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1. Constitutional framework

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1.1 The Constitution of the Kingdom of Tonga

Clauses 30, 31, 33, 50A and 83A Constitution

The Constitution of Tonga (the Constitution) was granted on 4 November 1875 with later amendments.

The Constitution details the basic elements of the Tongan system of Government by defining:

- the principles of equality and social justice that will be upheld;
- the structure of the legal system;
- the roles, responsibilities and powers of the Executive, the Legislative Assembly and the Judiciary; and
- details related to land.

The Kingdom of Tonga is a constitutional monarchy, whereby the King is the Head of State and the Commander-in-Chief of the Armed Forces: cl 30. Tonga's Prime Minister is currently appointed by the King from among the members of Parliament with the support of a majority of its members: cl 50A.

The Constitution gives effect to four important constitutional principles:

1. the doctrine of the separation of powers;
2. the independence of the judiciary: cl 83A;
3. the rule of law: cl 83A; and
4. protection of human rights: The Declaration of Rights, Part 1 (cls 1-29).

1.1.1 The doctrine of the separation of powers

This constitutional principle means there are three distinct and separate branches of Government (cl 31):

- the executive (Cabinet): makes policy and administers public policy and allocates funds;
- legislative assembly (Parliament): makes the law; and
- judiciary: comprises the legal system and the judges and justices who interpret the law.

Each branch of government checks the roles and functions of the other branches, so that the balance of power between the three branches is maintained. The independence of the judiciary is an important element of the doctrine of separation of powers and is vital for maintaining the balance of power.

1.1.2 The independence of the judiciary

The judiciary must be independent and free from all political or other influence in carrying out its duties and in making decisions: cl 83A.
The independence of the judiciary is protected by:

- the Constitution;

- the concept of the rule of law;
- the process of appointing or removing judicial officers, and conditions of their appointment; and
- the immunity of judges and justices from civil actions.

1.1.3 The rule of law

This principle holds that all people and institutions are subject to and accountable to law that is fairly applied and enforced: cl 83A Constitution. Its purpose is to protect people from the arbitrary use of state authority. The rule of law also recognizes that the Constitution is the supreme law of the land and provides checks and balances for the executive and legislative branches of government.

1.1.4 Human rights

As one of the branches of Government, courts are the duty bearers of human rights and required to provide processes and outcomes consistent with The Declaration of Rights (Part 1 of the Constitution), taking into account human rights treaty obligations.

Key Constitutional human rights include:

- declaration of freedom (cl 1)
- prohibition on slavery (cl 2)
- equality before the law (cl 4)
- freedom of worship (cl 5)
- freedom of the press (cl 7)
- Habeas Corpus: no unlawful or arbitrary detention (cl 9)
- right to a fair trial (cl 14) including non-self-incrimination, before an unbiased court (cl 15)
- defendant must be tried (cl 10) by indictment (cl 11) and charges cannot be altered (cl 13)
- no double trial for the same crime (cl 12)
- no searches without a warrant (cl 16)
- Government to be impartial (cl 17)
- no retrospective laws (cl 20)
- army subject to civil law (cl 21)

The Kingdom of Tonga has ratified:

- The International Convention for the Elimination of Racial Discrimination (ICERD); and
- The Convention on the Rights of the Child (CRC).

The Kingdom has signed:

- The Convention on the Rights of People with Disabilities (CRPD).

Judges and Magistrates should interpret any ambiguity in Constitutional rights and national laws consistently with these treaties.

Other human rights treaties can also be referred to and provide guidance where cases raise human rights issues (see: *Fangupo v Rex; Fa'aoa v Rex* [2010] Tonga LR 124 (CA); AC 34 and 36 of 2009) where in setting aside a sentence of whipping against children, the Court of Appeal:

- referred to the International Convention against Torture and other Cruel Inhumane or Degrading Treatment or Punishment;
- noted that even though Tonga has not ratified this Convention, the prohibition on torture is part of customary international law, which all states are bound by; and
- observed that the whipping sentence was likely unconstitutional under cl 1 (declaration of freedom) and cl 14 (right to fair trial) of the Tonga Constitution.

1.2 The Branches of Government in Tonga

Clause 31 Constitution

Under the Constitution, the Government is divided into three bodies:

1. the King, Privy Council and the executive (Cabinet);
2. the Legislative Assembly (Parliament); and
3. the Judiciary.

1.2.1 The executive (government)

Clauses 31 and 50-52 Constitution

- The role of the executive is to make and put into place government policy. The executive effectively runs and controls the public affairs of the country. The executive and Parliament are distinct even though some members make up both.

The King: cl 31 Constitution

- The King is the Head of State, Head of the Executive and Commander-in-Chief of the Forces. The Monarchy has secured perpetual succession: cl 30.

The Privy Council: cl 50 Constitution

- The King appoints a Privy Council to provide him with advice. The Privy Council is made up of any persons whom the King shall see fit to call to his Council: cl 50.
- The Privy Council regulates its own procedures by Orders in Council.

Cabinet: cl 51 Constitution

- Cabinet is collectively responsible to the Legislative Assembly for the executive functions of the Government. It consists of the Prime Minister and such other ministers who are nominated by the Prime Minister and appointed by the King: cl 51.

- However, the Prime Minister may not nominate for Cabinet more than four persons who are not elected representatives as ministers. The total number of ministers including the Prime Minister must be less than half the elected members of the Legislative Assembly (excluding the Speaker).
- The Prime Minister may assign and re-assign ministries to and amongst the Cabinet Ministers. Each minister must provide an annual report to the Legislative Assembly advising of the activities and plans of their ministry. If the Legislative Assembly has any queries about that ministry, the minister responsible must answer any of their questions.

1.2.2 The Legislative Assembly of Tonga

Clauses 38, 56, 58, 60-62, 70, 75 and 78 Constitution

The Legislative Assembly is composed of Privy Councillors and Cabinet Ministers sitting as nobles, with nine noble representatives, and 17 elected representatives of the people: cl 60.

The Legislative Assembly:

- Consists of a single chamber, based on the UK Westminster model;
- meets at least once in every 12 calendar months but can be summoned at any time by the King: cls 38 and 58;
- has a four-year term, unless the King revokes or dissolves the Assembly at any time and order that new elections be held: cls 38 and 78 Constitution;
- is presided over by the Speaker of the Legislative Assembly who is appointed by the King: cl 61; and
- makes its own rules of procedure: cl 62.

Any member of the Legislative Assembly may introduce any bill or propose any motion for debate in the Assembly or present any petition to the Assembly: cl 62.

The Legislative Assembly has the power to:

- pass Bills, which become law after being signed by the King and published: cl 56;
- impeach any Privy Councillor, Minister, Governor or Judge for breach of the law, Legislative Assembly resolutions, maladministration, incompetency, or other offences: cl 75; or
- imprison any person for contempt of the Legislative Assembly: cl 70.

Attorney General: cl 31A Constitution

The King in Privy Council, acting on advice from the Judicial Appointments and Discipline Panel, must appoint an Attorney General, who is also qualified to be a Judge of the Supreme Court.

The Attorney General:

- is the principal legal advisor to Cabinet and Government;
- is in charge of all criminal proceedings on behalf of the Crown; and

- performs any other functions and duties required under law.

The Attorney General, unless otherwise provided by law, may exercise their legal powers and duties, independently from any person or authority. They hold office on such term(s) or conditions that the King on advice from the Judicial Appointments and Discipline Panel determines.

1.2.3 The Judiciary

Clauses 83A, 84-86A Constitution

The judiciary is an independent body that:

- interprets and applies the Legislative Assembly's laws;
- develops and interprets case law; and
- settles disputes of fact and law between individuals, and between individuals and the State.

The judicial power of Tonga is vested in the superior courts (the Court of Appeal, the Supreme Court, and the Land Court) and a subordinate court (the Magistrate's Court): cl 84.

The judiciary include (cl 84):

- The Lord President of the Court of Appeal and Judges of the Court of Appeal;
- the Lord Chief Justice, who is the professional Head of the Judiciary and Judges of the Supreme Court;
- the Lord President of the Land Court and Judges of the Land Court; and
- the Chief Magistrate and the Magistrates.

For more details about the judiciary and the Courts, see the chapter "Court system of Tonga".

The Lord Chancellor: Clause 83B Constitution

- The King in Privy Council, acting on advice from the Judicial Appointments and Discipline Panel, must appoint a Lord Chancellor, who is also qualified to be a Judge of the Supreme Court.

The Lord Chancellor is responsible for:

- the administration of the courts;
- all matters related to the Judiciary and its independence;
- the maintenance of the rule of law; and
- such related matters set out in the Constitution or any other Act.

The Lord Chancellor may, with the consent of the King in Privy Council, make regulations to:

- establish an age at which the Attorney General, a Judge, a Magistrate and the Lord Chancellor shall retire from office;
- regulate a judicial pension scheme; and
- provide for administrative arrangements for and related to the Office of the Lord Chancellor.

The Lord Chancellor, unless otherwise provided by law, may exercise their legal powers and duties, independently from any person or authority. They hold office on such term(s) or conditions that the King on advice from the Judicial Appointments and Discipline Panel determines.

Judicial Appointments and Discipline Panel: Clause 83C

The Judicial Appointments and Discipline Panel (the Panel) is a Committee of the Privy Council. It comprises:

- the Lord Chancellor, as the Chairman;
- the Lord Chief Justice;
- the Attorney General; and
- the Law Lords, appointed by the King.

The Panel's role is to recommend to the King in Privy Council:

- the appointment of qualified persons to the judiciary, Lord Chancellor and to any other office that the King requires;
- the disciplining of members of the judiciary;
- the dismissal of members of the judiciary for bad behaviour through gross misconduct or repeated breaches of the Code of Judicial Conduct;
- the remuneration and terms of service of members of the judiciary;
- a Judicial Pensions Scheme;
- a Code of Judicial Conduct; and
- the appointment of assessors to the Panel of Land Court Assessors.

1.3 Gubernatorial Government

There are two Governors, one for each of the island groups of Ha'apai and Vava'u who are appointed by the King with consent of Cabinet, holding office at the King's pleasure.

The Governors are responsible for enforcement of the law, supervising Government Officers and the giving of annual reports to the Prime Minister.

2. The Court system

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2.1 Introduction to the Tongan Courts

The Tongan courts are structured like a pyramid. In descending order, the Courts are:

- the King in Privy Council (on hereditary titles and estates only);
- the Court of Appeal;
- the Supreme Court;
- the Land Court; and
- the Magistrate's Court.

This hierarchy is essential to the Doctrine of Precedent (the principle that requires judges to follow the rulings and determinations of judges in higher courts, where a case involves similar facts and issues). A decision by a senior court is binding on a lower court.

The Land Court only deals with land matters and there is a right of appeal to the Privy Council on hereditary titles and estates only: cl 50.

Most judicial work is carried out by the Magistrate's Court, consisting of the Chief Magistrate and magistrates, dealing with criminal and civil matters.

2.2 Jurisdiction

Jurisdiction is the authority to hear and determine a particular matter. Courts may only act within their legally defined jurisdiction. If a Court acts outside its jurisdiction, it is said to be acting ultra vires (outside the power), which makes the Court's decision invalid on that matter. It is important to check that you have authority to hear any matter before proceeding.

2.2.1 Jurisdiction derived from legislation

The Constitution establishes the judicial power of the Court of Appeal, the Supreme Court, the Magistrate's Court, and the Land Court: cl 84 Constitution.

Statutes normally define a Court's power and authority. For example, the power and authority of the Magistrate's Court is set out in ss 8 and 11 of the Magistrate's Court Act 2020 (MCA).

2.2.2 Inherent jurisdiction

Inherent jurisdiction allows a Court to fill in any gaps left by statute or case law. This jurisdiction is normally reserved for the higher courts like the Supreme Court and the Court of Appeal.

2.2.3 Original jurisdiction

Original jurisdiction means that a court is given power to hear certain kinds of cases in the first instance.

The Magistrate's Court has the power to try all summary offences where the maximum sentence is $10,000 or three years imprisonment: s 11 MCA.

2.2.4 Enhanced jurisdiction

Magistrates with enhanced jurisdiction have sentencing powers of up to seven years imprisonment or up to a $50,000 fine: s 11 MCA. Cases are remitted from the Supreme Court with the consent of both parties. These are usually cases where the likely sentence will not exceed seven years imprisonment.

2.2.5 Concurrent jurisdiction

Concurrent jurisdiction means that more than one court has the power to hear a particular kind of case.

In some instances, a criminal case will give rise to more than one offence, one being summary (judge alone) and another being indictable (jury trial). Offences arising from the same incident must be tried by the same court. If one is indictable and is committed to the Supreme Court, the other case cannot be dealt with by the Magistrate and should be remitted to the higher Court to be dealt with at the same time: *R v Veamatahau* [1999] Tonga LR 195; Cr 619/99.

2.2.6 Territorial jurisdiction

Territorial jurisdiction refers to the geographic area in which a particular court has competence. Every summons, warrant, order or other process issued by any magistrate in a matter within their jurisdiction, may be served and executed in any part of Tonga and shall have the same effect in every other district as in the district of the magistrate who issued it: s 9 MCA.

Any offences committed within the limits of any bay or inlet of the sea within the Kingdom may be heard and determined by the magistrate within whose district the bay or inlet may be: s 10 MCA. All offences committed on board any vessel or boat beyond such limits may be heard by the magistrate on or near to the shore of whose district the vessel or boat after the commission of the offence may anchor or touch: s 10 MCA.

2.2.7 Appellate jurisdiction

Appellate jurisdiction is the right of a Court to hear appeals from a lower Court. The Court of Appeal and the Privy Council sitting with the Court of Appeal have appellate jurisdiction under the Constitution. The Supreme Court has appellate jurisdiction under the Magistrate's Court Act.

2.2.8 Criminal jurisdiction

A crime is the commission of an act that is forbidden by legislation or the omission of an act that is required by legislation.

The Criminal Offences Act sets out almost all the acts which are crimes in Tonga. Other Acts, such as the Public Order (Preservation) Act, the Immigration Act and the Traffic Act, also set out crimes in Tonga.

