discretion to grant name suppression

You should weigh up the following public and private interests when deciding whether or not to grant name suppression to a defendant:

➢ When deciding on name suppression you may ask the question:

> "Is it likely that the possible harm to the person from publishing their name outweighs the requirement that justice be open to the public in all respects?"

➢ A temporary order pending advice to family, until a plea is taken, or until the next appearance after the first is more commonly acceptable.

➢ An order for name suppression does not necessarily follow an acquittal, as the public is entitled to know who is acquitted.

➢ On conviction, an order for name suppression would be very unusual and likely inappropriate.

➢ The public interest in knowing the character of the person seeking name suppression, particularly in cases involving sexual offending, dishonesty and drug use.

➢ It is appropriate to consider the victim's position. If the defendant is a relative of the complainant in a sexual case, it may be necessary to grant name suppression to protect the identity of the complainant.

➢ The more serious the crime, the less likely it is to be appropriate to grant name suppression to the defendant. Where the charge is "truly trivial", particular damage caused by publicity may outweigh any real public interest.

➢ The personal circumstances of the defendant, their family and work colleagues, and any adverse impact upon their financial and professional interests. But there must be extraordinary damage to displace the principle of open justice.

8. Defended hearing

Preliminary matters

1. Record appearances.
2. Ensure unrepresented defendant aware of processes.
3. Put charges to defence.

Prosecution and defence set out their case

4. Prosecution gives short outline of charge(s) the defendant faces.
5. Defence may give short outline of the issues.

Prosecution witnesses give evidence

6. Prosecution calls witness, they are sworn in and give evidence (evidence in chief).
7. Defence may cross-examine.
8. Prosecution may re-examine (if witness has been cross-examined).
9. You can ask questions to clarify.

Steps 6–9 repeat for all prosecution witnesses.

Close of prosecution case

10. After last witness, prosecution closes their case.

Is there a case to answer?*

11. Defence can submit there is no case to answer and charge(s) should be dismissed.
12. Prosecution can make submissions in reply.
13. You make your decision on the face of the evidence, NOT the merits of the case.

Defended criminal hearing process

No case to be answered → **Case dismissed**

Case to be answered → **See step 14**

Defence witnesses give evidence

14. Defence is asked if they are giving evidence.
15. If defence elects to call or give evidence and, if they haven't already done so, can give a short outline of the issues – their defence.
16. If the defendant elects to give evidence, they are sworn in and give their evidence (the defendant is the first defence witness unless there is a reason for any other approach, for example, availability of an expert witness).
17. Prosecution can cross-examine.
18. If witness cross-examined, defence can re-examine.
19. You can ask questions to clarify.

Steps 15–19 repeat for all defence witnesses.

Close of defence case

20. After last defence witness, defence closes their case.

Further evidence to rebut defence evidence

21. If appropriate, prosecution can ask to call evidence in rebuttal of defence evidence.

Final submissions

22. Prosecution and defence can make submissions on law only and not on the facts or the evidence (unless the Court allows).

Decision

23. You give an oral judgment immediately or reserve your decision to be delivered on a later date.

8.1 Relevant legislation

- Cook Islands Constitution, arts 64–65.
- Criminal Procedure Act 1980–81 (CPA), ss 46, 69–82.
- Cook Islands Act 1915 (CIA), ss 590–593.
- Judicature Act (JA), ss 19(a)–20(a); Judicature Amendment Act 1991 (JAA), s 15A.

8.2 Relevant case law

- No case to answer: *Business Trade and Investment Board v Taakoka Island Villas Ltd* [2011] CKHC 23.

8.3 Legal representation

You should ensure that a defendant is given time to meet with a legal representative if they so choose. Once they have been advised and if they don't wish to instruct a lawyer, you may wish to record on the Criminal Decision Sheet "Informed of rights".

A defendant who does not have a lawyer to represent them in a criminal case will need your help to ensure they receive a fair trial, particularly if they have never been to court before. Times when they may particularly need assistance are:

- after arrest and being held in police custody or on police bail;
- on summons after the police have laid an Information.

8.4 Key issues for a self-represented defendant in a criminal hearing

It is important that the defendant understands the process at their first appearance. Where the defendant is representing themselves, you need to consider their fundamental rights under art 64 and the principles in art 65 under the Constitution, including:

- their right to a fair hearing in accordance with principles of fundamental justice: art 65(1)(d);
- the presumption of innocence until proven guilty according to law in a fair and public hearing by an independent and impartial court: art 65(1)(e); and
- to not be convicted of any offence except for the breach of a law in force at the time of the act or omission: art 65(1)(g).

8.5 Issues for justices

It is your responsibility to use language that will ensure that the defendant understands:

- the criminal charges faced;
- the procedures of the court;
- what the court is doing;
- why the court is following that course.

When dealing with unrepresented defendants, you should explain to them:

- the nature of the charge;
- the possible legal outcomes, including the possibility of a prison term if they are convicted;
- that legal representation is available;
- that they need to present their case;
- about their right to not give evidence, which can't be used negatively against them, under s 71 CPA;
- that you can adjourn the hearing to enable an interpreter to be obtained and sworn in if needed.

8.6 Putting the charge to the defendant and entering a plea

After the court clerk has read the charge to the defendant, you should do the following.

- Explain the charge (including the elements involved) to the defendant, so that the defendant fully understands the charge against them: s 61(1) CPA.
- When you are satisfied that the defendant understands the charge, ask the defendant how they plead to the charge: s 61(2) CPA.
- A defendant is considered to have a disability if they are unable to plead, understand the nature of proceedings, or instruct a lawyer. If this may be an issue:
  - adjourn the hearing to obtain expert medical evidence (see "Dealing with evidence"); and
  - refer the matter to a judge of the High Court under either ss 105 or 106 CPA.

Note: A finding of disability can result in the defendant's detention in a hospital or psychiatric facility; or immediate release: ss 590-593 Cook Island Act 1915 (CIA).

- If fitness to plead is not an issue, ask the accused whether the charge is true or not.
- If the accused says it is true:
  - ask the prosecution to read a brief summary of the facts;
  - tell the accused to listen very carefully to this. Explain that they will be asked at the end whether the facts are true.
- After the prosecution has read the facts, ask the accused whether they are true or not.
- If the accused admits the truth of the facts, this will suffice as a plea of guilty.
- If they dispute any of the facts, consider if these disputed facts are:
  - not relevant to the elements and enter a plea of guilty; or
  - relevant to any of the elements, or if comments made by the defendant may amount to a defence and enter a plea of not guilty for the defendant.

- If the defendant wilfully refuses to plead or will not answer directly, you may enter a plea of not guilty: s 61(3) CPA.
- The defendant may change a not guilty plea to a guilty plea at any time.
- A guilty plea may, with your leave, be withdrawn any time before the defendant has been sentenced or otherwise dealt with: s 68 CPA. Consider:
  - the overall principle of whether or not this would be in the interests of justice;
  - whether the applicant acted upon a material mistake;
  - whether there is a clear defence to the charge (that is at least reasonably arguable);
  - whether the proceedings were defective or irregular.
- The registrar may accept a written guilty plea if the defendant is liable to a fine and you may try, convict and sentence the defendant as if they had appeared and pleaded guilty: s 60 CPA.

8.7 Guilty plea

For a guilty plea under s 61(4) CPA, you may then:

- record their admission as nearly as possible in the words used by them;
- convict them;
- adjourn the case for later sentencing if more complex;
- pass sentence or make an order against them (either immediately or later);
- record all of the above on the court record.

8.8 Not guilty plea

For a not guilty plea under s 61(5) CPA you may then have an immediate hearing if:

- you can do so and all parties and witnesses are ready; and
- the matter can be dealt with quickly.

More usually you will adjourn the hearing to a later date and:

- find out the number of witnesses to estimate the probable length of the trial, and set a date for the trial;
- issue witness summons, if necessary, under s 23 CPA;
- deal with bail/remand in custody if bail is not granted; and
- record all of the above on the court record.

8.9 Special pleas

You will need to seek advice from a High Court judge if any of the three special pleas arise: previous acquittal; previous conviction, or a pardon: s 63 CPA. See "Special Pleas" to find out more about special pleas.

8.10 Election for trial by three justices or judge alone

For certain offences, a defendant can elect to have a trial by three justices or a trial by a High Court judge alone: s 15A JAA 1991. If this is the case, then:

- ask the defendant to make an election on the first appearance; or
- adjourn the case so the defendant can seek legal advice; and
- if the defendant does not bring a lawyer at the next sitting, explain the right of election to the defendant and allow the proceedings to move forward.

If the defendant elects to be tried by a judge alone, you may grant leave to withdraw that election at any time before the charge is gone into, but not afterwards. The case will then be heard by three justices sitting together: s 15A(4) JAA.

8.11 Summons or warrant for a witness to appear

You may issue:

- a summons in Form 5 for a person to appear as a witness at a hearing, and to produce any books, deeds, papers, writings, and photographs: s 23 CPA; or
- a warrant in Form 6, (with or without a summons) if you are satisfied that any witness for either party will not attend to give evidence without being compelled to do so. You may also withdraw this warrant at any time before it is executed: s 24 CPA.

8.12 The defendant's right to be heard

It is important that the defendant is properly "heard" – and there are three parts to this:

1. **Prior notice:** This relates to the charges against the defendant as set out by the relevant statute creating the offence, proof of service of any court documents such as the summons, and having sufficient time to prepare.
2. **Fair hearing:** This is the way the hearing is managed and witnesses are examined. All sides should be heard and be able to correct any mistakes or unfavourable material if they are able to. This also requires you to ensure you have all the relevant facts and materials before deciding a case.
3. **Relevant material disclosed:** The defendant must have the opportunity to deal with or answer any key facts or evidence that you may rely on to convict them.

8.13 Non-appearance of the defendant

If the defendant fails to appear at the trial date, you may:

- adjourn the trial to such time and place and on such conditions as you think fit to enable them to be present: s 59 CPA; or
- issue a warrant to arrest the defendant (Form 7) and bring them before the court, if they are liable to on conviction to a sentence of imprisonment: s 59 CPA; or

- try the defendant and sentence them for that offence in their absence, if they are only liable to a fine: s 56 CPA; or
- issue a warrant to arrest the defendant (Form 7), if they are released on bail and do not attend personally at the time and place specified in the bond, or at any adjourned hearing: s 92 CPA.

See "Adjournments" to find out more if the complainant or any of the witnesses are not present.

8.14 Conflict of interest

If you consider there might be a "conflict of interest" because you are related to the defendant or in some other relationship that could mean that you might be biased, or could create the appearance of bias, you should not hear the case. See "Judicial conduct" to find out more about conflicts of interest.

8.15 Objection to the Information during trial

The following actions may be taken when there is an objection to the Information:

- If the Information does not in substance state an offence, amend the Information or quash the Information or (rarely) leave the objection to be taken in arrest of judgment: s 18(3) CPA.
- Amend the Information, including substituting one charge for another: s 47(1)-(2) CPA.
- State the charge as amended or substituted to the defendant and ask how they plead.
- Continue as if the defendant had originally been charged with the amended or substituted offence:
  - any evidence already given shall be deemed to have been given in and for the purposes of the trial of the charge as amended or substituted;
  - either party shall have the right to recall and examine or cross-examine or re-examine any witness whose evidence has already been given in respect of the offence originally charged: s 47(3) CPA.
- Adjourn the case, if the defence applies, because they would be prejudiced in their defence due to any amendment or substitution made: s 47(4) CPA.

8.16 Witnesses refusing to give evidence

- Any person present in court at the hearing of any charge, whether or not they have been summoned to give evidence, may be required to give evidence: s 77(1) CPA.
- If they refuse, without any just excuse, to be sworn or affirmed, or answer questions after having being sworn or affirmed to testify, then you may:
  - issue a warrant in Form 8 for their arrest and detention: s 77(2) CPA; or

- offer the witness the chance to obtain legal advice (and appoint legal counsel if necessary) and then, if they still refuse, order that the witness be detained in custody for a period not exceeding 7 days (this may be repeated for another 7 days thereafter if they still refuse, and so on): s 77(2)–(3) CPA;
- punish the witness for contempt of court: s 77(4) CPA.

8.17 Self-incrimination by a witness

Watch out for self-incriminatory statements for the witness. If a question is asked, the answer to which could be self-incriminatory:

- warn the witness to pause before answering the question;
- explain that any evidence the witness gives in court that is self-incriminating could be used to prosecute them for a crime;
- explain that the witness may refuse to answer the question: s 75 CPA;
- stand the witness down to see a lawyer to explain the consequences.

8.18 Application for change of plea

- The defendant may change a not guilty plea to a guilty plea at any time.
- You may grant leave for a plea of guilty to be withdrawn any time before the defendant has been sentenced or otherwise dealt with: s 68 CPA.

8.19 Withdrawal of complaint

- You may grant leave for the prosecutor to withdraw the charge (Information) if they apply to do so at any time before conviction, dismissal of the Information, or, if the defendant has pleaded guilty, before they have been sentenced or otherwise dealt with: s 46 CPA.
- Ask the police for their reasons to withdraw the charge and note these on the Criminal Decision Sheet.
- Weigh up the interests of justice in granting this application where the defendant opposes an application to withdraw the charge and seeks a dismissal instead.
- You must discharge and release the defendant once leave to withdraw has been granted, unless a substituted Information is laid: s 46(3) CPA.
- You may also award reasonable costs as you think fit where the Information is withdrawn: s 46(2) CPA, s 92 JA.

8.20 Adjournments

At the start of a defended hearing trial, you may adjourn:

- due to the lack of jurisdiction: s 79(2) CPA;
- if the defence would be prejudiced in their defence because of any amendment or substitution made to the Information or charges: s 47(4) CPA.

During the trial and prior to sentencing you may adjourn:

- if the defence is unaware of a prosecution witness who would be prejudicial to their defence either because the witness did not make a written statement, or this was not disclosed to the defence: s 101(1) CPA;
- you think a witness should have been called who has not been called by the police: s 101(2) CPA;
- a new issue has been raised and a party needs time to prepare a response: s 79(1) CPA;
- if a complex question of law arises and either the police or the defendant request an adjournment, or you decide on an adjournment for retrial before a judge: s 105 CPA.

For more information regarding adjournments, see "Adjournments".

8.21 The power to clear the court and prevent reporting of the case

You may:

- exclude all or any persons (not the parties or their legal representatives or any accredited news reporter) for the whole or any part of the proceedings in the interests of:
  - justice or public morality; or
  - the reputation of any victims of alleged sexual offences or extortion: s 76(1) CPA; and/or
- make an order stopping the publication of any report or account of the whole or any part of the evidence adduced; and any breach may be treated as contempt of court: s 76(2) CPA.

For more information see "Name suppression".

8.22 Step-by-step process for a criminal defended hearing

Introductory explanations and cautions

1. Ask witnesses to leave the court: s 78 CPA.
2. Confirm the defendant's plea and ensure this is recorded on the Criminal Decision Sheet: s 61 CPA.
3. Ask the defendant whether they prefer to have the hearing interpreted and arrange for an interpreter for them if needed.
4. Provide the defendant with a simple and clear explanation of:
   - the procedure to be followed;
   - the right to give and call evidence;
   - the right to cross-examine; and
   - the need to put their case to any witness of the police.

5. Before the evidence for the prosecution is heard, the court must give the following directive for self-represented defendants: s 71 CPA:

> "When the evidence against you has been heard, you will be asked whether you wish to give evidence yourself or to call witnesses. You are not obliged to give or call evidence, and, if you do not, that fact will not be allowed to be the subject of any comment; but if you do, the evidence given may be used against you."

The prosecution's case

6. Ask the prosecutor to open their case and call witnesses, who enter into the court room when they are called. Consider the rules of evidence: s 74 CPA.

   Note: During the trial the defence may admit any fact alleged against the defendant, so the prosecution does not need to prove that fact: s 69 CPA.

7. In the case of each witness:

   - swear/affirm an interpreter, if necessary;
   - swear/affirm the witness: ss 73–74 CPA.

   If the witness chooses to swear an oath, they stand in the witness box, hold the Bible in their hand, and face you.

   The court clerk asks:

   > "Do you swear by Almighty God that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth?"

   The witness replies: "I do."

   If the witness chooses to affirm, the question from the court clerk is:

   > "Do you solemnly, sincerely and truly declare and affirm that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth?"

   The witness replies: "I do."

   Record the evidence at each stage of questioning.

   The witness must be shown and must identify any documents relied upon.

8. Allow cross-examination by the defendant.
9. Allow re-examination by the prosecutor only as to new matters raised in cross-examination.
10. You may ask questions of the witness. If you ask any questions you must ask the prosecutor and the defendant if there are any further matters raised by your questions that they wish to put to the witness: ss 70, 74 CPA.
11. After each witness has given evidence, excuse the witness from further attendance and warn them not to discuss the evidence with other witnesses who have yet to give evidence: s 78 CPA.

Is there a case to answer?

12. At the close of the prosecutor's case, hear a "no-case" submission, if any. The defence is always entitled to argue that the defendant has no case to answer.
13. Decide whether the defendant has no case to answer. If necessary, adjourn briefly to consider the matter. The defendant is entitled to a discharge without having to give or call evidence if you decide there is no case to answer.
14. If there is no case to answer, give and record your reasons.
15. If there is a case to answer, give reasons and explain to the defendant their right to remain silent if they wish. Explain their right:
    - to remain silent at this stage, as the burden of proof is on the prosecution. The issue at this stage is only whether the defendant is guilty and, if they are found guilty, they will be able to speak at sentencing later; or
    - to make an unsworn statement (explain the significance of this);
    - to give evidence on oath and/or, if the defendant wishes, to call witnesses. Explain that all such evidence can be questioned by the prosecution and by the court, and that the defendant must decide who the witnesses will be: s 71 CPA.

The defence case

16. If the defendant is self-represented, on the completion of the examination of the witnesses by the prosecution, ask:

> "Do you wish to give or call evidence?"

17. If the defendant makes an unsworn statement, record it and do not allow any questions.
18. If the defendant wishes to present evidence, follow the steps for the prosecution's witnesses above.

The prosecution may recall witnesses to answer any new matter raised by the defence

19. Ask the police/prosecution if they wish to recall a prosecution witness to answer any new matter raised by the defence that has taken the prosecution by surprise. Recall should follow immediately after the defence evidence.

Addresses

20. Except with leave of the court (commonly granted), neither the prosecutor nor the defendant may sum up or address the court upon the evidence: s 74(3) CPA.
21. However, if the defendant calls no evidence, they may address the court at the end of the prosecution's case: s 74(3) CPA.
22. Both parties are still allowed to address the court on matters of law: s 74(3) CPA.

Verdict – finding the defendant guilty/not guilty

See "Decision making: Oral or reserved judgments" to guide your decision.

23. If necessary, adjourn to consider the verdict, and reserve your decision. Explain to the defendant that you are going to consider all of the evidence and will make a decision once you have done so. Set a date for handing down the decision.
24. If you do adjourn, consider whether the defendant will need an extension of bail, and whether you need to set a hearing for an application for bail. See "Bail" for more information.
25. Consider all the evidence and decide from the facts before you whether the defendant's guilt has been established beyond reasonable doubt. Announce a finding that the defendant is guilty as charged, or is acquitted, and record the decision.
26. On acquittal, the defendant is entitled to leave the courtroom immediately and go free, unless there are other charges on which they can be lawfully held in custody.

Sentence the defendant if found guilty

Unless the hearing was a very simple one, you would usually adjourn to allow time for reports and victims' statements to be sought, and for the prosecution and defence to prepare for the sentencing hearing. See "Sentencing".

9. Making a decision (reaching a verdict)

The charge

1. What is the defendant charged with?

> **Note:** charge is included in the Information.

The essential elements

2. What are the essential elements of the offence the prosecution must prove beyond reasonable doubt?

   These will vary and may involve such factors as the defendant's intent, ownership of property involved, and so on.

   See "**Common offences**". This provides a breakdown of the offence elements you will most commonly face. Lawyers should also assist the court by making clear which issues are in dispute and which are not.

The evidence

3. Identify which evidence you accept or reject, and why?

   You may either:

   - **admit evidence:** accept and act on the evidence you think sufficient and relevant; or
   - **reject evidence:** if you consider it irrelevant or needless, or unsatisfactory as being hearsay or other secondary evidence.

4. Some important general rules of evidence:

   - 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 except by an expert
   - evidence and the law must be interpreted and understood by all parties to a case.

> Note: see the Chapter on Evidence for all the evidence rules that apply.

Facts not in dispute

5. What are the facts the defence accepts (if any), and what elements of the offence do those "accepted" facts prove?

   What elements of the offence are there left to prove?

Your finding of the facts in dispute (factual issues)

6. What are the remaining facts, as you find them to be?
   - » First consider the defendant's evidence and/or any witnesses called by them.
   - » Does their evidence relate to facts at issue in the case?
     - » if not, ignore it
     - » if it does, is the evidence true, or might reasonably be true? Is it reliable, or might reasonably be reliable? If yes, does it raise a reasonable doubt? If yes, the defendant must be found not guilty.
   - » If you reject the evidence as untrue or unreliable on the essential aspects, go to the case for the prosecution.
7. Consider each prosecution witness in turn and consider their:
   - » credibility (how believable is their evidence)
   - » reliability.

> **Note:** If you find the witness reliable and credible, you will accept their evidence in whole or in part.

8. Reasons for accepting one witness—or set of witnesses—must be accompanied by reasons for rejecting other witnesses.

> **Note:** Collect all the reliable and credible evidence as you assess it. Those are the facts as you find them.

The law (legal issues)

9. Mention any legal matters or issues that arise.

Apply the law to the facts

10. Do the facts prove the essential elements of the offence?

> **Note:** You are charged with reaching a decision and you must make it. Under no circumstances should you ask anybody else to decide the matter or even to comment or assist in any way. (However, you may seek guidance from a trusted judicial colleague on matters of law or procedure: see the Flowchart on Questions of law).

11. You must convict (**guilty**) if you are satisfied beyond reasonable doubt the prosecution has proved a version of the facts that proves the essential elements of the offence.
12. If there is reasonable doubt, your verdict must be **not guilty** and dismiss the case.

Test your decision

13. Check the following.
    - **a.** Have the basic requirements of natural justice been satisfied in the hearing? (See chapter on Judicial Conduct: Natural justice).
    - **b.** Have all the requirements of the relevant law been met in order for the decision to be made?
    - **c.** What facts have been proved?
    - **d.** Do these facts prove all the elements of the offence beyond reasonable doubt?

Deliver your decision

14. State your decision and reasons for it simply and clearly, so it can be easily understood by the parties. Your decision must be a conclusion on the facts and law. You must:
    a. a. use plain English
    b. b. give reasons for the decision
    c. c. do not be equivocal. Do not say, “maybe [this] or maybe [that]” or, “on the one hand…but on the other hand…”, or “it seems likely”.
15. Record your decision on the Criminal Decision Sheet.

10 Evidence

10.1 Relevant legislation

- Evidence Act 1968 (EA).
- Evidence Amendment Act 1986–1987 (EAA).
- Evidence Amendment (No. 2) Act 1986–87 (EAA No. 2).
- Cook Islands Act 1915 (CIA).
- Crimes Act 1969 (CA).
- Criminal Procedure Act 1980–81 (CPA).

10.2 Key principles

Evidence rules (from common law and statute) 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**.

For 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?

You may either:

- **admit** evidence: accept and act on such evidence as you think sufficient (and relevant) whether such evidence is or is not admissible or sufficient at common law: s 3 EA; or
- **reject** 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.

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

10.3 Legal and evidential burden of proof

In criminal cases the **prosecution** bears the legal and evidential burden of proving all the elements in the offence (the burden of proof) **beyond reasonable doubt** (the standard of proof). The defendant does not have to prove they did not commit the offence.

If the legal burden to prove something 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 burden to establish the defence on the balance of probabilities.

For some common law and statutory defences, once the defendant discharges their evidential burden (sufficient evidence on the facts in issue), then the legal burden of disproving the defence will be on the prosecution.

10.4 Judicial notice without inquiry

If a fact is of such common knowledge that it requires no proof, you may take judicial notice of it and treat it as an established fact.

Judicial notice without inquiry may be required by statute. Part 3 EA 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, body corporate: s 25 EA;
- all Public Acts: s 26 EA.

10.5 Admissions

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

10.6 Best evidence rule

If an original document is available and can be produced without any difficulty, it should be produced.

10.7 Opinion evidence rule

Witnesses may only give evidence of facts they have seen, heard or done, but may not give their opinion (which is an inference they have drawn from the facts).

Exceptions to the opinion rule:

- Experts – but only if qualified to do so and the matter is beyond the ordinary person.
- Non-experts or lay persons – but only on facts personally known by them and based on facts (for example, age, weather, car speed).

10.8 The hearsay rule

A statement made by a person **out of court** is not admissible as evidence to prove the truth of some fact that was asserted in that statement. That is because the person making the statement cannot be cross-examined.

To decide if evidence is hearsay or not depends on the purpose for which the evidence will be used. A statement made to a witness by a person who is not called to be a witness:

- is hearsay and inadmissible if the purpose would be to establish the truth of what is contained in the statement; or

- is admissible and not hearsay if the purpose is to establish, not the truth of the statement itself, but the fact that it was made.

Exceptions to the hearsay rule

Some of the common law exceptions to the hearsay rule include:

- confessions (by the defendant before the hearing. They may deny making this in court or state it is untrue, and you will have to resolve this);
- evidence of a person about to leave the Cook Islands that is taken before a judge or justice: s 32 CPA;
- dying declarations: s 33 CPA;
- documents (see below);
- *res gestae* (certain statements made during or soon after, a transaction that is the subject of the court's inquiry); and
- telephone conversations.

10.9 Confessions

Confessions are hearsay but admissible.

A confession made after a promise, threat, or other inducement does not have to be automatically rejected on those grounds (not being the exercise of violence or force or other form of compulsion) 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.

10.10 Character evidence

Defendant

Evidence of bad character is not admissible if it relates to the defendant. Police can't give evidence of the defendant's:

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

Exceptions

Evidence of other misconduct forming part of the same transaction of the offence charged is admissible at common law.

Admissibility of evidence of good character for a defendant is admissible but doing so puts their character in issue. Police may then cross-examine witnesses or the defendant about their character and any previous convictions.

If the defendant gives evidence, they may in certain circumstances face cross-examination on their character.

