



**HANDBOOK**  
for the  
**LAW COMMISSIONERS**  
of  
**TOKELAU**

**TUHI TAKI**  
mo na  
**KOMEHINA TULAFONO**  
o  
**TOKELAU**

## CONTENTS

Editorial Note.....	ii
Acknowledgements.....	iii
<b>I THE CONSTITUTIONAL FRAMEWORK OF TOKELAU.....</b>	<b>1</b>
<b>II JUDICIAL CONDUCT .....</b>	<b>5</b>
<b>III JURISDICTION .....</b>	<b>8</b>
<b>IV CRIMINAL RESPONSIBILITY .....</b>	<b>14</b>
<b>V EVIDENCE .....</b>	<b>24</b>
<b>VI PREPARING FOR COURT PROCEEDINGS.....</b>	<b>29</b>
<b>VII FIRST APPEARANCE .....</b>	<b>32</b>
<b>VII FIRST APPEARANCE .....</b>	<b>33</b>
<b>VIII DEALING WITH YOUNG OFFENDERS .....</b>	<b>35</b>
<b>IX JUDGMENTS .....</b>	<b>39</b>
<b>X SENTENCING .....</b>	<b>45</b>
<b>XI OTHER PROCEEDINGS.....</b>	<b>51</b>
<b>XII COMMON OFFENCES .....</b>	<b>54</b>
<b>APPENDICES .....</b>	<b>177</b>
Tokelau Amendment Act 1986 (NZ).....	177
Rule 16 of the Constitution of Tokelau.....	183
Universal Declaration of Human Rights.....	184
International Covenant on Civil and Political Rights .....	193
Court Clerk.....	207
Court of the Law Commissioner .....	209
Tokelau Court Register.....	210
Custom as a Source of Law Rules 2004 .....	211
Lawyers in the courts of Tokelau.....	212
Lexicon .....	213
Glossary.....	220
Index.....	222

### *Editorial Note*

This Handbook has been prepared for the guidance of the Law Commissioners of Tokelau. It reflects the needs of the Law Commissioners and the circumstances of the villages of Tokelau.

The work of the Law Commissioners mostly concerns minor criminal offences. The Law Commissioners have no jurisdiction in relation to land matters or family matters, and in practice hear very few civil claims. This book therefore deals with criminal procedure, evidence and some relevant offences.

Till 1975, the village judges had few laws to administer and no guidance for the use of their powers. In 1984, a *Handbook for the Commissioners* was published. It was little used and largely overtaken by the Crimes Procedure and Evidence Rules 2003 (the Crimes Rules).

Information on the law and court procedures has frequently been sought by the Elders, the Law Commissioners, and the Police of Tokelau. The main response to date to those requests has been the conducting of judicial workshops. They have taken place increasingly often over the last 12 years. The UNDP and the PJDP are to be thanked for their support to the Government of Tokelau for those workshops.

This Handbook has built on the experience of those workshops and will in its turn provide a solid basis for future workshops. It is the latest step by the Government of Tokelau to assist its Law Commissioners and all involved with the administration of the law in Tokelau. Experience in the use of this book will inform the development of future editions. The goal of all these endeavours is to improve the administration of the law and quality of justice in Tokelau.

It is hoped that this book assists in achieving this goal and that the book answers the needs of those who have the duty to apply the law.

## *Acknowledgements*

The Benchbook of Kiribati has been a useful precedent which was drawn on the preparation of this book.

The Benchbook Project team acknowledges with gratitude the support given to the project by the General Fono, the Ulu of Tokelau and the Council for the Ongoing Government, by the General Manager (TPS) Apia, by the Law Commissioners of Tokelau, and by the Taupulega of the villages of Tokelau.

The Chief Justice of New Zealand, Dame Sian Elias, has been a constant source of encouragement to the project team. Her interest has been a much valued inspiration.

### **Benchbook Project 2008**

Lise Hope Suveinakama – Project Manager

Olita Hakai – Translator

Keli Kololo – Translation Advisor

#### *In collaboration with*

Tony Angelo – Project Advisor

Nessa Lynch – Criminal Law Advisor

Michael McKay – Research and Editorial Officer

Yana Khatchian – Editorial Assistant

© Government of Tokelau

Published by the Government of Tokelau  
Office of the Council for Ongoing Government  
PO Box 3298, Apia, SAMOA

Printed by MTC, Wellington, New Zealand  
August 2008

## ***I THE CONSTITUTIONAL FRAMEWORK OF TOKELAU***

### ***1 The Government of New Zealand and the Relationship with Tokelau***

Tokelau is a non-self governing territory administered by the government of New Zealand (Section 3 of the Tokelau Act 1948).

Tokelau is part of the realm of New Zealand, which also includes the self-governing states of the Cook Islands and Niue (Clause 1(d) of Letters Patent 1989).

Tokelau is listed with the United Nations as a territory which has the right to self-determination.

The basic structure of the government of Tokelau is outlined in the Tokelau Act 1948. The Head of State is the Queen of New Zealand. The Governor-General of New Zealand is the Queen's representative. Tokelau is administered for New Zealand by the Ministry of Foreign Affairs and Trade, and an Administrator who is the Head of the Special Relations Unit in that Ministry.

The Parliament of New Zealand can make law for Tokelau by Acts (Section 3B of the Tokelau Act 1948). The Governor-General can make law for Tokelau as regulations (Section 4(1) of the Tokelau Act 1948).

The people of Tokelau do not vote for the New Zealand Parliament and have no representatives in the New Zealand Parliament. The people of Tokelau are citizens of New Zealand.

The rights and freedoms of people in Tokelau are contained in Rule 16 of the Constitution of Tokelau.

The main crimes in Tokelau, and the rules of criminal procedure, are set out in the Tokelau Crimes, Procedure and Evidence Rules. They are explained in this book.

## **2 *The Government of Tokelau***

### **(i) Village government**

Villages elect a Faipule and a Pulenuku every 3 years in accordance with the Village Incorporation Rules 1986.

Decisions that relate primarily to village matters are made at village level by the Taupulega.

Village rules are made in accordance with rules 18 and 19 of the Village Incorporation Rules 1986. The rules must be made by resolution of the Taupulega, signed by the Faipule and be impressed with the seal of the village.

Rules made by a village must not contradict Acts, regulations, international obligations and rules of the General Fono in force in Tokelau (Rule 18 of the Village Incorporation Rules 1989).

Law disputes at the village level are settled by the Commissioner and the Village Appeal Committee (Section 10 of the Tokelau Amendment Act 1986; Rule 103 of the Crimes Rules). Land and custom matters are settled by the Taupulega.

### **(ii) National government**

Government decisions which affect the whole of Tokelau are made by the General Fono.

The General Fono consists of:

- (i) The Faipule and Pulenuku of each village; and
- (ii) One delegate from each village for every 100 inhabitants (rounded to the nearest 100 inhabitants) (Section 3 of the Constitution).

The term of office of delegates to the General Fono coincides with that of Faipule.

The General Fono should meet at least twice every year. Two thirds of the members must be present for a decision to be valid.

Decisions are valid if more than half of the members present vote in favour of the decision.

“The General Fono may... make such rules as it thinks necessary for the peace, order, and good government of Tokelau” (Section 3A of the Tokelau Act 1948). The General Fono may not make law that contradicts an Act, regulation, or treaty that is in force in Tokelau.

The General Fono may not make law that can apply or have effect outside Tokelau (Section 3A(4) of the Tokelau Act 1948).

### *Executive*

It is the duty of the General Fono to manage the following matters in the interests of the nation:

- National budget appropriation
- National resources
- National public service
- International relations
- Telecommunications
- The relationship of Tokelau with New Zealand
- National integrity
- National transport
- Postal services
- Policy and structures for national health and education
- Tokelau currency for coin collectors
- Any matter referred by the Taupelga of each village to the General Fono.

(Section 5 of the Constitution)

Decisions of the General Fono are implemented by the Tokelau Public Service. When the General Fono is not in session, the Council for the Ongoing Government makes the decisions necessary for the administration of Tokelau. The Council includes the three Faipule and the three Pulenuke and is chaired by the Ulu o Tokelau (General Fono Standing Orders).

*The court system*

Tokelau has the following courts:

- The Commissioner's Court and Appeal Committee of each village;
- The High Court;
- The Court of Appeal

(Sections 3-10 of the Tokelau Amendment Act 1986; Rule 140 of the Crimes Rules; See also section 8 of the Constitution)

*Human rights*

All people in Tokelau have the rights and freedoms set out in the Universal Declaration on Human Rights (Section 16 of the Constitution).

The rights of individuals in Tokelau shall be exercised having proper regard to the rights of other individuals and to the community to which the individual belongs.

The Tokelau constitutional rule (Rule 16) and the relevant international treaties are set out in the Appendices to this book. Complaints concerning any breach or alleged breach of a Tokelau human right, are dealt with by the Council for the Ongoing Government.

## ***II JUDICIAL CONDUCT***

### ***1 Important matters***

- The main duty of a judge is to present before the public an image of justice.
- A judge must be a person of integrity.
- A judge administers justice to all without bias or favour.
- A judge performs official tasks competently and with dignity, courtesy and self control.
- A judge obeys the laws of the land.
- A judge does not accept any gift, favour or benefit of whatsoever nature which may possibly influence him or her in the execution of official duties or create the possible impression that this is the case.
- A judge must not decide any matter in which he or she has a direct or indirect interest.
- A judge must maintain good order in court.

### ***2 The principles in practice***

#### ***(i) Diligence***

The duty of judges to serving diligently requires judges to deliver decisions to the best of their ability, and without any unnecessary delay. To ensure this, judges should:

- be familiar with common offences,
- prepare as much as possible before sitting in court.

#### ***(ii) Integrity***

Judges must conduct themselves with the utmost integrity to sustain and enhance public confidence in the judiciary. Judges should make every effort to ensure that their personal and public conduct is lawful and that they are respected by the people of Tokelau.

(iii) Equality

Judges must conduct themselves and proceedings so as to ensure equality according to the law. This means judges should:

- carry out their duties with appropriate consideration for all persons (for example, parties, witnesses, court clerks) without discrimination;
- disapprove of improper conduct in the court. Improper conduct includes sexist, racist, or discriminatory language or actions which are prohibited by law.

(iv) Judicial independence

An independent judiciary is indispensable to justice under the law. Judges must make their decisions independently and free from influence by other people.

(v) Impartiality

Justice requires judges not only to be impartial, but also to appear to be impartial in their decision making.

Impartiality requires judges to not hear cases in which they have a personal involvement, either through the parties involved or through the subject of the case. Judges should never hear a case where close family members are parties.

If the Commissioner is the subject of a case, the matter must be heard by the High Court (Rule 88 of the Crimes Rules).

(vi) Judicial demeanour

At all times judges should maintain firm control of court processes and ensure all people in the court are treated with courtesy and respect.

(vii) Courtroom conduct

Judges should:

- Be courteous and patient.
- Be dignified.
- Be humble.
- Never make fun of a party or witness.
- Show appropriate concern for distressed parties and witnesses.

Judges should ensure that all people appearing before the court treat it with respect by:

- keeping order in court;
- being polite and respectful and expecting the same from all people in court.

(viii) Communication in court

Judges should:

- Use simple language without jargon.
- Avoid a patronising and/or unduly harsh tone.
- Generally, not interrupt witnesses.
- Always express themselves simply, clearly and audibly. It is important that:
  - the party examined and every other party understands what is happening in the court and why it is happening;
  - the court clerk is able to hear what is being said for accurate records; and
  - the public in the court are able to hear what is being said.

### ***III JURISDICTION***

Jurisdiction means the power to hear and determine a particular matter. Jurisdiction is given by a law. Courts may act only within the jurisdiction given by the law. If a court acts outside its jurisdiction, those acts are invalid.

There are three main areas of jurisdiction for the Commissioners:

1. Territorial
2. Criminal
3. Civil.

#### ***1 Territorial***

Territorial jurisdiction refers to the geographic area within which a court has the power to hear a case. Tokelau law applies on the islands of Tokelau and to the territorial sea of Tokelau that surrounds those islands (Section 7(3)(b) of the Tokelau Amendment Act 1986). The Commissioner can hear a case arising from conduct within the village, and in the sea within 12 miles of the village.

The Commissioner can also hear any breach of the Crimes Rules committed on board any vessel or aircraft that is:

- in the service of Tokelau; and
- travelling to or from Tokelau, or between any of the islands of Tokelau (Section 7(3) of the Tokelau Amendment Act 1986).

#### ***2 Criminal Jurisdiction***

This involves the types of offences that the Commissioner can deal with and also with the penalties that can be imposed.

## Jurisdiction

No person can be prosecuted for an act or omission that is not an offence under the Crimes Rules or other laws.

A Commissioner has jurisdiction:

- for any offence punishable by fine alone;
- for any offence punishable by imprisonment for not more than one year (Section 10 of the Tokelau Amendment Act 1970).

Offences for which the maximum penalty does not exceed 3 penalty units or 3 months imprisonment must be tried before a Commissioner (Section 7 of the Tokelau Amendment Act 1986; Rule 112(5) of the Crimes Rules). The maximum penalties for offences are set out in Schedule 2 of the Crimes Rules.

If the maximum penalty is more than 3 penalty units or more than 3 months imprisonment, the High Court also has jurisdiction.

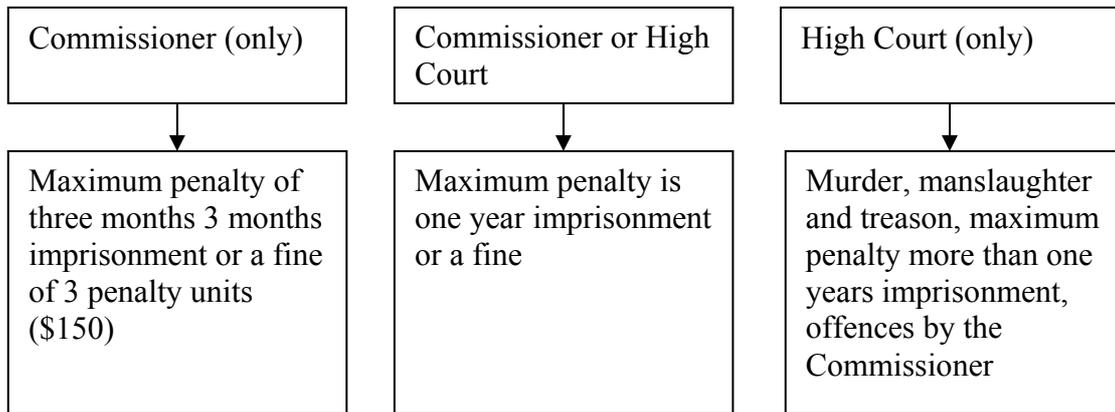
The maximum penalty a Commissioner can impose in any case is a fine of 3 penalty units (\$150) or 3 months imprisonment. Where the Crimes Rules permit a higher penalty, only the High Court may impose that higher penalty.

The High Court alone has jurisdiction to hear murder, manslaughter and treason charges, and any case in which a Commissioner is a party.