2.2.9 Civil jurisdiction

Civil jurisdiction covers disputes between individuals and between individuals and the State, that are not criminal matters. For example, family matters, contract and torts.

2.2.10 Supervisory jurisdiction

Supervisory jurisdiction refers to the supervisory role that a higher court has over subordinate courts to ensure that justice is properly administered.

2.3 A brief description of the Courts

2.3.1 The Privy Council

Clause 50 Constitution

The King relies on the Privy Council to provide him with advice. Members of the Privy Council are appointed by the King.

For any case heard in the Land Court on hereditary estates and titles, either party may appeal to the King in Privy Council who will determine how the appeal must proceed. Any judgment of the King in Privy Council is final.

The Privy Council may by Order in Council regulate its own procedures.

2.3.2 The Court of Appeal

Clauses 84, 85, 91 and 92 Constitution; ss 3 and 6 Court of Appeal Act 2020 (CAA)

Clause 84 of the Constitution gives judicial power to the Court of Appeal. Clause 85 establishes the Court of Appeal and sets out the qualifications required for judges to the Court.

Appeals from decisions of the Supreme Court are heard in the Court of Appeal (except for hereditary estates and titles disputes): cls 91 and 92.

The CAA regulates the procedure and powers of the Court of Appeal.

The Court of Appeal may deliver opinions on questions of law reserved by the Supreme Court. The Supreme Court is then bound by the opinions of the Court of Appeal in its proceedings: s 3 CAA. The Court of Appeal may only hear and determine appeals with three or more sitting members, with the exception that the Court's rules allow for the hearing of interlocutory applications and specified cases by only two members: s 6 CAA. Determination of all appeals is by majority.

Civil jurisdiction

The Court of Appeal has jurisdiction to hear civil appeals from the Supreme Court, including:

- all final orders, judgments and decisions, with the exception of orders made by consent or as to costs unless special leave has been given by the Judge of first instance or the Court of Appeal;

- judgments made during any cause of matter, by special leave of the Judge of first instance or the Court of Appeal on all interlocutory orders: s 10 CAA.

By written agreement of both the appellant and respondent, the Court of Appeal may determine the appeal on written submissions alone in accordance with the provisions set out at s 15 of the CAA.

The Magistrate's Court also has jurisdiction to decide and make orders in family protection and family law matters under the:

- Divorce Act (DA)
- Family Protection Act (FPA)
- Maintenance of Illegitimate Children Act (MICA)
- Maintenance of Deserted Wives Act (MDWA)

Criminal jurisdiction: Appeal against conviction

A defendant may appeal a conviction in the Supreme Court (s 16 CAA):

- on any question of law alone;
- with leave of the Court of Appeal or upon the certificate of the Judge who tried them, that it is a fit case for appeal:
  - on any question of fact alone, mixed law and fact, or
  - any other sufficient ground; or
  - against the sentence passed unless the sentence is one fixed by law, with leave of the Court of Appeal.

The Court of Appeal must allow the appeal (s 17(1) CAA):

- if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence; or
- if they think that the appellant was convicted on grounds of a wrong decision of any question of law or that there was a miscarriage of justice.

The Court may still dismiss the appeal if they consider that no substantial miscarriage of justice has occurred, even if it thought the point raised in the appeal might be decided in favour of the appellant: s 17(1) CAA.

If the Court allows an appeal against conviction, the Court of Appeal must either (s 17(2) CAA):

- quash the conviction and direct a judgment and verdict of acquittal; or
- order a new trial if it is in the interests of justice.

On an appeal against sentence, if the Court of Appeal decides that a different sentence should have been passed, they must either (s 17(3) CAA):

- quash the sentence and pass other such sentence as warranted in law by the verdict; or
- dismiss the appeal.

Questions of law

The Supreme Court may also submit any questions of law to the Court of Appeal for determination as if it were an appeal under s 16 (see also s 3 CAA), where the defendant is tried and convicted on indictment, related to matters in the trial or conviction: s 17A CAA.

If the defendant tried on indictment has been acquitted (in whole or part) the Attorney General may, at the end of the trial, submit any relevant questions of law for determination by the Court of Appeal. A statement of the circumstances is also filed and any further statement as the Court of Appeal may require. The Court of Appeal's decision on the question submitted does not in any way affect or invalidate any verdict or decision given at the trial: s 17D CAA.

Any party to any appeal to the Supreme Court from the Magistrate's Court has a **further** right of appeal on any point of law to the Court of Appeal with the leave of the Supreme Court or Court of Appeal: s 74(2) MCA.

Appeal by Crown against sentence

The Attorney General, with the leave of the Court of Appeal, may appeal to the Court of Appeal against any sentence pronounced by the Supreme Court in any proceedings in which the Crown was a party and the Court of Appeal shall determine the appeal in accordance with sub-section (3) of s 17: s 17B CAA.

Appeal after interlocutory judgment or order

Any party to proceedings to which this part applies may appeal to the Court of Appeal against an interlocutory judgment or order given or made in the proceeding with leave of the judge of first instance (who must certify that the judgment or order is a proper one for determination on appeal) or if the Court of Appeal gives leave to appeal: s 17C CAA.

The Court of Appeal also has several other powers in special cases: s 18 CAA.

2.3.3 The Supreme Court

Clauses 84, 86-90 Constitution

The existence, composition and powers of the Supreme Court are set out in the Constitution: cls 86-90. Judges of the Supreme Court have power to direct the form of indictments to control the procedure of the lower courts, and to make rules of procedure: cl 89.

The Supreme Court has jurisdiction in all cases arising under the Constitution and Tongan law (except cases concerning titles to land which the Land Court hears, subject to an appeal to the Privy Council for hereditary estates and titles or to the Court of Appeal in other land matters): cl 90.

Further requirements for practice and procedure are set out in the Supreme Court Act 1988 (SCA) and in the accompanying Supreme Court Rules (for civil cases).

Civil jurisdiction

The Supreme Court has jurisdiction in all civil cases. If proceedings are brought in the Supreme Court which could have been brought in another court or tribunal the Court should take that fact into account in determining any award of costs, unless it is satisfied that it should not do so: s 4 SCA.

The Supreme Court also has jurisdiction in all divorce, probate and admiralty matters and in any other matter not specifically allocated to any other tribunal.

Whenever any issue of fact is raised in any civil action triable in the Supreme Court, any party to such action may claim the right of trial by jury: cl 99.

Criminal jurisdiction

The Supreme Court has jurisdiction in all criminal cases other than (s 4(1) SCA):

- proceedings excluded from its jurisdiction by the Constitution of Tonga; or
- those within the exclusive jurisdiction of another court or tribunal by statute. However, a summary offence within that other court's or tribunal's jurisdiction arising from the same facts, as an offence triable in the Supreme Court, may all be heard together in the Supreme Court.

An offence within the jurisdiction of the Magistrate's Court arising from the same facts of an offence triable in the Supreme Court may be committed and heard together in the Supreme Court: s 11(7) MCA.

Appeals to the Supreme Court

Any party has the right to appeal to the Supreme Court a decision, sentence or order of a Magistrate made in a civil or criminal case tried summarily in Magistrate's Court: s 74 MCA.

The Supreme Court may on appeal (s 80 MCA):

- adjourn the hearing;
- after hearing the appeal, affirm, reverse or amend the decision of the magistrate;
- remit the case with the opinion of Supreme Court to the magistrate; or
- make such other order (including an order for costs by either party) as it thinks just and exercise any power which the magistrate might have exercised.

2.3.4 Magistrate's Court

Clause 84 Constitution; Magistrate's Court Act (MCA)

The Constitution gives judicial power to the Magistrate's Court. The MCA sets out the criminal and civil jurisdiction.

Civil jurisdiction

The Magistrate's Court is permitted to hear civil actions where the amount or value of something being claimed as debt, balance of account, or damages does not exceed $10,000: s 59 MCA.

A plaintiff may abandon the balance of their claim if it exceeds the jurisdiction of the Magistrate's Court to keep the claim within the jurisdiction of the Court.

Criminal jurisdiction

The Magistrate's Court has jurisdiction to hear and determine criminal cases which the Court is empowered to hear and determine by the MCA or any other Act: s 11(1) MCA.

Under the MCA, the Magistrate's Court has jurisdiction to hear and determine criminal cases where:

- the maximum punishment provided by law does not exceed three years imprisonment or a fine of $10,000 (summary cases): s 11(2) MCA;
- the Court has determined to hear summarily under s 35 or the Supreme Court has remitted to it for trial under s 36: s 11(3) MCA; or
- the Magistrate considers, either during the preliminary enquiry under s 35 or at any earlier time, that a suitable punishment for the offence will not exceed the maximum limits of its jurisdiction (three years imprisonment or a fine of $10,000) where the statute or common law has not specified any maximum penalty: s 11(5) MCA.

The Lord Chief Justice may give any named Magistrate increased sentencing power to impose a maximum punishment of up to seven years imprisonment or a fine of $50,000 when hearing criminal cases (with the parties' consent) under ss 35 or 36: s 11(4) MCA.

General powers and jurisdiction of Magistrates

Magistrates have all the powers and general jurisdiction provided under s 8 MCA. For example, a Magistrate may:

- cause to be brought by summons or by warrant, all persons charged with criminal offences;
- issue search warrants;
- investigate all charges of criminal offences in a preliminary inquiry and either:
  - discharge the defendant, or
  - commit them for trial before the Supreme Court;
- admit any defendants to bail;
- issue subpoenas for witnesses to attend in criminal and civil cases;
- take affidavits and administer oaths;
- hear and determine all civil proceedings as provided in Part V MCA;
- exercise other such powers not specified in the MCA that are specified in other laws; and
- award costs.

2.3.5 Land Court

Clauses 84 and 86A Constitution; ss 144 and 149 Land Act (LA)

Clause 84 of the Constitution gives judicial power to the Land Court. This Court is overseen by a Lord President and other Judges, assisted by assessors: cl 86A.

The Land Court is established under s 144 of the LA. The Land Court has jurisdiction to (s 149 LA):

- define the area and boundaries of every parcel of land in the Kingdom;
- hear and determine all disputes, claims and questions of title affecting any land or any interest in land, other than disputes affecting land resumed by the Crown under Part IX of the Act;
- appoint trustees for persons other than nobles or matapules who by reason of age may not succeed or by mental infirmity may not be capable of managing land; and
- dismiss such trustees for mismanagement, breach of trust or fraud.

Appeals

A party may appeal any order or judgment of the Land Court. If the matter relates to hereditary estates or titles, then the appeal goes to the Privy Council. All other appeals go to the Court of Appeal: s 162 LA; cl 50 Constitution.

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3.1 Introduction

Evidence is the information used to prove or disprove the facts in issue that are relevant to the case before the court. Evidence includes:

- oral evidence, or what the witnesses say in court;
- documentary evidence produced in court; and
- real evidence or physical items used in a criminal offence.

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

In criminal trials, the prosecution generally bears the burden of proving or disproving the facts in issue, to establish the guilt of the defendant, unless legislation specifically provides otherwise.

Evidence rules assist the court as to what evidence the court may (or may not) consider or accept (admissible). The key point with evidence is relevance (see below).

The Evidence Act (EA) is the principal statute dealing with this area of law. Part 1 sets out certain types of evidence that are *admissible* generally including evidence of any fact (s 3 EA):

- which existence is in issue;
- which is so closely connected with any fact in issue as to form part of the same transaction (even if at different times and places);
- which is the cause or effect immediate or otherwise of any fact in issue or which gave an opportunity for it to occur;
- which explains the circumstances (including the time and place) of any fact in issue;
- which shows or is a motive or preparation for any fact in issue; and
- tending to identify any person or thing whose identity is a fact in issue.

You may either:

- admit evidence: accept and act on such evidence you think is relevant to the issue/s; or
- reject evidence: refuse to receive evidence whether admissible or not at common law, which you consider irrelevant or needless, or unsatisfactory as being hearsay or other secondary evidence.

The hearsay rule is that a statement made by a person, other than the person giving oral evidence at trial, is inadmissible as evidence to prove the truth of some fact that has been asserted (see the paragraph below for more on the hearsay rule).

3.2 Classification of evidence

In a criminal trial you should understand how evidence is classified to properly apply the rules of evidence and take into account both the form of evidence and the content of the evidence. For example, oral evidence (the form) given during a trial may be direct or circumstantial (the content).

3.2.1 Classification by form

Classification by form refers to the way evidence is presented in court.

- **Oral evidence** is the statements, or representation of facts, made by witnesses.
- **Documentary evidence** is information contained in written or visual documents (see Parte3.3).
- **Real evidence** is usually some material object or thing (such as a weapon) that is produced in court and the object's existence, condition or value is a fact in issue or is relevant to a fact in issue.

3.2.2 Classification by content

Classification by content refers to the way the evidence is relevant to the facts in issue.

- **Direct evidence** is evidence which, if believed, directly establishes a fact in issue. This evidence is given by a witness who claims to have personal knowledge of the facts in issue.
- **Circumstantial evidence** is evidence from which the existence or non-existence of facts in issue may be inferred. It is circumstantial because, even if the evidence is believed, the information or circumstances may be too weak to establish the facts in issue or to uphold a reasonable conviction. It often works cumulatively in that there may be a set of circumstances that, individually, is insufficient to establish the facts in issue but taken together would be enough to do so.
- **Corroborating or collateral evidence** is evidence which is not relevant to the facts in issue either directly or indirectly but is relevant for the credibility or admissibility of other evidence in the case (either the direct or circumstantial evidence). It should come from another independent source (for example, an analyst or medical report).

3.3 Documentary evidence

This is information (including letters, figures, and designs) that is contained in written documents (which can be done on any substance): s 2 EA. These documents may include:

- public documents (statutes, parliamentary material, judicial documents of Tonga and New Zealand);
- private and local acts;
- historical books and records, maps and charts: ss 12 and 53 EA;
- statements in documents produced by computers (note that certain rules may apply to this form of documentary evidence);
- electronic records: s 54A EA; and
- photographs.