Witnesses

A party producing a witness can't discredit the witness with bad character evidence but may contradict the witness by other evidence.

The witness may be questioned about their prior conviction(s) and the cross-examiner may call evidence to prove any conviction(s) (by certificate signed by the registrar or officer of the court under s 15) if the witness denies, does not admit or is silent as to their conviction(s): s 13 EA.

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

- It is proper to do so if the truth of the allegations about the witness would seriously affect the credibility of the witness on the matters relevant to the issues in the defendant's case.
- It is improper if:
  - it relates to matters so remote in time or of no importance; or
  - there is a large gap between the charge made against the witness's character and the importance of their evidence: s 16(1) EA.

10.11 Types of evidence

Documentary evidence

Documentary evidence will only be admissible:

- under an exception to the hearsay rule; or
- under s 22 EA (including a certified true copy), if the maker of the statement in the document is called as a witness and:
  - had personal knowledge of the matters in the statement;
  - made the statement as part of a duty to record information as part of a continuous record;
  - the document is written/made by the maker by hand, or signed or initialled by them, or otherwise accepted by them as being accurate.

However, you do not have to call the maker of the statement if that person has died, is unfit, is overseas or has not been found; or the other party does not require them: s 22(1) EA.

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

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

Consider the weight, if any, to be attached to a documentary statement based on:

- all the circumstances that might reasonably be seen to affect the accuracy or otherwise of the statement;
- whether the statement was made at the same time as the existence or occurrence of the facts stated;

- whether the maker of the statement had any incentive to hide or distort the facts: s 23 EA.

Real evidence

Often little weight can be attached to real evidence (objects that are not documents, such as clothing, weapons, fingerprints and dental impressions, blood samples and so on), unless it is accompanied by testimony identifying the object and connecting it to the facts in issue.

Exhibits (documentary and real evidence once introduced into court)

Exhibits are admissible if:

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

Oral evidence

If the purpose of an out-of-court statement is to prove:

- the truth of any facts asserted, then it is hearsay and inadmissible; or
- that an out-of-court statement was made, then it is original evidence and admissible.

10.12 Witness evidence at trial

Note: Give a warning to witnesses against self-incrimination.

At any time during proceedings, there may be questions or objections as to the admissibility of evidence that you must decide using your discretion: ss 3–4 EA.

Either party may object to evidence based on:

- relevance – if the evidence proposed is relevant to the issues in dispute (it proves or disproves a key fact) then, apart from some exceptions, it will be admissible;
- hearsay;
- examination of witnesses, such as leading questions in examination-in-chief;
- refreshing memory;
- lies;
- corroboration;
- identification evidence by witnesses;
- opinion evidence;
- privilege – that is, they do not have to disclose information on a certain subject or be a witness against the other person because of the nature of their relationship (minister; doctor/patient: s 9 EA; spouse (husband/wife): s 7 EA; solicitor/client privilege, under the common law;
- competence and compellability of witnesses (see below).

However, if there are difficult questions as to the admissibility of evidence, you should refer the matter to a judge pursuant to s 106 CPA. See "Appeals, retrials and reservations".

10.13 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. The more reliable the evidence is, the more weight you give it.

You will need to decide if:

- the witness is **truthful** or honest. Relevant credibility factors include:
  - relationships between parties;
  - attempts to maximise/minimise their own role;
  - alcohol and/or drugs;
  - performance under cross-examination;
  - independent evidence;
  - statements made before/after/during the incident;
  - consistency/inconsistency with words or written material;
  - time between the incident and the hearing, and memory;
  - ability to see/observe the incident (lighting, distance and so on);
  - motive/anger/tension/revenue;
- the evidence you have heard is **reliable** (a witness can be honest but the evidence they give can be unreliable). Consider all of the following:
  - the circumstances, to decide on the accuracy of the statement;
  - if the statement was made at the same time as the occurrence of the facts stated;
  - if the maker of the statement was given any incentive to conceal or misrepresent the facts: s 23(1) EA.

10.14 Competence and compellability of witnesses

The **defendant**:

- is not a competent or compellable witness for the prosecution;
- is a competent witness for the defence but cannot be compelled to give evidence unless they choose to and if not, no adverse comment may be made: s 75 CPA.

The **co-defendant** is a competent and compellable witness for the prosecution or defence, without the consent of the other person only if:

- the proceedings against the co-defendant have been stayed, withdrawn or dismissed;
- the co-defendant has been acquitted of the offence or pleaded guilty; or
- the co-defendant is being tried separately from the other defendant: s 6(5) EA.

The **spouse of a defendant** is a competent but not compellable witness for the prosecution, without the consent of the defendant for various offences, including:

- an offence against the wife or husband;
- where the defendant is charged with bigamy or an offence against s 215 CA (cruelty to a child); or
- those where the law specifically provides for a spouse to be called without the consent of the defendant under s 6(3) Evidence Act;
- an offence, or attempt to commit an offence, under ss 141–148, or ss 153–155 Crimes Act 1969: s 6(4) EA.

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

You may allow children younger than 12 years to give evidence after a declaration if you are satisfied by questioning the child that they understand what a promise is and what telling the truth is: s 332 CIA.

You should carefully control how the child gives evidence, for example, by the use of a screen. Make sure any questioning of the child uses simple words. Prevent any bullying or harassment and ensure regular court breaks to help the child's concentration, or to regain composure if they are upset.

10.15 Examination of witnesses

Either party may apply 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 an 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.

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

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. These also include:

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

- usually a party is not allowed to attack the credibility of a witness they have called, unless they are a hostile witness who has made prior inconsistent statements (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;
- in appropriate circumstances, to draw questions as to the credibility of the witness.

Note: *Browne v Dunn* (1893) 6 R 67 (HL) applies as a rule of practice to allow a fair trial, and it does not displace the other rules of practice, that is 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 in examination-in-chief) may attack the witness' credibility by asking the witness if they made any prior statements that were inconsistent with their present testimony.

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.

A witness may be cross-examined on statements reduced to writing without showing them the writing, but if contradicting the witness then they must make the witness aware of those parts that are being relied on: s 12(1) EA. You may also at any time require the writing to be produced for inspection and make such use of it for the purposes of the trial as you think fit: s 12(2) EA.

Leading questions

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 only 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.

Refreshing memory

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

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

However:

- the witness should not normally read from the notes but should use them only to refresh their memory, unless the notes are lengthy and complex;
- if the defendant or their lawyer wishes to see the notes, there is a right to inspect them.

10.16 Lies

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

It does not necessarily mean, however, that the defendant is guilty (lies are told for a variety of reasons).

10.17 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 are still convinced that the complainant was telling the truth, you may still convict the defendant.

Note on the record that you were aware of the danger of convicting on the uncorroborated evidence of the complainant, 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;
- see whether they avoid giving straight answers in areas of importance.

Note: The fact that any documentary evidence is deemed to be admissible under s 23(1) EA does not mean that it is therefore 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.

10.18 Self-incrimination

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

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.

10.19 Identification by a witness

Treat the visual identification of the defendant by witnesses 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 (adopted in *Police v Ruaporo* [1985] High Court Cook Islands) where the United Kingdom Court of Appeal made the following guidelines for visual identification:

- How long did the witness observe the defendant for?
- At what distance did the witness observe the defendant, and in what light?
- 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? If so, how often and if only occasionally, had they any special reason for remembering the defendant?
- How long was the time between the original sighting and the 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?

11. Sentencing

Preliminary matters

1. Organise charging documents in order of dates.
2. Check for entry of plea and/or convictions.
3. Read parties' submissions, pre-sentence reports (if any).

   At a sentencing hearing, the prosecution will make submissions on sentencing options first and include, where appropriate, a victim impact statement, a medical report (in case of injury to a person), information for reparation, or other material. The prosecution will also outline any prior convictions of the defendant. If the defendant does not accept these, the prosecution will have to obtain the court records in support.

4. Call the defendant's name.
5. If the defendant does not appear, check the summons was served and date of service.

   See **Adjournments** for non-appearance

6. Check:
   a. charge(s) on the Information
   b. the statute setting out the charges
   c. the maximum penalties and whether you have jurisdiction to sentence the defendant.
7. You need to confirm with the defendant:
   - the charge(s) and maximum penalties that apply; and
   - that a guilty plea was made by the defendant to that charge or charges and the date this was made; or
   - confirm the guilty verdict and the date of the defended hearing.
8. Check:
   a. the charges are the same as to which the defendant has been convicted on or pleaded guilty
   b. if the defendant has pleaded guilty, it is assumed they have agreed to the main facts relevant to sentencing in the police summary of facts, but it is good practice to check this if you have any doubts
   c. in a complex matter, if any key facts are disputed, you may need to set out which facts you regard as essential to the verdict and leave it to the parties to apply for a disputed facts hearing if they disagree
   d. the Registrar has asked the defendant if they have anything to say as to why the sentence should or should not be passed on them according to the law. If they do have any mitigating facts these should be outlined to you (plea in mitigation).
9. If the matter is straightforward, you may sentence the defendant immediately.
10. If the defendant doesn't have a lawyer, explain the process in simple terms. Consider any disabilities they may have and if they need help from others.

Sentencing

Simple or straightforward offences

11. Consider the starting sentence based on the summary of facts.
12. Start with a brief summary of the facts. State features that would increase the sentence (aggravating), then the features that would reduce the sentence (mitigating).

    Consider prosecution and defence submissions and any reports provided in support. Refer to these in your reasons for sentencing.
13. You have a final sentence. Ask yourself, is this a fair sentence overall for this offence and this offender?
14. Sentence the defendant including any other orders for compensation or reparation.

Complex or serious offences

15. For more serious offences, and if you need pre-sentencing reports, adjourn the case and set a date for callover.
16. Consider whether defendant is remanded at large, on bail (with conditions) or in custody.
17. For simple offences, repeat steps 11-14 above.

11.1 Relevant legislation

- Cook Islands Constitution- Article 65(h).
- Crimes Act 1969, ss 9, 217, 317, 321, 414- 416.
- Criminal Justice Act 1967 (CJA)- ss 6-11, 21, & Criminal Justice Amendment Act (CJAA) 1976, ss8-13.
- Criminal Procedure Act 1980-81 (CPA); Criminal Procedure Amendment Act 2000 (CPAA), ss 5A, 15, 80, 108, 112-114, 117, 121-127.
- Judicature act 1980-81 (JA) & Judicature Amendment Act (JAA) 1991, ss 15A, 21, 92.

11.2 Relevant case law

- *Police v Mahia* [2017] CKHC 53; JP Appeal 4.17 (18 September 2017).
- *Police v Anguna* [2013] CKHC 41; JP Appeal 7.13 (11 September 2013).
- *Police v Waters* [2018] CKHC 16; CR 538.2018 (17 September 2018).
- *Police v Pare* [2005] CKHC 5; CR 454-459 of 2005 (25 November 2005).
- *Police v Metcalfe* [2017] CKHC 14; JP Appeal 3.2016 (15 March 2017).
- *Police v Okotai* [2009] CKHC 19; CR31.08 (10 December 2009).

11.3 List court sentencing

Do not put sentencing off if you do not need to. You need to balance efficiency, time constraints and the need to give reasons in open court. Consider simply imposing the sentence. If comments are made, keep them brief.

11.4 Always give reasons

Consider who the audience is.

- First, and most important, the defendant. They are entitled to know why you are imposing the sentence you are.
- Second, the victim(s), if any, and the public. Telling the wider public what you are doing and why will help boost public confidence in courts, especially in the criminal courts.
- Last, the Appellate Court. If you give clear concise reasons for your sentence, then the Appellate Court can more easily assess whether your sentence was correct if there is an appeal.

11.5 Sentencing options

One of the most common sentences many of you will impose will be a fine. You can place the fine in the range between $1 and the maximum.

Consider the following when deciding how much this should be:

- What is the maximum fine for the offence?
- What are the facts? Is this a serious or less serious offence of its type?
- The defendant's ability to pay. You can order weekly or monthly payments – but be careful about extending the payment period beyond 12 months.

If you have to choose between a reparation order and a fine, it is better to order reparation so that the victim gets payment instead of the state.

11.6 Early guilty plea

Generally, a reduction in sentence (up to a third) may be appropriate where the defendant enters an early guilty plea.

This is because it saves a great deal of public resources and private distress of any victims, family or other witnesses in having a defended hearing.

11.7 Sentencing checklist

Work through this before sentencing.

Relevant purposes

Consider which of these sentencing purposes are relevant when deciding on an appropriate sentence:

- Punishment: The sentence is to punish the offender for their criminal behaviour.
- Deterrence: The sentence is to deter the offender from breaking the law again and be a warning to others not to do the same.
- Prevention: The aim is to prevent the offender from doing the same thing again.
- Rehabilitation: The goal is to change the defendant's behaviour, so they do not reoffend.
- Restoration: The sentence serves to restore or repair the damage done to others.

Note: Generally, the threat of a prison sentence doesn't stop people from offending, for the simple reason that they do not think of the consequences at the time.

Starting point

- Where does this case fit within the possible range of a maximum and minimum sentence for this offence?
- What are the minimum requirements, such as mandatory disqualification from driving?
- What is the maximum sentence according to the relevant statute?
- What prior sentences for similar offences have been made in other cases (consistency)?

Establishing the facts

- You must sentence on an agreed set of facts of the offending. If the sentencing comes after a trial, then it is your view of the facts from that trial on which you should sentence.
- On a guilty plea, unless all the important facts raised by the prosecution are accepted by the defendant, you may issue a minute setting out the facts you regard as essential to the verdict and leave it to the parties to apply for a hearing if they disagree.

Factors that increase the sentence (aggravating factors)

- Violence.
- Major impact on the victim and/or hostility to victim because of age, disability, race, religion, sexual orientation.
- Multiple defendants.
- Use of a weapon.
- Abuse of power/trust (including the age and vulnerability of the victim).
- Planning (pre-meditation).
- Forced or unwanted home entry (home invasion).
- The amount of damage to person or property.
- Value of property stolen.
- Danger to the public.
- How common this type of offending is in the community.
- Persistent offending.
- Defendant's personal information including previous conviction(s) and lack of remorse.

Factors that decrease the sentence (mitigating factors)

- No or minimal harm to person or property.
- Defendant's personal information including their age (if young or very old) and good character including no previous convictions (first offender).
- Physical or mental disabilities, depending on the degree of disability.
- The defendant's early guilty plea (but note that you can't penalise an offender for exercising their right to plead not guilty).
- Genuine remorse and steps taken to restore the damage or make reparation payments to the victim(s) for the harm done.
- Reconciliation (having made peace with/friendly relationships with the victims).

Factors that may be relevant but are less important

- Family ties and custom ties.
- Whether the defendant holds any positions of responsibility.
- If the defendant played a minor role in the offending.

Reports

- Probation reports including community sentence reports.
- Police submissions and victim impact statements.
- Quotes for reparations.
- Defence submissions that may include letters of support.
- Psychiatric reports if required.

Scaling

Scaling means increasing the sentence to reflect aggravating circumstances and decreasing it to reflect mitigating circumstances. You may consider reductions if reasonable and just for the following:

- time spent in custody;
- punishment meted out by other tribunals;
- traditional or customary penalties;
- a guilty plea.

Totality principle

Look at the overall sentence and ask yourself whether the total sentence reflects the totality of the offending. Some obvious sentencing considerations include:

- multiple counts;
- serving prisoner;
- concurrent/consecutive terms;
- avoiding excessive lengths;
- suspending the sentence.

11.8 Sentencing template for simple matters

Sentencing template: Simple matters

Name of defendant **Date:**
Age of defendant

Charges and maximum penalty

Any minimum or mandatory requirements (such as mandatory disqualification from driving)

Plea (guilty or conviction after trial)

Summary of facts
Agreed facts

Any facts in dispute

Summary of police submissions

Criminal convictions and traffic history

Victim impact (brief description if known)

Summary of defence submissions

Starting point for sentence

- Based on facts of the crime only.

Features that increase the sentence

- Indicate how much you would increase your starting sentence.

Features that decrease the sentence

- Indicate how much you would decrease your starting sentence.

Early guilty plea

- Reduce sentence (if relevant).

Where does this case sit between the maximum and minimum sentence range?

What can the defendant afford to pay?

Final sentence

- Bring all of the above together.

State sentence in simple terms

Give reasons

11.9 Sentencing template for more complex matters

Sentencing template: Complex matters

Name of defendant **Date:**
Age of defendant

Charges and maximum penalty

Any minimum or mandatory requirements (such as mandatory disqualification from driving)

Plea (guilty or conviction after trial)

Summary of facts
Agreed facts

Any facts in dispute

Pre-sentence reports (if any)

Summary of police submissions

Criminal convictions and traffic history

Victim impact (brief description if known)

Summary of defence submissions

Starting point for sentence

- Based on facts of the crime only.

Personal circumstances adjusting the sentence from starting point

- Based on "good" and "bad" of offender's circumstances

Features that increase the sentence

- Indicate how much you would increase your starting sentence.

Features that decrease the sentence

- Indicate how much you would decrease your starting sentence.

Early guilty plea

- Reduce sentence (if relevant)

Where does this case sit between the maximum and minimum sentence range?

Final sentence

- Bring all of the above together

State sentence in simple terms

- Include any compensation/reparation awarded

Give reasons

- Deal with any arguments the defendant or their lawyer has put forward in submissions
- Relevant principles
- Relevant factors from reports/written statements

12. Criminal harassment

Complaint of harassment

1. The complainant may make a complaint to the police about an alleged harasser who has engaged in a pattern of behaviour (harassment), which includes any specified act and is directed against that other person or their family, on at least 2 separate occasions or a continuous specified act over a prolonged period within a period of 12 months.
2. Specified acts include:
   - » following someone
   - » watching or loitering outside or near a building or place where a person resides, works, farms, fishes, carries on a business or studies, or any other place frequented by them
   - » telephoning, text messaging, emailing, or using other technologically assisted means to contact someone, or inducing another person to contact that person
   - » sending or delivering, or causing the delivery of letters, packages, or other objects to someone
   - » entering or interfering with property in the person's possession without their express consent
   - » keeping someone under surveillance
   - » acting in any other way towards someone that could arouse fear in a reasonable person.
3. For a criminal offence of harassment, this harassment must also meet the criteria in paragraph 11 following.

Police investigation

4. If there is reasonable cause to believe harassment has occurred, the police will try to contact the alleged harasser (if they can identify them) to get their name and address (if the complainant does not know them).
5. The Police must tell the alleged harasser their details (name and address) are required by law.
6. If the alleged harasser, without reasonable excuse, refuses or fails to supply required details or evidence, and continues to refuse after being warned, they may be arrested without warrant.
7. If the Police suspect on reasonable grounds that any details supplied are false, they may require the alleged harasser to supply satisfactory evidence of those details.
8. It is an offence to refuse or fail to supply any such details or evidence, with a penalty upon conviction of a fine up to $500.
9. The Police may also release information to the Registrar if they know the name, whereabouts, or address of a person alleged to be harassing, or to have harassed, another person.
10. The Police will investigate and decide whether to lay a criminal charge of harassment against the alleged harasser and file an Information.

Offence of harassment

11. To convict the defendant of a criminal offence of harassment, you must be satisfied that the Police have proven beyond reasonable doubt that:

- the defendant intends their harassment to cause the other person to fear for their own safety or that of another family member; or
- the defendant knows their harassment is likely to cause the other person to reasonably fear for their own safety or that of another family member.

An alleged harasser includes a person who is encouraged by the defendant to do any specified act.

See **Defended criminal hearing** ➔

12. You may decide the penalty on conviction, which is a maximum term of imprisonment of up to 2 years or a fine up to $3,000, or both.

Breach and enforcement of civil restraining orders

13. A person with a civil restraining order may make a complaint to Police that the harasser is not complying with the order's terms.

14. It is a criminal offence to contravene a civil restraining order without any reasonable excuse. This alleged breach includes either:

- any act breaching the order
- failing to meet the restraining order conditions.

15. You will decide the penalty upon conviction:

- imprisonment up to a maximum term of 6 months
- a maximum fine of $1,000
- both imprisonment and fine.

16. You may increase a penalty on conviction to a maximum sentence of 2 years imprisonment, if the alleged breach is a qualifying offence. This is defined as two offences committed against the same restraining order, or separate restraining orders granted to benefit the same person and:

- the defendant has been convicted on at least two different occasions of a qualifying offence; and
- at least two of these were committed within the past 3 years before the current offence before the Court.

17. The penalty for breaching an order is a maximum fine of $1,000 for a person or $5,000 for a company.

See **Defended criminal hearing** ➔

Closed court hearings and name suppression orders

18. For criminal harassment charges, you may exclude all or any persons for part or all of the proceedings if necessary to do so:

- in the interests of any person (including the privacy of the applicant); and
- the public interest.

This does not include the Police or defendant or their agents, lawyers or any court officer.

19. You may also make a temporary or permanent name suppression order preventing the publication of:

- the name of any person or details that may disclose their identity or affairs
- any report
- an account of all or any part of the evidence presented in court
- submissions made.

20. At any time on application by any person, you may renew a temporary order or review a permanent order for preventing publication.

Non-molestation orders

21. If a non-molestation order was in force before the Harassment Act 1997, it remains in force as if it were a restraining order made under this Act. This order can be varied or discharged.

12.1 Introduction

There are two parts to the Harassment Act 2017 (HA)**: civil restraining orders** and **criminal offences**. A person's behaviour can amount to both criminal and civil harassment. In those situations, the person being harassed can both complain to the police and apply to the court for a restraining order.

- If a person wishes to get a legal order to prevent harassment, they can apply for a restraining order from the court under Part 3 HA. See "Civil harassment".
- Protection orders are also available from the Family Court where family members are involved. See "Temporary protection orders".

This section relates to **criminal harassment.**

12.2 Relevant legislation

- Harassment Act 2017 (HA), ss 4–9, 26–29, 39–41, 44.

12.3 The test for criminal harassment

The Harassment Act makes the more serious kinds of harassment a criminal offence under Part 2.

There are two elements.

1. The behaviour must amount to "harassment". This means there must be a pattern of behaviour involving the specific kinds of acts set out in the Harassment Act on at least two separate occasions within a period of 12 months: s 4 HA. Section 5 HA sets out the behaviours that constitute harassment.
2. The harassment must meet the specific test for "criminal" harassment under s 9 HA, which depends on the defendant's intention and state of mind. For the behaviour to be criminal, the defendant must either:
   - **intend** to make the person fear for their safety, or the safety of their partner or a family member; or
   - **know** that, given the person's particular situation, the harassment is likely to cause them to reasonably fear for their safety or the safety of their partner or family member.

12.4 Closed court hearing and no publication of case

You may exclude all or any persons for the whole or any part of the proceedings, where you are satisfied that it is desirable to do so in the interests of any person (including the privacy of the applicant) and the public interest: s 39 HA.

With or without this order, you may also make a temporary or permanent order forbidding the publication of:

- any report;
- an account of the whole or any part of the evidence presented in court;

- submissions made;
- the name of any person or details that may disclose their identity or their affairs: s 39 HA.

At any time on application by any person, you may renew a temporary order or review a permanent order for preventing publication: s 40 HA.

12.5 Enforcing restraining orders

You may also hear criminal cases relating to breaches of a civil restraining order; or failure to comply with the conditions of that order, without any reasonable excuse.

13. Preliminary inquiry

Introduction

1. You may, in very rare cases, hold a preliminary inquiry if the defendant elects to be tried by a Judge alone for certain offences with a maximum penalty up to 6 months imprisonment (set out in s16 Judicature Act).

   The purpose of the preliminary inquiry is for you to decide if:

   » there is sufficient evidence from the written statements of witnesses for the prosecution to have the defendant committed for trial before the Judge; or

   » discharge the defendant.

   Note: A discharge does not prevent other proceedings in the same matter.

Process before

2. The Police or prosecution, and defendant or lawyer, must give written statements for each witness to be called at least 28 days before trial date.

   These must:

   » be signed by the person making the statement

   » include a declaration they are true and correct to the best of their knowledge and belief

   » provide their age if under 21

   » be in both English and Māori if a Cook Islander

   » if they can't read – read to them before they sign and be accompanied by a declaration by the person reading the statement that it was read.

   Note: These written witness statements may, with the defendant's consent, be admissible as evidence as if they were oral evidence given at trial.

3. If a written statement refers to any document as an exhibit, this must include:

   » a copy of the document; or

   » information to enable the party who it is given to, to inspect the document or a copy.

4. If there is no written statement from a witness, the prosecutor must give the Court and the defendant or lawyer:

   » a written summary of the evidence to be given by the witness

   » a statement with reasons why no written statement from the witness provided.

Notice of preliminary inquiry

5. If a defendant is represented by a lawyer:

   » the lawyer may, within 14 days of trial date, notify the Registrar they require the written statements to be considered by a Justice at a preliminary inquiry

   » if no such notice given, the defendant shall be deemed to have consented to their committal for trial and be committed.

6. If a defendant is not represented by a lawyer they shall be brought before a Justice within 14 days of trial date.

Hearing of the preliminary inquiry

The charge

7. Read the charge and explain to the defendant (if not legally represented):
   - » the charge (including its elements)
   - » the purpose of the proceedings
   - » that they will have the opportunity later to make a statement if they choose.

Statements of witnesses and exhibits

8. The prosecution should:
   - » provide the statement of any witness they intend to call
   - » provide any exhibit they intend to produce
   - » read every witness statement to the defendant's counsel, or if unrepresented, to them. Both counsel and defendant may waive this right.

Submissions by the parties

9. After you have read or heard the prosecution's witness statements and summaries of evidence, before deciding whether to commit, you must:
   - **a.** ask the prosecution if they wish to make any submissions
   - **b.** ask the defence if they wish to make any submissions.
10. Make an order on the retention of exhibits.

No case to answer

11. The defence may submit there is no case to answer where:
   - **a.** no evidence has been presented to support an essential element of the offence; or
   - **b.** the evidence presented is insufficient for a reasonable Court to find the defendant committed the offence beyond reasonable doubt.

Make your decision

12. You must decide:

    "Would a Judge, at the trial, convict the defendant on the evidence placed before me, if that evidence was not contradicted?"

    - » if so, there is enough evidence to commit the defendant for trial; or
    - » if not, you must discharge the defendant.

    Record your decision on the Criminal Decision Sheet.