## Jurisdiction

The criminal jurisdiction of the courts in Tokelau is shown in this diagram.

### *Criminal Jurisdiction*

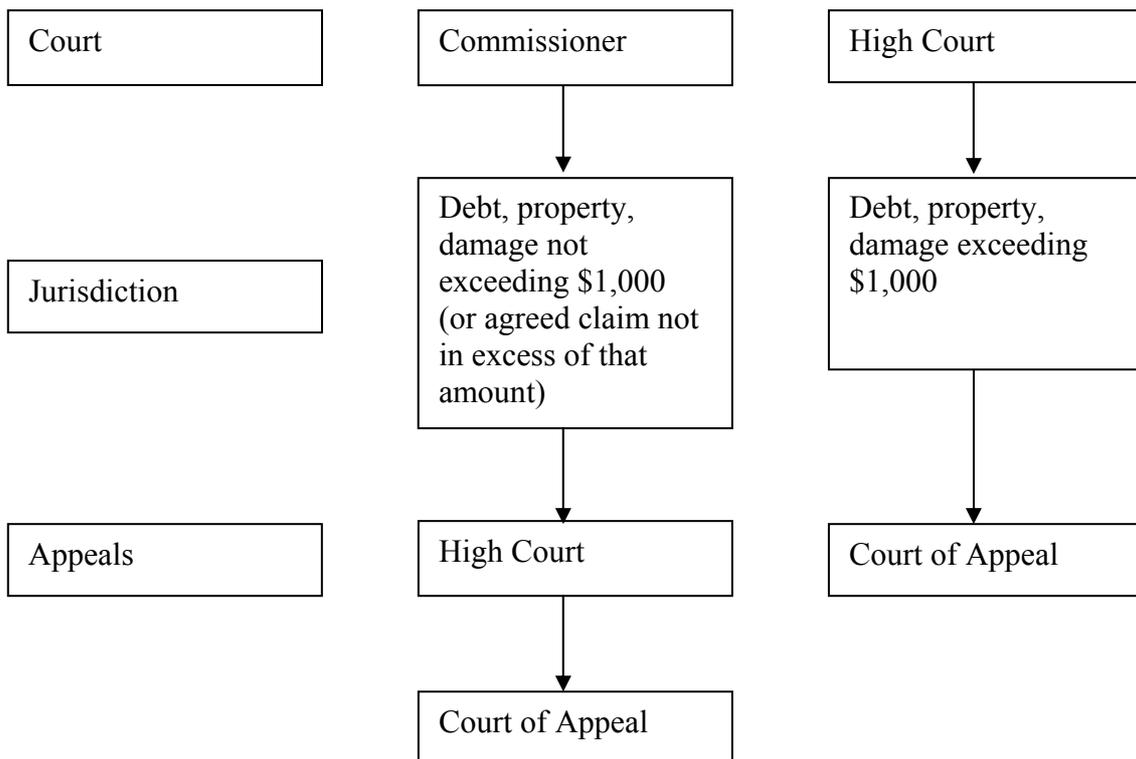


### 3 *Civil Jurisdiction*

This jurisdiction concerns disputes between individuals, and by individuals and the government which do not involve penalties. These are usually demands for money. Commissioners have power to hear claims for the recovery of any debt, property or damage not exceeding \$1,000 (Section 10 of the Tokelau Amendment Act; Rule 142 of the Crimes Rules).

Claims in excess of \$1,000 must be heard in the High Court. Where a claim would otherwise exceed \$1,000, parties may agree to reduce the amount of money sought to \$1,000 so that the case can be heard by a Commissioner.

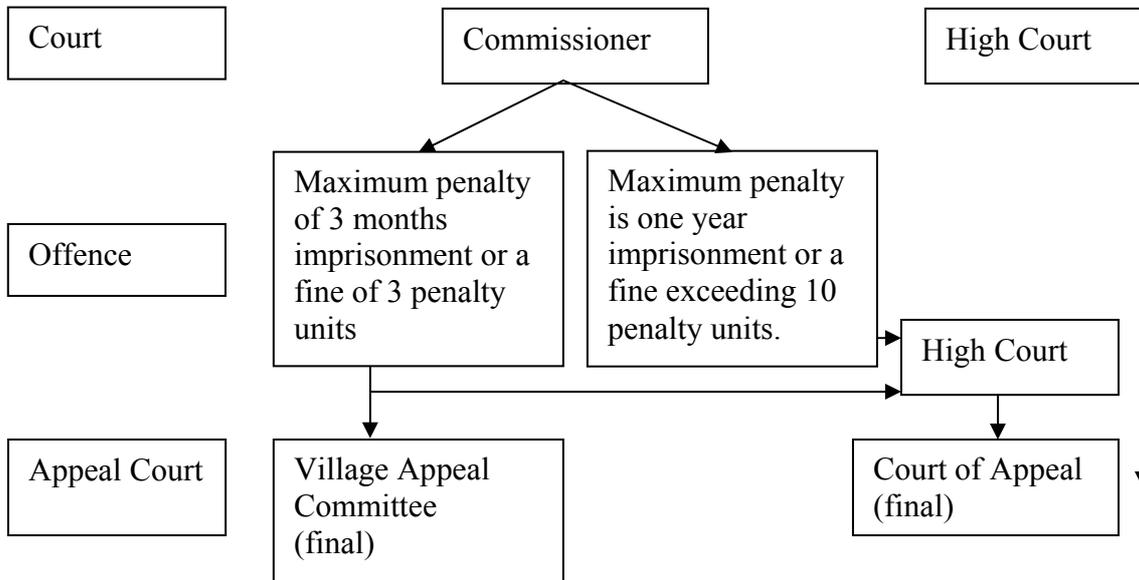
#### *Civil Jurisdiction*



## 4 Appeals

### (i) Criminal appeals

#### *Criminal Appeals*



#### Appeal Committee

The Appeal Committee of each village may hear appeals from some judgments of Commissioners (Rule 140(1) of the Crimes Rules). Offences punishable by imprisonment for not more than 3 months or only by a fine may be appealed to the village Appeal Committee. There is no appeal from the judgments of the Appeal Committee.

#### High Court

A person may appeal to the High Court instead of the village Appeal Committee. For offences for which the maximum penalty is more than 3 months imprisonment the appeal from a Commissioner's judgment is to the High Court.

## Court of Appeal

Judgments of the High Court may be appealed to the Court of Appeal.

### (ii) Civil Appeals

Civil judgments of the Commissioner can be appealed to the High Court. There is no appeal to the Village Appeal Committee. Judgments of the High Court can be appealed to the Court of Appeal.

## ***IV CRIMINAL RESPONSIBILITY***

### ***1 Introduction***

The Crimes Rules are the main law that sets out the offences and the rules related to them in Tokelau.

This chapter discusses:

- important principles of the criminal law;
- defences that can be used to excuse an accused from criminal responsibility;
- the range of persons who may be criminally responsible for offences;
- attempts to commit an offence; and
- offences under laws other than the Crimes Rules.

### ***2 Important Principles of Criminal Law***

#### **(i) Innocent until Proved Guilty**

One of the most important principles in criminal law is that the accused is innocent until proved guilty. Unless and until the prosecution proves all elements of the offence, the accused is innocent. The court must always remember this.

#### **(ii) Burden and Standard of Proof**

The prosecution must prove all the elements of the offence beyond reasonable doubt.

If, at the end of the prosecution's case, the prosecution has not provided evidence of all the elements of the offence, then there is no case for the accused to answer and the case must be dismissed.

If the prosecution has proved all the elements of the offence, then the defence can present its case. After the court has heard the prosecution case and anything the accused wants to say, the court must decide whether the prosecution has proved its case beyond reasonable doubt.

Remember that the defence does not have to prove anything. It is for the prosecution to prove all elements beyond reasonable doubt. If, after hearing any defence evidence, you have a reasonable doubt on any of the elements, then the case must be dismissed.

### (iii) Beyond Reasonable Doubt

This means that the court must be sure that the accused is guilty of the charge. On the basis of the evidence presented to the court, the court must have no reasonable doubt that the accused is guilty. If the court has any reasonable doubt, the accused is not guilty and the case must be dismissed.

### (iv) What must be proved

Most offences involve two elements: the physical element and the mental element. It is necessary to prove both elements.

### (v) The Physical Element

This is the physical conduct or action (eg. Hitting a person) or an omission (eg. Failure to feed a child) which is forbidden by law.

These acts or omissions are the physical elements of the offence. They just all be proved by the prosecution.

An offence may consist of one act or omission or a series of acts or omissions.

If the prosecution cannot prove that the act or omission occurred, the person cannot be convicted.

(vi) The Mental Element (Guilty Mind)

Most offences require the prosecution to prove that the accused had a particular state of mind. This is in addition to the physical element.

This mental element could be:

- intention: The accused intends to do something, or desires a certain result (eg. Throwing a stone at a window with the desire to cause damage).
- knowledge: knowing the circumstances which constitute the offence;
- belief: mistaken idea of the circumstances of the offence;
- negligence: the failure of the accused to foresee a consequence of the action, where a reasonable person would have foreseen that consequence and avoided taking that action.

The two main ideas regarding the mental element are:

- it is an element of every criminal offence, unless specifically excluded; and
- individuals are presumed to intend the natural consequences of their actions.

### ***3 General Exemptions to Criminal Responsibility***

Generally speaking, ignorance of the law is not a valid defence.

Generally, an accused will argue that he or she should not be found guilty because:

- the prosecution has not proved all elements of the offence beyond a reasonable doubt; or
- he or she has a defence specified in the law relating to the offence (eg. lawful excuse);

- one of the general defences eg. Provocation; self-defence.

Where the accused presents a defence the accused must provide evidence to support that defence. Then the prosecution must prove that evidence should be excluded.

(i) Intention

*Accident*

With the exception of absolute liability offences, an accused is not responsible for an act which occurs by accident.

For example, if Meto is pushed into Alo, Meto does not have the intention to assault Alo and is therefore not guilty of the offence of assault.

*Intending Result*

Intention also relates to intending a particular result of an act. Unless expressly declared to be an element of an offence, the result intended by an accused is immaterial.

For example, Alo tickles Meto, intending to make her laugh and to respond playfully. If as a result Meto suffers a broken rib, Alo is guilty of an assault even if he intended otherwise.

*Motive*

The reason or motive for the behaviour is irrelevant. Even where the accused had a good motive, that motive does not affect responsibility. It may be relevant to the sentence imposed.

For example, if Meto steals from a store in order to feed her children, Meto is still guilty of theft.

*Mistake of Fact*

The law tries to punish only blameworthy acts, not those where the accused acted honestly, even if the accused was mistaken.

For example, if Meto takes a mat from Alo, believing honestly and reasonably, but incorrectly, that Alo gave her the mat, Meto is not guilty of theft.

(ii) Insanity

An accused is not criminally responsible (and cannot be convicted) if, by reason of a disease of the mind at the time of the act in question, he or she was incapable of understanding the nature of the act or knowing that the act was wrong (ie. Insanity: Rule 116 of the Crimes Rules).

The accused must prove, on the balance of probabilities (this means it is more probable than not) that the accused was insane at the time of the offence and, therefore, did not have the required mental state.

The Crimes Rules presume every person is sane until proven otherwise (Rule 116(1)(ii) of the Crimes Rules).

If the accused had a disease of the mind but the disease did not render the accused incapable of understanding the nature or wrongfulness of the act, then the accused may still be found criminally responsible.

If a person is not guilty by reason of insanity, then they are dealt with under rule 11 of the Health Rules.

(iii) Drunkenness not an excuse for offending

Drunkenness is not a defence to a charge. This means that if a person has committed a crime, they cannot be excused because of drunkenness (Rule 82 of the Crimes Rules).

(iv) Children

A child under 10 years is not criminally responsible for any act or omission (Rule 114 of the Crimes Rules). This is because the law treats children under 10 years as being incapable of knowing right from wrong.

A child aged between 10 and 14 years is not criminally responsible for an act or omission unless it is proved that, at the time of the act in question, the child had capacity to know the act was wrong (Rule 114(2) of the Crimes Rules).

(v) Judicial Officers

Judicial officers are not criminally responsible for any act or omission done in good faith in the exercise of judicial functions (Rule 84(1) of the Crimes Rules).

(vi) Duress

Generally, a person who was forced to do an act by another person is not held criminally responsible for that act because they did not act of their own free will.

Meto steals goods in a shop. She forces Alo, by threat of violence to his children, to hide and remove the goods from the shop. Alo is not guilty of theft.

### (vii) Defence of Person or Property

A person has a right to defend themselves and their property. Therefore, self-defence could be a defence to a charge (Rule 116 of the Crimes Rules).

For instance, if Meto punches Alo, and Alo then punches Meto to defend himself, Alo is not guilty of assault.

### General Principles

- A person may use force that is reasonable in the circumstances if they honestly believe that use of force is necessary as a matter of defence.
- What force is necessary is a matter of fact to be decided on consideration of all the surrounding factors.
- The state of mind of the accused should be taken into account.
- Where an accused has used force to defend property, the harm to the property must be serious in order to excuse the accused from committing an offence.
- Where the accused raises the defence, the accused must provide evidence of the need and circumstances. Then the prosecution must prove that the accused did not act in self-defence or in defence of property.

### (viii) Provocation

A defence of provocation could reduce a charge of murder to manslaughter. This may apply where the person killed or another person provoked the accused.

Provocation may be relevant to the penalty imposed where something was said or done which was enough in the particular circumstances to cause the person to lose the power of self-control (see Rule 7 of the Crimes Rules).

#### 4 *Parties*

The law recognises that there can be more than one person connected with an offence. This includes:

- Those who actually commit the offence (principal offenders);
- Those who before the offence contribute in some way to the commission of the offence through encouragement, advice or assistance (accessories);
- Those who plan together to commit an offence;
- Those who aid an offender after the commission of an offence (accessories after the fact).

##### (i) Principal Offenders

A principal offender is the person whose conduct satisfies the elements of the offence in question.

In order to be a principal offender, it must be proved in respect of the accused that both the mental and physical elements of the offence exist. For example, if Anita punches Feleti, Anita would be considered the principal offender for the offence of assault.

##### (ii) Accessories

Anyone who commits any of the following acts may be guilty of committing the offence:

- anyone who does any act for the purpose of enabling or assisting another person to commit the offence;
- anyone who encourages another person in committing the offence;
- any person who counsels any other person to commit the offence; or
- arranges for the principal offender to commit an offence (Rule 113(iv) of the Crimes Rules).

The physical element of an offence by an accessory involves three concepts:

- assisting, encouraging or arranging;

- the offence committed by the principal offender;
- the behaviour of the accessory caused, directly or indirectly, the offence.

The mental element for an accessory is more specific than that required for a principal offender. Recklessness or negligence is not enough. The mental element must be:

- knowledge: the accessory must know the essential matters of the offence; and
- intention: the accessory must have the intention to assist, encourage or arrange.

A person who is an accessory after the fact to an offence, is guilty of the offence (Rule 113 of the Crimes Rules).