Documentary evidence consists of statements or representations made outside of court and therefore is hearsay evidence. With some exceptions (ss 66 and 67), the contents of documents must be proved by primary evidence (original copies are best): s 62 EA.

The contents of documents must be proved by primary evidence: s62 EA. It is best if all documents provided to the court are originals. Primary evidence means (s 63 EA):

- the document itself is produced to the court;
- each part where the document is in several parts;
- where a document is executed in counter-parts, each duplicate copy executed by one or some of the parties only, may be used only against the parties who executed that counter-part; and
- documents made by printing, photography or another uniform process (each is primary evidence of the contents), but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Secondary evidence refers to evidence that is not original. It may not be given as much weight as original evidence. Secondary evidence includes (s 64 EA):

- certified copies in compliance with ss 92 and 93 EA;
- copies made from the original by mechanical processes so that the copies are accurate (for example, photocopies of a proved original);
- copies made from or compared with the original;
- counterparts of documents (duplicate copies of a document may be produced to use against the parties who did not execute those copies); and
- oral accounts of the contents of any document given by a person who has seen the document.

Secondary evidence is admissible where:

- the person has a valid lawful objection to producing the original document on any of the grounds given under s 65: s 66 EA; and
- when the original has been lost or destroyed or is otherwise impossible or inconvenient to produce: s 67 EA.

Valid grounds for not producing primary documents include where (s 65 EA):

- producing the document may expose the person producing it or their spouse to a criminal charge or to any penalty or forfeiture;
- the document is held as mortgagee or pledge;
- the person is a public officer, and the document is a communication made in official confidence, and the Minister in control of the Department concerned considers the public interests would be likely to suffer by its disclosure; and
- the document is a communication between spouses during their marriage.

See s 65 for the full list.

Where a witness makes a statement as to the contents of a document, you may require the document to be produced or that proof be produced which will entitle the party who called the witness to give secondary evidence of the document: s 70 EA.

Often, documentary evidence will only be admissible under an exception to the hearsay rule. See s 89 for the full list of exceptions. For example, under s 89(n) EA where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact is admissible as evidence of that fact. The following conditions must be satisfied to be able to produce the document in court:

- the document is, or forms part of, a record relating to any trade or business or finance or commercial operation from information supplied (directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters in that record; and
- that person who supplied the information:
  - is dead, or overseas, or unfit by reason of their bodily or mental condition to attend as a witness, or
  - cannot with reasonable diligence be identified or found; or
  - cannot reasonably be expected (because of the time elapsed since they supplied the information and all the circumstances) to have any recollection of the matters dealt with in the information they supplied.

In deciding on (s 89(n)(ii)(A)-(C) EA):

- the admissibility of a document, you may draw any reasonable inference from the document's form or contents or any other circumstance: s 89(n)(ii)(A) EA; or
- whether a person is fit to attend as a witness, you may act on a certificate of a medical officer; or
- the weight, if any, to be attached to a statement which is admissible you must consider:
  - all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement;
  - whether the statement was made at the same time as the facts stated or their existence; and
  - whether the maker of the statement had any incentive to conceal or misrepresent facts.

See *Jin-Chuan v Li* [1999] Tonga LR 140 (CA) where the Court of Appeal refused to overturn the trial judge's finding that the documentary evidence was inconclusive in a "contest of credibility." Credibility and demeanour of each of the two parties in giving their evidence and submissions is an important part of assessing the evidence especially given inconclusive documentary evidence.

3.4 Real evidence

Real evidence usually refers to physical items which are produced at trial.

Documents can also be real evidence when:

- the contents of the document are only used to identify the document in question or to establish that it exists; or
- the document's contents do not matter, but the document itself bears fingerprints, is made of a certain substance, or bears a certain physical appearance.

The following facts about a person may also, in some circumstances, be regarded as real evidence:

- their behaviour;
- their physical appearance; and
- their conduct or attitude, which may be relevant to their credibility as a witness, or whether they should be treated as a hostile witness.

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

3.5 Exhibits

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

3.5.1 Checklist for exhibits

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

An evidentiary foundation for an exhibit is required to prove its relevance and that it complies with the rules of evidence. This requires the party who wishes to use the real or documentary evidence to ask has:

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

Also, the party seeking to have the item become an exhibit must have formally asked to tender it to the court and made the other party aware of the exhibit before the trial or hearing has started.

Once an item has become an exhibit, the court must:

- keep the exhibit safe from loss or damage if the court retains the exhibit; or
- if the prosecutor or the police are entrusted with the item, ensure that the defence is given reasonable access to it for inspection and examination.

3.6 Oral evidence

Oral evidence consists of statements or representations of fact. All facts except the contents of documents may be proved by oral evidence: s 60 EA.

These statements may be made in court or outside of court.

Oral evidence must always be direct. This means that if it refers to a fact which could be seen, heard or otherwise perceived, it must be the evidence of the person who says they saw, heard or otherwise perceived the fact in question: s 61(a)-(c) EA.

Similarly, if the oral evidence refers to an opinion or to the grounds on which an opinion is held, it must be the evidence of the person who holds that opinion on those grounds: s 61(d) EA.

'In court' statements are defined as those made by a witness who is giving testimony. If a witness wants to mention in their testimony a statement which they or somebody else made outside of the court, the witness is making an 'out of court' statement.

The difference between 'in court' statements and 'out of court' statements is important. If a witness wants to refer to 'out of court' statements in their testimony, you must decide whether it should be classified as hearsay or original evidence.

If the purpose of the 'out of court' statement is to prove the truth of any facts asserted, then the 'out of court' statement is classified as hearsay evidence and will generally be ruled inadmissible, under the hearsay rule.

If the purpose of mentioning the 'out of court' statement is simply to prove that the 'out of court' statement was made, then it should be treated as original evidence and should generally be ruled admissible.

The value of oral evidence is that you can observe:

- the outward behaviour of the witness (demeanour);
- the delivery;
- the tone of voice;
- the body language; and
- the attitude towards the parties.

You must ensure that at every stage of the proceedings, you take down in writing oral evidence you think is material that is given before the court.

The clerk is required to attend all sittings of court and must record all the evidence and particulars of any trial or inquiry. As keeper of the record, the clerk (s 96 MCA):

- has charge of the seal of the court;
- must furnish certified copies of your decisions to applicants, upon payment of the prescribed fee; and
- must furnish transcripts of the record in every case to the Supreme Court when required to do so by law or by order of the Chief Justice.

You have a duty to ensure a record is properly and correctly kept by the clerk and that all procedural matters, such as taking of oaths by witnesses, are included.

3.7 Evidentiary issues relating to witness testimony

There are several issues that may arise related to witness testimony during a criminal trial, including:

- the competence and compellability of witnesses including the defendant, spouse, co-defendant, and children;
- privilege;
- examination of witnesses;
- leading questions;
- refreshing memory;
- lies;
- corroboration;
- warnings to witnesses against self-incrimination; and
- identification evidence by witnesses.

3.7.1 Competent and compellable witnesses

Special statutory and common law rules have been developed regarding the competence and compellability of certain kinds of witnesses.

A witness is *competent* to give evidence if they may lawfully be called to testify. Any person is a competent witness in any proceedings, unless you consider that they are prevented from understanding the questions put to them or from giving rational answers to those questions because they are (s 118 EA):

- too young;
- too old;
- unwell in body or mind; or
- any other similar cause.

A person called as a witness who is unable to speak, shall not be deemed incompetent to testify but may give evidence in any other way they can make it intelligible (for example, by writing or by signs made in open court, deemed as oral evidence): s 119 EA.

A person cannot be excluded from being a witness because they have a physical or mental disability. Providing they can understand the questions being asked and provide rational answers (as per s 118 EA) then it is incumbent on the magistrate to provide the support they need (whether it is translation or other practical measures) so that persons with disabilities can participate in cases without discrimination and on the same basis as others.

Compellability means that the court can require or compel a witness to testify once they have been found competent. You may compel a witness to give material evidence in a criminal trial, subject to some exceptions.

No witness shall be compelled to answer any question which would tend to expose themselves or their spouse to a criminal charge or to a penalty of forfeiture, except as provided by ss 121(1)(e) and 129: s 137 EA.

Defendant

The general rule is the defendant is not a competent or compellable witness for the prosecution. This means that the defendant cannot be called by the prosecution to give evidence against themselves, nor can the court require the defendant to do so.

The defendant is a competent witness for the defence (whether charged solely or jointly) but cannot be compelled to give evidence in their defence at trial unless they choose to: s 121(1)(a) EA. Other rules that also apply include:

- the failure of a defendant to give evidence shall not be commented upon by the prosecution: s 121(1)(c);
- if the defendant chooses to give evidence, then they may be cross-examined like any other witness, even if it might incriminate them: s 121(1)(e);
- a defendant called as a witness shall not be asked or required to answer, any question tending to show that they have committed, been convicted of, or been charged with any other offence or is of bad character unless:
  - the proof that they have committed or been convicted of such other offence is admissible evidence to show that they are guilty of the current offence(s);
  - the defence has asked questions of the prosecution witnesses to establish the defendant's own good character, or the nature of the defence is to discredit the character of the prosecutor or any of the witnesses for the prosecution; or
  - the defendant has given evidence against any other person charged with the same offence: s 121(1)(f) EA
- the defendant or their spouse must give their evidence from the witness box or other place from which the witnesses give their evidence: s 121(1)(g) EA;
- nothing in s 129 shall affect the right of the defendant to make a statement without being sworn: s 121(1)(h) EA;
- the defendant, if giving evidence, is the first witness examined after the close of the evidence for the prosecution: s 121(2) EA; and
- the defendant may be cross-examined if they give evidence against any other person charged jointly with the same offence or whose evidence affects the defence of such other person: s 121(3) EA.

Spouse

The general rule is that a spouse is a competent witness for the defence at every stage of the proceedings, except that:

- the spouse of a defendant may only be called as a witness for either party (without the consent of the defendant), in any of the criminal proceedings set out in the Schedule: s 121(4) EA;
- the failure of a spouse to give evidence shall not be commented upon by the prosecution: s 121(1)(c) EA; and
- a spouse is not compellable in any proceeding to disclose any communication made to each other during the marriage: s 121(1)(d) EA.

The criminal proceedings set out in the Schedule in which the spouse may be called as a witness without the defendant's consent are proceedings (s 121(4) EA):

- against a husband charged with an offence against his wife (or the other way around);
- against a husband or wife charged with an offence against any member of their family living with them at the time of the offence;
- for bigamy; and
- under sections 116 to 133 of the Criminal Offences Act.

See also the paragraph on Privilege below for a spouse.

Co-defendant

Where there are reasonable grounds to show that two or more persons have conspired together to commit an offence, evidence may be given against each defendant of anything said, done or written by any one of the defendants to achieve their common purpose: s 4 EA.

If a defendant gives evidence against a co-defendant (or whose evidence affects the defence of the co-defendant) they may:

- be asked and, if asked, are required to answer, any question tending to show that they have committed or have been convicted of or charged with any offence or are of bad character: s 121(1)(f)(iii) EA; and
- be cross-examined by such other person: s 121(3) EA.

Children

Children are competent to give evidence at any age, based on their level of development and understanding. Great care should be taken with child witnesses to ensure that, if possible, they tell the court all the relevant information they have.

The general rule is that every witness in any criminal matter shall be examined upon oath. However, if you think a young child as a witness does not understand the nature of an oath, you may take their unsworn evidence, if you think that the child can give evidence and understands the duty of speaking the truth: s 116 EA.

The evidence of any unsworn child is recorded in the same manner as the evidence of any other witness: s 116 EA.

In any case, the child's evidence is given at your discretion and will depend on the circumstances of the case and on the child themselves. The defendant may not be convicted of a criminal offence solely on the unsworn evidence of any child, unless corroborated by some other material evidence implicating the defendant: s 116 EA.

This provision is controversial as crimes against children, especially sexual offences, are often committed in private where there are no other witnesses and there may be limited other material evidence. Applying this requirement for corroboration of unsworn child evidence may result in vulnerable young children receiving less protection than others under the law (contrary to cl 4 of the Constitution).

If any child willfully gives false evidence, they are liable upon conviction to imprisonment for any term not exceeding two years, and male children may be whipped: s 116 EA.

See the "Principles of criminal responsibility" chapter for more information on child defendants.

3.7.2 Privilege

Privilege is a rule of evidence that allows the holder of the privilege to refuse to disclose information or provide evidence about a certain subject or to bar such evidence from being disclosed or used in a judicial or other proceeding.

A spouse does not have to disclose any communication made to them by the other spouse during the marriage: s 128 EA.

However, this privilege does not apply where (s 129 EA):

- one spouse is charged with an offence against the other spouse; or
- a husband or wife is charged with an offence against any member of their family living with them at the time the offence was committed.

The English case *R v Pitt* [1983] QB 25 at 65 and 66, discussed a spouse who is competent but not compellable for the prosecution and that:

- the choice whether to give evidence is that of the spouse who retains the right of refusal; and
- if the spouse waives that right, they become an ordinary witness and, in some cases, they may be treated as a hostile witness.

Under the Evidence Act the following persons or matters are protected by privilege:

- Any official confidence that a public officer holds which the head of their department considers should not be disclosed in the public interest: s 132 EA.
- Any unpublished official records on affairs of state unless the head of the department consents: s 133 EA.
- The source of any information for any offence or for any tax offending: s 134 EA.

- Any communication (including any documents or advice) made by a lawyer to their client except with the express consent of their client (unless for illegal or fraudulent purpose): s 135 EA.
- Any confidential communication which has taken place between client and their lawyer (client privilege): s 136 EA.
- A witness does not have to answer any question which would put them at risk of a criminal charge, penalty or forfeiture (except if s 121 (1) (e) and 129 applies for spouses): s 137 EA.

3.7.3 Examination of witnesses

Examination-in-chief

The purpose of a party calling and examining a witness is to gain evidence in support of that party's case (examination-in-chief).

Examination-in-chief must be conducted using the general rules of evidence such as those relating to hearsay, opinion and the character of the defendant (see below).