    Note: a discharge of the defendant does not operate as a bar to any other proceedings in the same matter.

Witness depositions if not called at the preliminary inquiry

13. Before or during a trial, you may make an order for the evidence of a witness to be taken at a time and place fixed by you or a judge where:

- the defendant has been committed for trial
- the witness is able to give evidence of matters at trial
- the witness was not called to give evidence at the preliminary inquiry
- it is in the interests of justice the witness gives such evidence.

14. You or a judge may modify any times set for this and give any directions in relation to the taking of the evidence.

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1. Common criminal offences

1.1 Common assault: s 216 Crimes Act 1969 (CA)

Common assault: s 216 CA	Any person is guilty of an offence who assaults any other person.
Definition of "assault or to assault": s 2 CA	Assault is: ➢ the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly; or ➢ threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that they have present ability to effect their purpose.
Elements of common assault	Every element (numbers 1-3 and either of the options under 4) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in Court. 2. A date or period of time when the common assault is alleged to have taken place. 3. A place where the common assault was alleged to have been committed. **Specific** 4. Direct or indirect force - the accused: ➢ applied force to the person of the complainant; and ➢ the application of force was deliberate; [to accidentally strike A while intending to strike B is an assault]. ***or*** 4. Threats - the accused: ➢ did or said something that amounted to a threat to apply force to the complainant; ➢ intended to threaten the complainant (i.e.is, the accused was serious). It is not necessary for the Police to prove that they intended to carry out their threat); and ➢ had the present ability to carry out the threat or caused the complainant to believe that they did.

Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was the accused who used physical force. **Context** The context in which the alleged assault occurred is very important and you will need to give careful consideration to: ➢ What the situation was. ➢ Where dd the alleged assault occurred. If the person assaulted is injured, then a more serious assault charge might be more appropriate.
Defences	Part III CA provides for statutory justifications or excuses in the case of all charges to which they apply: s 23(2) CA, including: ➢ Self-defence or defence of another against unprovoked assault or provoked assault: ss 50- 53; ➢ Defences of property: ss 54-57. The defence would have to point to some evidence in support of any of these defences, which the prosecution must then rebut beyond reasonable doubt. See "Criminal responsibility" to find out more about all the relevant defences.
Sentence	The maximum term is 1-year imprisonment.

1.2 Assault with intent to injure: s 213 CA

Assault with intent to injure: s 213 CA	Any person is guilty of an offence who, with intent to injure anyone, assaults any person.
Definition of "assault or to assault": s 2 CA	Assault is: ➢ the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly; or

	➢ threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that they have present ability to effect their purpose.
Elements	Every element (numbers 1-3 and either of the options under 4) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in Court. 2. A date or period of time when the common assault is alleged to have taken place. 3. A place where the common assault was alleged to have been committed. **Specific** 4. Direct or indirect force: The accused: ➢ intended to injure another; ➢ applied force to the person of the complainant; and ➢ the application of force was deliberate; [to accidentally strike A while intending to strike B is an assault]. ***or*** 4. Threats: The accused: ➢ intended to injure another; ➢ did or said something that amounted to a threat to apply force to the complainant; ➢ intended to threaten the complainant (that is, the accused was serious). It is not necessary for the Police to prove that they intended to carry out their threat); and ➢ had the present ability to carry out the threat or caused the complainant to believe that they did.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

	The prosecution must provide evidence to prove that it was the accused who used physical force. **Physical force** Actual physical force must be used. This could be with their body or something else. **Intent to injure** The prosecution needs to prove that the accused intended to injure. "To injure" means cause actual bodily harm. **Context** The context in which the alleged assault occurred is very important and you will need to give careful consideration to: ➢ What the situation was. ➢ Where the alleged assault occurred.
Defences	Part III CA provides for statutory justifications or excuses in the case of all charges to which they apply: s 23(2) CA, including: ➢ Self-defence or defence of another against unprovoked assault or provoked assault: ss 50- 53; and ➢ Defences of property: ss 54-57. The defence would have to point to some evidence in support of any of these defences, which the prosecution must then rebut beyond reasonable doubt. See "Criminal responsibility" to find out more about all the relevant defences.
Sentence	The maximum term is 3 years imprisonment.

1.3 Assault on a child, or by a male on a female: s 214 CA

Assault on a child, or by a male on a female: s 214 CA	Anyone of is guilty an offence who: ➢ assaults any child under the age of fourteen years; or ➢ being a male, assaults any female.
Definition of "assault or to assault": s 2 CA	Assault is: ➢ the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly; or

	➢ threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that they have present ability to effect their purpose.
Elements	Every element (numbers 1-3 and either of the options under 4) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in Court. 2. A date or period of time when the common assault is alleged to have taken place. 3. A place where the common assault was alleged to have been committed. **Specific** 4. Direct or indirect force: The accused: ➢ applied force to the person of the complainant who is a child under the age of 14 years; or is male and applied force to the person of the complainant who is a female; and ➢ the application of force was deliberate; [to accidentally strike A while intending to strike B is an assault]. ***or*** 4. Threats: The accused: ➢ did or said something that amounted to a threat to apply force to the complainant who is a child under the age of 14 years, or is male and did or said something that amounted to a threat to apply force to the complainant who is female: and ➢ intended to threaten the complainant (that is, the accused was serious). It is not necessary for the Police to prove that they intended to carry out their threat); and ➢ had the present ability to carry out the threat or caused the complainant to believe that they did.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

	The prosecution must provide evidence to prove that it was the accused who used physical force. **Identity of offender and victim** Check the gender of the offender and/or victim when they appear in Court; or the age of the complainant (if relevant). If the offender and/or victim does not appear in court, the Police will need to provide evidence: ➢ that the complainant was under the age of 14 at the time of the offence; or ➢ of the gender of the offender and victim in the case of an assault by a male on a female.
Defences	Part III CA provides for statutory justifications or excuses in the case of all charges to which they apply: s 23(2) CA, including self-defence or defence of another against unprovoked assault or provoked assault: ss 50- 53. **Defences of property: ss 54-57** The defence would have to point to some evidence in support of any of these defences which the prosecution must then rebut beyond reasonable doubt. See "Criminal responsibility" to find out more about all the relevant defences.
Sentence	The maximum term is 2 years imprisonment.

1.4 Theft: s 242 CA

Definition of "theft or stealing": s 242 CA	Theft or stealing is the act of intentionally and dishonestly taking or converting for use, anything capable of being stolen, with an intent at the time of taking to permanently deprive the owner of the thing. "Property" includes real and personal property, and any estate or interest in any real or personal property, and any debt, and any thing in action, and any other right or interest: s 2.
Elements	Every element (numbers 1-7 below) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in Court.

	2. A date or period of time when the common assault is alleged to have taken place. 3. A place where the common assault was alleged to have been committed. **Specific** 4. The accused took or carried away something capable of being stolen. 5. The accused did this without the consent of the owner. 6. The accused, at the time of such taking, intended to permanently deprive the owner of the thing taken. 7. The accused did not have a claim of right in the property taken.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was the accused who stole the property. **Ownership** Whether the owner is named or not, ownership must be proved by the prosecution as an essential element of the offence. **Act** Taking" does not include obtaining property or possession with a person's consent from whom it is obtained, although that consent may be induced by a false pretence; but if so then a subsequent conversion may be theft. It does not matter if the item converted was taken for the purpose of conversion or whether it was already in their possession at the time of the conversion. Theft is committed when the offender moves the thing, or causes it to move or to be moved, with intent to steal it. An agent is not guilty of theft by pledging or giving a lien on any goods or document of title to goods entrusted to them to sell or otherwise for any sum of money not greater than the amount due from their principal at the time of pledging or giving a lien on the same, together with the amount of any bill of exchange or

	promissory note accepted or made by them for or on account of their principal. An employee who takes any food from their employer's possession to give it or having it given to any horse or other animal of their employer or in their possession is not guilty of theft. **Without claim of right made in good faith** 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. **Intent at the time of taking to permanently deprive** The accused must intend to permanently deprive the complainant, which disqualifies situations of borrowing or temporary possession: See *Lloyd's Case* [1985] 3 WLR 30. It is common for offenders to claim they were only borrowing the item claimed to be stolen. Therefore, there was no intent on their part to permanently deprive the rightful owner of that property. They would have to provide evidence of this intention at the time they took the item and that they had either returned the stolen property or was able to do so. **Fraudulently** The intent to defraud may consist of an intention to steal but not always so. A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with their property on the basis of that statement: See *Denning* [1962] NSWLR 175.
Defences	The defence may raise evidence to support a belief of honest claim of right, that is, they had a good faith belief the property they took was theirs or that they had a valid claim to it. The prosecution must then rebut this beyond reasonable doubt. See "Criminal responsibility" to find out more about all the relevant defences.
Sentence: s 249 CA	The length of sentence is based on the value of the property stolen; or where it was taken from or by whom. Maximum penalty: 5 years imprisonment for any property which is stolen: ➢ if the theft is one to which ss 244- 246 CA apply; ➢ by an employee from his or her employer; or ➢ as a clerk or servant, or as an officer of the Government or of any Island Council, or as a constable; or

	➢ from another person; or ➢ from a dwelling house; or ➢ from a locked safe; or ➢ that exceeds the value of $40; or ➢ that is a will. Maximum penalty: 1 year imprisonment if the theft is one for which there is no other punishment prescribed by the Crimes Act, or if the object stolen exceeds $10 in value. Maximum penalty: 3 months imprisonment if the theft is one for which there is no other punishment prescribed by the Crimes Act, or if the object stolen does not exceed $10 in value.

1.5 Conversion or attempted conversion of motorcars or other vehicles: s 250 CA

Conversion or attempted conversion of motorcars or other vehicles: s 250(1)(a) CA **Definition of "property": s 2 CA**	A person is guilty of conversion or attempted conversion of motorcars or other vehicles, who intentionally and dishonestly, but not so as to be guilty of theft, takes or converts to their use or to the use of say other person a motor vehicle of any description: s 250(1)(a). "Property" includes real and personal property, and any estate or interest in any real or personal property, and any debt, and anything in action, and any other right or interest: s 2.
Elements	Every element (numbers 1-7 below) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in Court. 2. A date or period of time when the common assault is alleged to have taken place. 3. A place where the common assault was alleged to have been committed. **Specific** 4. The accused took or converted a motorcar or vehicle of any description without the owner's permission. 5. The accused took the vehicle intentionally and dishonestly, but not so as to be guilty of theft.

	6. The accused used or intended to use the vehicle, or intended or allowed another person to use the vehicle 7. The accused did not have bona-fide claim of right to the vehicle.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was the accused who took or converted the vehicle. **Intentionally and dishonestly takes or converts** An express part of the offence is that the accused must take or convert the vehicle intentionally and dishonestly.
Defences	The defence may raise evidence to support a belief of honest claim of right, that is, they had a good faith belief the property they took was theirs or that they had a valid claim to it. The prosecution must then rebut this beyond reasonable doubt. See "Criminal responsibility" to find out more about all the relevant defences.
Sentence	Maximum penalty: Imprisonment not exceeding 5 years. Everyone is liable to imprisonment for a term not exceeding two years who attempts to commit the offence (in subs 1), or who, intentionally and dishonestly interferes with or gets into or upon or attempts to get into or upon any of the things referred to in paragraph (a): s 250(2). You may also order the person if convicted to pay compensation to the owner for anything destroyed or damaged, for a sum not more than the loss suffered by them: s 250(3).

1.6 Unlawfully found on property: s 267 CA

Unlawfully found on property: s 267 CA	A person is guilty of an offence who is found on any property (including any building or garden) or on any boat, without lawful excuse but in circumstances that do not disclose the commission of, or an intention to commit, any other offence.

Definition of "property": s 2 CA	"Property" includes real and personal property, and any estate or interest in any real or personal property, and any debt, and any thing in action, and any other right or interest: s 2 CA.
Elements	Every element (numbers 1-6) must be proved by the prosecution. **General** 1. The person named in the charge is the same person who is appearing in Court. 2. A date or period of time when the common assault is alleged to have taken place. 3. A place where the common assault was alleged to have been committed. **Specific** 4. The accused was found on property or boat. 5. There is no evidence that the accused committed or intended to commit another offence. 6. There was no lawful excuse or justification for the accused to be on the property or boat.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove it was the accused who was found on a property unlawfully.
Defences	For the statutory defence of lawful excuse or justification the accused will have to establish this to your satisfaction, on the balance of probabilities (that is, more likely than not). The prosecution must then rebut this beyond reasonable doubt. See "Criminal responsibility" to find out more about all the relevant defences.
Sentence	Maximum penalty: Imprisonment for a term not exceeding 3 months or a fine not exceeding $40.

1.7 Breach of condition of probation: s 10 Criminal Justice Act 1967 (CJA)

Breach of probation condition(s): s 10 (1) CJA	A person who contravenes or fails to comply with any condition of their probation commits an offence.
Definitions of "probationer" and "probation officer": s 2 CJA	Section 2, Interpretation: "Probationer" means any person for the time being under the supervision of a probation officer under or by virtue of this Act. "Probation officer" means a probation officer appointed under Part I of this Act.
Elements	Every element (numbers 1 to 5) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in Court. 2. A date or period of time when the common assault is alleged to have taken place. 3. A place where the common assault was alleged to have been committed. **Specific** 4. The accused was on probation. 5. The accused contravened or did not comply with one or more conditions of their probation.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was the accused who breached their probationary license. **Conditions** The prosecution must prove that the accused was on probation and provide evidence of the conditions of probation. The prosecution must then show that the accused breached one or more of those conditions.

CJA provisions ss 6-9 may be relevant	Other relevant provisions relating to probation include: ➢ Power of High Court to impose probation: s 6; ➢ Conditions of release: s 7; ➢ Power of High Court to impose additional conditions: s 8; ➢ Variation of conditions and discharge from probation: s 9; ➢ Probation may follow Community Service: s 10 (CJA Amendment Act 1976). Also under the CJA Amendment Act 1976: ➢ Conditions of Probation: s 11; ➢ Application for substituted sentence: s 21; ➢ Court empowered to substitute sentence: s 22.
Sentence	Maximum penalty: Imprisonment for a term not exceeding 3 months or a fine not exceeding $40. Where a person is found guilty of this offence, the Court may do all or any of the following: ➢ extend the term of probation to any period but no longer than 3 years from when the probation began; or ➢ vary any condition of the probation; or ➢ impose any other additional condition.

1.8 Fighting in a public place: s 96 CA

Fighting in a public place: s 96 CA	Any person who fights in any public place commits an offence.
Definitions: s 2 CA	"Assault" is: ➢ the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly; or ➢ threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that they have present ability to effect their purpose. "Public place" means any road, any place or public resort open to or used by the public as of right, any wharf or jetty, any vessel at a wharf or jetty or within one mile of the shore, any church or other building where Divine service is being publicly held, any hall or room in which any public entertainment is being held, and any market place.

Elements	Every element (numbers 1-4) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in Court. 2. A date or period of time when the common assault is alleged to have taken place. 3. A place where the common assault was alleged to have been committed. **Specific** 4. The accused was fighting in a public place.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was the accused who was fighting in a public place. **Context** The context in which the fighting occurred is important and you will need to give careful consideration to: ➢ What the situation was. ➢ Where the alleged fighting occurred. It has to be in a public place (see the definition of "public place" above). There is no legal definition of "fighting". In its ordinary meaning it includes to take part in a violent struggle with physical blows or the use of weapons. See the definition of "assault" above. If the other person is injured, then a more serious assault charge might be more appropriate.
Defences	Part III CA provides for statutory justifications or excuses in the case of all charges to which they apply: s 23(2) CA, including self-defence or defence of another against unprovoked assault or provoked assault: ss 50- 53

	Defences of property: ss 54-57 The defendant must provide evidence to raise this as a defence, which the prosecution must then rebut beyond reasonable doubt. See "Criminal responsibility" to find out more about all the relevant defences.
Sentence	Maximum penalty: 3 months imprisonment or fine not exceeding $100.

1.9 Burglary: s 263 CA

Burglary: s 263 CA	A person is guilty of burglary who: ➢ breaks and enters any building or ship with intent to commit a crime inside; or ➢ breaks out of any building or ship either after committing a crime inside or after having entered with intent to commit a crime inside.
Interpretation of s 263-266: s 262 CA and s 2 CA	"To break" in relation to any building or ship, means to break any internal or external part of the building or ship, or to open by any means (including lifting things kept in their places by their own weight) any door, window, shutter, cellar-flap, port, hatch, scuttle, or other cover of openings to the building or ship or to give passage from one part of it to another. "Building" means any building, erection, or structure of any description, whether permanent or temporary and includes a tent, a caravan, or a houseboat; and also includes any enclosed yard or any closed cave or tunnel. (a) Anyone who obtains entrance into any building or ship by any threat or artifice used for that purpose, or by collusion with any person in the building or ship, or who enters any chimney or aperture of the building or ship permanently left open for any necessary purpose, shall be deemed to have broken and entered that building or ship; (b) An entrance into a building or ship is made as soon as any part of the body of the person making the entrance, or any part of any instrument used by them, is within the building or ship. "Ship" means every description of vessel used in navigation, however propelled; and includes any barge, lighter, dinghy, raft, or like vessel; and also includes any ship belonging to or used as a ship of the armed forces of any country.
Elements	Every element (numbers 1-3 and **either** the first **or** second set of 4-5) must be proved by the prosecution beyond reasonable doubt.

	General 1. The person named in the charge is the same person who is appearing in Court. 2. A date or period of time when the common assault is alleged to have taken place. 3. A place where the common assault was alleged to have been committed. **Specific** 4. The accused breaks or enters into a building or boat. 5. With the intent to commit a crime. ***or*** 4. The accused breaks out of the building or ship. 5. Having committed or with the intent to commit a crime.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove it was the accused who was found on a property unlawfully.
Defences	Part III CA provides for statutory justifications or excuses in the case of all charges to which they apply: s 23(2) CA. These include defences of property: ss 54-56 CA. The defendant has an evidentiary burden to raise this as a defence, which the prosecution must then rebut beyond reasonable doubt. See "Criminal responsibility" to find out more about all the relevant defences.
Sentence	Maximum penalty: Term of imprisonment not exceeding 10 years.

10.10 Wilful damage: s 321 CA

Wilful damage: s 321 CA	A person is guilty of wilful damage who wilfully destroys or damages: ➢ any property, whether they have an interest in it or not, if they know or ought to know that danger to life is likely to ensue; or ➢ any road, railway, bridge, tunnel, or similar means of communication, or any aerodrome, wharf, quay, or jetty, if they know or ought to know that it is thereby likely to be rendered dangerous, impassable, or unusuable; or ➢ any power station or gas works, or any building, erection, or structure, or any equipment, line, cable, or pipe, used for or in connection with the production, transmission, or distribution of electricity or gas, if they know or ought to know that the supply of electricity or gas is likely to be affected; or ➢ any stopbank, wall, dam, or sluice gate, or any pumping station or pumping equipment, or any other works, if the destruction or damage causes actual danger of flooding; or ➢ any container, building, erection, or structure used for the storage of bulk supplies of gas or liquid fuel; or ➢ any rare or irreplaceable book, manuscript, original painting, etching, engraving, print, or other work of art, or any rare or irreplaceable article kept for purposes of art or science; or ➢ any property in any case not provided for elsewhere in this Act.
Definition: **"criminal damage": s 316 CA**	Criminal damage: For the purposes of s 321, every one who causes any event by an act which they knew would probably cause it, being reckless whether that event happens or not, shall be deemed to have caused it wilfully. Where the act done results in the destruction of or any damage to anything in which the person charged has an interest, whether total or partial, the existence of that interest shall not prevent their act being a crime if it is done with intent to defraud or to cause loss to any other person. For the purposes of this subsection, where any property is subject to any mortgage or charge, each of the parties to the mortgage or charge shall be deemed to have a partial interest in that property.
"property": s 2 CA	"Property" includes real and personal property, and any estate or interest in any real or personal property, and any debt, and any thing in action, and any other right or interest.
"material benefit": Crimes Amendment Act 2003	To "obtain a material benefit", in relation to doing a thing, means obtain, directly or indirectly, any goods, money, pecuniary advantage, privilege, property, or other valuable consideration of any kind for doing the thing (or taking an action that forms part of doing the thing)."

Elements	Every element (numbers 1-3 and one of the options under 4) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in Court. 2. A date or period of time when the common assault is alleged to have taken place. 3. A place where the common assault was alleged to have been committed. **Specific** 4. The accused: ➢ has wilfully destroyed or damaged any property whether they have an interest in it or not; and ➢ knew or ought to have known this act was dangerous to life. ***or*** 4. The accused: ➢ has wilfully destroyed or damaged any road, railway, bridge, tunnel, or similar means of communication, or any aerodrome, wharf, quay, or jetty; and ➢ knew or ought to have known that it is thereby likely to be rendered dangerous, impassable, or unusuable: s 321(1)(a)-(b) CA. ***or*** 4. The accused: ➢ has wilfully destroyed or damaged any power station or gas works, or any building, erection, or structure, or any equipment, line, cable, or pipe, used for or in connection with the production, transmission, or distribution of electricity or gas; and ➢ The accused knew or ought to have known that that the supply of electricity or gas is likely to be affected: s 321(1)(c) CA. ***or*** 4. The accused: ➢ has wilfully destroyed or damaged any stopbank, wall, dam, or sluice gate, or any pumping station or pumping equipment, or any other works; and ➢ the destruction or damage causes actual danger of flooding:s 321(2)(a) CA .

	or 4. The accused: ➢ has wilfully destroyed or damaged any container, building, erection, or structure used for the storage of bulk supplies of gas or liquid fuel: s 321(2)(b) CA. ***or*** 4. The accused has wilfully destroyed or damaged any rare or irreplaceable book, manuscript, original painting, etching, engraving, print, or other work of art, or any rare or irreplaceable article kept for purposes of art or science: s 321(3) CA. ***or*** 4. The accused wilfully destroys or damages any property in any case not provided for elsewhere in this Act: s 321(4) CA.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove it was the accused who was found on a property unlawfully. **Wilful damage** See the definition of criminal damage in s 316(1) CA. This includes a mental element of either: ➢ knowing that their actions would probably cause the specific event [damage or destruction of property etc]; or ➢ being reckless whether that event [damage or destruction of property etc] happens or not.
Defence	There is a specific defence to wilful damage provided in the definition of criminal damage in s 316(2) CA. Nothing shall be an offence under s321, unless it is done without lawful justification or excuse, and without colour of right: s 316(2) CA. The defendant must prove the excuse, cause or lawful justification, on the balance of probabilities. See "Criminal responsibility" to find out more about all the relevant defences.

Sentence	Maximum penalty: Term of imprisonment not exceeding: ➢ 14 years for s 321(1) offences. ➢ 7 years for s 321(2)-(3) offences. ➢ 1 year if the property does not exceed $50 or 3 years if greater than $50 for s 321(4) offences.

2. Common drug offences

2.1 Dealing with controlled drugs: Narcotics and Misuse of Drugs Act 2004 (NMDA)

Dealing with controlled drugs: (NMDA)	No person shall: (a) import into, or export from the Cook Islands any controlled drug; (b) produce or manufacture any controlled drug; (c) supply or administer, or offer to supply or administer, any Class A or Class B controlled drug to any other person, or otherwise deal in any such controlled drug; (d) supply or administer, or offer to supply or administer, any Class C controlled drug to any other person; (e) sell, or offer to sell, any Class C controlled drug to any other person; (f) have in their possession any controlled drug for any of the purposes in subss (c), (d) or (e). No person shall conspire with any other purpose to commit any of the above offences.
Relevant definitions: s 2	"Controlled drugs" are listed and described in the First, Second and Third Schedules. "Class A controlled drug", "Class B controlled drug", and "Class C controlled drug" mean respectively the controlled drug specified or described in the First, Second Schedule, or Third Schedules. "Export" means to take, or cause to be taken, out of the Cook Islands. "Import" means to bring or cause to be brought into the Cook Islands and is a continuing process until any item reaches the intended recipient. "Manufacture" means to carry out any process by which an illicit drug or controlled chemical is produced, and includes extracting, refining, formulating, preparing, mixing, compounding, transforming it into another drug, making an illicit drug into dosage form, and packing. "Produce" and "production" includes compound. "Supply" includes distribute, give, sell and offer to supply.
Bail jurisdiction	Section 73 provides that bail for this offence can only be granted by a judge.

2.2 Possession and use of controlled drugs: NMDA

Possession and use of controlled drugs: s 7	No person shall: ➢ procure or have in their possession, or consume, smoke or otherwise use, any controlled drug; or ➢ supply or administer, or offer to supply or administer, any Class C controlled drug to any other person; or ➢ otherwise deal in any such controlled drug. Note: "Controlled drugs" are listed and described in the First, Second and Third Schedules of the Act.
Elements	Every element (numbers 1-3 and either options under 4) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in Court. 2. A date or period of time when the offence is alleged to have taken place. 3. A place where the offence was alleged to have been committed. **Specific for possession** 4. The accused did one or more of the following activities in relation to a controlled drug: ➢ procured; or ➢ had in their possession; or ➢ consumed; or ➢ smoked; or ➢ otherwise used. ***or*** **Specific for use** 4. The accused did one or more of the following activities in relation to a Class C controlled drug: ➢ supplied; or ➢ administered; or ➢ offered to supply; or ➢ offered to administer; or ➢ to any other person; or

	➢ otherwise dealt in any such controlled drug.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the accused the accused who committed the offence.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. Once possession of a controlled Class C drug has been established the accused may have a defence if they can prove on the balance of probabilities any one of the affirmative defences provided in s 7(3) NDMA. These are that the defendant knowing or suspecting the item(s) to be a controlled drug took possession of it to: ➢ prevent another from committing or continuing to commit an offence in connection with that drug and that as soon as possible after taking possession of it the defendant took all reasonable steps to deliver the drug into the possession of a person lawfully entitled to have possession of it; or ➢ deliver it into the possession of a person lawfully entitled to have possession of it and that as soon as possible after taking possession of it the defendant took all reasonable steps to deliver it into the possession of such a person. They may also be exempted under s 8 of the Narcotics and Misuse of Drugs Act or have a licence under the Act. Further, this charge will not apply to the possession of a narcotic by any person in the service of the Crown for the purposes of an investigation of any offence, suspected offence or prosecution of any person.
Sentence	**Maximum penalty** Any other controlled drug that is a Class C controlled drug: maximum imprisonment is 2 years or a fine not exceeding $5,000 or both.
Bail jurisdiction	Note: This offence should only come before you for any arrest and remand. Your power is limited to the granting of bail, or otherwise under s 83 CPA.