The elements for accessories after the offence are:

- the person assisted has committed an offence; and
- the defendant (accessory) knew that person had committed an offence; and
- the defendant (accessory) received or assisted the offender
- the defendant (accessory) received or assisted the principal offender in order to enable the principal offender to escape punishment.

## **5 Attempts**

A person is criminally responsible for attempting to commit an offence, and is liable for the same penalty as if they had committed that offence (Rule 80 of the Crimes Rules).

An attempt to commit an offence is anything done in order to commit that offence (Rule 80 of the Crimes Rules).

An attempt requires:

- some act or omission that is connected to the commission of the offence; and

- intention to commit that offence; and
- interruption of the offence either voluntarily (by the offender), or otherwise.

For example, Feleti intends to steal a piglet from Puga's pigsty. He is walking along the path near Puga's pig. He is carrying a bag, string and a knife. Unexpectedly, Puga arrives at the pigsty. Feleti quickly goes home. Puga reports the matter to the Police. Feleti has committed the offence of an attempt to steal.

In some cases, it would be impossible for the offender to commit the offence intended. Impossibility alone is not enough to excuse the offender.

For example, if Anita puts her hand into Feleti's pocket intending to steal. Anita is guilty of the offence of an attempt to steal although there is nothing in Feleti's pocket.

## **6 *Offences under other laws***

This book uses examples from the Crimes Rules. There are many other laws with offences. They are all within the jurisdiction of the Commissioner. It is, for instance, an offence to disobey a rule made by the village council; it is an offence to do banking or insurance business without the approval of the Council for the Ongoing Government; it is an offence to fail to register a birth or a death.

## ***V EVIDENCE***

Evidence means all statements, documents and exhibits which a court permits or requires in relation to matters of fact under inquiry in the case (Rule 163 of the Crimes Rules).

### ***1 Any court may receive documentary, real or oral evidence***

#### **(i) Documentary Evidence**

This consists of information in written or visual form. These documents may include:

- Public documents (village or General Fono records, judicial documents, public registers)
- Private documents (business records, agreements, deeds)
- Plans and reports
- Certificates
- Statements in documents produced by computers
- Tape recordings and photographs.

If an original document is available, it should be produced. This is known as the best evidence rule.

If the original document cannot be produced in proceedings, a copy may be produced because it is the best evidence that is available.

Some matters need not be proved by evidence. Commissioners shall take judicial notice of all enactments in force in Tokelau, and of the government seal (Rules 169 of the Crimes Rules).

## (ii) Real Evidence

Real evidence usually refers to objects that are produced at trial. For example, the prosecution may produce as evidence the weapon that was allegedly used to injure a complainant.

Often little weight is attached to real evidence unless it is accompanied by other evidence identifying the object and connecting it to the facts in issue.

When documentary evidence is admitted in court, it becomes an exhibit. The court must ensure that proper care is taken to keep the evidence free from damage, and that the evidence is available for inspection by both the prosecution and the defence.

## (iii) Oral Evidence

Oral evidence consists of statements of fact.

## ***2 Competence and Compellability***

All persons are competent to testify unless the court considers that the witness is not able to understand the questions or give rational answers to those questions by reason of age, disease or similar cause (Rule 164 of the Crimes Rules).

Compellability means a court can require a witness to give evidence. All witnesses are compellable, unless the Rules expressly state that they need not testify (Rule 164 of the Crimes Rules).

### **3 Privilege**

There are strict rules concerning information that is communicated to people during some relationships that attract legal privilege. Persons generally cannot be compelled if information was communicated to them in privileged circumstances.

A minister of religion must not disclose any confession made to the minister of religion in a professional context unless the person who made the confession has expressly consented to its being divulged (Rule 170(1) of the Crimes Rules).

A doctor must not, without the express consent of the person who made the confession, divulge in proceedings (unless the sanity of the patient is in dispute) any communication made to the doctor that was necessary to prescribe or act for the patient (Rule 170(2) of the Crimes Rules).

A lawyer must not, without the express consent of the client, disclose any communication made to the lawyer in the course and for the purpose of employment as a lawyer (Rule 170(3) of the Crimes Rules).

#### *Oaths*

All evidence must be given on oath or affirmation (Rule 167 of the Crimes Rules).

Children under 14, however, do not swear the oath set out in Rule 167. Before giving evidence children must make the following declaration: “I promise to speak the truth, the whole truth and nothing but the truth” (Rule 168 of the Crimes Rules).

#### **4 *The Accused***

The accused is a competent and compellable witness (Rule 132 of the Crimes Rules).

The Commissioner may, at any stage in proceedings, ask any questions of the accused that the court thinks necessary or proper for arriving at the truth in respect of the case. The answers of the accused shall be evidence in the case (Rule 132(1) of the Crimes Rules).

A confession made in relation to a crime shall not be rejected on the ground that a promise or threat or inducement has been held out to the person confessing, if the judge is satisfied that the means by which the confession was obtained were not likely to cause an untrue admission of guilt to be made (Rule 165 of the Crimes Rules).

The court may expressly summon a compellable witness to appear in court. If a witness fails to attend in answer to the summons or leaves the village without the permission of the court, the court may issue a warrant for the arrest of that person using form 6 of schedule 1 (Rule 102(2) of the Crimes Rules).

All evidence should be taken in the presence of the accused unless the accused has been given notice to appear before the Commissioner and fails to appear (Rule 103 of the Crimes Rules). If the accused has been given notice to appear and fails to do so the court may adjourn the case or may try and sentence the accused in the absence of the accused.

## **5 Use of Evidence**

The purpose for examining a witness called by a party is to gain evidence from the witness that supports that party's case.

A witness may give evidence as to the visual identification of the accused. Such evidence needs to be treated with caution because honest witnesses may have made mistakes regarding the identity of the accused.

The purpose of cross-examining witnesses is twofold. First, to gain evidence that supports the cross-examining parties' version of the facts in issue. Second, cross-examination may weaken the evidence given by the witness when first questioned.

Only the Commissioner may ask questions of the accused (Rule 132 of the Crimes Rules). If a party wishes to ask questions of the accused, those questions must be put to the Commissioner. It is for the Commissioner to ask those questions of the accused, if doing so is appropriate.

An important part of examining a witness is to establish, or try to diminish, the credibility of the witness. A cross-examining party will seek to attack a witnesses credibility by proving that a witness has made other statements inconsistent with their present testimony. If it is established that the accused or other witness has lied, this is relevant to his or her credibility. It does not mean the accused is guilty. People lie for many reasons. The witness may, however, be found guilty of perjury under Rule 76 of the Crimes Rules.

As a general rule, it is not open to the prosecution to produce evidence of the bad character of the accused. An accused may, however, put their own character in issue by bringing evidence of good character. In such circumstances, the prosecution may cross-examine witnesses (other than the accused) about the accused's character.

## ***VI PREPARING FOR COURT PROCEEDINGS***

Before going to court the Commissioner should:

- Ensure that the clerk has prepared the case list for the day;
- Try to have a Police officer present.

### ***1 Bail***

#### **(i) General**

Bail is extremely important as it deals with the right of an individual to liberty. This right is contained in the Universal Declaration of Human Rights, and incorporated into Tokelau law by Rule 16 of the Constitution.

No person shall be arrested without a warrant, except where the Rules expressly permit that to occur. An accused may be granted bail at any stage of the proceedings (Rule 122(1) of the Crimes Rules).

Upon arrest of a person under warrant, the person must be brought before the court. Upon being brought into court, the court must:

- Commit the accused to the custody of the apprehending police officer;
- Commit to other safe custody as the court thinks fit;
- Admit to bail on such conditions as the court orders.

An accused must not be committed to custody for more than seven days unless the circumstances make it necessary or proper that the accused should be held in custody before trial (Rule 121(2) of the Crimes Rules). The court may order custody for a longer period but no order shall be for a longer period but no order shall be for more than 30 days. There is no limit on the number of orders that may be made (Rule 121(4) of the Crimes Rules).

## (ii) Bail on Appeal

Occasionally, an individual convicted of an offence will appeal the conviction and the court will have to deal with bail. The court may:

- Order that the accused should be released on bail, with or without sureties till the appeal is heard;
- Deny bail (Rule 121(1) of the Crimes Rules).

## (iii) Relevant factors for bail:

There are a number of factors relevant to whether bail should be granted. These include:

- the protection of the rights of all persons to their personal liberty contained in the Universal Declaration of Human Rights.
- whether the person will try to leave Tokelau while on bail;
- the nature, circumstances and seriousness of the offence charged;
- the weight of the evidence against the accused, bearing in mind the presumption of innocence;
- the history and circumstances of the accused, including age, physical and mental condition, past conduct, community ties;
- whether at the time of the alleged offence, the accused was subject to a sentence or awaiting trial;
- whether the accused will interfere with witnesses or the Police investigation;
- the possibility of further offences;
- the danger posed by the accused to the alleged victim;
- the needs of the accused's family.

## **2 *Victims***

The victim of a crime is usually the main witness in criminal proceedings relating to the crime. There are no specific rules that deal with victims; judges are expected to treat them with courtesy and compassion.

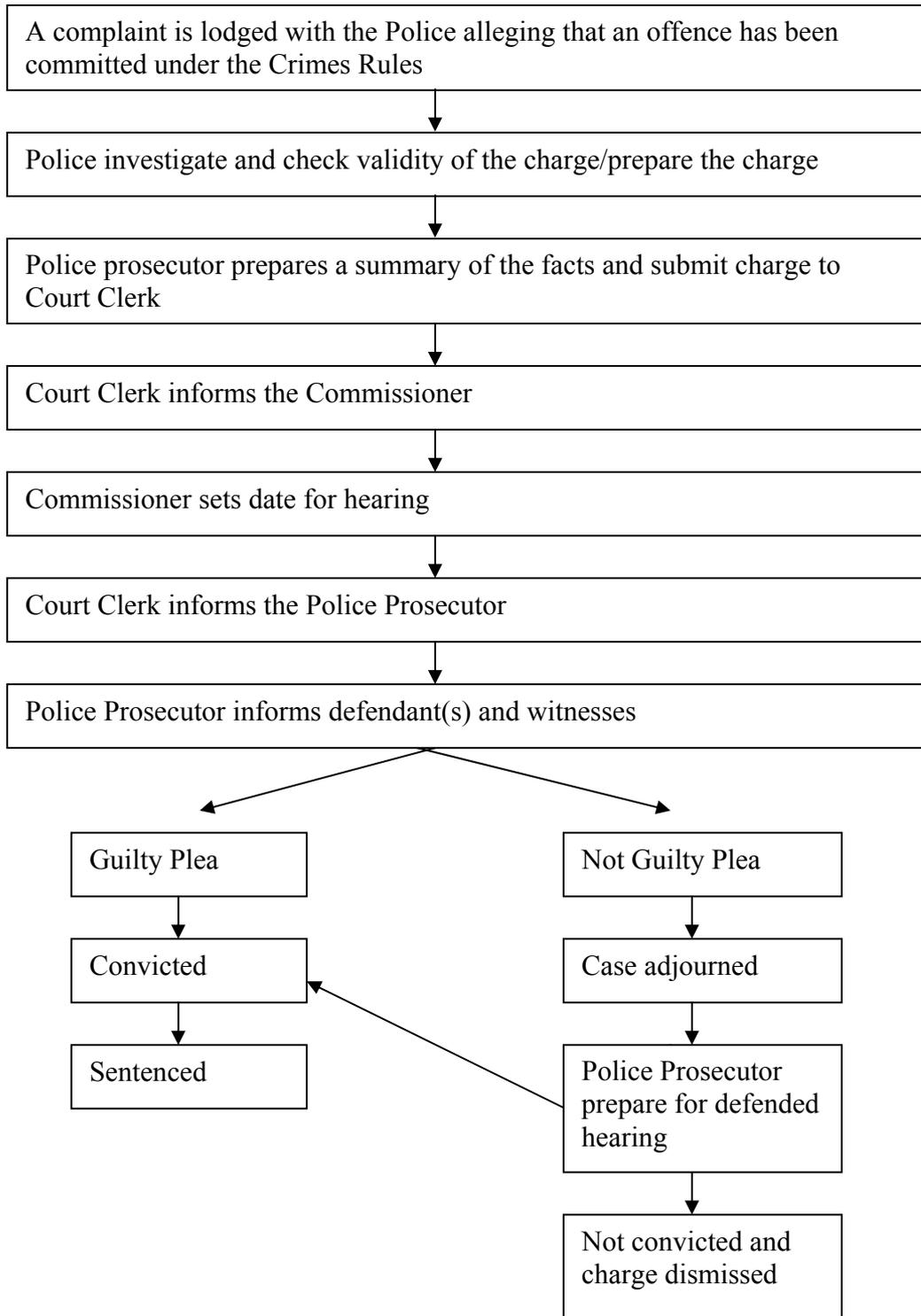
## **3 *Assistance with the law***

The Judge decides who may speak in court. A person who wants another person to speak for them (for instance, a young offender may wish a parent to speak for them) or who wants assistance with the law, must ask the court. The matter is dealt with in Rule 94 of the Crimes Rules.

Requests for assistance with the law are referred to the Council for the Ongoing Government which will decide in accordance with Rule 94(3) and (4).

If a Commissioner needs special assistance with the law, the Commissioner must make a request to the Council for the Ongoing Government under Rule 96 of the Crimes Rules.

**4 The following diagram shows how a case comes to the Commissioner:**



## ***VII FIRST APPEARANCE***

### ***1 General***

At the first hearing, the judge will be concerned with some or all of the following:

- whether the matter is within the court's jurisdiction;
- whether the facts alleged support the validity of the charge made;
- non-appearance, summons and warrants;
- legal representation;
- plea;
- remand in custody;
- bail;
- adjournments.

Once a charge has been laid, the court can ensure the attendance of the accused, and other witnesses through:

- a summons
- a warrant.

A summons is a formal means of ensuring the attendance of people, particularly those who will not appear voluntarily, before the court. If a court is satisfied that a person is able to give or produce evidence relevant to a case, that person may be required to attend.

If a witness (including the accused) does not appear, the court may issue a warrant for his or her arrest (Rule 102(1) of the Crimes Rules).

### ***2 Taking a plea***

After the court is sure the accused understands the charge, the accused is asked to plead guilty or not guilty.

The accused should be asked 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 and explain that he or she will be asked at the end whether the facts are true;
- After the facts have been stated, ask the accused whether the facts are true or not.

Note that a plea of guilt is a plea to the elements of the offence and is not necessarily an acceptance of the Police summary of the facts. If the accused only disputes facts that are not relevant to the elements of the offence, the court should enter a plea of guilty. If the disputed facts are relevant to the elements, the court must enter a plea of not guilty for the accused.

If the accused denies the charge, or refuses to plead, the court must enter a plea of not guilty.

(i) Guilty Plea- Next Steps

Once a guilty plea has been entered, the court can convict the accused. The court may also impose a sentence if it considers doing so is appropriate. No person under 16 years shall be given a prison sentence (Rule 136(3) of the Crimes Rules). Further, a person should never be sentenced without first being convicted.