Usually, a party is not allowed to attack the credibility of a witness they have called. However, if a witness acts in an adverse manner which frustrates the party calling the witness, they may be treated as a hostile witness and their credibility may be attacked through showing inconsistent statements (see below).

There are also other rules that relate to examination-in-chief including:

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

Other than not compelling a witness to answer any question to which they are legally entitled to refuse, you may ask any question in any form at any time of any witness, and with your leave, any party may cross-examine the witness on the answer: s 162 EA.

You may compel any person present in court, whether a party to the proceedings or not, to give evidence and produce any document then and there in their actual possession, in the same manner and subject to the same rules as if they had come to court by way of summons: s 163 EA.

If a witness refuses to be sworn or affirmed, to give evidence or pretends not to understand any question, in certain circumstances you may find them guilty of contempt of court: s 70 MCA.

See "Perjury" below which is a criminal offence if a witness deliberately lies.

For more details of contempt, see the "Management of Proceedings" chapter.

Cross-examination

The purpose of cross-examination is:

- to gain evidence from the witness that supports the cross-examining party's version of the facts in issue;

- to weaken or cast doubt upon the accuracy of the evidence given by the witness in examination-in-chief; and
- in appropriate circumstances, to draw questions as to the credibility of the witness.

Note: *Browne v Dunn* (1893) 6 R 67 (HL) applies as a rule of practice to allow a fair trial. It requires counsel to "put the case" of their client to the witnesses called by opposing counsel. Failure to do so might be held to imply acceptance of the evidence-in-chief.

It does not displace the other rules of practice that when you put something to a witness, you must provide evidence of what you are proposing. The purpose of the rule is to:

- ensure fairness to the party and the witness whose evidence is contradicted; and
- promote accurate fact-finding by ensuring the trier of fact has the benefit of the witness's response. The duty is not intended to protect the interests of the party cross-examining the witness.

Inconsistent statements by witnesses

A cross-examining party (or a party in the examination-in-chief) may seek to attack the witness's credibility by asking the witness if they made any prior written statements inconsistent with present testimony in criminal trial: s 143 EA.

Normally a witness may be cross-examined on written statement(s) without showing these, but if it is intended to contradict such witness then the cross-examining party must make the witness aware of those parts that are being relied on: s 143 EA.

You may also at any time during the trial require the writing to be produced for inspection and any use you think fit relevant to the trial: s 143 EA.

Prior convictions of witnesses

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

- denies having been so convicted;
- does not admit a conviction; or
- refuses to answer: s 144 EA.

This is subject to s 121(1)(f) Evidence Act (right of the defendant not to answer questions about prior convictions or of their bad character unless any exceptions apply).

In exercising your discretion, you may decide that:

- such questions are proper if the truth of their allegations would seriously affect the opinion of the court as to the credibility of the witness on the matter they are giving evidence about; or
- such questions are improper if:

- They relate to matters so remote in time or are of such character that even if true they would not (or only slightly) affect the opinion of the Court; or
- there is a large gap between the importance of the charges made against the witness's character and the importance of their evidence.

A previous conviction may be proved by the production of a certificate signed by a court clerk in which the conviction was made with the charge and conviction: s 95 EA.

Testing a witness in cross-examination

A witness on cross-examination may be asked any questions to test:

- their accuracy, veracity, or credibility; and
- their credit by injuring character.

But you may disallow or forbid any question which appears to:

- be vexatious or scandalous and not relevant to any matter in issue in the case; or
- have been put for the purpose of insult or annoyance only: s 145 EA.

Subject to s 144, no evidence may be given to contradict a witness, but if a witness is asked any question tending to impeach their impartiality, and answers it by denying the facts suggested, they may be contradicted: s 146 EA.

Hostile witnesses

A party is not entitled to cross-examine or impeach the credit of their own witness by asking questions or introducing evidence concerning such matters as the witness's bad character or previous convictions, except with your consent when you believe the witness to be hostile: s 147(1) EA.

A hostile witness is one who, from the way in which they give evidence, shows that they do not want to tell the truth to the court: s 147(2) EA.

The following guidelines are suggested:

- The party applying must state the grounds for the application based on definite information and not just on speculation.
- Sometimes the witness will show such clear hostility towards the prosecution that this attitude alone will justify declaring the witness hostile.
- The mere fact that a witness called by the prosecution gives evidence unfavourable to the prosecution or appears forgetful, is not in itself sufficient ground to have them declared hostile.
- You should be cautious about declaring a witness hostile as this can destroy the value of that witness's evidence.

When you have found a witness to be hostile and have allowed the party calling the witness to treat the witness as such, the party may question the credit of the witness through:

- evidence of persons who testify that they from their knowledge of the witness believe them to be untrustworthy; or
- proof that the witness has been bribed or has received any other corrupt inducement to give evidence; or
- proof of former statements inconsistent with any part of their present evidence: s 148 EA.

See *Rex v Mo'unga* [2001] Tonga LR 1 where the Supreme Court granted the prosecution's application to have the "first three witnesses (including the complainant) declared hostile." These applications were granted based on the evidence being inconsistent with evidence given at earlier preliminary hearings in the Magistrate's Court.

Re-examination

Re-examination is where a witness has been cross-examined, and is then again examined by the party who called them.

3.7.4 Rules of examination

Witnesses are first examined-in-chief by the party calling them. Then if the other party wishes to, they will cross-examine that witness, then if the party calling them wishes, they will re-examine them: s 139 EA.

The examination and cross-examination must relate to facts which you think are relevant to the facts in issue, but the cross-examination need not be confined only to the facts raised in the examination-in-chief: s 140 EA.

The re-examination is only allowed to explain matters referred to in cross examination. If, with your permission, new matter is introduced in the re-examination, the other party may further cross-examine upon the matter: s 141 EA.

3.7.5 Leading questions

A leading question is one which either:

- suggests to the witness the answer which should be given; or
- puts facts which are in dispute to the witness in such a way as to make for "Yes" or "No" answers: s 150 EA.

Leading questions must not be asked in an examination-in-chief or in a re-examination without your permission: s 151(1) EA. But you must permit leading questions on:

- introductory matters;
- undisputed matters; or
- matters which have in your opinion already been sufficiently proved: s 151(2) EA.

Leading questions may be asked in cross-examination, but must not assume that facts have been proved or that particular answers have been given, if that is not the case: s 152 EA.

Sometimes you may prevent leading questions in cross-examination if the witness being cross-examined shows a strong interest or bias in favour of the cross-examining party: s 153 EA.

3.7.6 Refreshing memory

While giving evidence, a witness may refer to their notes to refresh their memory if (s 154(1) EA):

- the notes have been made by the witness; and
- the notes were made at the time of the incident or almost immediately after the incident occurred (so the events are fresh in their memory).

The witness should not normally read from the notes but should use them only to refresh their memory. However, if the notes are lengthy and complex, then you may allow the witness to read them.

The witness may also refer to any such writing made by any other person and read by the witness within the time stated in s 154(1) so that when they read it, they knew it was correct: s 154(2) EA.

Whenever a witness wishes to refresh their memory, they may refer to a copy of the document, if you are satisfied that there is a good reason the original cannot be produced: s 155 EA.

A witness may also refer to facts mentioned in any document, although they have no specific recollection of the facts themselves, if the witness is sure the facts are correctly recorded in the document: s 157 EA.

An expert witness may refresh their memory referring to professional treatises: s 156 EA.

Any writing used to refresh their memory by a witness under ss 154, 155 or 156 EA, must be produced and shown to the other party if they require this and that other party may cross-examine the witness on this issue: s 158 EA.

3.7.7 Perjury

If it is established that the defendant lied (ie: told a deliberate lie as opposed to making a genuine error), this is relevant to their credibility as a witness. It does not necessarily mean, however, that the defendant is guilty.

If you believe the witness is lying you should also warn them that it is an offence under ss 63, 64 Criminal Offences Act (CoA).

Experience demonstrates that lies are told for a variety of reasons, and not necessarily to avoid guilt. As with a defendant, where a witness is shown to have lied, this is highly relevant to that witness's credibility.

3.7.8 Corroboration

Corroboration is only specifically required in a few instances. These are:

- the offences of treason and sedition;
- the offence of perjury;
- in cases where a defendant would be convicted upon the unsworn evidence of a child: s 116 EA; and
- in cases where a defendant would be convicted upon the testimony of an accomplice: ss 123-126 EA.

In all other cases (apart from these), no specific number of witnesses are required to prove any fact: s 127 EA. See *R v Mohulamo* Criminal Case Cr 607 of 1998.

3.7.9 Sexual offences

> "There is no requirement in the law of Tonga that the evidence of the complainant in a sexual case must be corroborated (…) it is the practice to warn the jury against the danger of acting on [their] uncorroborated evidence, particularly where the issue is consent or no consent": see *Teisina v R* [1999] Tonga LR 145 (CA).

In all criminal proceedings for rape or other sexual offences, evidence that the complainant at or shortly after the crime was committed voluntarily made a statement relating to its commission may be given. Such a statement shall not be considered as constituting additional or independent evidence of the crime but only as showing that the complainant's conduct is consistent with their evidence at the trial (which goes to weight): s 11 EA.

The absence of a contemporaneous voluntary statement made by a complainant cannot be used to suggest that the complainant's conduct was inconsistent with their evidence at the trial.

It is important to note that there is no requirement that a complainant's evidence be corroborated as sexual offences often occur in situations where there are no other witnesses. Where corroboration is required (evidence must be backed up by at least one other source) you must look for it in the prosecution's evidence.

If, at the end of the hearing, you find that the complainant's evidence does not have support from another witness, but you were still convinced that the complainant was telling the truth, you may still convict the defendant.

You must make it clear on the record or in your judgment that you were aware of the danger of convicting on the uncorroborated evidence of the complainant alone but were still satisfied beyond reasonable doubt that the defendant was guilty of the offence charged.

It is important to watch the witness as well as recording details of facts. You may want to:

- record how they give their evidence;
- record any inconsistencies within their evidence, or with their evidence and another witness's evidence; and

- see whether they avoid giving straight answers in areas of importance.

3.7.10 Self-incrimination

Be aware of self-incriminatory statements by a witness. If a question is asked of a witness, the answer to which could be self-incriminatory, you should:

- warn the witness to pause before answering the question;
- explain to the witness that they may refuse to answer the question; and
- explain that any evidence the witness gives in court that is self-incriminating could be used to prosecute them for a crime.

A witness may refuse to answer any question which may incriminate them: s 137 EA. See also clause 14 of the Constitution which provides that no person should be intimidated into giving evidence against themselves.

The warning against self-incrimination does not apply to a question asked of a defendant, where the question relates to the offence being considered by the court.

3.7.11 Identification by a witness

The visual identification of the defendant by witnesses needs to be treated with some caution. Honest and genuine witnesses have made mistakes regarding the identity of defendants. The weight to be given to such evidence is determined by the circumstances under which the identification was made.

See the English case of *R v Turnbull and Others* [1977] QB 224 where the Court made the following guidelines for visual identification:

- For how long did the witness observe the defendant?
- At what distance and in what light?
- Was their view blocked in any way, eg: by passing traffic or a crowd?
- Had the witness ever seen the defendant before?
- How often and if only occasionally, had they any special reason for remembering the defendant?
- How long was the time before the original sighting and the subsequent identification to the police?
- Was there any major difference between the description of the defendant given to the police by the witness when first seen by them and their actual appearance?

3.7.12 Visiting the scene

You may view and investigate any subject matter and for this purpose you are entitled to access any land or other property for the inspection: s 164 EA.

3.8 Rules of evidence

Rules of evidence have been established by both the common law and by statute. Rules relating to evidence can be found in the Magistrate's Court Act (MCA), the Criminal Offences Act (COA) and the Evidence Act (EA).

The important rules of evidence are that:

- evidence must be relevant to the issues before the court;
- the best evidence must be produced;
- hearsay evidence is not admissible;
- statements of opinion cannot be given unless that person is an expert; and
- evidence and the law must be interpreted and understood by all parties to a case. These rules of evidence are discussed in more detail below.

3.8.1 Burden and standard of proof

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

Legal burden of proof

The legal burden is the burden imposed (or responsibility) on a party to prove a fact or facts in issue. The standard of proof required to discharge the legal burden varies according to whether the burden is borne by the prosecution or the defendant.

For criminal trials, the general rule is that the prosecution bears the legal burden of proving all the elements in the offence necessary to establish guilt: ss 104-108 EA. The standard of proof required is beyond reasonable doubt. They will do that by calling evidence from witnesses and using exhibits. The defendant does not have to prove they did not commit the offence. See for example: *R v Ikamanu* [2020] TOSC 67; CR 53 of 2020, 3 September 2020.

A good explanation of what is "reasonable doubt" is offered by the New Zealand Court of Appeal in *R v Wanhalla* [2007] 2 NZLR 573. In that case, the Court stated:

> "Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if, at the end of the case, you are sure that the accused is guilty.
>
> It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.
>
> A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have reviewed all the evidence."

The defendant will try to establish a reasonable doubt on one or more elements of the charge or to prove a defence and may call and lead evidence to do so.

In any criminal proceeding the prosecution has the burden of proving that the defendant does not come within any exception or exemption contained in the Act under which the charge has been brought: s 108 EA.

Special defences: If the defendant raises a special defence, such as insanity or alibi, then the burden of proof transfers to the defendant and they must bear the burden of proving it, usually on the balance of probabilities. Special requirements of notice are placed on the defendant before such evidence may be admitted: ss 106, 108 EA.

The term balance of probabilities means "more probable than not" that a contested fact exists. This standard of proof is lower than proof beyond reasonable doubt.

The burden also shifts where a statute expressly casts on the defendant the burden of proving a particular issue or issues: s 106 EA.

Other facts: If the admissibility of a second fact requires proof of a first fact to be established, then the burden of proving the first fact lies on the party wishing to give evidence of the second fact: s 107 EA.

Evidence of state of mind: Evidence showing the existence of any state of mind, state of body or bodily feeling may be given if such state is in issue or relevant to proceedings, but only to show the state of mind or body related to the matter in question and not generally: s 10 EA.