2.3 Cultivation of prohibited plants: NMDA, NMDA Amendment Act 2009 (NMDAA)

Cultivation of prohibited plants: s 9	No person shall cultivate any prohibited plant. Note: This offence should only come before you for an arrest and remand. Your power is limited to the granting of bail, or otherwise.
Relevant definitions: s 2	"Cultivate and cultivation" includes planting, sowing, scattering the seed, growing, nurturing, tending or harvesting and also includes the separating of opium, coca leaves, cannabis and its extracts from the plants from which they are obtained. "Prohibited plant" means: ➢ any plant of the genus cannabis ("marijuana"); ➢ any plant of the species Papaver somniferum ("poppy"); ➢ erythroxylon coca and erythroxylon novagranatense ("cocaine"); ➢ any plant of the species Lophophora williamsi or hophophora lewinnii ("dumpling cactus"); ➢ any fungus of the genera Conocybe, Panaeolus, or Psilocybe from which a controlled drug can be produced or that contains a controlled drug; ➢ any other plant, which is declared to be a prohibited plant by regulations, made under this Act.
Bail jurisdiction	Note: This offence should only come before you for any arrest and remand. Your power is limited to the granting of bail, or otherwise under s 83 CPA.

2.4 Possession of prohibited items: NMDA

Possession of prohibited items: s 13	A person commits an offence who has in their possession: ➢ any pipe or other utensil (not being a needle or syringe), for the purpose of commission of an offence against this Act; or ➢ (unless excepted by regulations under the Act), a needle or syringe for the purpose of commission of an offence against this Act; or ➢ (unless excepted by regulations under the Act), a seed or fruit (not being a controlled drug) of any prohibited plant, which they are not authorised to cultivate under the Act.

Relevant definition: s 2	"Prohibited plant" means: ➢ any plant of the genus cannabis ("marijuana"); ➢ any plant of the species Papaver somniferum ("poppy"); ➢ erythroxylon coca and erythroxylon novagranatense ("cocaine"); ➢ any plant of the species Lophophora williamsi or hophophora lewinnii ("dumpling cactus"); ➢ any fungus of the genera Conocybe, Panaeolus, or Psilocybe from which a controlled drug can be produced or that contains a controlled drug; ➢ any other plant, which is declared to be a prohibited plant by regulations, made under this Act.
Bail jurisdiction	Note: This offence should only come before you for any arrest and remand. Your power is limited to the granting of bail, or otherwise under s 83 CPA.

3. Common traffic offences

3.1 No annual licence for motor vehicle: The Transport Act 1966 (TA); Transport Amendment Acts (TAA) 1995 and 2016

Annual registration and licence: ss 5, 9 TA	It is an offence for any person in any licensing year to use any motor vehicle on any road, or permit any motor vehicle to be so used: s 5(2) TA, unless: ➢ the motor vehicle is registered in accordance with the Transport Act; and ➢ registration plates for the motor vehicle and a licence to use the motor vehicle for that licensing year issued under the Transport Act are attached to the motor vehicle as required: s 5(1) TA. Every person must attach a licence to the motor vehicle, as prescribed, every licensing year. No license will be issued to any motor vehicle that is not registered under the Act: s 9 TA.
Interpretation: s 2 TA	"Driver's licence" means a licence to drive a motor vehicle issued in accordance with the Transport Act. "Licensing year" means a period of 12 months ending with the thirty-first day of March in any year. "Motor vehicle" means a vehicle drawn or propelled by mechanical power; and includes a trailer. "Transport licence" means a passenger-service licence, a taxicab-service licence, a goods-service licence, a rental-service licence, or as the case may require.
Minor offences: Part VA, ss 55A–55G TAA (1995) **Interpretation: s 55A TAA** **Minor offences: s 55B TAA** **Prosecution of minor offences: s 55C TAA (2016)**	"Minor offence" means an offence specified in the Schedule. This includes s 5(2) TA. "Parking offence" means parking in breach of any provision made under this Part. Where a constable has reason to believe that the user of a vehicle has committed a minor offence, the constable may issue a minor offence notice in the form prescribed by regulations made pursuant to this Act, requiring the user of the vehicle to pay a fine of the amount set out in the Schedule in respect of the alleged offence. Every person served with a minor offence notice and who does not pay the fine within 7 days of being served shall be liable to prosecution in respect of the offence to which the notice shall relate and shall upon conviction be liable to a fine not exceeding $500.00.

Elements	Every element (numbers 1–5) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in court. 2. A date or period of time when the offence charged is alleged to have taken place. 3. A public place where the offence was alleged to have been committed. **Specific** 4. The accused is the owner of a motor vehicle. 5. The accused did not: ➢ have a licence for that motor vehicle for that licensing year; or ➢ did not attach the licence to the motor vehicle in the prescribed manner.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence that it was the accused who did not have an annual licence or who failed to attach an annual licence to the motor vehicle in the prescribed manner. **Motor vehicle** The prosecution will need to produce evidence that the accused owned the motor vehicle that did not have a licence.
Additional offences that may be relevant: s 35 TLA	Every person commits an offence against this Act who: ➢ knowingly supplies any false or misleading information under the TLA; or ➢ omits or refuses to supply any information required under the TLA; or ➢ fails to comply with any condition, duty, or obligation imposed in any licence under the TLA; or ➢ without lawful excuse, does not comply with any section of the TLA or causes or permits or suffers a breach of the TLA to be committed.

Unauthorised, deceptive, or obscured registration plates or unauthorised licence: s 11 TA	Section 35(2) TLA sets out a fine of $100 for any breaches. Every person commits an offence who: ➢ attaches or causes to be attached to any motor vehicle any registration plate or licence that is not authorised by this Act, and that is likely to be mistaken for any authorised registration plate or licence; or ➢ in any licensing year attaches or causes to be attached to any motor vehicle any licence that is not a licence issued for that motor vehicle for that licensing year or authorised to be used on that motor vehicle in that licensing year; or ➢ uses any motor vehicle while any registration plate or licence attached to the motor vehicle is in any way obscured or is rendered or allowed to become not easily distinguishable, whether by night or by day.
Sentence: ss 55A–55G TAA (1995)	Fine of $20.

3.2 No driving licence: TA, TAA 1995, 2014, 2016

No driving licence: s 17 TA (as amended by TAA (2016)), s 17A TAA (2014)	Part III – Licensing of drivers of motor vehicles sets out the requirements for driver licences. A person will be guilty of an offence who: ➢ drives a motor vehicle on any road, unless they hold a licence that allows the person to drive a motor car at that time; or ➢ employs or permits any other person to drive a motor vehicle on any road, unless that other person holds a licence that allows them to drive a motor vehicle at that time: s 17(1) TA.
Interpretation: s 2 TA	"Driver" means the driver of a vehicle; and includes the rider of a motorcycle or power cycle or bicycle; and "Drive" has a corresponding meaning. "Driver's licence" means a licence to drive a motor vehicle issued in accordance with the Transport Act. "Licensing year" means a period of 12 months ending with the thirty-first day of March in any year. "Motor vehicle" means a vehicle drawn or propelled by mechanical power; and includes a trailer.

	To "Operate" means to use or drive or ride, or cause or permit to be driven or ridden, or to permit to be on any road whether the person operating is present in person or not. "Owner" means the person lawfully entitled to possession of the motor vehicle unless it is: ➢ to a bailment that is for a period not exceeding 28 days; or ➢ let on hire under a rental-service licence, in which cases "owner" means the person who, but for the bailment or letting on hire, would be lawfully entitled to possession of the motor vehicle; and "owned" and "ownership" have corresponding meanings in all cases. "Transport licence" means a passenger-service licence, a taxicab-service licence, a goods-service licence, a rental-service licence, or as the case may require. "Use" and "to use" includes driving, drawing, or propelling by means of another vehicle, and permitting to be on any road.
Minor offences: Part VA, ss 55A–55G TAA (1995) **Interpretation: s 55A TAA** **Minor offences: s 55B TAA** **Prosecution of minor offences: s 55C TAA (2016)**	"Minor offence" means an offence specified in the Schedule. This includes s 5(2) TA. "Parking offence" means parking in breach of any provision made under this Part. Where a constable has reason to believe that the user of a vehicle has committed a minor offence, the constable may issue a minor offence notice in the form prescribed by regulations made pursuant to this Act, requiring the user of the vehicle to pay a fine of the amount set out in the Schedule in respect of the alleged offence. Every person served with a minor offence notice and who does not pay the fine within 7 days of being served shall be liable to prosecution in respect of the offence to which the notice shall relate and shall upon conviction be liable to a fine not exceeding $500.00.
Elements	Every element (numbers 1–3 and **either** the first set of 4-5 **or** the second set of 4-5) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in court. 2. A date or period of time when the offence charged is alleged to have taken place. 3. A public place where the offence was alleged to have been committed.

	Specific **s 17(1)(a)**: 4. The accused drove a motor vehicle on a road. 5. The accused did not have a licence for the time that authorised them to drive a motor vehicle. ***or*** **s17(1)(b)**: 4. The accused employed or permitted another person to drive a motor vehicle on a road. 5. That other person did not have a licence which authorised them to drive a motor vehicle at the time of the offence.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove it was the accused: ➢ who did not have a licence that authorised them to drive a motor vehicle; or ➢ who employed or permitted another person who did not have a licence to drive the motor vehicle on any road.
Additional offences that may be relevant: s 35 TLA	Every person commits an offence against this Act who: ➢ knowingly supplies any false or misleading information under the TLA; or ➢ omits or refuses to supply any information required under the TLA; or ➢ fails to comply with any condition, duty, or obligation imposed in any licence under the TLA; or ➢ without lawful excuse, does not comply with any section of the TLA or causes or permits or suffers a breach of the TLA to be committed. Section 35(2) TLA sets out a fine of $100 for any breaches.

Part II – Registering and Licensing of drivers of motor vehicles: ss 24 TA; 24A TAA (2016)	Section 24 TA sets out various offences including to alter or add any words or figures to a motor-driver's licence as issued; or to provide any misleading information to obtain one. Section 24A TAA (2016) provides for the making of regulations for driver licensing, including: ➢ different requirements for drivers of different age groups or experience for the issue and expiry of licences; and ➢ the theoretical, practical, and medical examination and testing of applicants and holders of driver licences and appropriate standards to apply.
Sentence: ss 55A–55G TAA (1995)	Fine of $40.

3.3 Reckless of dangerous driving: TA, TAA 2000, 2007, 2014 and 2017

Reckless or dangerous driving: s 27 TA (amended by s 5 2007 TAA)	A person commits an offence who: ➢ recklessly drives a motor vehicle; or ➢ drives a motor vehicle at a speed or in a manner which, having regard to all the circumstances of the case, is or might be dangerous to the public or to any person.
Interpretation: s 2	"Driver" and "drive" means the driver of a vehicle; and includes the rider of a motorcycle or power cycle or bicycle. "Driver's licence" means a licence to drive a motor vehicle issued in accordance with the provisions of this Act. "Motor vehicle" means a vehicle drawn or propelled by mechanical power; and includes a trailer.
Elements	Every element (numbers 1–3 and either of the options under 4) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in court. 2. A date or period of time when the offence charged is alleged to have taken place. 3. A public place where the offence was alleged to have been committed. **Specific** 4. The accused recklessly drove a motor vehicle ***or***

	4. The accused drove at a speed or in a way that was dangerous to the public or to any person at the time of the alleged offence.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the accused who was driving recklessly or speeding and/or driving dangerously. **Recklessly** The term "recklessly" is not defined in the Transport Act. It implies a conscious assumption of risk by the defendant. Reckless driving has a higher degree of culpability than careless driving and requires the police to prove a specific state of mind (knowledge of the danger or risk, intentional risk taking or wilful blindness). The test for reckless driving is whether: ➢ the driver fell below the standard of care expected of a reasonable and competent driver; and ➢ the resulting situation was objectively dangerous; and ➢ the driver was aware of the potential danger and continued to act despite knowledge of the possible consequences. **Dangerous driving** Danger generally refers to the danger of injury to a person, the public or serious damage to property. Any danger to any person, if it is obvious to a careful and competent driver, will be sufficient for dangerous driving. Consider: ➢ does the way the accused drove fall far below what would be expected of a competent and careful driver and would it be obvious to a competent and careful driver that driving in that way would be dangerous? ➢ the circumstances of the case, which may include the nature, condition and use of the road, and the amount of traffic actually on the road or reasonably expected to be on the road. Proof of dangerous driving may be: ➢ pinpointed from a single dangerous act; or

	➢ inferred from proved facts, where the inference is so strong as to admit no other conclusion. There must be some fault on the driver's part that caused the dangerous situation, although it need not be the sole cause.
Additional offences that may be relevant: s 35 TLA	Refer to the Transport Act: ➢ causing bodily injury or death through reckless or dangerous driving or driving while under the influence of drink or drugs: s 25 TA; ➢ causing bodily injury or death through careless use of motor vehicle: s 26 TA; ➢ driving while under the influence of drink or drugs: s 28 TA; ➢ being in charge of a motor vehicle while under the influence of drink or drugs: s 29 TA; ➢ careless or inconsiderate use of a motor vehicle: s 30 TA.
Sentence: s 27 TA (as amended by s 5 TAA 2007) and s 31(2) TA	Maximum penalty: 12 months' imprisonment or fine of $1000. The court may, in addition to a fine or imprisonment, impose disqualification: s 31 (2) Transport Act 1966.
Limited licence: s 31(3)–(6) TA	You may, if satisfied that the order of disqualification has resulted or will result in undue hardship to the applicant or someone else, make an order authorising them to obtain immediately or after a certain period, a driver's licence only for the purpose and to the extent needed to alleviate any hardship: s 31(3) TA. But no order shall be made authorising the applicant to obtain a driver's licence for their work, unless the court is satisfied that such a licence is essential for that work and no other arrangements can be conveniently made to obtain the services of another driver: s 31(3) TA. No such application may be made until: ➢ the expiry of 6 months from the date of the order for disqualification if it is a first offence: s 31(4) TA; or ➢ the expiry of 2 years from the date of the order for disqualification if it is a second or subsequent offence against s 28: s 31(5) TA. You may direct that the period of disqualification so ordered shall commence on a date later than the date of order: s 31(6) TA.

3.4 Driving under the influence of drink or drugs: TA, TAA 2007, 2016 and 2020

Driving under the influence of drink or drugs: s 28 as amended by s 6 TAA (2007) and s 7 TAA (2016)	A person commits an offence who is under the influence of drink or a drug or both to such an extent as to be incapable of having proper control of the vehicle and drives or attempts to drive a motor vehicle on a road or is in charge of a motor vehicle that is on a road.
Interpretation: s 2	"Driver" and "drive" means the driver of a vehicle; and includes the rider of a motorcycle or power cycle or bicycle. "Driver's licence" means a licence to drive a motor vehicle issued in accordance with the provisions of this Act. "Motor vehicle" means a vehicle drawn or propelled by mechanical power; and includes a trailer. "Road" includes a street; and also includes any place to which the public have access, whether as of right or not; and also includes all bridges, culverts, ferries, and fords forming part of any road, street, or place as aforesaid.
Evidence: s 28F TAA (2007) as amended by TAA (2016) **Interpretation: s 2 TAA (2007) and TAA (2020)**	Evidence of the proportion of alcohol or any drug in a specimen of breath or blood provided by the defendant shall, in all cases, be taken into account. It is conclusively presumed that: ➢ the proportion of alcohol or drugs in the defendant's breath or blood at the time of the alleged offence was not less than in the specimen taken from the defendant; ➢ the result of the analysis of the breath or blood specimen taken from the defendant is correct, unless the contrary is proven. **The Transport Amendment Act 2007** "Blood specimen" means a specimen of venous blood taken by a medical officer in accordance with prescribed medical procedures. "Blood test" means the taking of a blood specimen for laboratory analysis. "Breathalyser test" means a test carried out for the purposes of measuring the alcohol content level in a person's breath, by means of an approved device. "Drink" means alcoholic drink. "Drug" includes any substance, not including alcohol, that affects control of the human body, whether taken for medicinal, curative, recreational or ceremonial purposes.

	"Hospital" means a facility that provides medical and or surgical treatment for in-patients or outpatients and includes medical centres. "Medical officer" means: ➢ a registered medical practitioner; or ➢ a person acting in a hospital or doctor's surgery and who, in the normal course of the person's duties, takes blood specimens; or ➢ a nurse or; ➢ (d) a medical laboratory technician. **The Transport Amendment Act 2020** "Prescribed limit" means: ➢ 250 micrograms of alcohol in per litre of breath as measured by an approved device; or ➢ 50 milligrams of alcohol per 100 millilitres of blood as measured by an approved analyst. "Registered medical practitioner" means a person registered as a medical practitioner under s 9 of the Medical and Dental Practitioners Act 1976.
Elements	Every element (numbers 1–4 and either of the options under 5) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in court. 2. A date or period of time when the offence charged is alleged to have taken place. 3. A public place where the offence was alleged to have been committed. **Specific** 4. The accused was under the influence of drink or a drug or both to such an extent as to be incapable of having proper control of the vehicle; and 5. The accused drove or attempted to drive a motor vehicle on a road; ***or*** 5. The accused was in charge of a motor vehicle on a road.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

	Identification In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the accused who was driving under the influence of drink or drugs on a road or was in charge of a motor vehicle on a road. **Under the influence** This term has been amended by the 2016 Transport Amendment Act clarifying that the person is under the influence to such an extent as to be incapable of having proper control of the vehicle. **In charge of** This term is not defined in the Transport Act and therefore has its common sense meaning. **Legal defence** It is a defence under s 28(4) if the person proves on the balance of probabilities, that, at the time they are alleged to have committed the offence, the circumstances were such that there was no likelihood of the person driving the vehicle while they were under the influence of a drink, or a drug, or both.
Additional offences that may be relevant: s 35 TLA	Refer to the Transport Act: ➢ causing bodily injury or death through reckless or dangerous driving or driving while under the influence of drink or drugs: s 25 TA; ➢ causing bodily injury or death through careless use of motor vehicle: s 26 TA; ➢ driving while under the influence of drink or drugs: s 28 TA; ➢ being in charge of a motor vehicle while under the influence of drink or drugs: s 29 TA; ➢ careless or inconsiderate use of a motor vehicle: s 30 TA.
Additional sections that may be relevant: ss 28A–28G as amended by TAA 2007, and 2016	➢ Driving with excessive breath-alcohol or blood-alcohol concentration: s 28A. ➢ Who must undergo breath screening test or breathalyser test: s 28B. ➢ Who must give blood specimen: 28C. ➢ How blood specimen is to be taken: 28D. ➢ Protection of patients: 28E.

	Section 28C sets out who, when required to do so by a constable, must permit a medical officer to take a blood specimen. This is anyone who: ➢ fails or refuses to undergo without delay a breathalyser test under s 28B; or ➢ has undergone a breathalyser test under s 28B and appears to the police to be over the prescribed limit ➢ by 150 micrograms of alcohol per litre of breath; and ➢ within 10 minutes the person advises the constable that the person wishes to undergo a blood test; or ➢ is not able to have a breathalyser test because such a testing device is not readily available; ➢ the constable has arrested without a warrant with good cause to suspect that they have committed an offence under any of ss 28 or 28A; or ➢ is under examination, care, or treatment in a hospital. It is an offence to fail or refuse to: ➢ go with the police to a hospital, police station or other place for a blood specimen to be taken when required to do so under this section; or ➢ remain at the hospital, police station or other place; or ➢ permit a medical officer to take a blood specimen to be taken under this section. It is a defence to proceedings for an offence under this section if the court is satisfied, on the evidence of a registered medical practitioner, that the taking of a blood specimen from the defendant would have been prejudicial to the defendant's health. Section 28D sets out how a blood specimen is to be taken. Section 28E provides for certain requirements to be followed by the medical practitioner who is taking the blood specimen to protect the accused. Section 28G provides for that there is no defence available of non-compliance with any of the requirements of those sections (by the police or a medical officer), for an offence against any of ss 28–28F, if there has been reasonable compliance.
Sentence: s 28(2) TA (as amended by s 6 TAA 2007)	Maximum penalty: 12 months' imprisonment or fine of $1000 or both. The court may also impose a sentence of community work. The court shall in addition to a fine or imprisonment, impose disqualification for a minimum period of 12 months: s 28(2).

3.5 Driving with excessive breath or blood-alcohol: TA, TAA 2007, 2016, 2020

Driving with excessive breath or blood-alcohol: s 28A TA (s 6 TAA 2007)	A person commits an offence who: ➢ drives or attempts to drive a motor vehicle on a road or is in charge of a motor vehicle that is on a road, and ➢ has the proportion of alcohol in their breath or blood exceeding the prescribed limit.
Interpretation: s 2	"Driver" and "drive" means the driver of a vehicle; and includes the rider of a motorcycle or power cycle or bicycle. "Motor vehicle" means a vehicle drawn or propelled by mechanical power; and includes a trailer. "Road" includes a street; and also includes any place to which the public have access, whether as of right or not. and also includes all bridges, culverts, ferries, and fords forming part of any road, street, or place.
Evidence: s 28F TAA (2007) as amended by TAA **Interpretation: s 2 TAA 2007 and (2020)**	Evidence of the proportion of alcohol or any drug in a specimen of breath or blood provided by the defendant shall, in all cases, be taken into account. It is conclusively presumed that: ➢ the proportion of alcohol or drugs in the defendant's breath or blood at the time of the alleged offence was not less than in the specimen taken from the defendant; ➢ the result of the analysis of the breath or blood specimen taken from the defendant is correct, unless the contrary is proven. **The Transport Amendment Act 2007** "Blood specimen" means a specimen of venous blood taken by a medical officer in accordance with prescribed medical procedures. "Blood test" means the taking of a blood specimen for laboratory analysis. "Breathalyser test" means a test carried out for the purposes of measuring the alcohol content level in a person's breath, by means of an approved device. "Drink" means alcoholic drink. "Drug" includes any substance, not including alcohol, that affects control of the human body, whether taken for medicinal, curative, recreational or ceremonial purposes. "Hospital" means a facility that provides medical and or surgical treatment for in-patients or outpatients and includes medical centres.

	"Medical officer" means: ➢ a registered medical practitioner; or ➢ a person acting in a hospital or doctor's surgery and who, in the normal course of the person's duties, takes blood specimens; or ➢ a nurse or; ➢ a medical laboratory technician. **The Transport Amendment Act 2020** "Prescribed limit" means: ➢ 250 micrograms of alcohol in per litre of breath as measured by an approved device; or ➢ 50 milligrams of alcohol per 100 millilitres of blood as measured by an approved analyst. "Registered medical practitioner" means a person registered as a medical practitioner under s 9 of the Medical and Dental Practitioners Act 1976.
Elements	Every element (numbers 1–5) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in court. 2. A date or period of time when the offence charged is alleged to have taken place. 3. A public place where the offence was alleged to have been committed. **Specific** 4. The proportion of alcohol in the accused's breath or blood exceeded the prescribed limit. 5. The accused: ➢ drove or attempted to drive a motor vehicle on a road; ➢ attempted to drive; or ➢ was in charge of a motor vehicle on a road.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

	Identification In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that the accused's breath or blood exceeded the prescribed limit and the accused was driving or attempting to drive a motor vehicle on a road or was in charge of a motor vehicle on a road. **In charge of** This term is not defined in the Transport Act and therefore has its common sense meaning. **Prescribed limit** The term "prescribed limit" is defined in s 2 of the Transport Act as amended by the Transport Amendment Act 2020. **Legal defence** It is a defence under s 28A(3) TA if the defendant proves on the balance of probabilities that, at the time they are alleged to have committed the offence, the circumstances were such that there was no likelihood of the person driving the vehicle while the proportion of alcohol in their breath or blood exceeded the prescribed limit.
Additional sections that may be relevant: ss 28A–28G as amended by TAA 2007, and 2016	➢ Who must undergo breath screening test or breathalyser test: s 28B. ➢ Who must give blood specimen: 28C. ➢ How blood specimen is to be taken: 28D. ➢ Protection of patients: 28E. Section 28C sets out who, when required to do so by a constable, must permit a medical officer to take a blood specimen. This is anyone who: ➢ fails or refuses to undergo without delay a breathalyser test under s 28B; or ➢ has undergone a breathalyser test under s 28B and appears to the police to be over the prescribed limit by 150 micrograms of alcohol per litre of breath, and within 10 minutes the person advises the constable that the person wishes to undergo a blood test; or ➢ is not able to have a breathalyser test because such a testing device is not readily available; or ➢ the constable has arrested without a warrant with good cause to suspect that they have committed an offence under any of sections 28 or 28A; or ➢ is under examination, care, or treatment in a hospital.

	It is an offence to fail or refuse to: ➢ go with the police to a hospital, police station or other place for a blood specimen to be taken when required to do so under this section; or ➢ remain at the hospital, police station or other place; or ➢ permit a medical officer to take a blood specimen to be taken under this section. It is a defence to proceedings for an offence under this section if the court is satisfied, on the evidence of a registered medical practitioner, that the taking of a blood specimen from the defendant would have been prejudicial to the defendant's health. Section 28D sets out how a blood specimen is to be taken. Section 28E provides for certain requirements to be followed by the medical practitioner who is taking the blood specimen to protect the accused. Section 28G provides for that there is no defence available of non-compliance with any of the requirements of those sections (by the police or a medical officer), for an offence against any of ss 28–28F, if there has been reasonable compliance.
Sentence: s 28A TAA (2007)	The maximum penalty is: ➢ a term not exceeding 12 months; or ➢ a fine not exceeding $1,000 or both; and ➢ disqualification with or without condition from holding or obtaining a driver's licence for a minimum period of 12 months. You may also impose a sentence of community work.
Limited licence: s 31(3)–(6) TA	You may, if satisfied that the order of disqualification has resulted or will result in undue hardship to the applicant or someone else, make an order authorising them to obtain immediately or after a certain period, a driver's licence only for the purpose and to the extent needed to alleviate any hardship: s 31(3) TA. But no order shall be made authorising the applicant to obtain a driver's licence for their work, unless the court is satisfied that such a licence is essential for that work and no other arrangements can be conveniently made to obtain the services of another driver: s 31(3) TA. No such application may be made until: ➢ the expiry of 6 months from the date of the order for disqualification if it is a first offence: s 31(4) TA; or ➢ the expiry of 2 years from the date of the order for disqualification if it is a second or subsequent offence against s 28: s 31(5) TA.