(ii) Not Guilty – Next Steps

If the accused pleads not guilty, a hearing must follow. The hearing may be held immediately, or adjourned until a later date (Rule 91 of the Crimes Rules). If the accused is found guilty, conviction and sentencing may follow.

## ***VIII DEALING WITH YOUNG OFFENDERS***

### ***1 Guidelines***

The following guidelines may help the court when it is dealing with young people.

When a person appears before the court, and that person looks as if they may be under 14 years, the court will need to check the age of that young person before it proceeds. The Police should know the person's age, as they will have been responsible for the investigation and the decision to charge. If the Police do not know the age of accused then the court should verify the person's age with the parents or by birth records.

### ***2 Dealing with a Young Person Privately***

If the court can, it should deal with the young person a little more privately.

When a case involving a young person is called, it is best to announce that the public will be excluded from the hearing. However, it should be made clear that anyone connected with the case, family of the young offender, or who is part of the court process, is able to stay.

### ***3 Assistance for the Young Person***

Usually, the plea of a young person should be taken when the young person's parent or guardian is present. This is because:

- they can give useful advice to the young person; and
- they usually have valuable information on the young person's position – whether they are attending school, getting into trouble with the Police, and whether they are living at home.

It may be a good idea, when the case has been called, to ask the young person where his or her parents are.

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

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

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

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

#### ***4 Not Guilty Plea – Defended Hearing***

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

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

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

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

When it is time for the defence to give evidence, go out of your way to use simple language, and make sure everyone else in court uses simple language too. You may need to help the young person give their evidence, by asking some questions which gets their story out.

Keep the questions simple and straightforward saying things such as:

- Tell me what happened?
- What happened next?
- Why do you say that?

Police may ask questions but you must make sure that they are reasonable questions, and that the young person understands. At times you may need to interrupt by checking with the young person if they understand. One way to check if they understand is to ask them to repeat the question in different words.

## **5 *Sentencing Young Offenders***

You must have particular regard when sentencing young offenders because the greatest emphasis is put on rehabilitation of the offender rather than on punishment.

Before deciding how to deal with the convicted young offender, you should obtain any information related to his or her:

- general conduct;
- home surroundings;
- school record; and/or
- medical history.

This information will help the court deal with the case in the best interests of the young offender.

## **6 Conviction**

A person under the age of 10 years cannot be guilty of an offence: Rule 114(1) of the Crimes Rules.

A person between the ages of 10 and 14 years cannot be guilty unless that person knew that the act or omission was wrong or illegal. Rule 114(2) of the Crimes Rules.

## ***IX JUDGMENTS***

A court makes its judgment by applying the relevant law to the particular facts of the case. Courts should follow a structured approach to decision-making. The decision must be recorded in writing.

In making a judgment, the court must act fairly and impartially. Parties must be given a reasonable opportunity to be heard before a decision is made in the case.

In addition to the formal court record, Commissioners should make their own notes of the arguments and any evidence that is presented, and also note their reaction to the arguments and evidence.

### ***1 Delivering judgment***

The judge must make the decision. Under no circumstances can the decision be delegated to someone else. Even when members of the Taupulega are part of the court, the Commissioner alone must make the decision.

Every court must record its judgment in writing. Each judgment must contain the reasons for the decision and be signed by the Commissioner (Rule 93 of the Crimes Rules).

Judgments of a village Appeal Committee must be made by consensus and be signed by all the judges.

### ***2 Procedure for writing a criminal judgment***

#### ***1. Introduction***

The first paragraph explains the issue of the case.

2. *Briefly explain the facts of the case*

Summarise the facts and explain what actually happened,

Give only the relevant facts of what happened. Only go into the detail where it is necessary to do so.

3. *The Law*

- State the relevant law
- Important to ask yourself “Who needs to prove that an offence was committed?”
- The offence needs to be proved beyond reasonable doubt
- All elements of the offence need to be proved
- In a civil case, all elements of the claim must be proven on the balance of probabilities.

4. *Investigation of the facts that must be proved*

Facts in dispute must be identified, and reasons given for any decision on conflicts in evidence.

5. *Relevant facts of the case*

Apply law to relevant facts.

6. *Conclusion*

In a criminal case, the conclusion must state whether the defendant in a criminal case is guilty or not guilty.

In a civil case, the conclusion will state whether the defendant is liable or not liable.

7. *Decision*

The order of the court must be clear, and in accordance with the maximum penalty or award that can be imposed by that court.

## *Template for judgment*

### **Introduction**

This introduces the case before the court.

### **Statement of the facts of the case**

Explains what happened

### **The law**

State the relevant rules and who has the duty to prove what facts.

### **Application of the law to the facts**

### **Reasoning on the disputed matter**

### **Conclusion**

**Verdict** (guilty or not guilty)

### **Sentence**

In the case of sentencing, it is to be dealt with separately after hearing any relevant comments from the parties.

### ***Case Scenario***

Puga is charged for being drunk in a public place under rule 52 (drunkenness) of the Crimes Rules.

The Police allege that on the morning of 25 August 2005 Puga and Lata has been drinking beer on the steps behind the store opposite Hieni's house. On or about midday Hieni observed from her house that Puga was drunk and was creating disturbances around the area. Hieni alleged that after consuming an enormous amount of alcohol Puga shouted obscene words at her family. Hieni then called the Police. The Police escorted both men to their houses. Both men were questioned and admitted drinking but argued that they were not drunk.

***Procedure of Making a Judgment***

**1. Introduction**

The first paragraph introduces the case.

This is a case about Puga who is charged with being drunk in a public place and causing a disturbance. The charge is brought under Rule 52(i) of the Crimes Rules.

**2. Brief statement of the facts of the case**

Explains what actually happened.

On the morning of 25 August 2005 Puga and Lata were drinking beer on the steps behind the store opposite Hieni's house.

On or about midday Hieni observed from her house that Puga, a quiet young man, was drinking beer and creating disturbance in the area.

Hieni alleged that after consuming an enormous amount of alcohol Puga shouted obscene words to her family.

Hieni then called the Police. The Police escorted both men to their houses.

In accordance with the Police Report both men were questioned and admitted drinking and shouting obscenities but argued they were not drunk.

### 3. The Law

Who should prove that the offence was committed?

Under Rule 52, the prosecution must prove beyond reasonable doubt that Puga was drunk, that he was in a public place, and that he caused disturbance.

How will the prosecution prove its case?

The community should provide some information (through police report and witnesses) to prove beyond reasonable doubt that Puga committed the offence.

It is not the responsibility of Puga to prove that he did not commit the offence.

Elements of the offence that must be proved

Elements of the offence under Rule 52(i):

- a person (the accused)
- drunk
- public place
- caused a disturbance.

It must therefore be proved that:

- Puga was drunk
- Puga was drunk in a public place
- Puga caused the disturbance.

It is important that all elements of the offence are proved.

Under the law, if one of the elements of the offence is not proved then Puga did not commit the offence charged.

#### **4. Investigation of statements that must be proved**

##### *Facts that are not in dispute*

The information before the court shows that the following facts are not in dispute:

1. Puga is a quiet person.
2. On August 2005 Puga was drinking on the steps behind the store and opposite Hieni's house.
3. Puga caused disturbance and Puga called out obscene words to Hieni's family.
4. The area where Puga was drinking is a public place.

##### *Facts that are in dispute*

Was Puga drunk?

#### **5. Reasoning**

A person is drunk when they have consumed alcohol and as a result have lost normal control of their behaviour. It is admitted that Puga had consumed alcohol, and that his behaviour was uncharacteristic. Given that Puga is normally a quiet young man, it must have been the alcohol that led him to cause the disturbance and shout the obscene words. Puga was therefore drunk.

#### **6. Conclusion**

What is your conclusion on the case?

Puga was drunk in a public place and caused disturbance.

#### **7. Verdict**

Puga is guilty of an offence under Rule 52 of the Crimes Rules. Puga is convicted.

## ***X SENTENCING***

After the court has heard and considered all relevant evidence and has convicted the defendant, the court must impose an appropriate penalty. The maximum penalties available to a court are set out in the Crimes Rules.

If a person has already been acquitted or convicted for an offence, that person must not be tried or punished again for that offence on the same facts (Rule 111 of the Crimes Rules).

### ***1 Sentencing principles***

There are 4 main purposes for imposing a penalty –

Deterrence: The penalty is designed to deter the offender from breaking the law again and to warn others not to do the same.

Prevention: The penalty is to prevent the offender from doing the same thing again

Rehabilitation: The penalty is to help the offender to reform and not offend again.

Punishment: The penalty is to punish the offender for his or her criminal behaviour.

### ***2 Sentencing discretion***

The level of penalty to be imposed in each case is a matter for the court to decide. The jurisdiction of the court sets the maximum penalty that can be imposed. The penalty in a particular case must be just and appropriate.

## Sentencing

Sentencing requires the court to balance:

- The gravity of the offence
- The needs of society
- The timely and just disposal of the case.
- Before deciding on the penalty, the court must give the offender an opportunity to comment on penalty. The offender may inform the court of any mitigating factors; these favour a lower sentence. The Police may also inform the court of any relevant factors; these may be aggravating factors which support imposing a harsher sentence.

Mitigating factors include:

- Guilty plea
- Remorse
- Reparation
- Reconciliation
- Young age of the offender
- First offence.

Aggravating factors include:

- The use of violence
- Persistent offending
- Damage to property
- Age and vulnerability of the victim
- Value of stolen property
- Premeditated action
- Danger to the public.

### **3 *A structured approach to sentencing***

The Commissioner has the power to:

- Dismiss the charge despite evidence to convict.
- Discharge the accused without sentence (Rule 139 of the Crimes Rules).
- Order the offender to do community service.
- Impose a fine
- Order the offender to repay stolen money or return property
- Order the offender to pay compensation
- Order the restitution of property
- Put the offender under police supervision (Rule 138 of the Crimes Rules)
- Reprimand the offender.

### **4 *Sentencing format***

The court must balance all the factors. The court should do so openly and in the following form:

1. Introduction
2. Brief summary of the facts
3. Fix the appropriate sentence
4. Conclusion and order.

## *Format for a sentencing decision*

### **1. Introduction**

- The first paragraph says what the sentencing is for
- Who are you addressing in the sentencing decision.

This sentencing is for Puga who committed an offence under Rule 52(i) of the Crimes Rules.

### **2. Brief of the facts**

On 25 August Puga was drinking beer with Lata in a public place near Hieni's house. Puga shouted obscene words to Hieni's family and caused disturbance to Hieni's family. Puga was drunk.

At the end of the hearing Puga was found guilty of an offence under rule 52(i) of the Crimes Rules.

### **3. Fixing the proper sentence**

- State the penalty imposed by applicable law.

Under the Crimes Rules, the maximum penalty that may be imposed on a person convicted of an offence under Rule 52 is a fine of 3 penalty units (\$150) or 3 months imprisonment. There is no prison in Tokelau, the fine is therefore more relevant in your case.

I also have the power under Rule 136 of the Crimes Rules:

- to reprimand;
- to order community service for a term not exceeding 3 months.

Rules 138 and 139 give me the power also:

- to order work under the supervision of the police. (Rule 138(1)); or
- to convict and discharge with or without special conditions will apply. (Rule 139(1) of the Crimes Rules).
- Principles of sentencing to be emphasised in the present case.

## Sentencing

I noted that the offender has appeared before me for the very first time. The Police have confirmed that you are a first time offender. As a young offender who is also a student at USP, you have a promising future. In this regard, I do not want to see you in my court again. Following this sentencing I would like you to stop drinking. You have your future in front of you.

- Consider the views of the victim and the public.

I will take into account Hieni's statement that you have apologised to her family and you were sorry for what you had done. Hieni also confirmed that her family has accepted your apology.

- Identify and state aggravating factors, if any.
- Identify and state mitigating factors, if any. State what discount, if any, you have made but give clear warning of future offending without making categorical and specific threats or promises such as "I promise you will certainly go to prison".

Having considered Hieni's statement that you had apologised to her and her family, and your apology to the court, I am satisfied that you are sorry for the offence you have committed. In your apology to the court you said that you will not re offend.

- What is the most appropriate sentence, if any, taking into account all the circumstances.

Having considered the case, and that you have apologised for the offence committed, and noting that you are a student at USP, I believe the appropriate penalty in your case is to discharge you without conviction on special conditions. These specific conditions must be followed by you for the next 12 months.

#### **4. Conclusion and Orders**

- State the conclusion and orders clearly.
- If there is to be a sentence imposed, then it must be announced that the defendant “Is CONVICTED and SENTENCED to.....”.
- State the sentence or penalty imposed, any conditions ordered and any other orders made CLEARLY.

In conclusion I therefore order that you, Puga, are discharged without conviction, under Rule 139(3)(i). However, there are special conditions given to Puga which must be followed.

The special conditions are:

- no more drinking of alcohol within the next 12 months
- no further offending in the next 6 months.

If you intentionally refuse or neglect to obey those conditions you will commit the offence of contempt under Rule 74 of the Crimes Rules. In breaching those conditions, you may also commit the offence of drunkenness under Rule 54 of the Crimes Rules.

## ***XI OTHER PROCEEDINGS***

### ***1 Alternative Dispute Resolution***

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

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

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

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

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

### ***2 Preliminary Enquiries***

#### **(i) General**

A preliminary enquiry will be held if:

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

## Preliminary Enquiries

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

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

In a preliminary hearing, the Commissioner should avoid:

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

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

### (ii) Conduct of the Enquiry

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

The accused must enter a plea.

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

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

## Preliminary Enquiries

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

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

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

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

There is no case to answer when:

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

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

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

## ***XII COMMON OFFENCES***

The purpose of this chapter is to assist in dealing with common offences.

For each offence listed in the chapter there is-

- a description of the offence by reference to the relevant rule of law;
- the elements of the offence which the prosecution is required to prove;
- a commentary, which provides information to be considered; and
- the maximum penalty that can be imposed if the defendant is found guilty.

### ***1 General requirements***

1. The person named in the charge must be the same person as the defendant in the court.
2. The date and period of time when the offence charged is alleged to have taken place must be stated.
3. The place where the offence is alleged to have been committed must be stated.

### ***2 Elements***

The elements section lists all the elements that must be proved for the offence.

The elements section is very helpful as it provides a guide for checking that the prosecution has proved all that is required before the defendant can be proved guilty.

### **3 *Commentary***

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

### **4 *Sentencing***

The sentencing section describes the maximum penalty for each offence.

## ***Rule 8 of the Crimes Rules – Concealment of Birth***

### *Description*

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

### *Elements of Offence*

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

### *Commentary*

#### (1) Identification

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

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

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

#### (3) Defences

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

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

### *Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 9 of the Crimes Rules – Counselling suicide***

### *Description*

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

### *Elements of Offence*

- 1 (i) any person (accused)  
(ii) counselled (advised) or procured (persuaded)  
(iii) a person to commit suicide
  
- 2 (i) a person (the accused)  
(ii) aided (assist) or abetted (encouraged)  
(iii) a person in the commission of suicide.