Where there is a question whether an act was accidental, intentional or done with a particular knowledge or intention, evidence may be given that the act formed part of a series of similar occurrences in each of which the person doing the act was concerned: s 7 EA.

The evidential burden of proof

The evidential burden is the burden imposed on a party to introduce sufficient evidence on the fact or facts in issue to satisfy you that you should consider those facts in issue.

Generally, the party bearing the legal burden on a particular issue will also bear the evidential burden on that issue. Therefore, the general rule is that the prosecution bears both the legal and evidential burden in relation to all the elements in the offence necessary to establish the guilt of the defendant.

Where the defendant bears the legal burden of proving insanity or some other issue, due to an express statutory exception, they will also bear the evidential burden. However, in relation to some common law and statutory defences, once the defendant discharges their evidential burden, then the legal burden of disproving the defence will be on the prosecution.

You must decide whether a party has discharged the legal burden borne by them at the end of the trial, after all the evidence has been presented.

3.8.2 Judicial notice

The doctrine of judicial notice allows the court to treat a fact as established although no evidence has been introduced to establish it. The purpose of this rule is to save the time and expense of proving self-evident or well-established facts.

If a fact is of such common knowledge that it requires no proof you may, without relying on other sources of information, take judicial notice of it and direct the court to treat it as an established fact: s 35 EA.

The subjects of which the court may take judicial notice include:

- any laws or rules whether in force in Tonga (both past, present and future);
- the course of proceedings of the Legislature;
- the Seals of the Superior Courts of any Commonwealth territory and all courts in Tonga or authorised by law in Tonga;
- the names, titles, functions and signatures of persons of any public office in Tonga, if their appointment is noted in the Gazette;
- the names of the members of the Courts of Tonga and of their subordinate officers and clerks, and of all lawyers authorised to appear and act before them;
- the rules of the road on land or at sea; and
- all other matters which the court is directed by any statute to notice: s 36 EA.

On all these subjects and on all matters of public history, literature, science or art, you may refer to appropriate books or documents of reference: s 37(1) EA.

If a party asks for judicial notice of any matter, you may refuse to take judicial notice until that party produces a book or document that you consider necessary to establish the fact: s 37(2) EA.

General presumptions

Presumptions (matters that are taken to be true without the need to prove them) speed up the conduct of a trial by acknowledging well-known or sometimes hard to prove facts. Some presumptions are conclusive and cannot be challenged, while others can be rebutted by contrary evidence.

The ones that are most applicable to criminal proceedings are the presumptions that:

- the defendant is innocent in the absence of evidence to the contrary: s 46 EA;
- a boy under 13 years of age is incapable of committing rape (conclusive): s 45 EA;
- if a person is found to be in possession of recently stolen property, then they have stolen it or received the property knowing it to be stolen unless they can give some satisfactory explanation of how they got possession: s 40 EA; or
- any act done in any official or judicial capacity satisfied all necessary conditions to be a valid act (rebuttable): s 39 EA.

Documentary presumptions

Presumptions as to documents produced in court speed up the process of proving they are genuine in their contents or otherwise valid. These presumptions are set out in sections 47-59 of the Evidence Act.

It is presumed, until otherwise shown, that any document claiming:

- to be a document which by any Act at the time in force would be admissible if signed, stamped, sealed or otherwise authenticated in accordance with the Evidence Act, that:
  - the signature, stamp, seal or other authentication of the document is genuine; and
  - the person signing, stamping, sealing or otherwise authenticating it had at the relevant time the official or other position claimed: s 47 EA.
- to be either a record or memorandum of evidence given by a witness in judicial proceedings, or a statement or confession by any prisoner or defendant legally taken, and signed by any Judge, Magistrate or clerk that:
  - the document is genuine;
  - any statements as to the circumstances under which it was taken made by the person signing it are true; and
  - the evidence, statement or confession was duly taken: s 48 EA.

Genuineness of documents

It is presumed, until otherwise shown, the genuineness of every document that is:

- a Government notice in any official newspaper or official Gazette;
- a newspaper or journal;
- a document directed by law to be kept by any person if the document is kept substantially in the form required by law; and
- executed or authenticated either by a Tongan or foreign lawyer: s 50(a)(c)(d)(e) EA.

Genuineness of Government publications

It is presumed, until otherwise shown, the genuineness of:

- every book printed or published under the authority of the Government or of the Legislature of any country containing the laws of such country; and
- every book containing reports of legal decisions of the courts of that country: s 51 EA.

Powers of attorney

It is presumed, until the contrary is shown, that every document purporting to be a power of attorney and to have been executed and authenticated by a Notary Public or any Court, Judge or Magistrate in any Commonwealth territory or by a High Commissioner (Consul or Vice-Consul) or other representative of a Commonwealth territory was so executed and authenticated: s 52 EA.

3.8.3 Admissibility of evidence

At any time during proceedings, there may be questions or objections as to the admissibility of evidence. You may admit and receive evidence that you think fit to accept, whether it is admissible or sufficient at common law.

Relevance

If the evidence proposed is relevant to the issues in dispute in the court case before you then, with exceptions (some exclusionary rules), it will be admissible but not otherwise: s 14 EA.

It is your duty to ensure that irrelevant facts are excluded. To ensure this occurs, you may ask any party proposing to give evidence of any fact in what manner the alleged fact, if proved would, be relevant to the issues before you.

If any fact is not admissible unless another fact has first been proved you may, in your discretion, either permit evidence of the second fact to be given before the first fact is proved or you may require that evidence of the first fact be given before you allow admission of the second fact: s 15 EA.

Likewise, any fact of which of which evidence is admissible under Part 1 of the Evidence Act is treated as if it is relevant to the issues before the court.

All evidence which is irrelevant or insufficiently relevant to the facts in issue should be excluded.

A relevant fact is that which proves or disproves a claim that:

- the prosecution or defence in a criminal case need to prove to establish their case or disprove the other side's case; or
- the claimant or defence in a civil case need to prove to establish their case or disprove the other side's case.

Generally, a statement is only evidence if the person who, for example, saw the event makes a sworn statement as to its truth. And the same generally with a document – the person who made the document or signed the document must also swear that the document produced in court is the document made or signed by them (exceptions dealt with later).

Relevance is a question of degree and will have to be determined by you, according to specific facts in the case at hand.

Weight

If you rule that a piece of evidence is admissible, you will then need to determine what weight (the amount of importance) the evidence should be given.

Once you are satisfied that evidence is truthful you will then need to decide if the evidence you have heard is reliable. Of course, a witness can be honest but the evidence they give can be unreliable. For example, their memory of a conversation may be poor, or an identification of an event may be too far away or too dark to reliably describe what happened.

You will have to decide what weight you give evidence you have heard when you come to a decision. The more reliable the evidence is, the more weight you give it.

To decide what weight to attach to statements rendered admissible, you must consider:

- all the circumstances to decide on the accuracy of the statement;
- if the statement was made at the same time as the occurrence of the facts stated in the statement; and
- if the maker of the statement was given any incentive to conceal or misrepresent the facts.

Relevant credibility factors include:

- relationships between parties;
- whether the witness maximises/minimises their own role in the offending;
- alcohol;
- drugs;
- performance under cross-examination;
- independent evidence;
- statements made before, after or during the incident;
- consistency or inconsistency with words or written material;
- lapse of time between the incident and the trial (recall of events);
- ability to observe the incident (for example, lighting and distance);
- motive;
- tension; and
- revenue.

Irrelevant credibility factors include where the witness:

- is a woman;
- is a child; and
- has a disability.

Summary of approach to admissibility

Ask yourself:

- Is the evidence you have heard relevant to the case before you?
- If yes, is the evidence given truthful?
- If yes, how reliable is the evidence?

Discretion to exclude

You have a discretion, to refuse to receive any evidence, whether admissible or not at common law, if you consider the evidence to be:

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

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

3.8.4 The best evidence rule

The best evidence rule relates to the use of documents as evidence. The rule is that, if an original document is available and can be produced without any difficulty, it should be produced.

If the original has been lost or destroyed, or there is some other good explanation as to why the original cannot be produced, a copy may be produced as it is the best evidence that is now available.

3.8.5 The hearsay rule

The general rule is that a witness can only give evidence on what they heard and saw but not give evidence of what someone else heard and saw: s 89 EA. That is called a hearsay statement - a statement made by a person who is not a witness: s 88 EA.

Hearsay evidence is generally not admissible because:

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

To determine whether evidence is hearsay or not, you must:

- determine the purpose for which the evidence will be used; and
- ensure that the witness who gives the evidence has direct personal knowledge of the evidence contained in the statement, if the prosecution wants to rely on the evidence as being the truth of what is contained in the statement.

For example, a statement made to a witness by a person who is not called to be a witness may or may not be hearsay as follows:

- it would be hearsay and inadmissible if the object of the evidence would be to establish the truth of what is contained in the statement; but
- it would not be hearsay and would be admissible as evidence if, the statement is used to establish, not the truth of the statement itself, but the fact that it was made.

The reason for the hearsay rule is that the truthfulness and accuracy of the person whose words are spoken to another witness cannot be tested by cross-examination because that person is not or cannot be called as a witness. See *Teper v R* [1952] 2 All ER 447 at 449.

The rule against hearsay evidence is qualified by common law and some statutory exceptions. However, you may exclude hearsay evidence, even if it is admissible at common law, if you consider it unsatisfactory as being hearsay.

Exceptions to the hearsay rule

Statutory exceptions to the hearsay rule for criminal proceedings are set out in section 89 of the Evidence Act including where:

- admissions and confessions are made by or to the prejudice of the party against whom it is sought to be proved (subject to ss 17-23 EA): s 89(d);
- the statement forms part of the fact or transaction which is being investigated by the court: s 89(a);
- the death of the victim is the subject of a criminal charge and they made a statement as to the circumstances of their death when they expected to die without hope of recovery: s 89(b);
- the statement was made in front of and in the hearing of the defendant against whom the evidence is tendered and the defendant had the chance to reply: s 89(c);
- the knowledge, intention, motive or state of mind or body of any person is a fact in issue and the statement proves or disproves the knowledge, motive or state of mind or body: s 89(e);
- the documentary statement is part of any official book, register or record (is or relevant to a fact in issue) made by a public servant or other person in the course of their official or legal duties in the country in which the book, register or record is kept: s 89(f);
- the maker of the statement has died and the statement was made:
  - in the ordinary course of business by that person and is an account or record of some act which they were required to do and to record: s 89(g);
  - as to the existence of any relationship by blood or marriage (if this is a fact in issue), and you are satisfied that the deceased was related by blood or marriage to the parties and that the statement was made prior to the dispute arising: s 89(j)
- a deposition taken before a magistrate (as per ss 44-45 MCA) in a jury trial in the Supreme Court: s 89(m);
- a documentary statement where direct oral evidence of that statement would be admissible and certain conditions are met (see documentary evidence above): s 89(n) EA.

Several other exceptions to the hearsay rule exist under section 89 of the Evidence Act, which you may refer to when dealing with possible hearsay evidence.

Admissions

An admission is an oral or written statement about any fact in issue which may be to the prejudice of the maker of the statement regarding that fact, or to the prejudice of some person responsible for that person's statements: s 16 EA.

Evidence may be given against any party of any admission made by:

- the party;
- any person, who in your opinion, is expressly or impliedly authorized by the party to make such admissions on their behalf;
- any person whom the party has expressly referred for information regarding the matter in dispute: s 17(1)(a), (b), and (f) EA.

So long as the admission was made during the period of shared interest or privity (relationship recognized by the law) then evidence may also be given of any admission made by any person:

- who, for the purposes of the case, is regarded as having identical interests as the party;
- is jointly interested with the party in the subject matter of the proceedings (except admissions by co-defendants are not receivable against each other);
- who has an interest (by relationship, in law, or in estate) in the subject matter of the proceedings: s 17(1)(c), (d), and (e), 17(2) EA.

To protect a defendant, no evidence may be given of any admission made under illegal compulsion: s 19 EA.

Confessions

Confessions are admissions where the defendant has made a statement to another person out of court that they committed the offence: s 20 EA. The confession can either admit or deny in whole, or in part, the charge.

However, a body of law has developed to prevent confessions obtained through unlawful or improper means.

Evidence from a confession is not permitted where it appears the confession was made after any inducement, threat or promise from the prosecutor or other person having authority over the defendant and sufficient for the defendant to suppose on reasonable grounds that by making it, they would gain any advantage or avoid any evil: s 21 EA.

See *R v Li* [2006] Tonga LR 90 where the Supreme Court summarized the test for admitting a confession is that the prosecution must prove beyond reasonable doubt that (even if the confession may be true) there was no oppression; and that nothing said or done was likely to render the confession unreliable (see further the Court of Appeal decision in dismissing the appeal at *Li v R* [2006] Tonga LR 220 (CA)).

The exception to this is where any fact discovered as the result of the confession, evidence may be given of the fact and so much of the confession as strictly relates to the fact: s 21 EA.

Section 22 confirms that confessions are admissible even if made:

- under a promise of secrecy;
- where the defendant was deceived to obtain the confession;
- when the person making it was drunk;
- in answer to questions which the person making the confession need not have answered; or
- without any warning having been given to the person making it that they were not bound to make the confession and that evidence of it might be given against them: s 22 EA.

In *R v Li* the Supreme Court noted s 22 says among other things that a confession may be admissible even if no warning was given that the defendant was not bound to make a confession (although that was not the case here) and even if the defendant need not have answered the questions. However, the proviso is added that where a confession is made to a police officer in answer to questions when the defendant is in custody, the court has a discretion to refuse to admit evidence of the confession.

Therefore, you do have a discretion to refuse to admit a confession made to a police officer while the defendant is in custody and in answer to questions put to the defendant by the police officer: s 22 EA.

Aspects of s 21 and s 22 may be inconsistent with each other and should also be read consistently with cl 14 of the Constitution, that "no one shall be intimidated into giving evidence against himself".