	You may direct that the period of disqualification so ordered shall commence on a date later than the date of order: s 31(6) TA.

3.6 Refusal to undergo a breath screening test or breathalyser test: TA, TAA 2007, 2016, 2020

Refusal to undergo a breath screening test or breathalyser test: s 28B as amended by s 8 TAA (2016)	It is an offence to refuse to: ➢ undergo a breath screening test or breathalyser test; or ➢ accompany a constable to a police station; or ➢ remain at the place for testing where the person is required to undergo the breath screening test or breathalyser test: s 28B (4). Where a constable has reasonable cause to suspect that a person: ➢ is driving or attempting to drive or is in charge of a motor vehicle on a road; or ➢ has recently been driving or attempting to drive or has been in charge of a motor vehicle on a road; or ➢ was the driver or person in charge of a motor vehicle that was involved in a motor vehicle crash; the constable may, subject to s 28F, require that person to undergo without delay a breath screening test or a breathalyser test. If the person refuses to undergo a breath screening test as required, the constable may require the person to undergo without delay a breathalyser test. A person who is required to undergo a breath screening test or a breathalyser test must remain at the place where the person undergoes the test until after the result of the test is ascertained. The breath screening test or breathalyser test must be conducted on the spot where the person is apprehended or at a police station.
Interpretation: s 2	"Driver" and "drive" means the driver of a vehicle; and includes the rider of a motorcycle or power cycle or bicycle. "Motor vehicle" means a vehicle drawn or propelled by mechanical power; and includes a trailer. "Road" includes a street; and also includes any place to which the public have access, whether as of right or not. and also includes all bridges, culverts, ferries, and fords forming part of any road, street, or place.

Evidence: s 28F TAA (2007) as amended by TAA (2016)	Evidence of the proportion of alcohol or any drug in a specimen of breath or blood provided by the defendant shall, in all cases, be taken into account. It is conclusively presumed that: ➢ the proportion of alcohol or drugs in the defendant's breath or blood at the time of the alleged offence was not less than in the specimen taken from the defendant; ➢ the result of the analysis of the breath or blood specimen taken from the defendant is correct, unless the contrary is proven.
Interpretation: s 2 TAA 2007 and 2020	**The Transport Amendment Act 2007** "Blood specimen" means a specimen of venous blood taken by a medical officer in accordance with prescribed medical procedures. "Blood test" means the taking of a blood specimen for laboratory analysis. "Breathalyser test" means a test carried out for the purposes of measuring the alcohol content level in a person's breath, by means of an approved device. "Drink" means alcoholic drink. "Drug" includes any substance, not including alcohol, that affects control of the human body, whether taken for medicinal, curative, recreational or ceremonial purposes. "Hospital" means a facility that provides medical and or surgical treatment for in-patients or outpatients and includes medical centres. "Medical officer" means: ➢ a registered medical practitioner; or ➢ a person acting in a hospital or doctor's surgery and who, in the normal course of the person's duties, takes blood specimens; or ➢ a nurse or; ➢ (d) a medical laboratory technician. **The Transport Amendment Act 2020** "Prescribed limit" means: ➢ 250 micrograms of alcohol in per litre of breath as measured by an approved device; or ➢ 50 milligrams of alcohol per 100 millilitres of blood as measured by an approved analyst. "Registered medical practitioner" means a person registered as a medical practitioner under s 9 of the Medical and Dental Practitioners Act 1976.

Elements	Every element (numbers 1–5) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in court. 2. A date or period of time when the offence charged is alleged to have taken place. 3. A public place where the offence was alleged to have been committed. **Specific** 4. The accused: ➢ is driving or attempted to drive on a road; or ➢ has recently been driving or attempting to drive on a road; or ➢ is or was in charge of a motor vehicle on a road; or ➢ was the driver or person in charge of a motor vehicle that was involved in a motor vehicle crash. 5. The accused refused to: ➢ undergo a breath screening test or breathalyser test after being required to do so by the constable; or ➢ accompany a constable to a police station; or ➢ remain at the place for testing where the person is required to undergo the breath screening test or breathalyser test.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the accused who committed the offence. **In charge of** This term is not defined in the Transport Act and therefore has its common sense meaning.

Additional sections that may be relevant: ss 28C–28D amended by TAA 2007, and 2016	Section 28C sets out who, when required to do so by a constable, must permit a medical officer to take a blood specimen. This is anyone who: ➢ fails or refuses to undergo without delay a breathalyser test under s 28B; or ➢ has undergone a breathalyser test under s 28B and appears to the police to be over the prescribed limit by 150 micrograms of alcohol per litre of breath; and within 10 minutes the person advises the constable that the person wishes to undergo a blood test; or ➢ is not able to have a breathalyser test because such a testing device is not readily available; or ➢ the constable has arrested without a warrant with good cause to suspect that they have committed an offence under any of sections 28 or 28A; or ➢ is under examination, care, or treatment in a hospital. It is an offence to fail or refuse to: ➢ go with the police to a hospital, police station or other place for a blood specimen to be taken when required to do so under this section; or ➢ remain at the hospital, police station or other place; or ➢ permit a medical officer to take a blood specimen to be taken under this section. It is a defence to proceedings for an offence under this section if the court is satisfied, on the evidence of a registered medical practitioner, that the taking of a blood specimen from the defendant would have been prejudicial to the defendant's health. Section 28D sets out how a blood specimen is to be taken. Section 28E provides for certain requirements to be followed by the medical practitioner who is taking the blood specimen to protect the accused.
Sentence: s 28A(5) TA as amended by s 8 TAA (2016)	The maximum penalty is: ➢ a term not exceeding 12 months; or ➢ a fine not exceeding $1,000 or both; and ➢ disqualification with or without condition from holding or obtaining a driver's licence for a minimum period of 12 months. You may also impose a sentence of community work.

Limited licence: s 31(3)–(6) TA	You may, if satisfied that the order of disqualification has resulted or will result in undue hardship to the applicant or someone else, make an order authorising them to obtain immediately or after a certain period, a driver's licence only for the purpose and to the extent needed to alleviate any hardship: s 31(3) TA. But no order shall be made authorising the applicant to obtain a driver's licence for their work, unless the court is satisfied that such a licence is essential for that work and no other arrangements can be conveniently made to obtain the services of another driver: s 31(3) TA. No such application may be made until: ➢ the expiry of 6 months from the date of the order for disqualification if it is a first offence: s 31(4) TA; or ➢ the expiry of 2 years from the date of the order for disqualification if it is a second or subsequent offence against s 28: s 31(5) TA. You may direct that the period of disqualification so ordered shall commence on a date later than the date of order: s 31(6) TA.

3.7 Careless driving: TA

Careless driving: s 30 TA	A person commits an offence who uses a motor vehicle on any road carelessly or without reasonable consideration for other persons using the road.
Interpretation: s 2	"Driver" and "drive" means the driver of a vehicle; and includes the rider of a motorcycle or power cycle or bicycle. "Motor vehicle" means a vehicle drawn or propelled by mechanical power; and includes a trailer. "Road" includes a street; and also includes any place to which the public have access, whether as of right or not. and also includes all bridges, culverts, ferries, and fords forming part of any road, street, or place. "Use" and "to use" includes driving, drawing, or propelling by means of another vehicle, and permitting to be on any road.

Elements	Every element (numbers 1–5 below) must be proved beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in court. 2. A date or period of time when the offence charged is alleged to have taken place. 3. A public place where the offence was alleged to have been committed. **Specific** 4. The accused used a motor vehicle on a road. 5. The accused: ➢ was careless; or accompany a constable to a police station; or ➢ did not use reasonable consideration for other persons using the road.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the accused who used a motor vehicle carelessly or used a motor vehicle without reasonable consideration for other persons using the road. **Careless** The essential test of whether driving is careless is whether the standards of driving fell below that of a reasonably skilled and prudent motorist in the circumstances that existed at the time and place. The degree of carelessness is not what happened at the incident but the driver's conduct prior to the incident. Was the driver's carelessness the cause of the incident? The test is an objective one. If the defendant failed to exercise the degree of care a reasonable and prudent driver would exercise in the circumstances, he or she is guilty. There are no separate standards for learner, inexperienced, ill, infirm or incapacitated drivers. They are expected to come up to the standard of the reasonably prudent and careful driver.

	Place The use of motor vehicle must be on a road, which is defined in s 2 of the Transport Act (above).
Sentence: ss 124, 31 TA	The maximum penalty is a fine not exceeding $100: s 124 TA. The court may also disqualify that person from holding or obtaining a driver's licence for a period not exceeding 3 years: s 31(1) TA.
Limited licence: s 31(3)–(6) TA	You may, if satisfied that the order of disqualification has resulted or will result in undue hardship to the applicant or someone else, make an order authorising them to obtain immediately or after a certain period, a driver's licence only for the purpose and to the extent needed to alleviate any hardship: s 31(3) TA. But no order shall be made authorising the applicant to obtain a driver's licence for their work, unless the court is satisfied that such a licence is essential for that work and no other arrangements can be conveniently made to obtain the services of another driver: s 31(3) TA. No such application may be made until: ➢ the expiry of 6 months from the date of the order for disqualification if it is a first offence: s 31(4) TA; or ➢ the expiry of 2 years from the date of the order for disqualification if it is a second or subsequent offence against s 28: s 31(5) TA. You may direct that the period of disqualification so ordered shall commence on a date later than the date of order: s 31(6) TA.

3.8 Failing to stop at a stop sign: TA

Failing to stop at a stop sign: s 45 TA	A person shall, when approaching a stop sign affecting any portion of an intersection, stop their vehicle before entering the intersection in such a position as to be able to ascertain that the way is clear from them to proceed, and shall not proceed unless the way is clear. "Intersection" in relation to two intersecting or meeting roadways, means that area contained within the prolongation or connection of the lateral boundary lines of each roadway.
Interpretation: s 2	"Traffic sign" means a sign erected by the erecting authority for the purposes of this Act and includes the support of the signs. "Vehicle" means a contrivance equipped with wheels or revolving runners upon which it moves or is moved.

Elements	Every element (numbers 1–6) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in court. 2. A date or period of time when the offence charged is alleged to have taken place. 3. A public place where the offence was alleged to have been committed. **Specific** 4. The accused used a motor vehicle. 5. The accused: ➢ approached a stop sign at an intersection and did not stop in such a position as to be able to ascertain that the way was clear; and ➢ did not check to see if the way was clear; and ➢ proceeded through the intersection when it was not clear. 6. There was no legal excuse to pass through the intersection.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** The prosecution must provide evidence to prove that it was the accused who failed to stop at a stop sign. In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the accused who used a motor vehicle carelessly or used a motor vehicle without reasonable consideration for other persons using the road. **Defences** If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. Section 45 provides a specific defence that the driver need not comply with the requirements of this subsection if they: ➢ are using a siren or bell under the authority of this Act: and ➢ go through the intersection at speed not exceeding 20 kilometres per hour; and

	➢ took due care to avoid collision with other traffic. The defence would have to prove this on the balance of probabilities. This section of the Act does not apply at an intersection where traffic at that time is being controlled by a constable: s 45(2) TA.
Sentence: s 124 TA	The maximum penalty is: ➢ Fine not exceeding $100: s 124 TA.

3.9 Speeding: TA, TAA 1995, 2007

Speeding: s 56 TA (as amended by s 8 TAA 2007)	No person shall on any road drive any type of motor vehicle, motorcycle, motorised quad-bike or trike at a speed exceeding 50 kilometres per hour in zones not designated as reduced speed zones and exceeding 30 kilometres in reduced speed zones.
Interpretation: s 2 TA	"Driver" and "drive" means the driver of a vehicle; and includes the rider of a motorcycle or power cycle or bicycle. "Limited speed zone" means a limited speed zone declared under this Act. "Motor vehicle" means a vehicle drawn or propelled by mechanical power; and includes a trailer. "Road" includes a street; and also includes any place to which the public have access, whether as of right or not; and also includes all bridges, culverts, ferries, and fords forming part of any road, street, or place.
Calibration of approved devices: s 56A as amended by s 10 TAA (2007)	An approved device must be supported by a calibration certificate given under this section by a person authorised for the purpose by the commissioner: s 56A(1). A calibration certificate issued is deemed for all purposes conclusive evidence of the matters stated in the certificate, and neither the matters stated in the certificate nor the manufacturer's specifications for the device concerned may be challenged or called into question: s 56A(2). An approved device shall be calibrated every 12 months: s 56A(3).
Minor offences: s 55B TAA **Interpretation: s 55A TAA** **Minor offences: s 55B TAA**	"Minor offence" means an offence specified in the Schedule. This includes s 56 TA. "Parking offence" means parking in breach of any provision made under this Part. Where a constable has reason to believe that the user of a vehicle has committed a minor offence, the constable may issue a minor offence notice in the form prescribed by regulations made pursuant to this Act,

Prosecution of minor offences: s 55C TAA	requiring the user of the vehicle to pay a fine of the amount set out in the Schedule in respect of the alleged offence. Every person served with a minor offence notice and who does not pay the fine within 7 days of being served shall be liable to prosecution in respect of the offence to which the notice shall relate and shall upon conviction be liable to a fine not exceeding $100.00.
Elements	Every element (numbers 1–6) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in court. 2. A date or period of time when the offence charged is alleged to have taken place. 3. A public place where the offence was alleged to have been committed. **Specific** 4. The accused must have driven a motor vehicle on a road in excess of 50 kilometres an hour; or 5. The accused must have driven a motor vehicle in a restricted area in excess of 30 kilometres an hour. 6. There was no legal excuse to speed.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the accused who drove in excess of the speed limits described above. **Restricted area** The minister may from time to time by notice published in the Gazette declare any portion of any road as being a "restricted area". In cases where the accused is charged with driving to excess in a "restricted area" the prosecution will need to provide evidence that the area in which the offence occurred was a "restricted area".

	Defence Section 59 provides a specific defence to any person charged with driving a motor vehicle at a speed in excess of any speed limit fixed under this Act if they prove on the balance of probabilities that at the time of the alleged offence they were driving a motor vehicle: (a) Used as an ambulance and being at the time used on urgent ambulance service; or, (b) Conveying a constable in the execution of urgent duty, if compliance with the speed limit would be likely to prevent or hinder the execution of that duty; or, (c) Used by a fire brigade for attendance at fires and being at the time used on urgent fire-brigade service.
Additional sections that may be relevant	See the transport legislation for full details of each section: ➢ Stopping of Vehicles within half length of clear roadway: s 57 TA; ➢ Reduced Speed Zone: s 58 TA; ➢ Compliance with speed limit not a defence to other charges: s 60 TA.
Sentence: s 124 TA and s 55B TAA as amended by s 9 TAA (2007)	The maximum penalty is: ➢ exceeding speed limit by up to 10 km - fine of $100; ➢ exceeding speed limit between 11km to 20 km - fine of $150; ➢ exceeding speed limit between 21 km to 30 km - fine of $200; ➢ exceeding speed limit over 31 km - fine of $250.

3.10 No warrant of fitness: TA, TAA 1995

No warrant of fitness: s 79 TA	A person is guilty of an offence who operates any motor vehicle on any road without a current warrant of fitness attached in the prescribed form to the motor vehicle. **Requirements** In the case of a vehicle fitted with a windscreen, the warrant shall be affixed to the left-hand side of the inner side of the windscreen so as not to be readily detachable. In the case of a vehicle not fitted with windscreen, the warrant shall be affixed to the inside of a piece of clear glass or other transparent material fitted to an approved waterproof holder, which shall be attached to the vehicle, and which shall be readily visible.

	The expiry date to be enforced on the warrant of fitness shall be the date 6 calendar months from the date of examination. A warrant of fitness may be issued to a vehicle not equipped with lamps as required by ss 66 and 68 of this Act, if such warrant is expressed to be subject to both the following conditions: ➢ that no headlamps shall be fitted to the vehicle; ➢ that the vehicle shall not be operated during the hours of darkness. The warrant of fitness shall be issued only by a person or firm appointed or approved for the purpose by the minister (approved testing authority). No person shall knowingly operate a motor vehicle in which a warrant of fitness is required to be carried, if the vehicle is no longer so equipped as to justify that warrant of fitness.
Interpretation: s 2 TA	"Driver" and "drive" means the driver of a vehicle; and includes the rider of a motorcycle or power cycle or bicycle. "Motor vehicle" means a vehicle drawn or propelled by mechanical power; and includes a trailer. "Road" includes a street; and also includes any place to which the public have access, whether as of right or not; and also includes all bridges, culverts, ferries, and fords forming part of any road, street, or place.
Minor offences: Part VA, ss 55A–55C TAA **Interpretation: s 55A TAA** **Minor offences: s 55B TAA** **Prosecution of minor offences: s 55C TAA**	"Minor offence" means an offence specified in the Schedule. This includes s 79 TA. "Parking offence" means parking in breach of any provision made under this Part. Where a constable has reason to believe that the user of a vehicle has committed a minor offence, the constable may issue a minor offence notice in the form prescribed by regulations made pursuant to this Act, requiring the user of the vehicle to pay a fine of the amount set out in the Schedule in respect of the alleged offence. Every person served with a minor offence notice and who does not pay the fine within 7 days of being served shall be liable to prosecution in respect of the offence to which the notice shall relate and shall upon conviction be liable to a fine not exceeding $100.00.
Elements	Every element (numbers 1–5) must be proved by the prosecution beyond reasonable doubt. **General** 1. The person named in the charge is the same person who is appearing in court.

	2. A date or period of time when the offence charged is alleged to have taken place. 3. A public place where the offence was alleged to have been committed. **Specific** 4. The accused operated a motor vehicle on a road. 5. The motor vehicle did not, at that time, have a current warrant of fitness attached to it at the prescribed place, in the prescribed form.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove it was the accused who operated a motor vehicle on the road without a current warrant of fitness affixed in the correct position.
Sentence: s 124 TA (amended by ss 55A–55C TAA)	The maximum penalty is a fine of $20.

Civil harassment

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1. Civil harassment restraining orders

Making a restraining order with or without a defended hearing

Preliminary matters

1. Preliminary matters involve a complaint being made to the Police about alleged offence(s) of harassment. (Note: the applicant for the restraining order may not know the alleged harasser.)
2. If there is reasonable cause to believe harassment has occurred, the Police will try to contact the alleged harasser (if they can identify them) to get their name and address.
3. The Police will pass this information to the Registrar so the applicant can complete a restraining order application.
4. A copy of the application is served on the respondent (alleged harasser) and their associate(s) if any. Proof of service should be filed on the Court record.
5. The respondent can then either apply to defend the application or do nothing.
6. If the person being harassed is unable (a minor or disabled) or unwilling to make an application, someone else may be appointed as their representative. If the minor or person wishes to be heard on the appointment, set a date to hear them.

Undefended application

7. Ensure all relevant grounds for making a restraining order are proven on the balance of probabilities.

Has the respondent harassed the applicant?

» Two or more similar or different "specified acts" over 12 months against the applicant or their family, such as:

- sending unwanted, suggestive emails or text messages or making phone calls
- following someone at home, work or other places they visit or watching them
- sending unwanted objects, letters or packages
- entering or interfering with property in the person's possession without their consent
- doing something that could make a reasonable person fear for their safety.

These acts must also cause the applicant distress or threaten to cause the applicant distress (or would do so to a reasonable person in the applicant's circumstances).

In all circumstances, does the degree of distress caused or threatened justify making an order?

The restraining order must also be necessary to protect the applicant from further harassment.

There is no legal justification for the behaviour (defence).

Restraining orders

8. You may make a restraining order with the following standard conditions, to prevent the respondent, and any associate(s), from:
   - » doing, or threatening to do, any specified act against the person protected by the order; or
   - » encouraging any person to do any specified act against the person protected by the order, where the specified act, if done by the respondent, would be in breach of the order; or
   - » continuing to act (the respondent must then take reasonable steps to prevent the specified act from continuing).
9. You may make a restraining order for such time (whether longer or shorter than 1 year) as you think necessary to protect the applicant from further harassment. It continues in force until:
   - » it is discharged; or
   - » the expiry of any specified period; or
   - » in the absence of such a direction, the expiry of 1 year from the date on which the order is made.

   Note: As a matter of good practice, it may be sensible to include an express condition that the matter comes back before you for review at least 1 month before expiry or continuation of the restraining order.
10. You may also impose any special conditions for any length of time you think is reasonably necessary, to protect the person for whom the protection the order is made from further harassment by the respondent, their associate(s), or both. If no period is specified, any special condition has effect for the whole of the restraining order, unless varied or discharged sooner.
11. Record your decision and reasons on the Criminal Decision Sheet.
12. Record any standard or special conditions of the restraining order.
13. The Registrar must ensure a copy of the order is:
    - **a.** available or sent to the nearest police station
    - **b.** sent to the applicant
    - **c.** served on the respondent.

Defended application

14. Check if the respondent wishes to be heard on the application and has filed a statement of defence, then set a date and time for the hearing.
15. Hear submissions from the applicant, or their appointed representative, and evidence in support.
16. Hear the submissions from the respondent and evidence in support.
17. Has the respondent established at the hearing that the specified act(s) were done for a lawful purpose?
    - » **Yes** No restraining order may be made and case is dismissed.
    - » **No** Determine the grounds for making a restraining order have been met based on the evidence (see steps 7-13).
18. Has the respondent raised the issue of vexatious proceedings, that is, there is no merit or good reason for the application?
    - » **No** No, repeat steps 7–13.
    - » **Yes** You need to hear the applicant on the issue.
19. Are there any evidential grounds the application has been made to annoy or frustrate the respondent?
    - » **Yes** Make an order preventing the applicant from commencing any civil proceedings under this statute without your leave. Record on the Criminal Decision Sheet.
    - » **No** Proceed and repeat steps 7–13.
20. Any matter raised in defence must be proven on the balance of probabilities.

Power to vary or discharge restraining orders

21. Either the applicant, their representative, or the respondent may apply for an order to:
    - » vary the duration of the order
    - » vary, discharge or impose any special condition(s)
    - » discharge the restraining order
    - » vary the restraining order to apply against a particular person
    - » vary or discharge a restraining order on behalf of a minor.
22. You may make any of these orders as you think fit.
23. However, you may only grant an extension if you are satisfied that it is necessary to protect the applicant from further harassment.
24. An associate of the respondent can apply to discharge a restraining order.
25. A representative of a minor can also defend any such application to vary or discharge a restraining order.

Enforcement of restraining orders

26. It is an offence to either breach the restraining order or not meet any of the conditions, without any reasonable excuse. See Process for criminal harassment for more details.

1.1 Introduction

There are two parts to the Harassment Act 2017 (HA)**: civil restraining orders** and **criminal offences**. A person's behaviour can amount to both criminal and civil harassment. In those situations, the person being harassed can both complain to the police and apply to the court for a restraining order.

- If a person wishes to get a legal order to prevent harassment, they can apply for a restraining order from the court under Part 3 HA. See "Criminal harassment" in "Criminal".
- Protection orders are also available from the Family Court where family members are involved. See "Temporary protection orders".

This section relates to **civil harassment**.

1.2 Relevant legislation

- Constitution of the Cook Islands, art 64 (1)(e), (2).
- Harassment Act 2017 (HA), ss 4–9, 21–41, 44.

1.3 Relevant case law

New Zealand cases:

- *Burrows v Thomson* [2018] NZHC 2761.
- *Waxman v Crouch* [2016] NZHC 2004.
- *Beadle v Allen* [2000] NZFLR 639.

1.4 Key principles

The purpose of the HA is to:

- recognise that behaviour that may appear innocent or trivial when viewed on its own may amount to harassment when viewed in context over time; and
- provide adequate legal protection for all victims of harassment.

You must interpret the HA in accordance with the freedoms that are guaranteed in the Constitution. In particular, the need to balance freedom of expression as protected by the Constitution.

You must ensure that the order is justified in all the circumstances of the case and to protect the applicant and any child of the applicant.

1.5 Restraining order checklist

Check:

- ☐ That the applicant is not in a domestic relationship with the respondent. If they are, they will need to apply for a domestic protection order in the Family Court.

- That the application for a restraining order is filed by a competent adult or willing applicant.
  - If not, you have to appoint a representative on their behalf to make the application.
  - If the applicant is a minor or is otherwise unable to apply, or if they are unwilling to apply, determine whether the appointment is either in their best interests (if unable) or appropriate (if they are unwilling) to make the appointment regardless, and that there is no conflict with the proposed representative. That person is entitled to be heard before any appointment is made.
- That the application has been made on notice, with a copy served on the respondent and every person (associates of the respondent) in respect of whom the restraining order will apply.
- Whether the respondent wishes to be heard on the application and has filed a statement of defence. It is a defence if they establish at the hearing that the specified act was done for a lawful purpose.

All the following requirements or grounds must be established in the application or defended hearing before granting a restraining order:

- The respondent has harassed or is harassing the applicant. This must either be continuing behaviour, or be two or more similar or different "specified acts" over 12 months against the applicant or their family, such as:
  - sending unwanted suggestive emails or text messages or making phone calls; following someone at home, work or other places that they visit or keeping them under watch;
  - sending unwanted objects, letters or packages;
  - entering or interfering with property in the person's possession without their express consent;
  - doing something that could make a reasonable person fear for their safety.
- These acts must also cause the applicant distress or threaten to cause the applicant distress. Whether the behaviour would cause distress, or would threaten to cause distress, to a reasonable person in the applicant's particular circumstances.
- In all the circumstances, that the degree of distress caused or threatened by that behaviour justifies the making of an order.
- The restraining order must also be necessary to protect the applicant from further harassment.
- There is no legal justification for the behaviour (defence).

Note: Section 34(1) allows you to dismiss proceedings if you are satisfied that they are frivolous or vexatious (totally without merit) or an abuse of the procedure of the court. You may also prohibit that person from commencing further proceedings without leave of the court if they persistently bring vexatious proceedings before the court.

1.6 Standard conditions

Standard conditions are either 12 months, or for any length of time that you decide is necessary to prevent the respondent and their associate(s) if any, from:

- doing, or threatening to do, any specified act(s) against the person protected by the
- order;
- encouraging anyone else to do any specified act(s) against the person protected by the order.