### *Commentary*

#### (1) Identification

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

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

#### **Or**

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

#### **Or**

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

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 12 of the Crimes Rules – Cruelty to a child***

### *Description*

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

### *Elements of Offence*

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

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

### *Commentary*

#### (1) Identification

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

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

## Rule 12 of the Crimes Rules – Cruelty to a child

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

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

### (3) Defences

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

#### *Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 14 of the Crimes Rules – Bodily Harm***

### *Description*

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

### *Elements of Offence*

#### Rule 14(1)

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

#### Rule 14(2)

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

### *Commentary*

#### (1) Identification

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

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

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment (Commissioner).

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

## ***Rule 15 of the Crimes Rules – Assault***

### *Description*

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

### *Elements of Offence*

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

### *Commentary*

#### (1) Identification

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

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

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

#### (3) Definition of assault

The Rules define “assault” as follows:

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

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

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

(4) Lawful excuse

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

Examples of lawful reasons are:

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

(5) Defences

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

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 18 of the Crimes Rules – Incest***

### *Description*

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

### *Elements of Offence*

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

### *Commentary*

#### (1) Identification

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

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

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

The accused must know of the relationship.

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment (Commissioner).

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

## ***Rule 19 of the Crimes Rules – Unlawful carnal knowledge***

### *Description*

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

### *Elements of Offence*

#### Rule 19(1)(i)

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

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

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

*Commentary*

(1) Identification

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

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

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment (Commissioner).

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

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

### *Description*

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

### *Elements of Offence*

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

### *Commentary*

#### (1) Identification

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

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

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 21 of the Crimes Rules – Indecent Assault***

### *Description*

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

### *Elements of Offence*

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

### *Commentary*

#### (1) Identification

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

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

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

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 22 of the Crimes Rules – Adultery and fornication***

### *Description*

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

### *Elements of Offence*

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

### *Commentary*

#### (1) Identification

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

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

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

#### (3) Defences

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

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

### *Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 23 of the Crimes Rules – Unmarried Persons***

### *Description*

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

### *Elements of Offence*

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

### *Commentary*

#### (1) Identification

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

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

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

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

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 24 of the Crimes Rules – Miscarriage***

### *Description*

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

### *Elements of Offence*

#### Rule 24(1)

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

#### Rule 24(2)

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

#### Rule 24(2)

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

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

Rule 24(3)

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

*Commentary*

(1) Identification

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

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

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

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 26 of the Crimes Rules – Bigamy***

### *Description*

- (1) A person who commits bigamy commits an offence.
- (2) Bigamy is —
  - (i) the act of a person who, knowing he or she is married goes, through a valid form of marriage with another person; or
  - (ii) the act of a person who goes through a valid form of marriage with a person whom he or she knows to be married, if the parties go through the form of marriage, or if the person charged is habitually resident, in Tokelau.
- (3) The fact that the parties would, if unmarried, have been incompetent to contract marriage is not a defence to a prosecution for bigamy.
- (4) Every form of marriage shall for the purposes of this rule be deemed valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form.

### *Elements of Offence*

#### Rule 26(2)(i)

- (i) a person (accused)
- (ii) knowing he or she is married
- (iii) went through a form of marriage
- (iv) with another person
- (v) the home of the accused is Tokelau or the marriage was registered in Tokelau.

#### Rule 26(2)(ii)

- (i) a person (accused)
- (ii) went through a valid form of marriage
- (iii) with a person
- (iv) whom he or she knows to be married
- (v) the home of the accused is Tokelau or the marriage was registered in Tokelau.

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who had committed bigamy knowing that the person he or she married was already married or that the other person was already married.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 27(1) of the Crimes Rules – Theft***

### *Description*

Rules 27(1) Theft is the act of dishonestly taking, or converting to the use of any person, or misappropriating or disposing of, or dealing in any other manner, with anything capable of being stolen, with intent-

- (i) to deprive the owner, or a person having a special property or interest in it, permanently of the thing; or
- (ii) to part with it under a condition as to its return which the person parting with it may be unable to perform; or
- (iii) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time of the taking or conversion.

### *Elements of Offence*

- 1**
  - (i) a person (accused)
  - (ii) dishonestly takes or
  - (iii) converts to the use of any person or disposing of or deal with
  - (iv) anything capable of being stolen
  - (v) with intent
  - (vi) to deprive the owner, or other person with an interest in the thing
  - (vii) permanently of the thing
  
- 2**
  - (i) a person (accused)
  - (ii) dishonestly takes, or
  - (iii) converts the use of any person or disposing of or deal with
  - (iv) anything capable of being stolen
  - (v) with intent
  - (vi) to pass the thing to someone on condition as to return
  - (vii) that the accused may be unable to perform
  
- 3**
  - (i) a person (accused)
  - (ii) dishonestly takes, or
  - (iii) converts the use of any person or disposing of or deal with

- (iv) anything capable of being stolen
- (v) with intent
- (vi) to deprive the owner, or other person with an interest in the thing
- (vii) to use the thing in a way that it cannot be restored to the (viii) condition it was in at the time of the taking.

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who dishonestly took or disposed of the property with intent to permanently deprive the owner or other person of the thing.

“Takes” includes obtaining possession:

- by any tricks
- by intimidation
- under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; or
- by finding, where at the time of the finding the finder believes that the owner can be discovered.

“Owner” includes any part owner, or a person who has possession or control of, or a special a special interest in the thing capable of being stolen.

Whether the owner is named or not, ownership must be proved by the prosecution as an essential element of the offence. The prosecution must also prove that all the owners did not consent to the thing being taken.

Consider why the accused took it and whether there was an honest intention. An accused may have a valid defence where he or she has an honest belief that he or she has a legal right to take the goods in question (i.e that the accused honestly believed that the goods belonged to him or her).

(2) Intention to permanently deprive the owner

The prosecution must prove that the accused had the intention of keeping the thing and using it as his or her own. This includes the situation where the accused has sold the thing or given it away.

(3) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(4) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 27(4) of the Crimes Rules – Theft***

### *Description*

Any person who fraudulently abstracts or uses electricity commits theft.

### *Elements of Offence*

- (i) a person (accused)
- (ii) took or used
- (iii) electricity
- (iv) with intention not to pay.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who used the electricity fraudulently.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

#### (3) Defences

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

Rule 27 (4) of the Crimes Rules – Theft

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 27(6) of the Crimes Rules – Theft***

### *Description*

#### Rule 27(6)

A person commits theft who holds, receives, or obtains anything capable of being stolen subject to an obligation to deal with it in a certain manner, and who fraudulently or dishonestly deals with it in any other manner or fails to deal with it in accordance with that obligation.

### *Elements of Offence*

- (i) a person (accused)
- (ii) held or received or obtained
- (iii) anything capable of being stolen
- (iv) subject to conditions
- (v) fraudulently or dishonestly did not deal with the thing in accordance
- (vi) with the condition.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who had held the property and broke the conditions.

#### (2) Burden of proof

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 27(7) and (8) of the Crimes Rules – Theft***

### *Description*

#### Rule 27(7)

A person who by means of fraud or false pretence dishonestly obtains for himself or herself or for any other person, whether directly or through the medium of any contract procured by the fraud or false pretence, anything capable of being stolen commits theft of that thing.

#### Rule 27(8)

A person who destroys, cancels, conceals, or obliterates in whole or in part a document for any fraudulent or dishonest purpose commits theft of the document.

### *Elements of Offence*

#### Rule 27(7)

- (i) a person (accused)
- (ii) obtained
- (iii) anything capable of being stolen
- (iv) fraudulently or by false pretence.

#### Rule 27(8)

- (i) a person (accused)
- (ii) destroyed, cancelled, made unreadable
- (iii) whole or part of a document
- (iv) with fraudulent or dishonest purpose.

*Commentary*

(1) Identification

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 dishonestly obtained or destroyed the document.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 28 of the Crimes Rules – Receiving***

### *Description*

A person who receives stolen property knowing it to have been stolen or dishonestly obtained commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) received stolen property
- (iii) knowing the property to be stolen or dishonestly obtained.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who received stolen goods knowing that the goods were stolen or were dishonestly obtained.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 29 of the Crimes Rules – Conversion***

### *Description*

A person who, without lawful excuse but not so as to be guilty of theft, takes or converts to his or her use or to the use of any other person any movable property, commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) took or converted
- (iii) movable property
- (iv) without lawful excuse
- (v) for use.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who unlawfully converted another person's property.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 30 of the Crimes Rules – Breach of Trust***

### *Description*

- (1) A trustee who with intent to defraud, and in violation of the trust, converts anything of the trust to a use not authorised by the trust, commits an offence.
- (2) For the purposes of this rule an executor or administrator shall be deemed to be a trustee of the property subject to the administration.

### *Elements of Offence*

- (i) a person (accused)
- (ii) a trustee
- (iii) intended to defraud the trust
- (iv) took or used the property of the trust
- (v) in a way not permitted by the trust.

### *Commentary*

#### (1) Identification

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

The prosecution must prove the accused was the trustee who took or used the property of the trust without permission and had intention to defraud the trust.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment (Commissioner).

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

## ***Rule 31 of the Crimes Rules – Fraud***

### *Description*

- (1) A person who by deceit or falsehood or other fraudulent means –
  - (i) defrauds the public or any person ascertained or unascertained;
  - (ii) causes or induces a person to execute, make, accept, endorse, or destroy the whole or any part of a valuable security, commits an offence.
  
- (2) A person who in incurring a debt or liability obtains credit by fraud, commits an offence.

### *Elements of Offence*

- 1** Rule 31(i)
  - (i) a person (accused)
  - (ii) deceived OR lied to another person
  - (iii) that deception or lie caused the accused or another to receive a benefit.
  
- 2** Rule 31(ii)
  - (i) a person (accused)
  - (ii) deceived OR lied
  - (iii) that deception or lie persuaded OR caused another person to make OR accept OR cancel a bank deposit or loan.
  
- 3** Rule 31(2)
  - (i) a person (accused)
  - (ii) obtains a loan or obtains property on credit
  - (iii) by fraud.

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who lied to another person caused that person to confer a benefit on the accused.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment (Commissioner).

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

## ***Rule 32 of the Crimes Rules – Forgery***

### *Description*

- (1) A person who makes a false document with intent to defraud or deceive any person, whether ascertained or unascertained, commits an offence.
- (2) In this rule, “false document” means a document —
  - (i) of which the whole or any material part purports to be made by a person who did not make it or authorise its making; or
  - (ii) of which the whole or any material part purports to be made on behalf of a person who did not authorise its making; or
  - (iii) in which, though it purports to be made by the person who did in fact make it or authorise its making, or purports to be made on behalf of the person who did in fact authorise its making, the time, date or place of its making, where material, or any number or distinguishing mark identifying the document, where either is material, is falsely stated; or
  - (iv) of which the whole or some material part purports to be made by a fictitious or deceased person, or purports to be made on behalf of any such person; or
  - (v) which is made in the name of an existing person either personally or by the authority of that person, with the intention that it should pass as being made by some person, real or fictitious, other than the person who makes or authorises it.
- (3) In this rule, “make a false document” includes making a material alteration in a genuine document, whether by addition, insertion, obliteration, erasure, removal, or otherwise.
- (4) The offence under this rule is complete —
  - (i) as soon as the document is made with the requisite intent, although the offender may not have intended that any particular person should use or act on it as genuine, or should be induced by the belief that it is genuine to do or refrain from doing anything;

- (ii) although the false document may be incomplete, or may not purport to be such a document as would be valid in law, if it is so made and is such as to indicate that it was intended to be acted on as genuine.
- (5) A person who procures the execution of a document by falsely pretending that its contents are different from what they really are commits an offence.

*Elements of Offence*

Rule 32(1)

- (i) a person (accused)
- (ii) made a false document
- (iii) with intent to defraud OR deceive any person.

Rule 32(5)

- (i) a person (accused)
- (ii) inaccurately described the contents of a document to another person
- (iii) that description persuaded another person to create a implement a document.

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who intentionally made a false document OR inaccurately told another person about the content of a document and persuaded that other person to agree to that document.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

“false document” refers to a document made for a purpose that is set out in subparagraph (2) of Rule 32 of the Crimes Rules.

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment (Commissioner).

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

## ***Rule 34 of the Crimes Rules – Intentional fire***

### *Description*

A person who intentionally and without lawful excuse –

- (i) sets fire to any property; or
- (ii) damages or destroys property by means of explosive; or
- (iii) endangers human life by fire and by means of explosive.

This covers three distinct offences.

### *Elements of Offences*

#### Rule 34(1)(i)

- (i) a person (accused)
- (ii) set fire to any property
- (iii) intentionally
- (iv) without lawful excuse.

#### Rule 34(1)(ii)

- (i) a person (accused)
- (ii) damaged or destroyed property
- (iii) by means of explosive
- (iv) intentionally and
- (v) without lawful excuse.

#### Rule 34(1)(iii)

- (i) a person (accused)
- (ii) endangered human life by fire or by means of explosive
- (iii) intentionally and
- (iv) without lawful excuse.

*Commentary*

(1) Identification

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

The prosecution must provide evidence to prove that it was the accused who committed the offence, for example it was the accused who set the fire, damaged property by use of explosives.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Intentionally and unlawfully

“Intentionally and unlawfully” are important elements of this offence.

The prosecution must prove that the accused intended to set fire to the property. The prosecution must also show that there was no lawful reason for setting the fire (for example, following the orders of the Pūlenuku to burn rubbish).

(4) Defences

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

An accused may bring evidence to show that he or she was forced to commit the offence. The accused will have to establish their defence, on the balance of probabilities (i.e more likely than not).

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 35 of the Crimes Rules – Careless Fire***

### *Description*

A person who negligently causes a fire commits an offence.

### *Elements of Offence*

- (i) a person (the accused)
- (ii) caused a fire
- (iii) negligently.

### *Commentary*

#### (1) Identification

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

The prosecution must provide evidence to prove that it was the accused who committed the offence, i.e it was the accused who caused the fire.

A fire can be caused directly or by an act or omission that enabled the fire to start.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

“Negligently” is an important element of this offence. The prosecution must prove that the accused did or failed to do was careless and not what a reasonable person would have done in the circumstances.

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 36 of the Crimes Rules – Damage to property***

### *Description*

A person who intentionally and without reasonable excuse destroys or damages the property of another commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) the property of another
- (iii) destroyed or damaged
- (iv) intentionally and
- (v) without reasonable excuse.

### *Commentary*

#### (1) Identification

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 damaged and destroyed the property.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Intentionally and without reasonable excuse

“Intentionally and without reasonable excuse” are important elements of this offence.

The prosecution must prove that the accused intended to damage or destroy the property and without reasonable excuse damaged or destroyed the property. The prosecution must prove that the accused had no reasonable excuse for damaging or destroying the property.

“Property of another”: The prosecution must prove that the property which was damaged or destroyed did not belong to the accused.

(4) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment (Commissioner).