This is an important legal protection against the use of torture. Torture is prohibited under customary international law, which is binding on Tonga, even though Tonga has not ratified the ICCPR or the Convention Against Torture.

The Supreme Court in *R v Li* also confirmed that the test which should be applied in exercising that discretion is that the prosecution must prove beyond reasonable doubt that (even if the confession may be true) there was no oppression; and that nothing said or done was likely to make the confession unreliable: see *R v Pailate* [1989] Tonga LR 109; R v Fainga'anuku 38-67/88.

Also, the defence may not object to the admissibility of a confession just because it was made as a witness in a judicial proceeding unless, having refused to answer a question, the person was then improperly compelled to answer. Evidence of the answer may not be given: s 23 EA.

3.8.6 Opinion evidence

The rule on opinion evidence is that witnesses may only give evidence of facts they have seen, heard or done and not give evidence of their opinion on what they think or believe: this is irrelevant and not admissible.

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

There are two exceptions to the rule on opinion evidence:

- expert opinion evidence on the identity or genuineness of handwriting, or upon any point of foreign law, or of science, art, trade, manufacture, or any other subject which require special knowledge or skill, may be given by any persons who in your opinion have the special knowledge or skill in that particular subject: s 24(1) EA
- non-experts' opinion evidence.

Expert witnesses

You may admit any written report(s) of expert witnesses if a copy has been served on the defendant in sufficient time (for them to give effective notice that they require the expert to attend for cross-examination) and the report(s) contains:

- their qualifications and experience;
- such facts as are within their own knowledge;
- such facts as have been communicated to them by others, and the sources of such facts;
- their opinion; and
- their signature: s 24(2) EA.

Upon admitting the statement, it serves as evidence of all the contents, except for those facts communicated to the expert by other sources: s 24(2) EA.

If the defendant required the expert to attend for cross-examination and is convicted, they may be ordered to pay the costs of the attendance of the expert: s 24(2) EA.

An expert may refer to books or writing in support of their opinion, and you may consider such books and writing together with the expert's evidence: s 25 EA.

See *Bin Huang v Police* [2020] TOSC 28; CR 150/2019, 2 June 2020 for the court's discretion to assess and admit expert opinion evidence. The Supreme Court looked at the relevant principles of exercising this discretion discussed in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)* [2012] VSC 99 at [98], namely whether the opinion evidence is:

- relevant or of sufficient probative value (the relevance rule);
- based on specialised knowledge, training or experience (the expertise rule);
- put forward wholly or substantially on facts assumed or observed that have been, or will be, proved (the factual basis rules);
- put forward wholly or substantially on that specialised knowledge (the expertise basis rule); and
- based on a statement of reasoning showing how the 'facts' and 'assumptions' relate to the opinion stated to reveal that that opinion is based on the expert's specialised knowledge (the statement of reasoning rule).

Handwriting: if you must form an opinion as to the person who wrote or signed any document, any witness acquainted with the handwriting of the person alleged to have written or signed may give evidence on whether in their opinion, it was or was not made by the person in question: s 26(1) EA.

A witness is deemed to be acquainted with the handwriting of another, if they have:

- seen that person write;
- received documents written by that person in reply or addressed to the witness; or

- in the ordinary course of business, regularly seen documents which may contain the handwriting of that person: s 26(2) EA.

Non-experts may give a statement of opinion on facts that are commonly known about everyday life (eg: age, weather, car speed etc).

The witness should be asked to describe the persons or circumstances prior to being asked for their opinion. Examples of non-experts' opinion evidence:

- the identity of an object;
- a person's age;
- the speed of a vehicle;
- the weather; and
- whether relations between two persons appeared to be friendly or unfriendly.

Sometimes it is hard to tell the difference between fact and opinion. Therefore, use your commonsense in deciding if the evidence is admissible, and if so, what weight you should give it.

3.8.7 Character evidence

Admissibility of evidence of bad character

Defendant: Evidence of the defendant's bad character is only admissible by the prosecution if the defendant puts their character in issue either by evidence given of their good character, or during examination-in-chief questions asked to show good character: s 31 EA.

Once character becomes an issue, evidence of general reputation is admissible only and not specific acts of good or bad conduct: s 34 EA.

Evidence of previous convictions is allowed where the defence calls witnesses to show evidence of the defendant's good character or asks questions with that intent, and the defendant is charged with any offences of:

- larceny or for any other offence declared punishable as larceny;
- obtaining goods by false pretences;
- receiving property knowing it to have been stolen; or
- any other offence involving fraud: s 32(b) EA.

For any defendant found in the possession of stolen goods, evidence of previous convictions for offences involving fraud and dishonesty are admissible to show the defendant's knowledge that such goods are stolen. This evidence may be given even before evidence of the possession of stolen goods is given, so long as the defendant is given three days' notice before the previous convictions are tendered: s 8 EA.

Another exception to this rule at common law is evidence of other misconduct forming part of the same transaction of the offence charged is also admissible at common law.

Witnesses: Subject to s 121(1)(f) Evidence Act, a witness may also be questioned as to whether they have been convicted of any offence and if the witness either denies the fact or refuses to answer, the opposite party may prove the conviction: s 144 EA.

See also the paragraphs "Testing a witness in cross-examination" and "Hostile witnesses".

A previous conviction may be proved by the production of a certificate signed by a court clerk in which the conviction was made with the charge and conviction: s 95 EA.

Sexual offence cases

Specific rules regarding character evidence in rape and indecent assault cases also exist: see s 11 Evidence Act.

At trial for rape and indecent assault cases, without your leave, no evidence and no question in cross-examination may be adduced or asked by or on behalf of a defendant about any sexual experience of a complainant with a person other than that defendant: s 33(1) EA.

You may give leave to adduce such evidence if you are satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked: s 33(2) EA. These provisions are aimed at preventing gender bias through irrelevant examination of the victim's character based on their sexual history, as has often occurred in the history of trials concerning sexual offences.

Admissibility of evidence of good character

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

The purpose of introducing evidence of good character is primarily to establish the credibility of a witness or the defendant, and to point to the improbability of guilt. Evidence of good character also becomes important when sentencing the defendant upon conviction of an offence.

3.8.8 Evidence of reputation

General custom

It may sometimes be necessary to establish the existence of any general custom or right. In such cases, evidence may be given of general reputation with reference to such custom or right among those likely to know of its existence: s 27(1) EA.

For example, evidence of the inhabitants of a town is admissible as to the boundaries of the town.

The term "general custom or right" includes any custom or right common to any considerable class of persons: s 27(2) EA.

If the existence of a custom or right arises, evidence may be given of (s 5 EA):

- any transaction creating, modifying, recognizing, or denying the right or custom or which was inconsistent with its existence;
- specific circumstances in which the right or custom was claimed, recognised, asserted or in which its exercise was disputed, asserted or departed from.

Relationship

When you must decide on the relationship of one person to another, evidence may be given of general reputation regarding that relationship among those likely to know of its existence, with the exception that such evidence is not admissible for the purpose of proving a marriage in prosecutions for bigamy: s 28 EA.

For example, for the question of whether A is the legitimate son of B, evidence that A was always looked upon as such by members of the family is admissible

3.9 Evidence checklist

Relevant legislation

- Constitution of Tonga (Constitution)
- Criminal Offences Act (COA)
- Evidence Act (EA)
- Magistrate's Court Act (MCA)

Key principles for evidence

Evidence rules (from common law and statute) have been established to assist the court as to what evidence the court may (or may not) consider or accept (admissible). The key point with evidence is relevance.

For admissibility ask yourself:

- Is the evidence you have heard relevant to the case before you?
- If yes, is the evidence given truthful?
- If yes, how reliable is the evidence?

You may admit the following evidence (s 3 EA):

- The existence or non-existence of any fact in issue.
- Any facts which are so closely connected with any fact in issue as to form part of the same transaction (even if at different times and places).
- Any facts which are the cause or effect immediate or otherwise of any fact in issue or which gave an opportunity for it to occur.
- Any facts which explain the circumstances (including the time and place of fact in issue).
- Any facts which show or are a motive or preparation for any fact in issue.
- Any fact tending to identify any person or thing whose identity is a fact in issue.

You may reject evidence:

- Whether admissible or not at common law, which you consider irrelevant or needless, or unsatisfactory as being hearsay or other secondary evidence.
- You have a judicial discretion to exclude prosecution evidence that has been commonly used in cases where the police or prosecution unlawfully, improperly or unfairly obtained evidence.

Types of evidence

Documentary evidence

- Documentary evidence is information (including letters, figures, and designs) that is contained in written documents (can be done on any substance): s 2 EA.
- Documentary evidence consists of 'out of court' statements or representations and therefore is hearsay evidence. With some exceptions (sections 66 and 67), the contents of documents must be proved by primary evidence (original copies are best): s 62 EA.

Primary evidence means:

- the original document itself (or each part if in several parts) produced to the court: s 63 EA.

Secondary evidence includes:

- certified copies in compliance with ss 92 and 93 EA;
- copies made from the original by mechanical processes which ensure the copies are accurate (e.g., photocopies of a proved original): s 64 EA;
- copies made from or compared with the original etc: s 64 EA.

Secondary evidence is admissible where:

- the person has a valid lawful objection to producing the original document on any of the grounds given under s 65 of the Evidence Act: s 66 EA; or
- when the original has been lost or destroyed or is otherwise impossible or inconvenient to produce: s 67 EA.

Where a witness makes a statement as to the contents of a document, you may require the document to be produced or that proof be produced which will entitle the party who called the witness to give secondary evidence of the document: s 70 EA.

Often, documentary evidence will only be admissible under an exception to the hearsay rule. See s 89(n) EA where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if:

- the document is, or forms part of, a record relating to any trade or business or finance or commercial operation from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters in that record; and

- the person who supplied the information:
  - is dead, or overseas, or unfit by reason of their bodily or mental condition to attend as a witness; or
  - cannot with reasonable diligence be identified or found; or
  - cannot reasonably be expected (having regard to the time which has elapsed since they supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information they supplied.

In deciding on the admissibility of a document, you may draw any reasonable inference from the document's form or contents or any other circumstance. In deciding whether a person is fit to attend as a witness, you may act on a certificate of a medical officer.

In estimating the weight, if any, to be attached to a statement which is admissible, you should consider (s 89(n)(ii) EA):

- all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement;
- whether the statement was made at the same time as the facts stated or their existence; and
- whether the maker of the statement had any incentive to conceal or misrepresent facts.

Real evidence

Real evidence usually refers to material objects which are produced at trial.

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

Exhibits

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

An evidentiary foundation to prove an exhibit is required to prove its relevance and that it complies with the rules of evidence. This requires the party who wishes to use the real or documentary evidence to ask:

- has the witness seen the item; and
- has the witness been able to identify the item to the court.

Also, the party seeking to have the item become an exhibit must have formally asked to tender it to the court and made the other party been made aware of the exhibit before the trial or hearing has started.

Oral evidence

- Oral evidence consists of statements or representations of fact. All facts except the contents of documents may be proved by oral evidence: s 60 EA.

- Oral evidence must always be direct. If it refers to a fact which could be seen, heard or otherwise perceived it must be the evidence of the person who says they saw, heard or otherwise perceived the fact in question: s 61(a), (b) and (c) EA.
- If the oral evidence refers to an opinion or to the grounds on which an opinion is held, it must be the evidence of the person who holds that opinion on those grounds: s 61(d) EA.

Keeping a record of the evidence

The clerk is required to attend all sittings of court and must record all the evidence and particulars of any trial or inquiry. As keeper of the record, the clerk (s 96 MCA):

- has charge of the seal of the court;
- must furnish certified copies of your decisions to applicants, upon payment of the prescribed fee;
- must furnish transcripts of the record in every case to the Supreme Court when required to do so by law or by order of the Chief Justice.

Burden of proof

- In criminal cases the prosecution bears the legal and evidential burden of proving all the elements in the offence beyond reasonable doubt (the standard of proof): ss 104-108 EA.
- Evidence of the existence of any state of mind, state of body or bodily feeling may be given whenever this is in issue or relevant. But only to showing the state of mind or body existed as to that issue and not generally: s 10 EA.
- If the issue is whether an act was accidental, intentional, or done with a particular knowledge or intention, evidence may be given that the act formed part of a series of similar occurrences in each of which the defendant was involved: s 7 EA.
- The defendant does not have to prove they did not commit the offence.
- If the defendant raises a special defence, such as insanity or alibi, then the burden of proof transfers to the defendant and they must bear the burden of proving it, usually on the balance of probabilities. Special requirements of notice are placed on the defendant before such evidence may be admitted: ss 106 and 108 EA.
- The burden also shifts where a statute expressly (or by interpretation) requires the defendant to prove a particular issue(s): s 106 EA.

Judicial notice

- If a fact is of such common knowledge that it requires no proof, you may take judicial notice of it and treat it as an established fact: s 35 EA.
- Section 36 EA sets out various matters that you can take judicial notice of including official Seals, laws of Tonga, members of the Courts of Tonga and all other matters which the court is directed by any statute to take notice of: s 36 EA.
- On all these subjects and on all matters of public history, literature, science or art, you may refer to appropriate books or documents of reference: s 37(1) EA.

- If a party asks for judicial notice of any matter, you may refuse to take judicial notice until that party produces a book or document that you consider necessary to establish the fact: s 37(2) EA.

Presumptions

The following presumptions apply:

- The defendant is innocent in the absence of evidence to the contrary: s 46 EA.
- A boy under 13 years of age is incapable of committing rape (conclusive): s 45 EA.
- If a person is found to be in possession of recently stolen property, then they have stolen it or received the property knowing it to be stolen, unless they can give some satisfactory explanation of how they got possession: s 40 EA.
- Any act done in any official or judicial capacity has satisfied all necessary conditions to be a valid act (rebuttable): s 39 EA.
- Certain documents produced in court that speed up the process of proving the genuineness of their contents or validity as to form (rebuttable): ss 47-59 EA.