But if not specified, the restraining order will expire 1 year after the date on which the order is made. As a matter of good practice, it may be sensible to include an express condition that the matter comes back before you for review at least 1 month before the restraining order expires.

1.7 Special conditions

Special conditions are for a term that you decide (otherwise the same time as the restraining order) and include any such order(s) that you think are necessary to protect the applicant from further harassment.

1.8 Varying, extending and discharging a restraining order

Either party or the appointed representative (if any) may apply to vary, extend or discharge a restraining order or the conditions at any time. You may do so if you think this is appropriate, except for an extension, which must be justified to protect the applicant from any future harassment.

Children's Court and Te Koro Akaau Children's Community Court

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1. Young offenders

Children's Court

Preliminary matters

1. Children who may have committed a crime will first go to the Juvenile Crime Prevention Committee. This is made up of three members:
   - » the chairperson appointed by the Solicitor-General; and
   - » two people appointed by the Minister of Internal Affairs.
2. The Committee has extensive powers and most matters are settled by them.
3. **But** the child may be brought immediately before the High Court or the Children's Court (a division of the High Court), where:
   - **a.** a police officer or community youth officer has made a complaint to the Court that a child is being neglected, delinquent, not under proper control, or living in an environment detrimental to their physical or moral well-being (see the process for a child in need); or
   - **b.** an Information has been laid against a child in respect of any offence.

Check age of young person

Check if there is any birth or baptismal certificate, hospital or health clinic records, church or school records for the child, or any other documents of a similar nature.

If there is insufficient evidence or dispute about the child's age, the Children's Court may fix the age for all Court proceedings.

4. Is the child under the age of 16 years when crime committed?

   Yes The High Court may transfer the matter to the Children's Court.

5. If the young person has reached 16 years of age but is not more than 17 years of age, the High Court may either:
   - **a.** refer the case to the Children's Court to deal with the young person as if they were a child; or
   - **b.** make any order that could be made by a Children's Court if the case were referred the Children's Court.
6. If no Children's Court sitting is held immediately, a Justice may exercise jurisdiction for summary matters, such as bail, and adjourn the case to the next sitting date (refer to the bail flowchart).
7. Is the Information in respect of a homicide (murder or manslaughter)?

   Yes Adjourn and transfer case to the High Court under its criminal jurisdiction. You will also have to decide on bail (refer to the bail flowchart).
8. A community youth officer has to investigate the case circumstances and provide a report, before any case is heard or determined in the Court.

Te Koro Akaau Children's Community Court diversion process

9. When a young offender appears in the Children's Court or the High Court and acknowledges their offence(s), the Justice may refer them to Te Koro Akaau (TKA) or the Children's Community Court.
10. TKA remands the case to the Community Youth Officer to start the process and to:
    a. organise and chair an uipaanga kopu tangata (UKT) or family group conference before the next court date; and
    b. record any agreed recommendations in a kaveinga (diversionary plan).
11. An UKT is held and a kaveinga or diversionary plan (based on the public interests and best interests of the child) is prepared and tabled at the UKT.
12. The child or young person and their family or support group, plus others consider and agree to the kaveinga. The Court must check that the victim has agreed to the kaveinga. If the victim has not agreed, reasons are to be provided for the Court to consider whether or not to endorse the kaveinga.
13. Once agreed upon, the kaveinga is presented to TKA to consider and either accept or reject.
14. If rejected, the kaveinga may be referred for another UKT conference or dealt with by way of sentence.

> **Note:** A case may be referred back to the Court at any stage if this process is no longer appropriate.

15. If accepted, TKA will monitor the kaveinga. The purpose of TKA is to see if the offender can receive a discharge without conviction by performing all aspects of the kaveinga.
16. At the completion court date, TKA may either discharge the child or young person or further sentence them.

See **MOU-Children and Youth Court Process 2014** ➔

Children's Court hearings

17. All hearings in the Children's Court are closed to the public and, unless you consent, no one can publish a report of any proceedings.
18. If, after considering the community youth officer's report, you decide the matter is trivial, you may dismiss the Information and treat it as if it had never been laid.
19. Where the child is charged with an offence, at any time before a final decision, having regard to the gravity of the offence and the public interest, the Children's Court may decline to deal with the offence.
20. If the Court declines to deal with the offence, it must note this on the Information with reasons why and adjourn for hearing "de novo" (as if it had not previously been heard or otherwise disposed of) by the High Court.
21. At the hearing, if the parents are not at Court, ask why. If the reason is not sufficient, adjourn and require the parents' (or guardian's) attendance by issuing a summons.
22. At the hearing, the Court may examine the parents on the upbringing and control of the child.
23. Is there sufficient evidence a charge has been proven against the child or young person? If so, you may decide the matter is trivial (it is in the interests of justice that the matter be resolved informally), after considering the community youth officer's report, you may dismiss the Information and treat it as if it had never been laid. If the matter is more serious, you may choose between the following options: supervision orders, community service orders or probation orders.

Supervision orders

24. **Yes** Rather than convicting the child and sentencing them, you may make a supervision order placing them under the supervision of a community youth officer, after considering: the child's parents, their environment, history, education, mental state, disposition and any other relevant matters.

25. The supervision order may be for up to three years with conditions to ensure the child behaves, or to prevent them from offending. The order may include costs or damages.

Community service orders

26. **Yes** You may make a community service order for a term of up to one year, if the offender is 13 years of age or older and has been found guilty of an offence that carries a prison sentence (even if not convicted); or is liable to imprisonment for non-payment of any previous fine.

27. You must first consider the report of a probation officer (on the offender's character, personal history, and any other relevant circumstances) before you may order community service.

Probation orders

28. You may make an order for probation at the same time:

- **a.** as a community service order, for an offender over the age of 13 years, for a period of up to one year after the expiry of their term of community service; or
- **b.** as a supervision order, so that when the young person reaches 17 years of age, the supervision is to be replaced by probation for up to two years.

29. Has a community youth officer, who is the child's supervisor, applied to cancel the supervision order and to substitute a probation order?

Yes You may grant or refuse the probation order based on the child's behaviour.

30. You may grant a probation order for up to 2 years. Mandatory probation conditions apply as do any additional conditions you decide necessary.

31. At any time after the supervision order is made, the community youth officer may bring the child back before the Court if:

- **a.** a child fails to follow any instructions of the community youth officer or any condition(s) imposed by them or the Court
- **b.** they are not satisfied with the conduct of the child or the conditions they are living in.

32. You may, as appropriate:

- **a.** direct the child to be sentenced by the High Court for the initial offence the supervision order was made for; or
- **b.** make a further order for the maintenance, care and control of the child as necessary in the circumstances.

Review of orders

33. The community youth officer, or the child's parents, guardian or others supervising the child, may apply to the Court to review the supervision order.

34. You may:

a. cancel the order if it has been in force for one year and subject to conditions you think fit; or

b. refuse the application.

> **Note:** No further application may be made within six months after the refusal date except by a community youth officer.

35. Both the young offender and the probation officer may apply to the Court to review the supervision/ probation order at any time, and you may make an order to vary or suspend the conditions in the probation order (or to extend the term if it is less than three years).

36. If the youth offender has done half the term of their probation, they may apply for and you may grant a discharge from probation.

37. You may suspend, vary or cancel the community service order on application by the young offender within seven days of the service of the order.

1.1 Relevant legislation

- Family Protection and Support Act 2017 (FPSA).
- Prevention of Juvenile Crime Act 1968 (PJCA).
- Prevention of Juvenile Crime Amendment Act 2000 (PJCAA).
- Criminal Justice Act 1967 (CJA).
- Criminal Justice Amendment Act 1976 (CJAA) (ss 8–14).

See also:

- MOU – Establishment of Te Koro Akaau Children's Community Court (MOU).

1.2 Key principles for matters in the Children's Court and Te Koro Akaau

The **best interests of the child are the primary consideration** for all proceedings relating to the child's care and protection: s 3 FPSA.

The Children's Court (division of the High Court) is the primary court for dealing with child and youth offenders referred to it by the High Court: ss 19, 21 PJCA.

Check the age of the defendant

- A child is any person under the age of 16 years and a young person is under the age of 17 years: ss 2, 30, 36, 41 PJCA.
- If you are unsure of the age of any child or youth, in the absence of sufficient evidence you may fix their age – which will then be deemed to be the true age of such child or young person for any matters under this Act: s 41 PJCA.

If the child or young person appears before a justice (appointed under ss 20 PJCA, 20A PJCAA) after being arrested and charged or appearing on a summons and does not acknowledge their offence(s), the matter is still dealt with in the Children's Court: ss 19, 21 PJCA; MOU.

1.3 Te Koro Akaau (TKA) Children's Community Court diversion process

Refer the child or young person (under the age of 17 years) to Te Koro Akaau if they have acknowledged their offence (other than murder or manslaughter): cls 1–2 (Background) MOU. Te Koro Akaau offers a more inclusive and community justice approach to dealing with juvenile and youth offenders and will monitor any supervision orders or diversionary plans made: cl 1 (Background) MOU.

Appoint a community youth officer (Internal Affairs) to commence the process: ss 2–3 PJCA.

The overall purpose of Te Koro Akaau is to see whether the offender appearing before the court can receive a discharge without conviction if they have performed all aspects of a diversionary plan (kaveinga) that has been agreed to at a uipaanga kopu tangata (family group conference) and monitored by Te Koro Akaau: cl 3 MOU.

The other purposes of a uipaanga kopu tangata are to:

- discuss the circumstances of the offending;
- seek the views of those in attendance;
- consider whether a reconciliation or other outcome may be arrived at by the parties affected: cl 9 MOU.

The kaveinga and any recommendations must consider the following principles:

- the accountability by the young offender for the wrong that has been done;
- the rehabilitation of the young offender including an assessment of the suitability of their current living arrangements;
- the involvement of the young offender's family, church, chief and village;
- the protection of the community (public interest);
- an acknowledgement of the views of the victim and to restoring the position of the victim according to custom and tradition;
- the putting in place of a plan to rehabilitate the young offender that:
  - fosters responsibility by the young offender; and
  - promotes their self-esteem, cultural awareness and understanding: cl 11 MOU.

The kaveinga is then presented to Te Koro Akaau for them to consider and either accept or reject the kaveinga. If rejected, it may be referred for another conference or dealt with by way of sentence: cl 10 and sch A MOU.

Note: A case may be referred back to the Children's Court at any stage if it is no longer appropriate to use this process: cl 10(b) MOU.

If accepted, Te Koro Akaau will then monitor this plan: sch A MOU.

A family-based approach and the views of the child is an important part of the process. The community youth officer will chair the uipaanga kopu tangata and record any recommendations agreed to at the conference: cl 12 MOU.

Other people who may attend the uipaanga kopu tangata include:

- victims of offences;
- social worker(s), police officer(s), probation officer(s);
- the young offender, their family and any family supporters;
- youth advocate – either lay or professional or both;
- community (village, oire, tapere, and so on) support through aronga mana and religious leaders: cl 14 MOU.

This approach is also consistent with the rights of the child that are set out in the United Nations Convention on the Rights of the Child. Children must always be treated with dignity and respect and protected from harm. This Convention has been adopted by the Cook Islands.

1.4 Checklist for the Children's Court

For all orders record your reasons for your decision.

On each occasion the Children's Court (the Court) is sitting, the Court is closed to all persons except those set out in s 24 of the PJCA.

Jurisdiction

- ☐ Has a police officer or a community youth officer made a complaint to the Court (using Form 3 in the Schedule of the PJCA) that a child is in need, being neglected, delinquent, not under proper control, or is living in an environment detrimental to their physical or moral well-being?
- ☐ Has an Information been laid against a child in respect of any offence under ss 22 (1)(b), 26 PJCA?
- ☐ Was the defendant under the age of 16 years when the crime was committed; or when the complaint of a child in need was made?

  If so, transfer to the Children's Court in the area.

  - If there is insufficient evidence or any dispute about the young person's age, the Court may fix the age for all proceedings under s 41 of the PJCA.
  - Before fixing the young person's age, check if there are any birth certificates or baptismal certificates, hospital or health clinic records, church records or school records of the person or any other documents of a similar nature.

  Note: It can be difficult to determine age solely on physical appearance.
- ☐ Is the Information in respect of a homicide (murder or manslaughter)? If so, adjourn the case, and transfer the case to the High Court under its criminal jurisdiction. You will also have to decide on bail (see "Bail"): ss 20(1), 20A, 21, 26 PJCA, PJCAA.
  - If the Information is not in respect of a homicide, you may issue a summons addressed to any parent, guardian or custodian of the child requiring them to appear before the Court with the child at a time to be named in the summons: s 22(1)(b) PJCA.
  - If there is no Children's Court sitting immediately, a justice may exercise jurisdiction for summary matters such as bail and adjourn the case for the next sitting date in the Court (see "Bail"): ss 20(1), 20A, 26 PJCA; PJCAA.
- ☐ Has a community youth officer investigated the circumstances of the case and provided a report to the Court before any case is heard or determined in the Court? ss 23 PJCA.

Warrant to uplift a child in need: s 22 PJCA

- ☐ Have either the police or a community youth worker applied for a warrant to uplift a child in need where a complaint to the Court has been made?

- If such an application has been made, you may issue a warrant if are you satisfied on the evidence that a child is living in a bad environment, likely to be ill-treated or neglected, or for any other reason the child should immediately be removed from their surroundings.
- Under the warrant, the police or community youth officer may enter, search, remove and detain the child until the complaint has been dealt with, and may otherwise provide for the temporary care of the child.

Children's Court

Each time the Court sits, you should conduct proceedings in a way that is appropriate and sensitive to the young person's needs (given their age and vulnerability) including:

- safeguarding their procedural rights to a fair hearing;
- conducting the matters in an informal manner to encourage maximum participation by the young person and their parents, and addressing the young person in a manner appropriate to their age and intellectual development;
- giving the young person and their parents or guardians full opportunity to be heard and to participate in the proceedings, as far as this is practicable;
- asking the young person to declare, "I promise to speak the truth, the whole truth, and nothing but the truth" instead of swearing an oath;
- ensuring that the best interests of the young person are the primary consideration.

If the parents are not there, ask why, and if the reason given is not sufficient, you should adjourn and require the attendance of the parents, or guardian by issuing a summons: s 22 PJCA.

You may examine the parents once they appear on the upbringing and control of the child: s 22 PJCA.

At the hearing, you should determine whether there is sufficient evidence that the child is "in need" or that a charge has been proven against them.

Where the child is charged with any offence, at any time before a final decision has been given, having regard to the gravity of the offence and the public interest, you may decline to deal with the offence: s 26(4) PJCA.

If you decline to deal with the offence, you must note this on the Information with your reasons. In that case, you should adjourn the Information for hearing "de novo" (as if the same had not previously been heard or otherwise disposed of) by the High Court: s 26(5) PJCA.

Sentencing and other options

If you decide that the matter is trivial (it is in the interests of justice that the matter be resolved informally), after considering the community youth officer's report, you may dismiss the Information. It is then treated as if it had never been laid: s 25 PJCA.

You may also choose between the following options for children and young offenders:

- supervision orders;

- community service orders;
- probation orders.

Supervision order

After considering the child's or young offender's parents, their environment, history, education, mental state, disposition, and any other relevant matters, you may make a supervision order placing the child under the supervision of a community youth officer, rather than convicting the child or young offender and sentencing them: s 27 PJCA.

You will need to consider:

- the appropriate length of supervision – up to 3 years in total;
- any appropriate conditions to ensure the child behaves, or to prevent them from offending;
- whether the young offender should pay for any costs or damages incurred by or through their offending.

At any time after the supervision order is made, the community youth officer may bring the child back before the Children's Court if:

- the child or young offender fails to follow any instructions of the community youth officer or any condition(s) imposed by that officer or the Court;
- the youth officer is not satisfied with the conduct of the child or young offender or with the conditions under which they are living: ss 27–29 PJCA.

You may, as appropriate:

- direct that the child or young offender be sentenced by the High Court for the initial offence for which the supervision order was made; or
- make such further orders for the maintenance, care and control of the child or young offender as may be necessary in the circumstances.

The community youth officer, or the child's or young offender's parents, guardian or other supervisors, may apply to the Court to review the supervision order. If so, you may:

- cancel the order if it has been 12 months since the order was made and subject to such conditions you think fit to impose; or
- refuse the application.

Note: No further application may be made within 6 months after the date of the refusal except by a community youth officer.

Community service order

You may make a community service order for a term up to 12 months if the young offender is not less than 13 years of age and has been found guilty of an offence that carries a prison sentence (even if not convicted); or is liable to imprisonment for non-payment of any fine imposed on them previously: ss 8–9 CJAA.

Before making an order for community service, you must first consider the report of a probation officer (on the young offender's character, personal history, and any other relevant circumstances): s 13(1) CJAA.

Probation order

When you make a supervision order, you may at the same time order that when the young offender reaches 17 years of age, the supervision is to be replaced by probation: s 30 PJCA.

A community youth officer, who is the young offender's supervisor, may apply to cancel the supervision order and to substitute a probation order: s 31 PJCA.

In both cases, you may grant or refuse the probation order depending on the young offender's behaviour.

You may also order probation to follow a community service order on the expiry of the term of that order: s 10 CJAA.

If you grant the probation order you will need to consider:

- the appropriate length of probation:
  - for up to 2 years, if made as part of a supervision order, so that when the young person reaches 17 years of age, the supervision is to be replaced by probation for up to 2 years: s 30(1) PJCA; or
  - for a period of up to 1 year if made as part of a community service order for an offender over the age of 13 years, after the expiry of their term of community service: ss 10(1)–(2); 12–13(1) CJAA;
- any appropriate additional conditions (from the probation conditions in ss 7–8 of the CJA) to ensure the young offender behaves or to prevent them from offending: ss 32–34 PJCA.

The following sections of the CJA apply to every youth on probation:

- s 9 (vary or discharge probation);
- s 10 (breach of probation conditions);
- s 12 (effect of subsequent sentence on probation); and
- s 13 (discharge on expiry of probation).

MEMORANDUM OF UNDERSTANDING

Te Koro Akaau

Parties

This Memorandum of Understanding is entered into between

1. The House of Ariki by the President
2. Cook Islands Police Service by its Commissioner
3. The Crown Law Office by the Solicitor-General
4. The Ministry of Justice by its Secretary
5. The Ministry of Internal Affairs by its Secretary
6. The Judiciary of the Cook Islands by the Chief Justice

Background

1. We, the parties named above, are desirous of implementing some changes in the format of courts convened under the Prevention of Juvenile Crimes Act 1968 (the Act). These changes are based on a more community involved form of justice and rehabilitation of young offenders who have acknowledged their transgressions and are referred to the Children's Court for the monitoring of their supervision orders and diversionary plans.

2. The Children's Court will remain the primary Court for dealing with Children and Youth Offenders referred to it by the High Court. Where a child or youth offender has acknowledged his/her transgression he/she is then referred to Te Koro Akaau.

3. The prime philosophy of Te Koro Akaau is to see whether the offender appearing before the Court can receive a discharge without conviction by having performed all aspects of a diversionary plan that has been agreed to at a Uipaanga Kopu Tangata (conference) and sanctioned and monitored by Te Koro Akaau.

4. These changes are not meant to replace the Courts that are currently convened under the Act, but are to offer alternative methods of dealing with juvenile and youth offenders.

5. Many of us have experienced Te Kooti Rangatahi and Pasifika Children's Court procedures in New Zealand and, without departing from our Cook Islands customs and heritage, we wish to introduce similar inclusive and community justice options into the Cook Islands and more particularly Rarotonga.

6. As with the New Zealand models it is intended that this Court would involve, to a much larger degree than currently, the family of the offender and support for the offender and his/her family through government provided social services and monitoring agencies; advocacy either lay or professional or both; and community (village, oire, tapere, etc.) support through aronga mana and religious leaders. Most importantly, the opportunity for victims of offences to participate in the process must be made available.

Operative Part

Entry into Te Koro Akaau

1. Child or Youth offenders' matters shall be referred to Te Koro Akaau after process in the Children's Court and High Court. The overall process shall generally be that set out in the flow diagram attached as Schedule A hereto (and as further described below).

Judicial Officers

2. Justices of the Peace who are appointed under section 20 of the Act are able to preside in Te Koro Akaau.

Location

3. It is the intention that Te Koro Akaau will be convened in the Vaka where the youth offender resides and at such locations as are approved by the Registrar.

Frequency

4. As determined by the Registrar.

Who attends

5. Section 24 of the Act provides:

"Proceedings not open to the public -

(1) No person shall be entitled or permitted to be present at the hearing of any proceedings in the Children's Court, save the following:

(a) Any officer or member of the Court;
(b) The persons immediately concerned with the proceedings;
(c) The parents or guardians of any child in respect of whom the proceedings are taken, or any other person whom the Court may admit as the personal representative of the child;
(d) Any community youth officer;
(e) Any person representing a social welfare agency engaged in work for the benefit of children;
(f) Any other person specially permitted or required by the Court to be present.

(2) Save with the special consent of the presiding Judge or Justice, it shall not be lawful for any person to publish a report of any proceedings taken before a Children's Court; and in no case shall it be lawful to publish the name of any child, or any other name or particulars likely to lead to the identification of the child.

(3) Every person who commits a breach of the subsection (2) of this section shall be guilty of contempt of Court, and shall be liable accordingly and in addition shall be liable on conviction to a fine not exceeding two hundred dollars."

6. It is envisaged that people permitted under s24(1)(f) shall include, but not be limited to,

Traditional Leaders, Vaka/tapere Elders and any other person whom the Court considers

able to assist in the resolution of the matter before it. Rights of address shall be as determined by the presiding judicial officer.

Role of the Ministry of Justice

7. The administration and operation of Te Koro Akaau shall be the responsibility of the Ministry of Justice.

Relationship of Te Koro Akaau to conventional court

8. Te Koro Akaau operates and exists within the legal framework of the High Court and Children's Court.

Uipaanga Kopu Tangata (Conference)

9. Purpose of Conference:

   (a) Any Conference must:

      (i) discuss the circumstances of the offending; and
      (ii) seek the views of those in attendance; and
      (iii) consider whether a reconciliation or other outcome may be arrived at by the parties affected.

   (b) A recommended outcome may include payment to any victims for reparation, property loss, medical expenses incurred or any other reasonable loss suffered by the victim as a result of the young offender's actions.

10. For the avoidance of doubt:

   (a) There may be one or more Conferences as required in each case;

   (b) The individual file may be referred back to the Children's Court at any stage if it is no longer appropriate to utilise the procedure recorded in this MOU.

11. Principles to consider at a Conference. Any recommendation determined at a Conference shall have regard to the following principles:

   (a) The accountability by the young offender for the wrong that has been done;

   (b) The rehabilitation of the young offender including an assessment of the suitability of his or her current living arrangements;

   (c) The involvement of the young offender's family, church, chief, and village;

   (d) The protection of the community;

   (e) An acknowledgement of the views of the victim and to restoring the position of the victim in accordance with the Cook Islands custom and tradition;

   (f) The putting in place of a plan for rehabilitation of the young offender that fosters responsibility by the young offender and which promotes the young offender's self-esteem, cultural awareness and understanding.

12. The Community Youth Officer is to chair and then record any recommendation agreed at the Conference.

Guide to procedure

13. Te Koro Akaau shall be convened once there is a rehabilitation plan (containing a recommendation) agreed at the Conference.

14. The procedures of Te Koro Akaau should be along the following lines:

    (a) Judicial Officer already seated at bench, with Traditional Leaders Representatives, Social Worker, Community Youth Officer, Probation Officers, victim and Police already seated before young person and his support group enters the court area and sits with lay advocate and lawyer;

    (b) Elder speaks and offers a prayer;

    (c) Judicial Officer introduces self and young person introduces family/supporters to judge;

    (d) Rehabilitation plan (plus recommendation) tabled;

    (e) Direct discussion between Judicial Officer and young person to discuss reason for appearance, monitoring and progress. Up to a 40 minute very interactive discussion and quite personal;

    (f) Youth advocate speaks and refers to report and tasks undertaken and those yet to be undertaken

    (g) Lay advocate speaks on how relationship with young person has gone and offers insights into personality/character;

    (h) Judicial Officer offers victim the opportunity to address the court/gathering (if needed);

    (i) Social worker invited to comment;

    (j) Judicial Officer invites family or other community support to comment;

    (k) Judicial Officer asks police to comment especially as to disposition - for instance a section 25 discharge or section 26 Supervision Order;

    (l) Judicial Officer offers young person the opportunity to address the court/gathering;

    (m) Judicial Officer discusses next event or, if all tasks completed, disposition;

    (n) Closing prayer and address by elder;

    (o) In the event of a discharge a ceremony is undertaken and, if appropriate, a song is sung.