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

## ***Rule 37 of the Crimes Rules – Animal Trespass***

### *Description*

A person who owns, uses or has the care of an animal which wanders or is at large in a public place, or is on private property without permission, commits an offence.

### *Elements of Offence*

#### **1 Rule 37**

- (i) a person (accused)
- (ii) owned OR used OR had the care of an animal
- (iii) that animal
- (iv) wandered in a public place OR
- (v) was taken into a public place and not tied up or put in a cage  
OR
- (vi) was in private property without permission.

### *Commentary*

#### **(1) Identification**

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

The prosecution must prove that it was the accused who owned the animal that wandered in a public place or wandered on to another person's private property without their permission.

#### **(2) Burden of proof**

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 38 of the Crimes Rules – Trespass***

### *Description*

- (1) A person who, without lawful excuse, is —
  - (i) in or on a building; or
  - (ii) in an enclosed yard or similar area; or
  - (iii) in or on a vessel or vehicle,
  - (iv) belonging to anothercommits an offence.
  
- (2) A person who —
  - (i) enters a plantation, garden, land or house of another with intent to commit an offence;
  - (ii) without lawful excuse enters or remains in a plantation, garden, land or house of another after being warned not to enter, or to leave as the case may be,commits an offence.

### *Elements of Offence*

#### Rule 38(1)

- (i) a person (accused)
- (ii) without lawful excuse
- (iii) was in or on a building or in an enclosed yard or similar area or in or on a vessel or vehicle.

#### Rule 38(2)(i)

- (i) a person (accused)
- (ii) entered a plantation, garden, land or house
- (iii) of another
- (iv) with intent to commit an offence there.

Or

#### Rule 38(2)(ii)

- (i) a person (accused)
- (ii) without lawful excuse

- (iii) entered or remained in, a plantation, garden, land or house
- (iv) of another
- (v) was warned not to enter or was told to leave
- (vi) did not obey.

*Commentary*

(1) Identification

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

The prosecution must provide evidence to prove that it was the accused who entered the building or vessel or entered the land of another with intent to commit an offence or stayed on the land of another after being warned not to enter or to leave.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

Examples of “lawful excuse” are – official visits, entry permitted by law, or accepted by the owner, electricity repairs, telephone repairs.

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 39 of the Crimes Rules – Indecent documents and things***

### *Description*

- (1) A person who, knowingly and without lawful excuse —
  - (i) sells, or exposes for sale or to public view, an obscene or indecent book, picture, film, tape, photograph, document, or object or thing; or
  - (ii) publicly exhibits an obscene or indecent show, commits an offence.
  
- (2) Any person who has in his or her possession an obscene or indecent book, picture, film, tape, photograph, document, or object, or thing, commits an offence.

### *Elements of Offence*

- 1** Rule 39(1)(i)
  - (i) a person (accused)
  - (ii) knowingly
  - (iii) sold OR exposed for sale OR exposed to public view
  - (iv) an obscene OR indecent
  - (v) document OR object OR thing
  - (vi) without lawful excuse.
  
- 2** Rule 39(1)(ii)
  - (i) a person (accused)
  - (ii) knowingly
  - (iii) publicly exhibited
  - (iv) obscene OR indecent show
  - (v) without lawful excuse.

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who knowingly exposed the public to an indecent OR obscene document OR object, OR thing OR show.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment (Commissioner).

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

## ***Rule 40 of the Crimes Rules – False report to the Police***

### *Description*

A person who —

- (i) contrary to the fact and without a belief in the truth of the statement, makes or causes to be made to a constable a written or oral statement alleging that an offence has been committed; or
- (ii) does an act or makes a statement with the intention of causing wasteful deployment, or of diverting deployment, of police personnel or resources, or being negligent as to that result, commits an offence.

### *Elements of Offence*

#### Rule 40(i)

- (i) a person (accused)
- (ii) contrary to the fact and without a belief in the truth
- (iii) made or caused a written or oral statement to be made
- (iv) to a constable
- (v) the statement is incorrect and the accused did not believe it was true

Or

#### Rule 40(ii)

- (i) a person (accused)
- (ii) did an act or made a statement
- (iii) intentionally or negligently
- (iv) to cause wasteful deployment of police resources or
- (v) to divert deployment of police resources.

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who wrote or caused the statement to the police or that it was the accused who did the act or made the statement intended to waste the resources and time of police.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 41 of the Crimes Rules – Accusation of offence***

### *Description*

A person who —

- (i) with intent to extort or gain anything from any person, accuses or threatens to accuse either that person or any other person of an offence, whether the person accused or threatened with the accusation is guilty of that offence or not; or
  - (ii) with the intent as specified in subparagraph (i), threatens that any person shall be so accused by any person; or
  - (iii) causes any person to receive a document containing an accusation or threat of the kind specified in this rule, knowing its contents,
- commits an offence.

### *Elements of Offence*

#### Rule 41(i)

- (i) a person (accused)
- (ii) intended to gain something unlawfully from another
- (iii) accused or threatened to accuse any person of an offence

Or

#### Rule 41(ii)

- (i) a person (accused)
- (ii) intended to gain something unlawfully from another
- (iii) threatens a person that they will be accused by another of having committed an offence

Or

#### Rule 41(iii)

- (i) a person (accused)
- (ii) caused another person to receive

- (iii) a document which contain an accusation or having committed an offence or threatens that the accused will be made
- (iv) knowing what is in the document.

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who who made the threat, knew what was in the document and intended to gain something unlawfully.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

Whether the accusation of offending is correct or not, is irrelevant.

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 42 of the Crimes Rules – Spreading Rumours***

### *Description*

A person who knowingly spreads an untrue report which is likely to cause any other person to suffer in reputation commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) spread a report
- (iii) knowingly it was not true
- (iv) likely to cause damage to the reputation
- (v) of another.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who spread the report knowing that it was not true and likely to damage the reputation of another.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

It would be a good defence that the report was true.

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 43 of the Crimes Rules – Obstruction in a public place***

### *Description*

A person who intentionally obstructs a public place, or without lawful excuse, knowingly creates a source of danger in a public place, commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) intentionally obstructed a public place OR without lawful excuse and knowingly created a danger in a public place.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who caused the obstruction and that the accused intended to cause the obstruction OR that it was the accused who created the danger in the public place and the accused knew of that.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 44 of the Crimes Rules – Fighting in a public place***

### *Description*

A person who, without lawful excuse, fights in a public place commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) without lawful excuse
- (iii) fought
- (iv) in a public place.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who fought in a public place and that there was no lawful excuse for the fighting.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

#### (3) Defences

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

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

### *Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 45 of the Crimes Rules – Offensive behaviour***

### *Description*

A person who —

- (i) in or within view of a public place, behaves in an indecent, offensive or disorderly manner; or
- (ii) in a public place, addresses any words to any person intending to threaten, alarm, or offend that person; or
- (iii) in or within hearing of a public place uses threatening or insulting words and is negligent as to whether any person is alarmed or insulted by those words; or
- (iv) uses profane, indecent, or obscene language in a public place or within the hearing of a person in a public place, commits an offence.

### *Elements of Offence*

#### **1** Rule 45(i)

- (i) a person (accused)
- (ii) behaved in an indecent OR offensive or disorderly manner
- (iii) within view of public place.

#### **2** Rule 45(ii)

- (i) a person (accused)
- (ii) in a public place
- (iii) addressed words to a person
- (iv) intending to threaten, OR alarm, OR offend that person

#### **3** Rule 45(iii)

- (i) a person (accused)
- (ii) within hearing of a public place
- (iii) used threatening or insulting words
- (iv) negligent as to whether any person is alarmed or insulted by those words.

- 4 Rule 45(iv)
- (i) a person (accused)
  - (ii) used profane OR indecent, or obscene language
  - (iii) in a public place or within the hearing of a person in a public place.

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who behaved offensively in one of the four ways specified.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 46 of the Crimes Rules – Noise***

### *Description*

A person who makes or causes the making of an unnecessary and unreasonable noise in a village commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) made or caused
- (iii) unnecessary and unreasonable noise
- (iv) in the village.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who made or caused the making of unnecessary and unreasonable noise in the village.

“Unnecessary and unreasonable noise” means the noise that is not acceptable according to the custom of the village.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 47 of the Crimes Rules – Throwing Stones***

### *Description*

A person who throws or discharges a stone or other object in a manner that is likely to cause injury, damage or disturbance to any person, commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) threw or discharged
- (iii) a stone or other object
- (iv) likely to cause injury, damage or disturbance.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who threw the stone which had caused damage or disturbed another person.

“Discharge” involves the use of a tool such as a slingshot to project an object.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 48 of the Crimes Rules – Invasion of privacy***

### *Description*

A person who, without reasonable excuse, peeps or peers into a house commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) without reasonable excuse
- (iii) peeped or peered
- (iv) into a house.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who peeped or peered into the house without reasonable excuse for doing so.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

#### (3) Defences

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

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

### *Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 49 of the Crimes Rules – Drugs***

### *Description*

#### Rule 49(2)

Subject to paragraph (3) a person, other than a qualified medical practitioner, who knowingly —

- (i) imports a drug into Tokelau; or
- (ii) has a drug in their possession, commits an offence.

### *Elements of Offence*

#### Rule 49(2)(i) and (ii)

- (i) a person (accused)
- (ii) not a qualified medical practitioner
- (iii) knowingly
- (iv) imported a drug into Tokelau OR had a drug in their possession.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who imported the drug into Tokelau or had a drug in her or his possession and was not a qualified medical practitioner.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

In Rule 49 of the Crimes Rules, “drug” means —

- (i) cannabis plant or seed, opium poppy, coca leaves, or any derivative, preparation or product of any of them; and
- (ii) any psychotropic liquid or substance.

(3) Defences

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

The accused may prove that he or she had a written prescription from a medical practitioner to import the drug for his or her use or for that of the family.

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 50 of the Crimes Rules – Intoxicating Liquor***

### *Description*

- (1) A person who sells or supplies intoxicating liquor to a person under the age of 18 years commits an offence.
- (2) It is no defence to a charge under paragraph (1) that the person charged believed that the person to whom the liquor was sold or supplied was not under the age of 18 years.
- (3) A person under the age of 18 years who drinks any intoxicating liquor knowing the liquor to be intoxicating commits an offence.

### *Elements of Offence*

- 1** Rule 50(1)
  - (i) a person (accused)
  - (ii) sold or supplied
  - (iii) intoxicating liquor
  - (iv) to a person under 18 years of age.
  
- 2** Rule 50(3)
  - (i) a person (accused)
  - (ii) under 18 years of age
  - (iii) drank intoxicating liquor
  - (iv) knowing the liquor to be intoxicating.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who sold intoxicating liquor to a person under 18 years, or for (2) that the accused was under 18 years and drank intoxicating liquor knowing it is intoxicating.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

A belief that the person supplied is at least 18 years of age is not a defence to a charge under paragraph (1).

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 51 of the Crimes Rules – Tobacco***

### *Description*

A person under the age of 16 years who smokes tobacco in any form commits an offence.

### *Elements of Offence*

#### Rule 51

- (i) a person (accused)
- (ii) smoked tobacco
- (iii) under 16 years of age.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who smoked the tobacco and was under 16 years of age. Remember Rule 114 – a person under 10 years of age cannot commit an offence special rules apply to a person between the age of 10 and 14 years.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 52 of the Crimes Rules – Drunkenness***

### *Description*

- A person who is drunk in a public place, and —
- (i) causes a disturbance; or
  - (ii) is unable to look after him or herself, commits an offence.

### *Elements of Offence*

#### Rule 52(i)

- (i) a person (accused)
- (ii) drunk
- (iii) public place
- (iv) caused a disturbance.

#### Rule 52(ii)

- (i) a person (accused)
- (ii) drunk
- (iii) public place
- (iv) unable to look after himself or herself.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who was drunk in a public place and caused disturbance or was unable to look after himself or herself.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Found drunk as to incapable of taking care of himself or herself

The prosecution must prove beyond reasonable doubt that the accused was affected by alcohol. The prosecution must also prove that the accused was drunk. The effect of drunkenness must be such that the person was not in control and could not manage themselves.

(4) Public Place

The prosecution must prove that the accused was in a public place. It needs to be proved that the place was in a public place in nature of, for example the “malae”, the Meeting house, or hospital.

(5) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 53 of the Crimes Rules – Use of Explosives***

### *Description*

A person who —

- (i) discharges a firearm or explosive carelessly or in such a manner or place as to cause or be likely to cause danger to the public;
- (ii) uses dynamite, gelignite or any other explosive or any deleterious liquid or substance for the purpose of killing or taking fish, commits an offence.

### *Elements of Offence*

#### Rule 53(i)

- (i) a person (accused)
- (ii) discharged a gun or explosive
- (iii) carelessly OR in a manner or place to cause or to be likely to cause danger
- (iv) to the public.

#### Rule 53(ii)

- (i) a person (accused)
- (ii) used
- (iii) explosive or harmful liquid or harmful substance
- (iv) for fishing.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who discharged the fire arm carelessly to cause danger to the public or that it was the accused who used the explosive or harmful liquid or substance for fishing.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

***Rule 54 of the Crimes Rules – Offensive weapons and disabling substances***

*Description*

- (1) In this rule —  
“disabling substance” means any anaesthetising or other substance produced for use for disabling persons, or intended for such use by the person who has it;  
“offensive weapon” means —
  - (i) in paragraph (2)(i) an object made or altered for use for causing bodily injury, or intended for such use by the person who has it;
  - (ii) in paragraph (2)(ii) an object capable of being used for causing bodily injury including any form of knife.
- (2) A person who —
  - (i) without reasonable excuse, has an offensive weapon or disabling substance in a public place; or
  - (ii) has possession, in any place, of an offensive weapon or disabling substance in circumstances that prima facie show an intention to use it to commit an offence, involving bodily injury or the threat or fear of violence,  
commits an offence.
- (3) It is a defence to a charge under paragraph (2)(ii) if the person accused proves that it was not his or her intention to use the weapon or substance to commit an offence.

*Elements of Offence*

- 1** Rule 54(2)(i)
  - (i) a person (accused)
  - (ii) without lawful excuse
  - (iii) had an offensive weapon or disabling substance
  - (iv) in a public place.
- 2** Rule 54(2)(ii)
  - (i) a person (accused)
  - (ii) had possession

- (iii) an offensive weapon or disabling substance
- (iv) circumstances show intention to use it
- (v) to commit an offence that involves bodily injury or the threat or fear of violence.

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who had an offensive weapon or disabling substance in a public place without OR that the accused had an offensive weapon or disabling substance with intention to use it as described in subparagraph (ii).

“disabling substance” means any anaesthetising or other similar substance.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 55 of the Crimes Rules – Public Boats***

### *Description*

- (1) A captain shall be designated for each public boat.
- (2) The captain of a public boat shall be responsible —
  - (i) for its navigation, working and safety when on the water, and may refuse to take any person or cargo into the boat unless he considers it safe to do so; and
  - (ii) for the loading and discharge of passengers and cargo into and from the boat.
- (3) A person who without reasonable excuse fails to obey the command of the captain of a public boat given in the exercise of the duty of the captain commits an offence.