Rules of evidence

- The best evidence rule: if an original document is available and can be produced without any difficulty, it should be produced.
- The opinion evidence rule: witnesses may only give evidence of facts they have seen, heard or done and not their opinion (inference drawn from the facts).
- Exceptions to the opinion rule: expert opinion evidence on the identity or genuineness of handwriting, or upon any point of foreign law, or of science, art, trade, manufacture, or any other subject which require special knowledge or skill, may be given by any persons who in your opinion have the special knowledge or skill in that particular subject: s 24(1) EA.
- Non-experts or lay persons: may only state opinions on facts that are commonly known about everyday life (eg: age, weather, car speed etc).
- You may admit any written report(s) of expert witnesses, if a copy has been served on the defendant in sufficient time (for them to give effective notice that they require the expert to attend for cross-examination) and the report(s) contain:
  - their qualifications and experience;
  - such facts as are within their own knowledge;
  - such facts as have been communicated to them by others, and the sources of such facts;
  - their opinion;
  - their signature: s 24(2) EA.
- The expert witness statement serves as evidence of all the contents, except for those facts communicated to the expert by other sources: s 24(2) EA.
- If the defendant who has given notice requiring the expert to attend for cross-examination is convicted, they may be ordered to pay the costs of the attendance of the expert: s 24(2) EA.

- An expert may refer to books or writing in support of their opinion, and you may consider such books and writing together with the expert's evidence: s 25 EA.

Handwriting

If you must form an opinion as to the person who wrote or signed any document, any witness acquainted with the handwriting of the person alleged to have written or signed may give evidence on whether, in their opinion, it was or was not made by the person in question: s 26 EA.

The hearsay rule

The general rule is that a witness can only give evidence on what they heard and saw but not of what someone else heard and saw: s 89 EA. That is called a hearsay statement - a statement made by a person who is not a witness: s 88 EA.

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

- is hearsay and inadmissible, if the purpose would be to establish the truth of what is contained in the statement; or
- is admissible and not hearsay if the purpose is to establish, not the truth of the statement itself, but the fact that it was made.

Statutory exceptions to the hearsay rule

- Admissions and confessions are made by or to the prejudice of the party against whom it is sought to be proved (subject to ss 17-23 EA): s 89(d) EA.
- The statement forms part of the fact or transaction which is being investigated by the court: s 89(a) EA.
- the death of the victim is the subject of a criminal charge and they made a statement as to the circumstances of their death when they expected to die without hope of recovery: s 89(b) EA.
- The statement was made in front of and in the hearing of the defendant against whom the evidence is provided and the defendant had the chance to reply: s 89(c) EA.
- The knowledge, intention, motive or state of mind or body of any person is a fact in issue and the statement proves or disproves the knowledge, motive or state of mind or body: s 89(e) EA.
- The documentary statement is part of any official book, register or record (is or relevant to a fact in issue) made by a public servant or other person in the course of their official or legal duties in the country in which the book, register or record is kept: s 89(f) EA.
- The maker of the statement has died, and the statement was made in the ordinary course of business by that person and is an account or record of some act which they were required to do and to record: s 89(g) EA.
- Where the existence of any relationship by blood or marriage is a fact in issue, and you are satisfied that the deceased (who made the statement) was related by blood or marriage to the parties and that the statement was made prior to the dispute arising: s 89(j) EA.

- A deposition taken before a Magistrate (as per ss 44 and 45 MCA) in a jury trial in the Supreme Court: s 89(m) EA.
- A documentary statement where direct oral evidence of that statement would be admissible and certain conditions are met (see Documentary evidence above): s 89(n) EA.
- Other exceptions to the hearsay rule under s 89 EA (which are not listed above).

Admissions

An admission is an oral or written statement about any fact in issue which may be to the prejudice of the maker of the statement regarding that fact, or to the prejudice of some person responsible for that person's statements: s 16 EA.

Evidence may be given against any party of any admission made by (s 17(1)(a), (b), and (f) EA):

- the party;
- any person, who in your opinion, is expressly or impliedly authorized by the party to make such admissions on their behalf; or
- any person to whom the party has expressly referred the other party for information regarding the matter in dispute.

So long as the admission was made during the period of shared interest then evidence may also be given of any admission made by any person (s 17(1) and (2) EA):

- who, for the purposes of the case, is regarded as having identical interests as the party;
- is jointly interested with the party in the subject matter of the proceedings (except admissions by co-defendants are not receivable against each other); and
- who has an interest (by relationship, in law, or in estate) in the subject matter of the proceedings.

To protect a defendant, no evidence may be given of any admission made under illegal compulsion: s 19 EA.

This may include admissions made in the context of acts or threats of mistreatment made by police against suspects in police custody or undergoing questioning or investigation. See also admissibility of confessions, below.

Confessions

Confessions are admissions where the defendant has made a statement to another person out of court that they committed the offence: s 20 EA.

Evidence from a confession is not permitted if the confession was made after any inducement, threat or promise from the prosecutor or other person having authority over the defendant and sufficient for the defendant to suppose on reasonable grounds that by making it, they would gain any advantage or avoid any evil: s 21 EA.

Except for a fact discovered as the result of the confession, evidence may still be given of the fact and so much of the confession as strictly relates to the fact: s 21 EA.

The defence may not object to a confession being admissible on the grounds that it was made (s 22 EA):

- under a promise of secrecy;
- when the defendant was deceived to obtain the confession;
- when the person making the confession was drunk;
- in answer to questions which the person making the confession need not have answered; or
- without any warning having been given to the person making it that they were not bound to make the confession and that evidence of it might be given against them.

Note: Aspects of s 21 and s 22 EA may be inconsistent with each other and should be read consistently with cl 14 of the Constitution, that "no one should be intimidated into giving evidence against himself".

This is an important legal protection against the use of torture, which is prohibited under customary international law (binding on Tonga, even though Tonga has not ratified the ICCPR or the Convention Against Torture).

You may refuse to admit a confession made to a police officer while the defendant is in custody and in answer to questions put to the defendant by the police officer: s 22 EA. Such discretion should be used where there is doubt as to whether a confession made by someone held in custody can be lawfully admitted or not.

The defence may not object to the admissibility of a confession just because it was made as a witness in a judicial proceeding unless, having refused to answer a question, the person was then improperly compelled to answer. Evidence of the answer may not be given: s 23 EA.

Character evidence

Defendant:

- Evidence of the defendant's bad character is only admissible by the prosecution if the defendant puts their character in issue, either by evidence given of their good character, or during examination-in-chief questions asked to show good character: s 31 EA.
- Once character becomes an issue, evidence of general reputation is admissible only and not specific acts of good or bad conduct: s 34 EA.
- Evidence of previous convictions is allowed where the defence calls witnesses to show evidence of the defendant's good character or asks questions with that intent, and the defendant is charged with any offences of (s 32(b) EA):
  - larceny or for any other offence declared punishable as larceny;
  - obtaining goods by false pretences;
  - receiving property knowing it to have been stolen; or
  - any other offence involving fraud.

- For any defendant found in the possession of stolen goods, evidence of previous convictions for offences involving fraud and dishonesty are admissible to show the defendant's knowledge that such goods are stolen. The defendant must be given three days' notice before the previous convictions are tendered: s 8 EA.
- Evidence of other misconduct forming part of the same transaction of the offence charged is also admissible at common law.

Witnesses

- A party producing a witness cannot discredit the witness with bad character evidence but may contradict the witness by other evidence.
- Subject to s 121(1)(f) Evidence Act, a witness may also be questioned as to whether they have been convicted of any offence and if the witness either denies the fact or refuses to answer, the opposite party may prove the conviction: s 144 EA.

Sexual offences

- Specific rules regarding character evidence in rape and indecent assault cases exist: see s 11 EA.
- At trial for rape and indecent assault cases, without your leave, no evidence and no question in cross-examination may be adduced or asked by or on behalf of a defendant about any sexual experience of a complainant with a person other than that defendant: s 33(1) EA.
- You must give leave to adduce such evidence only if you are satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked: s 33(2) EA. These provisions are aimed at preventing gender bias through irrelevant examination of the victim's character based on their sexual history.

General custom

- To establish the existence of any general custom or right (any custom or right common to any considerable class of persons) evidence may be given of general reputation with reference to such custom or right among those likely to know of its existence: s 27 EA.
- If the existence of a custom or right arises, evidence may be given of (s 5 EA):
  - any transaction by which the right or custom was created, modified, recognised, asserted or denied or was inconsistent with its existence; and
  - specific circumstances in which the right or custom was claimed, recognised, asserted or in which its exercise was disputed, asserted or departed from.

Relationship

- If the relationship of one person to another is in issue, evidence may be given of general reputation regarding such relationship among those likely to know of its existence, with the exception that such evidence is not admissible for the purpose of proving a marriage in prosecutions for bigamy: s 28 EA.

Evidentiary issues with witness evidence at trial

- If the evidence proposed is relevant to the issues in dispute in the court case before you then, with exceptions (some exclusionary rules), it will be admissible but not otherwise: s 14 EA.
- If any fact is not admissible unless another fact has first been proved you may, in your discretion, either permit evidence of the second fact to be given before the first fact is proved or you may require that evidence of the first fact be given before you allow admission of the second fact: s 15 EA.
- Any fact of which evidence is admissible under Part 1 of the Evidence Act is therefore treated as if it is relevant to the issues before the court.
- You may exclude all evidence which is irrelevant or insufficiently relevant to the facts in issue, or unsatisfactory as being hearsay or other secondary evidence: s 14 EA.

Either party may object to evidence based on:

- relevance;
- hearsay;
- examination of witnesses such as leading questions in examination-in-chief;
- refreshing memory;
- lies;
- corroboration;
- warnings to witnesses against self-incrimination;
- identification evidence by witnesses;
- opinion evidence;
- privilege; or
- competence and compellability of witnesses.

Weight

If you rule that a piece of evidence is admissible, you will then need to determine what weight (the amount of importance) the evidence should be given. The more reliable the evidence is, the more weight you should give it.

To decide the weight to attach to admissible statements, you must consider:

- all the circumstances to decide on the accuracy of the statement;
- if the statement was made at the same time as the occurrence of the facts stated in the statement; and
- if the maker of the statement was given any incentive to conceal or misrepresent the facts.

You will need to decide if the witness is truthful. Credibility factors include:

- relationships between parties;
- whether the witness maximises/minimises their own role in the offending;
- alcohol;
- drugs;
- performance under cross-examination;
- independent evidence;
- statements made before, after or during the incident;
- consistency or inconsistency with words or written material;
- lapse of time between the incident and the trial (recall of events);
- ability to observe the incident (for example, lighting and distance);
- motive;
- tension; and
- revenue.

Irrelevant credibility factors include that the witness:

- is a woman;
- is a child; and
- has a disability.

Competence and compellability of witnesses

The defendant

- The defendant is not a competent or compellable witness for the prosecution.
- The defendant is a competent witness for the defence but cannot be compelled to give evidence unless they choose to and if not, no adverse comment may be made: s 121(1)(a) EA, cl 14 Constitution.
- The failure of a defendant to give evidence must not be commented upon by the prosecution: s 121(1)(c) EA.
- If the defendant chooses to give evidence, then they may be cross-examined like any other witness, even if it might incriminate them: s 121(1)(e) EA.
- A defendant called as a witness must not be asked or have to answer any question that shows they have committed, been convicted of, or been charged with any other offence or is of bad character unless (s 121(1)(f) EA):
    - the proof of any such other offence is admissible evidence to show that they are guilty of the current offence(s);
    - the defence has asked questions of the prosecution's witnesses to establish the defendant's own good character, or to discredit the character of the prosecutor or any prosecution witnesses; or

- the defendant has given evidence against any other person charged with the same offence.

- The defendant or their spouse must give their evidence from the witness box or other place from which the witnesses give their evidence: s 121(1)(g) EA.
- Section 129 does not affect the right of a defendant to make a statement without being sworn: s 121(1)(h) EA.
- The defendant, if giving evidence, is the first witness examined after the close of the evidence for the prosecution: s 121(2) EA.
- The defendant may be cross-examined if they give evidence against anyone charged jointly with the same offence or whose evidence affects the defence of the joint defendant: s 121(3) EA.

The co-defendant

- Where there are reasonable grounds to believe that two or more persons have conspired together to commit an offence, evidence may be then given against each co-defendant of anything said, done or written by any one of the co-defendants to achieve their common purpose: s 4 EA.
- If a defendant gives evidence against a co-defendant (or whose evidence affects the defence of the co-defendant) they may:
  - be asked and, if asked, are required to answer, any question tending to show that they have committed or have been convicted of or charged with any offence or are of bad character: s 121(f)(iii) EA; and
  - be cross-examined by such other person: s 121(3) EA.

The spouse

A spouse is a competent but not compellable witness for the prosecution, without the consent of the defendant except that:

- in any of the criminal proceedings set out in the Schedule: s 121(4) EA;
- the failure of a spouse to give evidence shall not be commented upon by the prosecution: s 121(1)(c) EA;
- a spouse is not compellable in any proceeding to disclose any communication made to each other during the marriage: s 121(1)(d) EA.

For certain offences, a spouse of a defendant may be called as a witness for the prosecution or defence without the consent of the defendant. These are proceedings:

- where one spouse is charged with an offence against the other spouse;
- where a husband or wife charged with an offence against any member of their family living with them at the time the offence was committed;
- for bigamy; and under ss 116-133 Criminal Offences Act: Schedule and s 121(4) EA.

See "Privilege" below for a spouse.

Children

- Children can be competent witnesses in a criminal trial, even where they might not understand the implications of swearing an oath.
- You may allow children less than 12 years to give evidence after a declaration if you are satisfied by questioning the child that the child is sufficiently intelligent to give evidence and understands the duty of speaking the truth: s 116 EA.
- In any case, the child's evidence is given at your discretion and will depend upon the circumstances of the case and upon the child themselves.
- If any child wilfully gives false evidence, they are liable upon conviction to imprisonment for any term not exceeding two years, and in the case of male children, liable to be whipped: s 116 EA.
- No person shall be convicted of a criminal offence solely on the unsworn evidence of any child unless corroborated by some other material evidence implicating the defendant: s 116 EA.
- Where complainants or witnesses are children or otherwise vulnerable, special measures should be taken to ensure they are able to feel physically and psychologically safe when they give their evidence.