Commencement

15. It is envisaged that the commencement of the Te Koro Akaau be on or about 1 October 2014.

Tou Travel Ariki
Kaumaiti Nui
President - House of Ariki

Hon. Thomas Crowley Weston QC
Chief Justice of the Cook Islands

Ms Kim Saunders (or delegate)
Solicitor-General

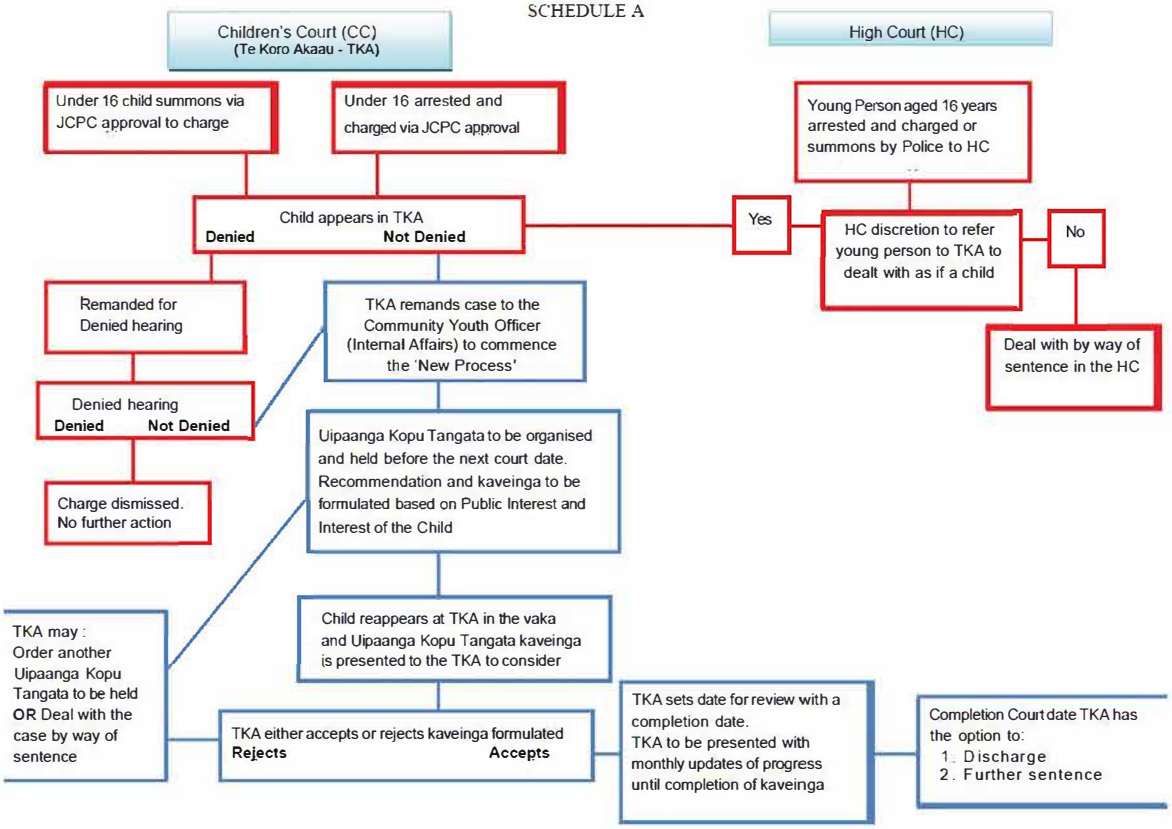
Mr Tingika Elikana
Secretary – Ministry of Justice

Mr Maara Tetava
Commissioner of Police

Ms Bredina Drollet
Secretary – Ministry of Internal Affairs

Dated this 24th day of September 2014

SCHEDULE A


Children's Court (CC)
(Te Koro Akaau - TKA)
High Court (HC)
Under 16 child summons via JCPC approval to charge
Under 16 arrested and charged via JCPC approval
Young Person aged 16 years arrested and charged or summons by Police to HC
Child appears in TKA
Denied
Not Denied
Yes
HC discretion to refer young person to TKA to dealt with as if a child
No
Deal with by way of sentence in the HC
Remanded for Denied hearing
TKA remands case to the Community Youth Officer (Internal Affairs) to commence the 'New Process'
Denied hearing
Denied
Not Denied
Charge dismissed. No further action
Uipaanga Kopu Tangata to be organised and held before the next court date. Recommendation and kaveinga to be formulated based on Public Interest and Interest of the Child
TKA may : Order another Uipaanga Kopu Tangata to be held OR Deal with the case by way of sentence
Child reappears at TKA in the vaka and Uipaanga Kopu Tangata kaveinga is presented to the TKA to consider
TKA either accepts or rejects kaveinga formulated
Rejects
Accepts
TKA sets date for review with a completion date.
TKA to be presented with monthly updates of progress until completion of kaveinga
Completion Court date TKA has the option to:
1. Discharge
2. Further sentence

2. Child in need

Children's Court

Preliminary matters

1. Notice for a child in need will first go to the Juvenile Crime Prevention Committee. This committee is made up of three members:
   - » the chairperson appointed by the Solicitor-General; and
   - » two people appointed by the Minister of Internal Affairs.
2. The Committee has extensive powers and most matters are settled by them.
3. Although a child in need is usually helped by the Committee, there is also a power to bring the child immediately before the Court, where:
   - **a.** a police officer or community youth officer has made a complaint to the Court that a child is being neglected, delinquent, not under proper control, or living in an environment detrimental to their physical or moral well-being (using form number 3 in the Schedule); or
   - **b.** an Information has been laid against a child in respect of any offence (see process for young offenders).

Warrant to uplift a child in need

4. Where a complaint to the Court has been made, and the matter is urgent, have the police or a community youth officer applied for a warrant to search, enter and remove a child from the premises and place them in temporary care?

   Yes You may issue a warrant if satisfied a child is living in a place of ill-repute, likely to be ill-treated or neglected; or for any other reason you believe the child should be removed from their surroundings.

   Police or a community youth officer may then enter, search, remove the child and provide for their temporary care.
5. Is the child under the age of 16 years when the complaint of a child in need is made?

   Yes Transfer to the Children's Court in the area.

Children's Court and supervision order

6. **Check age of young person**

   Check if there is any birth or baptismal certificate, hospital or health clinic records, church or school records for the child, or any other documents of a similar nature.

   If there is insufficient evidence or dispute about the child's age, the Children's Court may fix the age for all proceedings in the Court.

7. A community youth officer has to investigate the circumstances of the case and provide a report before any case is heard or determined in the Court.

8. All hearings in the Court are closed to the public and, unless you consent, no one can publish a report of any proceedings.

9. If the parents are not at Court, ask why. If the reason is not sufficient, adjourn and require the parents' (or guardian's) attendance by issuing a summons.

10. At the hearing, the Court may examine the parents on the upbringing and control of the child.

11. At the hearing, is there sufficient evidence the child is "in need"?

    Yes If you are satisfied of the truth of the complaint, you may make a supervision order placing the child or young person under the supervision of a community youth officer.

Family

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1. Family Protection and Support Act 2017: Civil jurisdiction

Section 138 of the Family Protection and Support Act 2017 (FPSA) sets out your power or civil jurisdiction to make different orders under the relevant sections of the FPSA, as set out in the table below.

Every question of fact arising in any proceedings under this Act (other than criminal proceedings) must be decided on the **balance of probabilities**.

Civil jurisdiction under the Family Protection and Support Act	
Domestic and child support orders	
➢ Divorce order, s 10 ➢ Variation or discharge of support order, s 15 ➢ Domestic support order, s 17 ➢ Childbearing expenses order, s 19	➢ Child support order, s 21 ➢ Child support order for adult child, s 23 ➢ Support enforcement order, s 24 ➢ Paternity order, s 27 ➢ DNA parentage testing, s 29
Parenting orders	
➢ Parenting order, s 40 ➢ Vary or discharge parenting order, s 42 ➢ Parenting enforcement order, s 44	➢ Registration and review of parenting plan, ss 37–38 ➢ Major long-term issues order, s 35
Care and protection orders	
➢ Warrant for return of child, s 45 ➢ Safety warrant and extension ss 54(1), 55(4)(c) ➢ Supervision order, s 57 ➢ Variation or discharge of supervision order, s 61	➢ Care order, s 63 ➢ Variation or discharge of care order, s 64 ➢ Contact order, s 68 ➢ Preventing removal of child, s 132
Domestic violence protection orders	
➢ Temporary protection order, s 99 ➢ Variation and discharge of protection order, ss 106–107 ➢ Conditions relating to weapons, s 103 ➢ Conditions relating to occupation of shared residence, s 104	➢ Compensation for injuries and losses, s 119 ➢ Compensation for expenses, s 120 ➢ Direction to organise hearing, s 100
Procedural orders	
➢ Registration of overseas order, s 130 ➢ Social welfare report, s 70 ➢ Medical and psychological report, s 71 ➢ Non-disclosure of report, s 77	➢ Legal representation for child, s 128 ➢ Representative for child, s 129 ➢ Uipaanga Kopu Tangata, s 69

Justices of the Peace are officers of the High Court. Accordingly, the Code of Civil Procedure of the High Court Act 1972 (the Code) applies to FPSA cases. Applications, such as an application for divorce, are originating applications under the Code.

2. Care and protection arrangements for children

Preliminary matters

1. Has a person (who suspects a child is in need of care or protection) notified the Ministry of Internal Affairs (the Ministry) that they believe the child has possibly been abused? Has that person given reasons for that belief?
2. **If the matter is urgent**, the Police or Secretary of the Ministry may apply for a **safety warrant** for the Police to search, enter and remove a child from premises and place them in Ministry care.
3. You may order the safety warrant if satisfied the child urgently needs care and protection.
4. The Secretary must, within 7 days:
   - » release the child from Ministry care if satisfied care and protection are no longer needed; or
   - » convene an **uipaanga kopu tangata (family group conference)** (but not if sexual or physical abuse by a parent, family member, or caregiver is suspected); or
   - » apply to the Court for a care order.
5. **If the matter is not urgent**, has the caregiver requested a temporary care arrangement (TCA) for the child? If a caregiver can't be found after making reasonable inquiries, or is incapable of agreeing to the TCA, then the Secretary for the Ministry may apply for the TCA.
6. The Secretary may make temporary care arrangements for up to 3 months. They must then convene an uipaanga kopu tangata, unless the person requesting the TCA is able and willing to provide the child with day-to-day care.
7. You may also direct the Secretary to convene an uipaanga kopu tangata and adjourn any application for care and protection orders until this has been held.

Uipaanga kopu tangata meeting

8. A registered chairperson appointed by the Secretary must set up the meeting within a reasonable timeframe and notify people entitled to attend, including:
   - » the child, parents, proposed or actual caregivers
   - » Ministry staff
   - » any other family members
   - » community members, social worker, police or other support person or advocate for the child.
9. If, at any time before or during an uipaanga kopu tangata, the chairperson believes there has been sexual or physical abuse by a parent, family member, or caregiver, they must:
   - » immediately stop the uipaanga kopu tangata; and
   - » apply to the court for a supervision or care order.
10. If the child is too young to understand and doesn't take part in the uipaanga kopu tangata, the chairperson must take all reasonable steps to include the child's view and ensure this is taken into account.
11. If a person entitled to attend can't do so, their views may be put forward by the chairperson, if they have been notified in advance.
12. The chairperson must hear the participants' views on whether the child needs care and protection and, if so, what is an appropriate arrangement for this.

13. The chairperson must help the participants to:
    - » reach a written and signed agreement (**kaveinga a te kopu tangata**) with all the details of who will care for the child and other arrangements for their education, welfare, employment, recreation and so on, with a fixed date for review; or
    - » apply for a care order; or
    - » renew the TCA for up to 3 months.
14. If the participants are unable to agree, the chairperson must inform the Secretary or you (if the uipaanga kopu tangata was convened by order of the Court) that no agreement was reached and the reasons why.
15. If the parties cannot agree at an uipaanga kopu tangata, the Secretary must:
    - » release the child from the care of the Ministry, if satisfied the child no longer needs care and protection; or
    - » make a temporary care arrangement for up to 3 months; or
    - » apply to the Court for a care order.
16. At the end of 3 months, a further uipaanga kopu tangata may be convened by the Secretary, if this was agreed. The participants must either:
    - » specify a caregiver for the child; or
    - » apply to the Court for a care order.

Care and protection orders

Preliminary matters

17. You may of your own accord, or at the request of any party, adjourn a hearing for up to 28 days, to order written reports, for example, social welfare or a medical and psychological report.

Supervision or care orders

18. If the Secretary applies, you may grant a supervision or care order for the child, if satisfied they need care and protection and it is in their best interests.
19. Hear the applicant's submissions and any evidence to support the need for care and protection.
20. Weigh up the relevant factors to decide the best interests of the child, if it's appropriate to make a supervision order and on what terms.
21. Make your decision based on the evidence and include any conditions you think appropriate. Record it in the court register with your reasons for either granting the supervision order or dismissing the application.

    Note: A supervision order lasts until the child turns 18 years, unless varied or discharged earlier.

22. The supervisor, the child or any other person with your leave, may apply to vary or discharge the supervision order.
23. You may vary or discharge the supervision order if satisfied it is no longer in the best interests of the child, no longer necessary or not being complied with.

Care order

24. The Secretary may apply for a care order if they believe the child is, or is likely to be, in need of care and protection.
25. Hear the submissions from the applicant and evidence supporting that the child is, or is likely to be, in need of care and protection and it is in the child's best interests to be placed in the Ministry's care.
26. Make your decision as to what is in the best interests of the child and give reasons why you have granted or dismissed the application. Otherwise repeat step 20.

> **Note:** A care order lasts until the child turns 18 years, unless varied or discharged earlier.

27. The supervisor, the child or any other person with your leave, may apply to vary or discharge the care order.
28. You may vary or discharge the care order if satisfied it is no longer in the best interests of the child, or the child's circumstances have changed, so the order should be changed to safeguard or promote the child's welfare.

Contact order

29. Where a child is in the care of the Ministry, the person seeking contact can apply for a contact order; or the Secretary, the child, or any person (with the leave of the Court) may apply to prevent or restrict contact with the child.
30. Hear the submissions from the applicant and decide if any conditions are appropriate.
31. Repeat step 20 – except the decision is to grant, restrict or prohibit contact.
32. The supervisor, the child or any other person who is authorised to have contact, may apply to vary or discharge the contact order.
33. You may vary the contact order if satisfied the circumstances of the child have changed, or discharge the contact order if it is no longer necessary to safeguard the child's best interests.

Warrant to prevent removal of a child from the Cook Islands and hearing

34. Are there reasonable grounds to believe someone is about to remove a child from the Cook Islands (person A) and this is likely to:
    - » breach an order made under this Act; or
    - » breach a kaveinga a te kopu tangata; or
    - » defeat the claim of someone who has applied, or is about to apply, for an order.
35. If so, you may:
    - » issue a warrant for a police officer to take immediate custody of the child and place them in Ministry care for up to 28 days
    - » order police to take any tickets or travel documents of the child or person A, or both, for any length of time and on any conditions you think necessary.
36. Direct the Registrar to schedule a hearing to determine the matter within 28 days.
37. Hear the submissions and decide if the evidence proves beyond reasonable doubt:
    - » the claim of a breach against any order under this Act or a kaveinga a te kopu tangata or to defeat a possible claim of someone who will apply for an order;
    - » this person attempted to remove any child from the Cook Islands, without leave from the Court; and
    - » did they do so knowing that:
        - » another person has applied, or is about to apply, for an order under this Act; or
        - » a parenting order, contact order, or a kaveinga a te kopu tangata is in force.
38. If found liable, you may impose a fine up to $1,000, or up to 12 months imprisonment, or both.
39. Record your decisions and the reasons for it in the Court Register.

2.1 Relevant legislation

- Family Protection and Support Act 2017 (FPSA).
- Family Protection and Support (Amendment) Act 2017 (FPSAA).

2.2 Key principles

The best interests of the child are the primary consideration for all proceedings relating to the child's care and protection. A child is any young person up to the age of 18 years.

The different types of orders and care arrangements provide care and protection for children who have experienced harm, abuse, neglect or deprivation.

You should also try to support the parents and caregivers to protect and prevent their child from experiencing harm.

Where possible the views of the child should be also be taken into account.

This family-based approach and the rights of the child to be heard are set out in the process for an uipaanga kopu tangata. This meeting is chaired by an appropriately trained registered chairperson with experience in care and protection matters. The purpose of this meeting is to:

- determine whether a child is in need of care and protection;
- make a kaveinga a te kopu tangata (agreement in writing) specifying agreed arrangements for the child's care and protection;
- review any kaveinga already in force.

The only time this meeting is not suitable is where the Secretary for the Ministry of Internal Affairs (Ministry in charge of care and protection of children) believes there has been sexual or physical abuse of the child by a parent, family member, or caregiver.

Note: This approach is also consistent with the rights of the child that are set out in the United Nations Convention on the Rights of the Child. Children must always be treated with dignity and respect and protected from harm. This Convention has been adopted by the Cook Islands.

It is only if a child is at serious risk of harm that you may order their immediate removal from their parents or caregivers (even if this is against the child's wishes) and temporary placement in an appropriate family-like setting.

You must always consider whether such separation is necessary for the best interests of the child.

For reference, there is a lot of case law in New Zealand as to welfare and best interest issues for children. The relevant principles are now set out in s 5 of New Zealand's Care of Children Act 2004 (COCA).

These factors may provide some guidance when considering Part 4 (Parenting arrangements) FPSA. They are all treated equally.

These principles include:

- a child's safety must be protected, and they should be protected from all forms of violence (especially if there is family violence and any protection orders or parenting orders in place);
- a child's care, development, and upbringing should be primarily the responsibility of their parents and guardians;
- a child should have continuity in their care, development, and upbringing;
- a child should continue to have a relationship with both of their parents, and their relationship with their extended family group should be kept and strengthened.

2.3 Checklist for care and protection orders

Record all orders and your reasons for your decision.

Temporary care arrangements (TCA): ss 52–53 FPSA

- ☐ Has the person providing day-to-day care of the child made a request for TCA (to place children in the care of the Ministry) to the secretary?
- ☐ Have reasonable enquiries been made to find the person who has day-to-day care of the child?
- ☐ Has that caregiver not been found, or if contact is made, is incapable of requesting or agreeing to the TCA?
- ☐ Is the TCA only for a period up to 3 months?
- ☐ Is the person who requested the TCA able and willing to resume providing day-to-day care of the child, in which case the TCA ends?
- ☐ Has the Secretary organised a uipaanga kopu tangata to:
  - ☐ specify a caregiver(s) for the child; or
  - ☐ apply to the court for a care order; or
  - ☐ renew the TCA for up to a further 3 months?
- ☐ Has the Secretary at the next meeting specified a caregiver(s) or applied for a care order?

Warrant for return of a child: s 45 FPSA

- ☐ Has a parenting order has been breached?

If so, you may grant a warrant for the police (or the person named in the warrant) to immediately uplift a child and return them to the caregiver under a parenting order.

Safety warrant: ss 54–55 FPSA

- ☐ Have the police applied for a safety warrant?
- ☐ Are you satisfied on the evidence that a child is urgently in need of care and protection?

Note: Under the warrant, the police may enter, search, remove and detain the child and where necessary to place them in the care of the Ministry.

All other care and protection orders

- ☐ Does the Secretary believe on reasonable grounds that the child is, or is likely to be, in need of care and protection: s 46 FPSA?

If so, the Secretary may apply for any of the care and protection orders below.

You may, of your own accord or at the request of any party, adjourn a hearing for any care and protection orders for up to 28 days, and to order written reports such as a social welfare report or a medical and psychological report.

Supervision order: ss 56–61 FPSA

- ☐ Are you satisfied on the evidence that the child is in need of care and protection and the order is in the best interests of that child?
- ☐ What conditions do you think are appropriate?
- ☐ Has the Secretary or the supervisor applied to vary or discharge the supervision order?

If so, you may vary or discharge the order if you are satisfied that the supervision order:

- ➢ has not been wholly complied with; or
- ➢ is no longer necessary; or
- ➢ is not in the best interests of the child.

Note: The Secretary will appoint an appropriately trained and experienced supervisor to assist the child and to take all reasonable steps to ensure the order is complied with.

Care order: ss 62–68 FPSA

- ☐ Are you satisfied on the evidence that:
  - ☐ the child is in need of care and protection; and
  - ☐ it is in the best interests of the child to place them in the care of the Ministry?
- ☐ Has the Secretary, the child, or, with leave of the court, any other person applied to vary or discharge a care order?

If so, you may vary or discharge the care order if you are satisfied that:

- ➢ it is in the best interests of the child to do so; and
- ➢ the circumstances of the child have changed and so the order should be changed to safeguard or promote the child's welfare.

Note: If granted, the secretary has the parental responsibility for the child and must ensure the child receives adequate and appropriate care. The secretary will choose the primary caregiver for the child, decide what contact the parents/caregivers may have and whether to restrict contact with any person.

Contact order: s 68 FPSA

- ☐ Is the child already in the care of the Ministry?
- ☐ Has the person seeking contact applied for an order to allow contact?
- ☐ If so, are you satisfied that it is in the best interests of the child to make a contact order to allow contact with the applicant?
- ☐ If so, what if any conditions are appropriate?
- ☐ Has the Secretary, the child, or any other person with your leave applied to prevent or restrict contact between the child and specified persons?
- ☐ If restricted contact is allowed, what conditions (if any) are appropriate?
- ☐ Has the secretary, child, or any person who is already authorised to have contact applied to vary or discharge a contact order?

You may vary the contact order if you are satisfied that the circumstances of the child have changed, and the order needs to be varied.

You may discharge the contact order if you are satisfied it is no longer necessary to safeguard and promote the child's welfare, best interests and development.

Order to prevent removal of a child from the Cook Islands: s 132 FPSA

- ☐ Are there reasonable grounds to believe that a person is about to remove a child from the Cook Islands and that this is likely to:
  - ➢ breach an order made under this Act; or
  - ➢ breach a kaveinga a te kopu tangata; or
  - ➢ defeat the claim of a person who has applied for, or is about to apply for, an order under this Act: s 132(1)?

If so, you may:

- ➢ issue a warrant for a police officer to take immediate custody of the child and to place them in the care of the Ministry until a further court hearing (within 28 days);
- ➢ order that the police take any tickets or travel documents of the child or the person, or both, for any length of time and on any conditions you think necessary. The person may later apply to have this order discharged if it is no longer necessary.

- ☐ At a hearing to consider whether the order was breached (that is, a later criminal hearing), you would ask does the evidence prove beyond reasonable doubt:
  - ☐ the claim of a breach against any order under this Act or a kaveinga a te kopu tangata, or that a possible claim of a person who will apply for an order was defeated;

- that the person attempted to remove or removed any child from the Cook Islands, without leave from the court; and
- that they did so knowing that:
  - another person has applied for, or is about to apply for, an order under this Act; or
  - that a parenting order, a contact order, or a kaveinga a te kopu tangata is in force that makes another person the caregiver of, or authorises contact with the child?

If they are found liable, you may impose a fine up to $1,000, or imprisonment for a term up to 12 months, or both.

3. Parenting arrangements
Registration or review of a parenting plan

Preliminary matters

1. Check that one or more of the parties to the parenting plan has applied to register the plan. Consider supporting evidence to decide if the plan is in the child's best interests.
2. If satisfied it is in child's best interests, register the parenting plan.
3. If not satisfied the plan is in child's best interests, the Registrar must set down the matter for a hearing and give the relevant parties notice of the date, time and place of hearing.
4. Record your decision and reasons.

Hearing to register a parenting plan

5. Hear submissions from the applicant or any other parties to the parenting plan and any evidence in support for best interests of the child.
6. You may decide to:
   - » vary the plan, with the parties' agreement, and register it; or
   - » cancel the plan and make a parenting order. Go to step 14.
7. Record your decision and reasons.

Hearing to review a registered parenting plan

8. If one or more of the parents or caregivers apply to review a registered parenting plan, you may set the matter down for a hearing to review the plan.
9. Give each party an opportunity to be heard and make submissions. If you think the child is mature enough to understand the proceedings, you must let the child express their views on the application.
10. If satisfied the plan is in the best interests of the child, you may vary, discharge or confirm the parenting plan.
11. Record your decision and reasons.

Hearing to make a parenting order

12. If one or more of the parents or caregivers apply for a parenting order, you may set the matter down for a hearing.
13. If another family member or caregiver applies for a parenting order, is it appropriate for them to do so? If YES, grant leave for them to apply.
14. You may decide to make a parenting order at your own discretion after registering a parenting plan.
15. Hear the submissions from the applicant or the child's appointed representative, and any evidence in support.
16. Weigh up the relevant factors to decide what the child's best interests are in each case. If it is appropriate to make a parenting order, what are the terms?
17. Make your decision based on the evidence and give reasons to either dismiss or grant the parenting order.
18. Record your decision and reasons.

Hearing to vary or discharge a parenting order

19. Check the applicant for review is a party to the parenting order, a representative of the child or the Secretary, or if the child is in the care of the Ministry of Internal Affairs.

    Note: A parenting order ceases to have effect when the child turns 18 years old.

20. Hear submissions from the applicant or the child's appointed representative, and any supporting evidence.
21. Make your decision based on the evidence in the best interests of the child. Give your reasons to dismiss the application, or vary or discharge the parenting order.
22. Record your decision and reasons.

Order determining major long-term issues

23. Major long-term issues involve the child's care, welfare and development. Parents or caregivers must consult (act jointly) before deciding on major long-term issues for their children. If they can't agree, a person with parental responsibilities (all the rights, responsibilities and duties of guardianship) can apply to the Court for an order to provide directions on a major long-term issue.
24. Repeat step 20.
25. Make your decision based on the evidence in the best interests of the child. Give your reasons to dismiss the application or to provide directions on the major long-term issue.
26. Record your decision and reasons.

3.1 Relevant legislation

- Family Protection and Support Act 2017 (FPSA).
- Family Protection and Support (Amendment) Act 2017 (FPSAA).

3.2 Key principles

The best interests of a child are the first and paramount consideration in all proceedings. Everything else is of lesser importance.

The purposes of Part 4 of the FPSA are to:

- ensure parents fulfil their duties and meet their responsibilities concerning the welfare, best interests and development of their children;
- acknowledge the role that family members and other relevant persons may have in the care of children;
- encourage agreed parenting arrangements;
- provide for the resolution of disputes about the care of children; and
- provide mechanisms for the enforcement of parenting orders: s 32 FPSA.

An important concept is that of "parental responsibility". Parental responsibilities include (but are not limited too) all the rights, responsibilities and duties of guardianship. This includes the responsibility of the parent or caregiver to:

- safeguard and promote the child's welfare, best interests and development;
- direct and guide the child appropriately in accordance with their stage of development;
- contribute to the child's intellectual, emotional, physical, social, cultural and other personal development;
- maintain personal relations and direct contact with the child on a regular basis if the child is not living with the parent (if appropriate);
- act as the child's legal representative;
- decide questions about major long-term issues affecting the child for or with the child: s 34 FPSA.

These parental responsibilities carry on even if either or both parents/caregivers remarry or enter into a de facto relationship.

A caregiver of a child may perform parental responsibilities without the consent of the other parent/caregiver, for issues that are not major long-term issues.

For comparison, New Zealand law (s 5 of the Care of Children Act 2004) sets out certain principles that may be helpful references in Cook Island circumstances (although they are not set out in the FPSA). These principles are all treated equally, although child safety is mandatory in New Zealand law.