### *Elements of Offence*

#### Rule 55(3)

- (i) a person (accused)
- (ii) without reasonable excuse
- (iii) failed to obey the command
- (iv) of the captain of a public boat
- (v) given in the exercise of the duty.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who failed to obey the command of the captain of a boat in the exercise of the captain's duty without reasonable excuse.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 56 of the Crimes Rules – Use of Vehicle and Vessel***

### *Description*

- (1) A person who drives or rides a vehicle or uses a vessel without due care and attention or without reasonable consideration for other persons using the road or place, commits an offence.
- (2) In paragraph (1) “vehicle” includes bicycle and motor-bike.

### *Elements of Offence*

#### Rule 56(1)

- (i) a person (accused)
- (ii) drove or rode
- (iii) a vehicle (includes bicycle or motorbike) or a boat
- (iv) without due care and attention OR reasonable consideration for other persons who are using the road or place.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who drove the vehicle on the road, or used the boat carelessly or without reasonable consideration for other people.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 57 of the Crimes Rules – Endangering Vessel***

### *Description*

A person who does an act or omits to do an act with intent to damage or endanger a vessel or its cargo, or with intent to injure or endanger a person on a vessel commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) did an act or omitted to act
- (iii) with intent
- (iv) to damage or endanger a vessel or its cargo OR injure or endanger a person on a vessel.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused did an act or omitted to do an act with the intention to damage or endanger the boat or its cargo or injure or endanger another person on the boat.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 58 of the Crimes Rules – Visiting Vessel***

### *Description*

- (1) A person who visits or boards a vessel while it is calling at Tokelau except —
  - (i) with the prior permission of the Faipule and of the officer in charge of the vessel; or
  - (ii) as an official or ticket-holding passenger; or
  - (iii) as required or permitted by any other enactment; or
  - (iv) as a member of the crew of the vessel,  
commits an offence.
- (2) If a person under the age of 14 years visits or boards a vessel in contravention of paragraph (1), each parent of that child commits an offence.

### *Elements of Offence*

#### Rule 58(1)

- (i) a person (accused)
- (ii) not listed in paragraph (1) visited or boarded a vessel.

#### Rule 58(2)

- (i) a person (accused)
- (ii) is the parent of a child under 14 years
- (iii) who visited or boarded the boat
- (iv) without right under paragraph (1).

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who visited the boat without right or is the parent of a child under 14 years of age who visited the boat.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 59 of the Crimes Rules – Poison***

### *Description*

A person who without lawful excuse places poison where it is a source of danger to human beings or to animals commits an offence.

### *Elements of Offence*

#### Rule 59

- (i) a person (accused)
- (ii) without lawful excuse
- (iii) placed poison
- (iv) to be a danger to human beings or animals.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who placed a poison in a position of danger to animals or a human beings without lawful excuse.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 60 of the Crimes Rules – Polluting Water***

### *Description*

A person who throws offensive matter into or otherwise pollutes any well, tank, or other place from which the supply of water for human use is obtained, commits an offence.

### *Elements of Offence*

#### Rule 60

- (i) a person (accused)
- (ii) threw offensive matter or polluted
- (iii) a well, tank or other place of water supply for human use.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused polluted or threw rubbish into a tank or other place that supplied water for human use.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 61 of the Crimes Rules – Unwholesome Provisions***

### *Description*

Any person commits an offence, who —

- (i) provides for public consumption; or
- (ii) sells, or exposes for sale; or
- (iii) possesses with intent to sell,  
any food or drink which that person knows, or might by the exercise of reasonable care have known, to be unwholesome.

### *Elements of Offence*

#### Rule 61

- (i) a person (accused)
- (ii) provided for public consumption OR sold or exposed for sale  
OR possessed for sale
- (iii) knew or OR ought reasonably to have known
- (iv) any food or drink
- (iv) to be unwholesome.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who provided food or drink for public consumption and knew or ought to have known that the goods were unwholesome.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

“Unwholesome” means rotten or prepared wrongly or likely to cause sickness or past the expiry date.

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 62 of the Crimes Rules – Unsanitary Premises***

### *Description*

A person who permits any place in his or her occupation or belonging to him or her to be in an insanitary or offensive condition to the danger or annoyance of the public or of neighbours commits an offence.

### *Elements of Offence*

#### Rule 62

- (i) a person (accused)
- (ii) permitted a place
- (iii) in his or her occupation or ownership
- (iv) to be in an unhealthy condition
- (v) that was a danger to or annoyed
- (vi) the public or neighbours.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who occupied or owned the place and permitted to be in a condition that annoyed or was a danger to others.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

This provision deals with uses of land such as those that may attract rats, flies, insects and spread diseases, and also to those that annoy because of smell or untidiness.

Note the requirement that the public place or neighbours are endangered or annoyed eg by smell of rubbish.

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 63 of the Crimes Rules – School Attendance***

### *Description*

- (1) Every person between the ages of 5 and 16 years who is resident in Tokelau shall attend school.
- (2) The parent or guardian of a child required by paragraph (1) to attend school who, without just cause, refuses or neglects to keep the child in regular attendance at school, commits an offence.

### *Elements of Offence*

#### Rule 63(2)

- (i) a person (accused)
- (ii) the parent or guardian
- (iii) of a child between the age of 5 and 16 years resident in Tokelau
- (iv) refused or neglected to keep the child in regular attendance at school
- (v) without just cause.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that the accused is the parent or guardian of a child under 16 years had refused or neglected to send the child to school regularly.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

No mental element is required, it is enough that the parent or guardian has not sent the child to school.

(3) Defences

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

It is a good defence to have a 'just cause' eg the child was sick.

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 64 of the Crimes Rules – Gaming***

### *Description*

A person who plays a game for money with cards or with dice commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) played a card game or dice
- (iii) for money.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who played a game with cards or dice for money.

This rule does not apply to bingo or dominoes. It does not apply to games with cards or dice unless money is used.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 67 of the Crimes Rules – Telephones***

### *Description*

- (1) No person, other than a person approved by Teletok for the purpose, shall interfere with or effect any connection or carry out any maintenance to any public telephone line.
- (2) A person who contravenes paragraph (1) commits an offence.

### *Elements of Offence*

- (i) a person (accused)
- (ii) not approved by Teletok
- (iii) interfered with OR made a connection line OR carried out maintenance
- (iv) public telephones.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who interfered with the telephones lines.

#### (2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 68 of the Crimes Rules – Electricity***

### *Description*

- (1) No person shall make a connection to a public electricity supply except with the prior approval of the public officer responsible for electricity.
- (2) The public officer responsible for electricity may refuse to approve the connection of any building to any public electricity supply or order the disconnection of any building from any such supply if —
  - (i) the building is not suitably constructed or is unsound;
  - (ii) the connection is likely to endanger the supply of electricity to, or the safety of, other buildings on the same circuit, or the safety of the circuit; or
  - (iii) insufficient generating capacity is available.
- (3) No person, other than a person authorised by the public officer responsible for electricity, shall interfere with or effect any connection to, or carry out any maintenance on, any public electricity supply.
- (4) No person shall —
  - (i) use any electrical appliance connected to any public electricity supply after having been warned not to do so by the public officer; or
  - (ii) use any electricity from any public electricity supply in such a manner as to interfere with the efficiency of the supply.
- (5) The public officer responsible for electricity or a person authorised by the public officer responsible for electricity may, at any reasonable time, enter any building connected to a public electricity supply for the purpose of inspecting or testing any electrical installation.
- (6) A person who contravenes this rule commits an offence.

*Elements of Offence*

Rule 68(1)

- (i) a person (accused)
- (ii) made a connection to the public electricity system
- (iii) not approved by the public officer responsible for electricity.

Rule 68(3)

- (i) a person (accused)
- (ii) not authorised by the public officer responsible for electricity
- (iii) interfered with or made a connection to or carried out maintenance on
- (iv) the public electricity system.

Rule 68(4)

- 1**
- (i) a person (accused)
  - (ii) used any electrical appliance
  - (iii) connected to the public electricity system
  - (iv) after being warned not to do so by a public officer.

Rule 68(4)

- 2**
- (i) a person (accused)
  - (ii) used electricity from any public electricity system
  - (iii) in such manner to interfere with the efficiency of the supply.

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who made a connection or interfered with the system without the approval of the public officer responsible for electricity.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 69 of the Crimes Rules – Sea Voyages***

### *Description*

- (1) No person shall use a boat of Tokelau for the purposes of travelling between the islands of Tokelau or between an island of Tokelau and any other place without approval of the village.
- (2) Before granting approval under paragraph (1), the village shall satisfy itself that the boat is in a sea-worthy condition, adequately manned and provided with sufficient serviceable life-saving equipment which shall consist of not less than —
  - (i) one life-jacket for each occupant of the boat;
  - (ii) one life-boat compass;
  - (iii) one electric lantern with spare battery or one oil lantern with filled oil container;
  - (iv) one life-boat sea anchor; and
  - (v) life-boat smoke signals or flares.
- (3) In addition to the life-saving equipment the village may require a boat travelling between islands to carry a serviceable radio-transceiver, and to communicate with the Tokelau radio station at designated times.
- (4) A person who travels between islands of Tokelau or Tokelau and any other place in a boat of Tokelau except in accordance with this rule commits an offence.

### *Elements of Offence*

#### Rule 69(1)

- 1**
  - (i) a person (accused)
  - (ii) used a boat of Tokelau
  - (iii) for the purpose of travelling between islands of Tokelau and any other place
  - (iv) without the approval of the village.

#### Rule 69(2)

- 2**
  - (i) a person (accused)
  - (ii) travelled between the islands of Tokelau in a Tokelau boat
  - (iii) without complying with the requirements in paragraph (2).

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who travelled by boat without the approval of the Taupulega OR the accused travelled without following the requirements of paragraph (2).

This rule does not relate to any boat operated by or for the government of Tokelau.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 72 of the Crimes Rules – Official Corruption***

### *Description*

- (1) Any public officer commits an offence who corruptly —
  - (i) accepts or agrees to accept; or
  - (ii) obtains,
  - (iii) a bribe
  - (iv) in respect of any act done or to be done by that person in an official capacity.
  
- (2) Any person commits an offence who corruptly —
  - (i) gives; or
  - (ii) offers,
  - (iii) a bribe to another with intent to influence that other person in respect of any act done or to be done by that person in an official capacity.
  
- (3) A public officer who corruptly uses information gained in an official capacity to obtain a personal advantage or an advantage for any other person commits an offence.

### *Elements of Offence*

#### Rule 72(1)

- (i) a person (accused)
- (ii) accepted or agreed to accept or obtained a bribe
- (iii) for an act or to be done in a official capacity.

#### Rule 72(2)

- (i) a person (accused)
- (ii) gave or offered a bribe to another
- (iii) with intent to influence
- (iv) an act done or to be done
- (v) done in official capacity.

Rule 72(3)

- (i) a person (accused)
- (ii) public officer
- (iii) corruptly used
- (iv) information gained in official capacity
- (v) to obtain a personal advantage or an advantage for another person.

*Commentary*

(1) Identification

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

The prosecution must prove that the accused was a public officer who took a bribe or used official information for private benefit; or that the accused was the person who bribed a public officer.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 73 of the Crimes Rules – Abuse of Office***

### *Description*

- (1) A public officer, acting under pretence of authority who fails to account for money duly levied commits an offence.
- (2) A public officer employed to execute an order of court who by neglect or omission misses the opportunity of executing the order commits an offence.

### *Elements of Offence*

#### Rule 73(1)

- (i) a person (accused)
- (ii) a public officer obtained money from another in the course of their job
- (iii) failed to deal to deal with that money in accordance with the law.

#### Rule 73(2)

- (i) a person
- (ii) a public officer
- (iii) employed to carry out an order of the court
- (iv) missed the opportunity to execute the order because they failed to do something.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that the accused was a public officer and failed to appropriately deal with money OR neglected to carry out an order of the court.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 74 of the Crimes Rules – Contempt***

### *Description*

- (1) A person who —
  - (i) within or close to the room or place where a court is sitting, intentionally misbehaves in a violent, threatening, or disrespectful manner, to the disturbance of the court, or to the intimidation of suitors or others resorting to the court;
  - (ii) intentionally insults a member of a court, or an officer of a court, during a sitting of a court,commits an offence and may be immediately apprehended by order of the court, and detained until the rising of the court.
  
- (2) A person who—
  - (i) intentionally refuses or neglects to appear before a court when summoned to do so;
  - (ii) attempts wrongfully to interfere with or influence a witness before court either before or after the witness has given evidence in connection with the case;
  - (iii) intentionally refuses or neglects to obey a court order;
  - (iv) refuses to be sworn or give evidence, or having been sworn refuses to answer a question that the person is lawfully required to answer,commits an offence.

### *Elements of Offence*

#### Rule 74(1)(i)

- (i) a person (accused)
- (ii) intentionally
- (iii) misbehaved in a violent OR threatening OR disrespectful manner
- (iv) within or close to a place where a court is sitting
- (v) disturbed OR intimidated a person in court .

*Commentary*

(1) Identification

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

The prosecution must prove that it was the accused who misbehaved in a way set out in Rule 74(1)(i) of the Crimes Rules.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## ***Rule 78 of the Crimes Rules – Offence against Public Officers***

### *Description*

- (1) A person who without reasonable excuse fails to assist a constable when requested by a constable to do so commits an offence.
- (2) A person who intentionally resists, assaults or knowingly obstructs —
  - (i) a public officer in the performance of that officer's duty; or
  - (ii) a person acting in aid of any constable, commits an offence.

### *Elements of Offence*

#### Rule 78(1)

- (i) a person (accused)
- (ii) without reasonable excuse
- (iii) failed to assist a constable
- (iv) when requested.

#### Rule 78(2)

- (i) a person (accused)
- (ii) intentionally resisted or assaulted or knowingly obstructed
- (iii) a public officer in the performance of their duty OR a person acting in aid of a constable.

### *Commentary*

#### (1) Identification

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

The prosecution must prove that it was the accused who failed to assist a constable or intentionally resisted or obstructed a constable or a public officer.

(2) Burden of proof

The prosecution must prove all the elements beyond reasonable doubt.

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

(3) Defences

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

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

*Maximum Sentence*

3 penalty units or 3 months imprisonment.

## *APPENDICES*

### *Tokelau Amendment Act 1986 (NZ)*

An Act to amend the Tokelau Act 1948

#### **1. Short Title and commencement**

- (1) This Act cited as the Tokelau Amendment Act 1986, and shall together with and deemed part of the Tokelau Act (hereinafter referred to as the principal Act).
- (2) This Act shall come into force on the 1st day of August 1986.

#### **2. Interpretation**

In this Part of this Act, unless the context otherwise requires, “Commissioner” means the Commissioner for Atafu or for Fakaofu or for Nukunonu appointed under section 5 of this Act.