Those principles include:

- a child's safety must be protected and they should be protected from all forms of violence (this is particularly relevant if there is family violence and there are any protection orders in place or parenting orders made);
- a child's care, development and upbringing should be primarily the responsibility of their parents and guardians;
- parents, guardians, and any other person having a role in a child's care under a parenting or guardianship order, should continue to consult and co-operate over the child's care, development, and upbringing;
- a child should have continuity in their care, development and upbringing;
- a child should continue to have a relationship with both of their parents, and their relationship with their family group, whānau, hapū, or iwi should be kept and strengthened;
- a child's identity (including, their culture, language and religious identity and practice) should be kept and strengthened.

3.3 Three types of parenting arrangements

There are three main types of parenting arrangements:

1. **Parenting plans** set out their parental responsibilities by agreement between the parents/caregivers involved in the child's care, which may also be registered by the court if the parties apply to do so and you are satisfied the plan is in the best interests of the child: ss 36–38 FPSA.

   But if you are not so satisfied, then the matter is set down for a hearing with all the parties notified.

   Note: A registered parenting plan has the same legal effect as a parenting order.

2. **Parenting orders** are made by you after registration of a parenting plan at your discretion, or if either parent or the child's representative applies, or another family member/caregiver applies with your leave. These last until the child turns 18 or the parenting order is varied or discharged earlier on review. A parenting order also overrides any parental responsibility if there is any conflict between them: ss 39–43, FPSA.

3. **Major long-term issues orders** are made if the parents/caregivers can't agree on major long-term issues such as education, religious or cultural matters, health, name or changes to living arrangements: ss 4, 35 FPSA; FPSAA.

3.4 Registering and reviewing parenting plans

If one or more of the parents/caregivers apply to register their parenting plan you need to weigh up the different factors involved to be satisfied that the plan is in the child's best interests.

If you are **not** satisfied that the plan is in the child's best interests, the registrar must set down the matter for a hearing.

At the hearing, you may:

- vary the plan, with the agreement of the parties, and register it; or
- cancel the plan and make a parenting order.

If one or more of the parents/caregivers apply to review a registered parenting plan you may set the matter down for a hearing to review the plan and give each party an opportunity to be heard and make submissions.

If you are satisfied that the child is of an age and maturity to understand the proceedings, you must give the child an opportunity to express any views on the application for review.

If you are satisfied that it is in the best interests of the child, you may vary, discharge or confirm the parenting plan. Any variation has the same effect as if it were the plan originally agreed to and registered by the parties.

3.5 Making parenting orders

Either a parent or the child's representative may apply for a parenting order.

If another family member/caregiver applies for a parenting order, consider whether it is appropriate for them to do so. If so, you may grant leave for them to apply.

You may also make a parenting order at your own discretion if you think it is appropriate where an application is made to register a plan or for a parenting order.

You need to weigh up the different factors to decide what are the best interests of the child in each case, if it is appropriate to make a parenting order, and on what terms.

A party to the parenting order, a representative of the child, or the Secretary (if the child is in the care of the Ministry of Internal Affairs) may apply to vary or discharge a parenting order at any time.

You may vary or discharge a parenting order if you are satisfied that it is in the best interests of the child to do so and that each party, and if appropriate a representative of the child, has been given an opportunity to make submissions on the application.

4. Order for a divorce

Preliminary matters

1. Check the application and supporting evidence, including production of the marriage certificate, and if there is any separation agreement.
2. Is there an original or certified marriage certificate in English (or translated into English and verified by the translator's affidavit) proving the marriage and naming the parties? The applicant should identify the signatures in the certificate.
3. If there is a separation agreement, has it been produced and has the applicant identified the signatures?
4. Check at least one of the parties has been domiciled in the Cook Islands for 2 years before making the application.
5. Set out a date by which the respondent may file a defence. This is usually within 30 days after service, but you may set a longer period if the applicant provides evidence the respondent lives in a distant island or is resident outside the Cook Islands.

Single application

6. Check the respondent has been served with a copy of the application and whether they wish to be heard on the application (filed a notice of defence).
7. If the respondent has requested a hearing, allocate a hearing date within 6 weeks. See step 14.
8. If no notice of defence is filed, you must make the order for divorce if there is proof on the papers that the parties have been separated for 1 year or more immediately before the filing of the application.

   For a single application, a separation period legally begins when:

   » a single application for divorce is served on the other party; or

   » when the parties cease living together.
9. A separation period continues after an application for divorce is made even if the parties continue to live in the same house or provide domestic services to each other. If the parties reconcile during their separation but then separate again, this reconciliation period is not included in the separation period. But any period of separation immediately before they reconcile, must be included if the parties subsequently separate again.

Joint application

10. For a joint application, you must make a divorce order if there is proof on the papers that the parties have been separated for 1 year or more immediately before the filing of the application.

    You may make a divorce order if the parties have not been separated for at least 1 year at the time the application is made and neither party is living on a permanent basis with a child of the marriage.

11. For a joint application, a separation period begins when:
    - » the parties to a marriage make a joint application for divorce; or
    - » the parties cease living together.

    See step 9 for more details about how to calculate a separation period.
12. Record your decision and reasons.

Other orders

13. You may also make any of the following orders at the same time as a divorce order:
    - **a.** support order requiring one party to pay domestic or child support
    - **b.** parenting order (see the flowchart for parenting orders)
    - **c.** order to determine which party is entitled to continue residing in their joint home regardless of title.

Defended single application

14. Check whether the respondent has been served and has filed a notice of defence.
15. Hear the submissions from the applicant, or their appointed representative, and any evidence in support.
16. Hear the submissions from the respondent and any evidence in support.
17. Consider the evidence and determine on the balance of probabilities, whether the applicant has proved:
    - **a.** the parties have been separated for the required length of time; or
    - **b.** if relevant, neither party is living on a permanent basis with a child of the marriage; or
    - **c.** at least one party has been domiciled in the Cook Islands for 2 years before the date of the application.
18. Make your decision on the evidence and give reasons for your decision to dismiss the application or grant the divorce order and repeat step 13.

4.1 Relevant legislation

- Family Protection and Support Act 2017 (FPSA), Part 2 (Divorce), Part 3 (Domestic and child support), s 138 (Jurisdiction of justices).
- Family Protection and Support (Amendment) Act 2017 (FPSAA).
- Code of Civil Procedure of the High Court Act 1972 (the Code).

4.2 Key principles

There are two types of application for an order for divorce:

1. Joint applications (made by both partners to the marriage).
2. Single applications (made by one party to the marriage).

Jurisdiction is only available when at least one party has been domiciled in the Cook Islands for 2 years before the date of the application.

How an application is determined depends on whether a party requests a hearing or wishes to defend the application if it is a single application.

The court **must** make a divorce order if the parties have been separated for a period of 1 year or more immediately before the filing of the application.

The court **may** make a divorce order if:

- the parties have not been separated for at least 12 months at the time the application is made; and
- the application is made jointly by both parties; and
- neither party is living on a permanent basis with a child of the marriage.

A separation period legally begins when:

- both parties make a joint application for divorce; or
- a single application for divorce is served on the other party; or
- when the parties cease living together.

Note: If the parties reconcile during a separation period but then separate again, this period of reconciliation is not included when assessing the length of the separation period.

During a period of separation either party can also apply to the court for:

- a support order requiring one party to pay domestic or child support;
- a parenting order (see "Parenting arrangements");
- an order to determine which party is entitled to continue residing in their joint home regardless of title.

4.3 Checklist for divorce order and support orders

Check that:

- ☐ At least one party to the marriage was domiciled in the Cook Islands for 2 years prior to the date of the application.
- ☐ There is an original or certified marriage certificate in English (or translated into English and verified by the affidavit of the translator) proving the marriage and naming the parties. The applicant should identify the signatures in the certificate.
- ☐ If there is a separation agreement, it has been produced and the applicant has identified the signatures.
- ☐ If it is not a joint application, the application and accompanying documents have been served on the respondent.

If the respondent requests a hearing, or the application is defended, then a hearing is allocated within 6 weeks.

If the respondent files a Notice of Defence, but does not appear at a hearing, the order may be made immediately if the relevant grounds are made out above.

If no notice of defence is filed, the order may be made on the papers with proof of the relevant grounds above.

5. Temporary protection orders

Preliminary matters

1. Is the adult who is applying for a temporary protection order (TPO) without notice in a domestic relationship with the respondent?
2. If an applicant for a TPO is an interested person, such as a family member or police officer, applying on behalf of the person in need of protection, is there written consent from the person in need of protection (unless they are unable to consent)?
3. If the applicant is a child, you may grant leave to apply if they understand the reason and legal effects of the application and TPO.

Undefended application

4. Determine if all three of the following grounds have been met on the face of the application (prima facie):
   a. the respondent is in a domestic relationship with the applicant;
   b. the respondent has committed domestic violence against the applicant, or the applicant has reasonable grounds to fear that the respondent will commit domestic violence; and
   c. the delay that would be caused by proceeding on notice would or might entail a risk of harm to the applicant or any child residing with the applicant.

   If these grounds are met, you **must** make a TPO.
5. Record your decision and reasons, including any:
   a. mandatory or special conditions of the TPO; and/or
   b. compensation and expenses to the applicant.
6. The Registrar should ensure a copy of the TPO is available or sent to the nearest police station and to the applicant. A police officer must serve the TPO on the respondent personally, within 24 hours, otherwise it lapses.
7. The TPO becomes a final protection order automatically after 3 months from the date it is made, and the Registrar must issue the final protection order, unless:
   a. you determine otherwise in a hearing requested by the respondent;
   b. you discharge the order earlier; or
   c. it lapses.
8. The respondent can apply to defend the TPO after being served with a copy.

Defended application

9. Check whether the respondent has requested a hearing to dismiss or vary the conditions (relating to weapons, or occupation) of the TPO, or you may direct the Registrar to hold a hearing if there is good reason for both parties to appear or be represented.

Pre-trial conference

10. The Registrar must schedule a pre-trial conference after the respondent requests a hearing or you direct a hearing.
11. The notice of the conference must:
    a. set out the time, date and place
    b. explain the purpose of the conference
    c. explain the recipients' rights so the recipients can understand.
12. The respondent, the applicant and any other person you think necessary must be served with the notice. The applicant may have a support person or ask to be excused if they have reasonable grounds to fear for their safety.
13. The Registrar should provide you with all criminal files relating to the respondent 3 days before the pre-trial conference.
14. The pre-trial conference is to:
    a. identify and simplify the issues
    b. determine what facts, if any, are agreed by the parties
    c. rule in advance on what evidence is required and its admissibility
    d. determine how much court time should be allocated for the hearing.

Hearing

15. The Registrar must schedule a hearing date within 2 weeks following the pre-trial conference and give the parties written notice of the time, date and place.
16. No application fees are payable.
17. You may hear any proceedings in private or exclude any person from the Court.
18. Hear the submissions from the applicant or their appointed representative and any evidence in support. This may be a written or recorded statement, or may be given from behind a screen or partition.

    You may also require the respondent to be in a different location or room from the protected person and allow the respondent to hear the evidence being given via a telephone or other appropriate technology.
19. You must appoint a lawyer (at the Court's expense) to act in the best interests for a child who is a party to, or involved in, proceedings if:
    a. the parents are in a major conflict;
    b. the parents are suffering a mental or other disability that affects their decision-making or are otherwise unsuitable;
    c. an older child has expressed strong views that would change a long-standing living arrangement or prevent contact by a parent;
    d. a parent wants to permanently remove a child from the Cook Islands;
    e. it is proposed to separate siblings; or
    f. child abuse is alleged, whether physical, sexual or psychological.

20. If a child who is the subject of, or a party to, proceedings is unable to understand the proceedings due to their age or maturity, or for any other reason is unable to express their views, the court must:
    a. appoint a representative for the child; and
    b. ensure the representative makes submissions to the court regarding the best interests of the child.

21. If a child is giving evidence, you may:
    a. ask the respondent to leave the court while the child gives evidence;
    b. require that cross-examination is done by video link with a screen;
    c. excuse the child from cross-examination if they are too young or immature to understand the proceedings;
    d. confer in private with the child in the presence of the child's lawyer or representative;
    e. receive the evidence of the child by written or recorded statement; and
    f. hear any evidence that you think fit.

22. You may call as a witness any person whose evidence in your opinion may help the Court, including any parent or caregiver of the child, or anyone else living with them, or any family member of the child. They have the same privilege to refuse to answer any question as if the witness had been called by a party and may be examined, cross examined or re-examined.

    Note: The Court must pay the witness's reasonable expenses.

23. If the respondent appears, hear the submissions from the respondent and any evidence in support.
24. If the respondent does not appear, you may still make a final protection order at the hearing, even if the respondent did not receive the notice.
25. You may make a **final** protection order if satisfied the respondent:
    a. is in a domestic relationship with the applicant; and
    b. has committed domestic violence against the applicant, or the applicant has reasonable grounds to fear they will commit domestic violence.

5.1 Relevant legislation

- Family Protection and Support Act 2017 (FPSA)
- Family Protection and Support (Amendment) Act 2017 (FPSAA)

5.2 Key principles

One of the overall purposes of the Family Protection and Support Act 2017 (FPSA) is to ensure the safety and protection of adults and children in domestic relationships: s 3.

For Part 6 (domestic violence protection orders) the purposes are to:

- ensure the safety and protection of all persons, including children, who experience, or are or may be exposed to, domestic violence;
- recognise that domestic violence in all its forms is unacceptable;
- prevent domestic violence: s 89.

These purposes should guide you when exercising any of your powers under Part 6. The overall question is whether protection is necessary having regard to the purposes of the Act.

Applications for temporary protection orders made without notice are often time pressured. The overall balance is in favour of ensuring the safety and protection of the applicant and any child living with them. But also consider if the application supports a decision that proceeding on notice would or might entail a risk of harm to the applicant or a child living with them.

You need to carefully consider whether all the grounds supporting an application made without notice have been met.

Factors to consider when assessing domestic violence include:

- the nature and seriousness of past violence and risk of future violence. The single most reliable predictor of future violence is a history of prior multiple offences, but also a serious one-off episode may still pose sufficient risk to justify an order;
- the applicant's view of the nature and seriousness of the respondent's behaviour (including their fears for the future); and
- the effect of the respondent's behaviours on the applicant.

Refer to the legal definitions related to domestic violence in ss 90–96 FPSA.

5.3 Definitions

ss 90–96 FPSA.

Domestic relationship between two people is where:

- they are or were previously married, in a de facto relationship, or in a close personal relationship;

- they have a child together (even if they were not otherwise in a relationship);
- they are a family member or domestic worker;
- one of them is dependent on the other person for help with an activity of daily living required because of disability, illness or impairment;
- they share or recently shared the same home;
- one of them is a child who:
  - ordinarily lives or lived with the other person; or
  - regularly lives or stays, or lived or stayed, with the other person: s 90.

Domestic violence means any of the following conduct (including threats to do so) by a person (A) against another person (B) where they are, or have been, in a domestic relationship:

- physical, sexual, economic, emotional, verbal, or psychological abuse and stalking;
- causing the death of, or injury to, an animal, even if the animal is not person B's property;
- any conduct that reasonably arouses in person B fear of personal injury, or damage to property;
- causing or allowing anyone else to do any such conduct above;
- any of the above conduct against a person in a domestic relationship with person B if that conduct or threat is intended to arouse fear in person B.

The conduct can be a single act or several acts that form a pattern of behaviour (no matter how trivial on their own): s 91.

Physical abuse includes any of the following acts:

- physical assault or any use of physical force;
- forcibly confining or detaining a person;
- withholding access to adequate food, water, clothing, shelter or rest: s 92.

Sexual abuse of a person includes any of the following acts:

- engaging them in sexual contact without their free agreement;
- engaging in any sexual conduct or exposing them to sexual material that abuses, humiliates or violates their sexual integrity: s 93.

Economic abuse includes any of the following acts:

- withholding or limiting money needed for their support (for example, for household items, mortgage repayments or rent if a shared home);
- forcing them to give up control over money, assets or income;
- selling or transferring matrimonial property, or assets owned during a de facto relationship, without their full and free consent;
- preventing them from making decisions over household spending;

- preventing or limiting their job opportunities or access to education: s 94.

Stalking includes any of the following acts on 2 or more separate occasions:

- following a person, watching or waiting outside or near where they live, work, farm, fish, carry on a business, study, or any other place they go to;
- telephoning, text messaging, emailing, or using other electronic means to contact a person, or inducing someone else to do so;
- sending, or delivering, or causing the delivery of letters, packages, or suchlike to a person;
- entering or interfering with a person's property in their possession without their express consent;
- keeping a person under watch;
- acting in any other way towards a person that could arouse fear in a reasonable person: s 95.

Emotional, verbal, or psychological abuse means a pattern of degrading or humiliating conduct towards the person, including:

- repeatedly insulting, ridiculing, or name calling, threatening or showing obsessive possessiveness;
- jealousy that is a serious threat to their privacy, freedom, integrity or security;
- if they have a child, this also includes any such abuse towards a person with whom the child has a domestic relationship: s 96.

5.4 Checklist for granting a temporary protection order without notice

All the following requirements must be established in the application before granting a temporary protection order without notice to the respondent.

The applicant: ss 97–98 FPSA

- ☐ Is there evidence of a domestic relationship between the applicant and the respondent, if the person applying is the one in need of protection?
- ☐ In any other case, where an interested person such as a family member or police officer is applying on their behalf, is there written consent of the person on whose behalf the application is made (unless that person is unable to consent due to their age, mental disability, being illiterate or such like)?
  - Note the exceptions to requiring written consent in s 97(3).
- ☐ Is the applicant a child?
  - If so, they can only apply with the leave of the court.
- ☐ Are you satisfied the child understands both the nature, purpose, and legal effect of the application and the legal effect of making a protection order?

Likelihood or actual domestic violence

- Does the evidence support a finding that either:
  - there has been domestic violence by the respondent? or
  - there are reasonable grounds to fear that the respondent will commit domestic violence?
- On the face of it, is the applicant or child in need of protection: s 99(1) FPSA.

Delay if on notice

- Does the application support a decision that proceeding on notice would or might entail either a "risk of harm" to the applicant or any child residing with the applicant: s 99(1) FPSA.
  - Unless it does, the application must proceed on notice.

Overall principles

You should also keep in mind the rights and freedoms of the respondent guaranteed under the Constitution of the Cook Islands, including the right to a fair hearing for the respondent. This must be weighed against the risk of harm to the applicant or any child living with them if the application is delayed and put on notice.

When taking an overview of all the information, are you able to conclude that this is a case where the respondent's rights to know of the application and to be heard are less than the immediate need for protection?

Duration

This order becomes a final protection order automatically after 3 months from the date that it is made, and the registrar must issue the final protection order, unless:

- you determine otherwise in a hearing requested by the respondent; or
- the order is discharged earlier or lapses: s 99(2) FPSA.

Compensation and expenses

You may order compensation for injuries and losses of the protected person and their reasonable expenses for setting up a separate household to be paid by the respondent: ss 119–120 FPSA.

Hearing

- You may also direct the registrar to organise a hearing, if you are satisfied there is good reason for a hearing, at which either or both parties to the application are present or represented, soon after a TPO has been granted. This may be useful in certain circumstances to get a better understanding of the situation: s 100 FPSA.
- Before the order becomes final, the respondent may request a hearing to decide if the order should be made final or discharged; or to vary or discharge any conditions relating to weapons or occupation: s 121 FPSA.

You may make a **final protection order** if you are satisfied that the respondent:

- is in a domestic relationship with the applicant; and
- has committed domestic violence against the applicant, or the applicant has reasonable grounds to fear that the respondent will commit domestic violence: ss 99, 121 FPSA.

5.5 Conditions

Mandatory conditions: s 102 FPSA

You **must** include the following conditions in the order.

The respondent must not do, or threaten to do, any of the behaviour that falls within the definition of "domestic violence" to the protected person or to a person in a domestic relationship with the protected person, or cause or allow another person to do so.

The respondent must not (unless with the consent of the protected person if living together) enter or remain on:

- any land or building occupied by the protected person; or
- any other land or building where the protected person is present if that would be a trespass.

The respondent may also not make any other contact with the protected person except as is reasonably necessary in an emergency.

Conditions relating to weapons: s 103 FPSA

You **may** include the following conditions relating to weapons if necessary.

- Forbid the respondent from keeping or having under their control any weapon.
- Direct the respondent to dispose of a weapon or give it to the police to dispose of.

Conditions relating to living in the same home: s 104 FPSA

You **may** include any of the following conditions for living in the same home if necessary.

- Grant the protected person and other family members exclusive rights to occupy any shared home; or exclusive use of part of the home, if legally owned by a third party.
- Direct a police officer to remove the respondent from the protected home immediately.
- Direct a police officer to bring the respondent to the protected premises and supervise the removal of their belongings.

Appeals, retrials and reservations of law

1. Appeals to the High Court 2
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3. Reservations of questions of law for a judge (case stated) 5

1. Appeal to High Court

Preliminary matters for an appeal

1. The party wishing to appeal must file a Notice of Appeal in the Court within 21 days of the Justice(s) giving their decision.
2. In the case of a conviction, no appeal can be brought against the conviction or sentence, until defendant sentenced or otherwise dealt with.
3. Upon filing the appeal, the justice(s) must place a hold on the judgment, unless a Judge makes an order to the contrary.
4. Copies of the appeal must be served on all parties affected by the decision.
5. If appellant in custody, the Justice(s) may release on bail, pending determination of appeal.
6. While on bail the defendant may, at any time and for any reason a Judge thinks sufficient, be arrested by warrant and returned to prison to undergo their sentence.
7. The Justice(s) should forward all hearing notes to the High Court Registrar once a notice of appeal has been filed including:
   - notes of evidence
   - summary of facts by the informant in case of guilty plea
   - any judgment delivered
   - all documents and exhibits produced at the hearing.
8. Following receipt of the notice, the High Court Registrar will set the appeal down for hearing on the first available sitting day and notify the parties to the appeal the hearing time and place.
9. The appellant may abandon an appeal by giving notice to do so to the Registrar. The appeal is then dismissed, subject to the right of the respondent to apply for costs.
10. Before hearing any appeal a Judge may impose, (except in the case of an appeal against conviction and sentence or sentence only), any conditions as to security for costs of the appeal or for performance of the judgment.
11. If the appellant does not make any reasonable effort to progress their appeal or observe any of the conditions the Judge imposed (security of costs) the Judge may dismiss the appeal.

Evidence at the appeal hearing

12. All appeals to the High Court are by way of rehearing.

13. When a question of fact is part of the appeal, evidence taken by the Justice(s) is produced as follows:

- oral evidence – copy of Justice(s) notes on the evidence or any other material the High Court Judge chooses
- affidavit and exhibits – those already forwarded by the Registrar and any exhibits in the custody of appeal parties
- copies of any evidence or statement taken by a witness at a distance, or a person about to leave the Cook Islands, or a seriously ill person, which has already been admitted by the Justice(s).

14. The High Court Judge may, in their discretion, rehear the whole or part of the evidence, or the evidence of any witness if they believe any Justice's(s) note(s) are incomplete.

15. The High Court Judge has the same jurisdiction and authority as the Justice(s) including powers of amendment. They may receive further evidence, if it could not reasonably have been given or produced at the hearing.

General powers on appeal

16. On any appeal a Judge may:

- affirm the judgment (so the decision stands)
- reverse judgment
- vary the judgment
- order a retrial
- make an order with respect to the appeal, at their discretion
- award costs against any party to the appeal.

17. On any appeal against any conviction, the Judge may also quash the conviction and substitute a conviction if that the facts justify this and pass a sentence to reflect the substituted conviction.

18. On appeal against sentence, if the Judge thinks that a different sentence should have been passed, they shall:

- quash the sentence and pass another sentence allowed in law; or
- vary the sentence, or any part of it, or any conditions, within the limits of the law; or
- dismiss the appeal.

2. Retrial application

1. The police or defendant may apply in writing to a Judge for a retrial for any offence tried by the Justice(s) where they have acquitted, convicted or made an order against the defendant, within 14 days of the decision. The Judge may allow more time if satisfied they could not have applied any sooner.

Powers of Judge on application for retrial

2. The retrial application must state:
   - » the grounds of application
   - » whether a complete or limited retrial is sought.
3. The applicant must serve a copy of the retrial application on the other party as soon as reasonably possible after applying.
4. If a defendant was sentenced to prison by the High Court will remand the defendant in custody, subject to bail provisions, until the date of the retrial if:
   - » the prison term has not expired
   - » the retrial cannot be held immediately.
5. In other cases, the acquittal, conviction, sentence or order made at the original trial shall cease to have effect.
6. If the applicant does not appear at the retrial, the High Court may order the original acquittal, conviction, sentence or order be confirmed without holding a retrial.
7. The Court of retrial shall have the same powers and follow the same procedure as if it were the Court of trial.

See **Defended hearings** ➔

8. On the hearing of any such application, the Judge may:
   - » refuse a retrial; or
   - » order a complete retrial by the Court who originally heard the offence or by a different Court; or
   - » order a retrial with specific limitations and on terms the Judge thinks fit, either by the Court who originally heard the offence or by a different Court.

3. Reservation of law

Removal of case for retrial by a Judge

1. If a question of law arises on a trial before you or 3 Justices, the Court, whether of its own accord or on the application either party, may refuse to continue the trial and adjourn it for retrial before a Judge.

See **Retrial application**

2. If so, the Information or charge remains valid; but every other step taken, document filed, or direction or determination given in that trial is void, unless ordered by you or the 3 Justices to remain valid.
3. The retrial of that person will begin and proceed before a Judge as if no steps, other than those saved in step 2 had been taken.

Reserving a question or law related to the trial of any offence

4. A Justice or 3 Justices may reserve a question of law for a Judge of the High Court to decide if such arises before, after, during or related to the trial of any person for any offence.
5. The Justice(s) must state a case for the High Court Judge to determine.
6. The police or the defendant may also apply during the trial to reserve a question of law. If you refuse to do so, you must make note of the application.
7. The police or defendant must submit a draft of the case stated to you through the Registrar, within 21 days of being notified of your decision to reserve the question of law, or within any further time that you may allow, and deliver or post a copy of the draft to the other party.
8. If the defendant is acquitted at trial, you must discharge them subject to being arrested again if the High Court Judge orders a new trial.
9. If the defendant is convicted at trial, you may postpone or delay carrying out the sentence, until the question of law has been determined by the High Court Judge.
10. In the meantime, you may remand the defendant in custody, or grant them bail on such terms and conditions you think appropriate.

Go to **Bail flowchart**