### **PART 1 - CIVIL AND CRIMINAL JURISDICTION**

#### **3. High Court of New Zealand to be a Court of Tokelau**

- (1) The High Court of New Zealand shall have all the jurisdiction which may be necessary to administer the law of Tokelau in the same manner in all respects as if that jurisdiction had been conferred upon that Court as a separate Court of justice in and for Tokelau.
- (2) The jurisdiction conferred on the High Court by subsection (1) of this section may, subject to the provisions of any

regulations made under the principal Act and to the provisions of any rules made by the General Fono, be exercised in the same manner in all respects as if Tokelau was for all purposes part of New Zealand.

- (3) In the exercise of the jurisdiction conferred on it by subsection (1) of this section, the High Court may sit either in Tokelau or in New Zealand, or in such other appropriate place as the Chief Justice may direct.

#### **4. Appeals to Court of Appeal of New Zealand**

- (1) An appeal shall lie to the Court of Appeal of New Zealand from any judgment, decree, or order of the High Court Zealand exercising the jurisdiction conferred on it by section 3 of this Act in the same manner as from any judgment, decree, or order of the High Court exercising its jurisdiction in respect of New Zealand.
- (2) The decision of the Court of Appeal on any appeal this section shall be final.

#### **5. Appointment of Commissioners**

- (1) The Governor-General, on the recommendation of the Minister of Foreign Affairs made after consultation by that Minister with the Elders of the island concerned, may appoint any Tokelauan to be -
  - (a) Commissioner for Atafu:
  - (b) Commissioner for Fakaofu:
  - (c) Commissioner for Nukunonu.
- (2) Subject to subsections (4) and (5) of this section, every Commissioner shall hold office for a term of 3 years.
- (3) Every Commissioner shall be eligible for reappointment from time to time.
- (4) The Governor-General may, if the Governor-General thinks fit, remove a Commissioner for inability or misbehaviour.

- (5) A Commissioner may resign the office of Commissioner by notice in writing addressed to the Administrator of Tokelau.
- (6) Every Commissioner may be paid out of the Tokelau General Account such salary or allowance and other allowances as may be fixed by the Administrator of Tokelau.

**6. Incapacity or absence of Commissioner**

- (1) If at any time a Commissioner is incapable by reason of sickness or otherwise of performing the office of Commissioner or is absent from the island for which that person is Commissioner, or where there is a vacancy in the office of Commissioner, any person performing in that island the functions of a Faipule may, without further authority or appointment, exercise any function, duty, or power of the Commissioner during that incapacity, absence, or vacancy.
- (2) The fact that any person performing the functions Faipule exercises any function, duty, or power a Commissioner shall be conclusive evidence of that person's authority to do so.

**7. Jurisdiction of Commissioners**

- (1) A Commissioner shall have jurisdiction -
  - (a) In actions for the recovery of any debt or damages not exceeding \$1,000 in amount:
  - (b) In actions for the recovery of chattels not exceed \$1,000 in value:
  - (c) In criminal proceedings for any offence punishable by fine only:
  - (d) In criminal proceedings for any offence punishable by imprisonment for not more than 1 year.

- (2) Subject to the provisions of any regulations made under the principal Act, a Commissioner shall, in the exercise of that Commissioner's criminal jurisdiction, have power to do any one or more of the following things:
- (a) To impose a term of imprisonment not exceeding 3 months:
  - (b) To impose a fine not exceeding \$150:
  - (c) To order the performance of community work:
  - (d) To place an offender under Police supervision:
  - (e) To give a public reprimand:
  - (f) To order the payment of compensation, not exceeding \$1,000 in amount, for the loss of or damage to any property of the victim of the offence:
  - (g) To order the restitution of any property to the victim of the offence.
- (3) Subject to subsection (3A) of this section, to any regulations made under the principal Act, and to any rules made by the General Fono under section 3A of the principal Acts, a Commissioner shall have jurisdiction only in respect of -
- (a) The island for which that Commissioner is appointed; and
  - (b) The territorial sea of Tokelau that surrounds that island.
- (3A) Notwithstanding anything in subsection (3) of this section, but subject to subsection (1) of this section, any Commissioner may exercise jurisdiction in respect of the following offences:
- (a) Any offence to which section 9 of the Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977 applies:
  - (b) Any offence against the law of Tokelau that is committed on board any vessel or aircraft, in any case where, at the time of the commission of the offence, the vessel or aircraft -

- (i) Is in the service of Tokelau; and
  - (ii) Is travelling to or from Tokelau or between any of the islands of Tokelau.
- (4) In any criminal proceedings, a Commissioner may, at any time during those proceedings, discuss the case, in the presence of the prosecutor, the defendant, and the defendant's counsel (if any), with the Taupulega of the island for which that Commissioner is appointed.
- (5) Where any such discussion is held, the Commissioner shall give –
  - (a) The prosecutor; and
  - (b) The defendant or the defendant's counsel (if any) - the opportunity to be heard and to tender evidence on any matter raised in that discussion.

**8. Extension of Jurisdiction of Commissioners by agreement between the parties**

If, but for the amount or value of the subject-matter claimed or in issue, a Commissioner would have jurisdiction under section 7(1)(a) or (b) of this Act, and the parties, by memorandum signed by them or by their respective agents, agree that a Commissioner shall have jurisdiction to hear and determine the proceedings, that Commissioner shall, notwithstanding anything in any enactment, have jurisdiction to hear and determine the proceedings.

**9. Abandonment of part of claim to give Commissioner jurisdiction**

- (1) Where a plaintiff has a cause of action for more than \$1,000 in respect of which a Commissioner would have jurisdiction if the amount were not more than \$1,000, the plaintiff may abandon the excess, and thereupon a Commissioner shall have jurisdiction to hear and determine the action.

- (2) Where any action, in which the plaintiff has abandoned part of the plaintiff's claim under this section, is heard by a Commissioner, the plaintiff shall not recover an amount exceeding \$1,000 together with costs thereon, and the judgment of the Commissioner in the action shall be in full discharge of all demands in respect of the cause of action, and judgment shall be entered accordingly.

#### **10. Appeal from Commissioners**

- (1) Subject to subsections (2) and (3) of this section, any party to any proceedings, whether civil or criminal, before a Commissioner may appeal from the judgment of the Commissioner to the High Court of New Zealand in the exercise of the jurisdiction conferred on it by section 3 of this Act -
  - (a) Subject to any other enactment, as if that judgment were a decision of a District Court in New Zealand; and
  - (b) In accordance with such procedures as a judge of the High Court determines are appropriate to the circumstances.
- (2) Any person who wishes to appeal pursuant to subsection (1) of this section shall, within 28 days after the date of the judgment of the Commissioner, give notice in writing to the Administrator of that person's intention to appeal.
- (3) No appeal shall lie pursuant to subsection (1) of this section in respect of any judgment of a Commissioner in any proceedings for any offence punishable by imprisonment for not more than 3 months or any offence punishable only by a fine of not more than \$150, but any party to any such proceedings may appeal from the judgment of the Commissioner to such body, and in accordance with such procedures, as are prescribed by regulations made under the principal Act.

## ***Rule 16 of the Constitution of Tokelau***

### 16 Human Rights

- (1) Individual human rights for all people in Tokelau are those stated in the Universal Declaration of Human Rights, and reflected in the International Covenant on Civil and Political Rights.
- (2) The rights of individuals in Tokelau shall be exercised having proper regard to the rights of other individuals and to the community to which the individual belongs.
- (3) If a person thinks that one of their human rights as provided in this Constitution has been denied or may be denied, that person may apply to the Council for the Ongoing Government for protection of that right.
- (4) If the Council of Ongoing Government agrees with the complaint, it may make any order it thinks appropriate for the protection of that right.
- (5) An order made under paragraph (4) may be enforced in the same manner as a judgment of the High Court.
- (6) The Council for the Ongoing Government has original and final authority to determine all matters of human rights.

[from the Constitution]

## *Universal Declaration of Human Rights*

### *Preamble*

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration

## Universal Declaration of Human Rights

constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

### *Article 1*

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

### *Article 2*

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

### *Article 3*

Everyone has the right to life, liberty and security of person.

### *Article 4*

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

## Universal Declaration of Human Rights

### *Article 5*

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

### *Article 6*

Everyone has the right to recognition everywhere as a person before the law.

### *Article 7*

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

### *Article 8*

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

### *Article 9*

No one shall be subjected to arbitrary arrest, detention or exile.

### *Article 10*

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

*Article 11*

- (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
- (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

*Article 12*

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

*Article 13*

- (1) Everyone has the right to freedom of movement and residence within the borders of each state.
- (2) Everyone has the right to leave any country, including his own, and to return to his country.

*Article 14*

- (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
- (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

*Article 15*

- (1) Everyone has the right to a nationality.
- (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

*Article 16*

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

*Article 17*

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.

*Article 18*

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

*Article 19*

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

*Article 20*

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

*Article 21*

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

*Article 22*

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

*Article 23*

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

*Article 24*

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

*Article 25*

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

*Article 26*

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
- (3) Parents have a prior right to choose the kind of education that shall be given to their children.

*Article 27*

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

*Article 28*

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

*Article 29*

- (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

*Article 30*

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

## ***International Covenant on Civil and Political Rights***

### *Preamble*

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

*PART I*

*Article 1*

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

*PART II*

*Article 2*

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.

*Article 3*

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

*Article 4*

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

*Article 5*

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

*PART III*

*Article 6*

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

*Article 7*

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

*Article 8*

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;  
(b) Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;  
(c) For the purpose of this paragraph the term “forced or compulsory labour” shall not include:

- (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
- (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
- (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- (iv) Any work or service which forms part of normal civil obligations.

*Article 9*

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

*Article 10*

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;  
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

*Article 11*

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

*Article 12*

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

*Article 13*

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

*Article 14*

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

*Article 15*

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

*Article 16*

Everyone shall have the right to recognition everywhere as a person before the law.

*Article 17*

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

*Article 18*

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

*Article 19*

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

*Article 20*

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

*Article 21*

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

*Article 22*

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

*Article 23*

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

*Article 24*

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

*Article 25*

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

*Article 26*

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Article 27*

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

....

## *Court Clerk*

Each Commissioner has a court clerk. The clerk is appointed by the relevant Taupulega.

The court clerk must fully understand the role of the Commissioner and be a careful and reliable assistant to the Commissioner by being professional at all times.

For a clerk, being professional means:

- perform tasks promptly when asked;
- maintain a dignified personal appearance;
- maintain focus when there is work to be done; and
- display respectful behaviour in all public functions.

## *Duties*

The duties of the court clerk are set out in the law and in the job description. They include:

### Daily activities

- inform the Commissioner when the Police or other persons have commenced a case in the Commissioner's court.
- keep a record book in which he or she registers all cases commenced in the Commissioner's court and records every order made by the Commissioner.
- The book must have an alphabetical index (Rule 85(1) of the Crimes Rules).
- co-ordinate and maintain the Commissioner's appointments and sittings.
- ensure the courtroom is properly arranged for the trials, court papers are in order and the Commissioner is ready for each court sitting.

In court,

- The court clerk must check that the defendant is the person whose full name was called out.
- In criminal cases, the court clerk must read out the charge, ensure that the accused understands the charge, and take the accused's plea (guilty or not guilty).
- If any witnesses are called in the case, the court clerk must administer the oath or affirmation.
- The court clerk must keep a record of arguments and evidence presented in court and properly manage the court filing system.
- The court clerk must take custody of any exhibits presented during the trial, and ensure that they are correctly labelled.

After judgment

- The court clerk should ensure that the Police accurately record any sentence imposed.
- In a criminal case where the accused has been convicted, the court clerk must inform that person of their right to appeal.

*Minutes of Proceedings*

All witness evidence must be recorded in writing and in Tokelauan.

One of the most important duties of the court clerk is to keep an accurate record of the proceedings.

Criminal Jurisdiction

Fakaofu Registry

Between : Police - Prosecution  
-v-

And : *Mele Ioane* - Accused

Offences : 1. Fighting in Public (Rule 44).  
2.  
3.

Date Filed : 03 April 2008

<b>Date</b>	<b>Item</b>	<b>Particulars</b>
03 April 08	1	Receive charge (Notice to appear – F.2) from Police (initial by clerk)
“ “ “	2	Forward to Law Commissioner for fixture and signature. (initial by clerk)
04 April 08	3	Case is set down for mentioning on 18 April at 9.00 am. (initial by Law Commissioner)
04 April 08	4	Actioned and forward to LC for signature (initial by clerk)
05 April 08	5	Notice to appear taken by Constable -Service Officer. (initial by S.O.)
05 April 08	6	Affidavit of Service filed. (initial by clerk)
16 April 08	7	Police report, statement of fact, etc filed. (initial by clerk)
18 April 08	8	Case heard. Accused pleads Guilty and is convicted. Fine for \$20.00 to be paid within 14 days. (initial by LC)
22 April 08	9	\$20.00 paid under receipt # 237 (initial by court clerk)

***Tokelau Court Register***

<b>Case No</b>	<b>Date filed</b>	<b>Prosecution</b>	<b>Accused</b>	<b>Offence &amp; section</b>	<b>Decision</b>	<b>Receipt &amp; Date</b>
01/08	01/04/2008	Police	Mele Ioane	Fighting in Public (Rule 44).	Fine \$20.00 to be paid within 14 days.	\$20.00 - Rec # 237 22/04/08
02/08	14/04/08	Police	Malia Uga	Drunkenness (Rule 52)		
03/08	04/05/08	Police	Mete Sione	Assault (Rule 15)	Fine \$50.00 to be paid within 2 months	
04/08	18/05/08	Police	Viliamu Iona	Throwing stones (Rule 47)		

## *Custom as a Source of Law Rules 2004*

### **1 Name**

These are the Custom as a Source of Law Rules 2004.

### **2 Custom as a source of law**

- (1) Where in a case before the High Court, any party to the proceedings or the Court raises a matter of Tokelau custom, the Court shall seek the advice of the General Fono on that question and shall adjourn its proceedings for 30 days or the earlier receipt of advice from the General Fono.
- (2) Where the High Court refers a matter to the General Fono it shall —
  - (i) briefly state the facts relevant to the matter;
  - (ii) enquire whether there is Tokelau custom on the matter; and
  - (iii) if there is Tokelau custom on the matter, request a description from the General Fono of the custom.
- (3) On receipt of a reference under this rule, the General Fono shall refer the matter to each Taupulega and shall, on the basis of the Taupulega responses, tender a formal response to the High Court.
- (4) Where within 30 days from the date of the request the General Fono gives information on a Tokelau custom, the Court shall determine issues concerning the matter of custom by reference to that information.
- (5) Where within 30 days from the date of the request the General Fono does not respond or responds that there is no relevant Tokelau custom, the High Court shall decide the matter on the basis that custom is not applicable.

### *Lawyers in the courts of Tokelau*

The qualifications needed to practice law in the courts of Tokelau are stated in Rule 95 of the Crimes Rules.

As at 1 September 2008, the Council for the Ongoing Government has approved three lawyers:

Jovilisi Suveinakama

Lise Hope Suveinakama

Talei Janet Pasikale