People with disabilities

- A person cannot be excluded from being a witness because they have a physical or mental disability. Providing they can understand the questions being asked and provide rational answers (as per s 118 EA) then it is incumbent on you to provide the support they need (whether it is translation or other practical measures) so that persons with disabilities can participate in cases without discrimination and on the same basis as others.
- A person is competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by reason of their age or 'disease' whether of body or mind, or any other cause of the same kind: s 118 EA.
- A person who is unable to speak is a competent witness and may give their evidence as necessary, for example by writing or signs, in open court. Such evidence is deemed to be oral evidence: s 119 EA.

Privilege

A spouse does not have to disclose any communication made to them by the other spouse during the marriage: s 128 EA. However, this privilege does not apply where:

- one spouse is charged with an offence against the other spouse;
- a husband or wife is charged with an offence against any member of their family living with them at the time the offence was committed: s 129 EA.

Under the Evidence Act the following persons or matters are protected by privilege:

- Any official confidence that a public officer holds which the head of their department considers should not be disclosed in the public interest: s 132 EA.
- Any unpublished official records on affairs of state unless the head of the department concerned consents: s 133 EA.
- A magistrate, police officer, or tax officer does not have to reveal their sources: s 134 EA.
- Any communication made to a lawyer by their client (unless for illegal or fraudulent purpose) unless the client consents: s 135 EA.
- Any confidential communication which has taken place between a client and their lawyer (client privilege): s 136 EA.
- A witness does not have to answer any question which would put them at risk of a criminal charge, penalty or forfeiture (except as provided by s 121(e) and 129 for spouses): s 137 EA.

Examination of witnesses

Examination-in-chief

Examination-in-chief must be conducted using the general rules of evidence such as those relating to hearsay, opinion, and the character of the defendant. These rules include:

- The prosecution must call all their evidence before the close of their case.
- Leading questions are not permitted (see below).
- Refreshing memory (see below).
- Usually, a party is not allowed to attack the credibility of a witness they have called, unless it is a hostile witness who has made prior inconsistent statements (see below).
- Other than not compelling a witness to answer any question to which they are legally entitled to refuse, you may ask any question in any form at any time of any witness, and with your leave, any party may cross-examine the witness on the answer: s 162 EA.
- You may compel any person present in court, whether a party to the proceedings or not, to give evidence and produce any document then and there in their actual possession, in the same manner and subject to the same rules as if they had come to court by way of summons: s 163 EA.
- If a witness refuses to be sworn/affirmed, give evidence, or pretends not to understand any question, in certain circumstances you may find them guilty of contempt of court: s 70 MCA. See Management of Proceedings.

Cross-examination

The purpose of cross-examination is:

- to gain evidence from the witness that supports the cross-examining party's version of the facts in issue;
- to weaken or cast doubt upon the accuracy of the evidence given by the witness in examination-in-chief; and

- in appropriate circumstances, to draw questions as to the credibility of the witness.

Note: *Browne v Dunn* (1893) 6 R 67 (HL) applies as a rule of practice to allow a fair trial and it does not displace the other rules of practice that when you put something to a witness, you must provide evidence of what you are proposing. The purpose of the rule is to:

- ensure fairness to the party and the witness whose evidence is contradicted; and
- promote accurate fact-finding by ensuring the trier of fact has the benefit of the witness's response. The duty is not intended to protect the interests of the party cross-examining the witness.

Inconsistent statements by witnesses

Under s 143 EA:

- A cross-examining party (or in examination-in-chief) may attack the witness's credibility by asking the witness if they made any prior statements inconsistent with present testimony in any civil or criminal trial;
- a witness may be cross-examined on statements reduced to writing without showing them the writing, but if contradicting the witness then they must make the witness aware of those parts that are being relied on;
- you may at any time require the writing to be produced for inspection and make such use of it for the purposes of the trial as you think fit.

Prior convictions of witnesses

A witness may be questioned as to whether they have been convicted of any offence. The cross-examiner may call evidence to prove the conviction if the witness (s 144 EA):

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

This is subject to s 121(1)(f) EA (right of the defendant not to answer questions about prior convictions or of their bad character unless any exceptions apply).

Testing a witness in cross-examination

A witness on cross-examination may be asked any questions to test their (s 145 EA):

- accuracy, veracity or credibility;
- character.

You may however, disallow or forbid any question which appears to be (s 145 EA):

- vexatious;
- scandalous;
- not relevant to any matter in issue in the case; or
- put for the purpose of insult or annoyance only.

Subject to s 44, no evidence may be given to contradict a witness, but if a witness is asked any question tending to impeach their impartiality, and answers it by denying the facts suggested, they may be contradicted: s 146 EA.

Note: for sexual offences, s 145 EA should be read alongside s 33(1) EA, prohibiting any questions about any sexual experience of a complainant with a person other than that defendant. It is your responsibility to ensure that the complainant or witness is always treated with respect by counsel or by the defendant, especially during cross-examination, to ensure they can give their evidence without fear or intimidation.

Hostile witnesses

- A party is not entitled to cross-examine or impeach the credit of their own witness by asking questions or introducing evidence concerning such matters as the witness's bad character or previous convictions, except with your consent when you believe the witness to be hostile: s 147(1) EA.
- A hostile witness is one who, from the way in which they give evidence, show that they do not want to tell the truth to the court: s 147(2) EA.

If a witness is declared to be hostile, the party calling the witness may question the credit of the witness through (s 148 EA):

- evidence of persons who testify that from knowing the witness they believe them to be untrustworthy;
- proof that the witness has been bribed or has received any other corrupt inducement to give evidence; or
- proof of former statements inconsistent with any part of their present evidence.

Rules of examination

- Witnesses are first examined-in-chief by the party calling them, then if the other party wishes to they will cross-examine that witness, then if the party calling them wishes, they will re-examine them: s 139 EA.
- Examination and cross-examination must be related to facts which, in your opinion, are relevant to the facts in issue but the cross-examination need not be confined only to the facts raised in the examination-in-chief: s 140 EA.
- Re-examination is only allowed to explain matters referred to in cross examination. If, with your permission, a new matter is introduced in the re-examination, the other party may further cross-examine upon the matter: s 141 EA.

Leading questions

A leading question is one which either:

- suggests to the witness the answer which should be given; or
- puts facts which are in dispute to the witness in such a way requiring "yes" or "no" answers: s 150 EA.

Leading questions must not be asked in an examination-in-chief or in a re-examination without your permission: s 151(1) EA. But you must permit leading questions on:

- introductory matters;
- undisputed matters; and
- matters which have in your opinion already been sufficiently proved: s 151(2) EA.

Leading questions may be asked in cross-examination but must not assume that facts have been proved or that particular answers have been given if that is not the case: s 152.

Sometimes you may prevent leading questions in cross-examination if the witness being cross-examined shows a strong interest or bias in favour of the cross-examining party: s 153 EA.

Refreshing memory

- While giving evidence, a witness may refer to their notes to refresh their memory if:
  - the notes were made by the witness or under their supervision; or
  - the notes were made at the time of the incident or almost immediately after the incident occurred.
- The witness should not normally read from the notes but should use them only to refresh their memory. However, if the notes are lengthy and complex, then you may allow the witness to read them.
- If the defence wishes to see the notes, there is a right to inspect them: ss 154, 158 EA.
- Whenever a witness wishes to refresh their memory, they may refer to a copy of the document, if you are satisfied that there is a good reason the original cannot be produced: s 155 EA.
- A witness may also refer to facts mentioned in any document, although they have no specific recollection of the facts themselves, if the witness is sure the facts are correctly recorded in the document: s 157 EA.
- An expert witness may refresh their memory referring to professional treatises: s 156 EA.

Perjury

- If you believe the witness is lying you should warn them that it is an offence under ss 63 and 64 Criminal Offences Act (COA).

Corroboration

- Where corroboration is required (evidence must be backed up by at least one other source) you must look for it in the prosecution's evidence.
- Corroboration is only specifically required in a few instances, including:
  - the offences of treason and sedition: s 123 EA;
  - the offence of perjury: s 124 EA;

- in cases where a defendant would be convicted upon the unsworn evidence of a child (although the requirement of corroboration of unsworn child evidence should be applied with caution): s 116 EA; and
- where a defendant would be convicted upon the testimony of an accomplice: s 126 EA.

➢ In all other cases (apart from these), no specific number of witnesses are required to prove any fact: s 127 EA.

Sexual offences

➢ In all criminal proceedings for sexual offences, evidence is admissible that the complainant voluntarily made a statement about this offence at or shortly after the crime was committed. This goes to the weight of that evidence, to show that the complainant's conduct is consistent with their evidence at the trial: s 11 EA. It does not follow that the absence of such a statement can call into question the complainant's evidence at the trial.

➢ A complainant's evidence does not need to be corroborated. Sexual offences often occur in situations where there are no other witnesses. If, at the end of the hearing, you find that the complainant's evidence does not have support from another witness, but you were still convinced that the complainant was telling the truth, you may still convict the defendant.

➢ **Note** on the record that you were aware of the danger of convicting on the uncorroborated evidence of the complainant but are still satisfied beyond reasonable doubt that the defendant was guilty of the offence charged.

➢ It is important to watch the witness as well as recording details of facts. You may want to:

- record how they give their evidence;
- record any inconsistencies within their evidence, or with their evidence and another witness's evidence;
- see whether they avoid giving straight answers in areas of importance.

➢ In assessing how the complainant gives their evidence, take into account that they may feel shame and a high level of discomfort or trauma in disclosing what has happened to them.

Self-incrimination

➢ A witness may refuse to answer any question which may incriminate them, except for the defendant, where the question relates to the offence: s 137 EA and cl 14 Constitution.

➢ If a question is asked of a witness, the answer to which could be self-incriminatory, you should:

- warn the witness to pause before answering the question;
- explain to the witness that they may refuse to answer the question; and
- explain that any evidence the witness gives in court that is self-incriminating could be used to prosecute them for a crime.

Identification by a witness

- Treat the visual identification of the defendant by witnesses with some caution. Honest and genuine witnesses have made mistakes regarding the identity of defendants.
- The weight to be given to such evidence is determined by the circumstances under which the identification was made.
- See *R v Turnbull and Others* [1977] QB 224 (adopted in *Police v Ruaporo* [1985] High Court of the Cook Islands) where the Court considered the following for visual identification:
  - the length of time the witness observed the defendant for;
  - the distance and in what light;
  - whether their view was blocked in any way (for example, by passing traffic or a crowd);
  - whether the witness had ever seen the defendant before and if so, how often (and if only occasionally, whether there was any special reason for remembering the defendant);
  - the length of time before the original sighting and the identification to the police; and
  - whether there is any major difference between the description of the defendant given to the police by the witness when first seen by them and their actual appearance.

Visiting the scene

- You may view and investigate any subject matter and for this purpose you are entitled to access any land or other property for the inspection: s 164 EA.

4. Human rights and criminal law

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4.1 Introduction to fundamental rights and freedoms

Courts are a part of the Tongan State and are therefore also a primary duty bearer, responsible for ensuring that the human rights of all people are always protected by the courts.

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

Tonga is a party to several international human rights treaties including the UN Convention on the Rights of the Child (CRC), (1989) and the Convention for the Elimination of All Forms of Racial Discrimination (CERD), (1966). Tonga has also signed the Convention on the Rights of People with Disabilities (CRPD), (2007).

Especially as Tonga does not have a juvenile justice law, the CRC is particularly relevant to take into consideration when deciding any kinds of cases involving children, defined in the CRC as being anyone under the age of 18 years (at the time of the incident).

The most important CRC rights for children facing criminal law processes include:

- the best interests of the child must be the primary consideration in any kind of legal case involving a child: Art 3(1);
- the right to understand, be heard and have their views given weight to the maximum degree possible in the process: Art 12;
- the right to be diverted from criminal justice processes wherever possible: Art 40(3)(b);
- expedited hearings of their cases: Art 40(2)(b)(iii);
- legal representation: Art 37(c) and Art 40(2)(b)(ii) and (iii);
- privacy (closed court, use of pseudonym in public court listings and judgment): Art 16 and Art 40(2)(b)(vii);
- bail, or detention only as a last resort and for the shortest possible time: Art 37(b);
- non-custodial sentences wherever possible: Art 40(3)(b);
- where a child is detained or sentenced in custody, they must be held in a facility separated from adults with access to family visits, education, and recreational activities: Art 37(c);
- the right to be accompanied by a responsible adult or parent: Art 40(2)(b)(iii); and
- the right to be brought before the court as soon as possible after arrest: Art 37(d).

While the CRC has not been fully incorporated into domestic law and so cannot be applied directly 'as law', Tongan courts can still use and refer to the CRC to interpret constitutional provisions or national laws where there is ambiguity and have done so in several decisions regarding children in both criminal and civil law cases (see *Tone anors v Police* [2004] Tonga LR 144 where the Supreme Court of Tonga held that the court was entitled to use the terms of the CRC as a guide to what is acceptable treatment of children).

The CRC Committee has recommended that the age of criminal responsibility be between 12 and14 years. In Tonga the age of criminal responsibility is seven (s 16 COA) and for those aged between seven and 11, the court might be satisfied that the child can form the intent necessary for a criminal act: s 16(2).

Given the gaps in Tonga's national laws regarding children's rights, as it is also bound by the CRC, every opportunity should be taken to apply the CRC standards where possible.

While Tonga is yet to fully ratify CRPD, its signature to the Convention indicates the Government's commitment to meeting its standards, which can be referred to or considered in interpreting Constitutional rights or national laws, in cases involving people with disabilities. Given that around 15 per cent of all people across the Pacific have a disability, this is not a small minority and people with disabilities will commonly be appearing before your court.

People with mental impairments, including mental illness, which can also be a form of disability, are overrepresented in criminal justice processes, including as pre-trial detainees and sentenced prisoners, right across the world and across the Pacific.

A lack of diagnosis or lack of account taken by courts where defendants have mental disabilities can result in unjust and discriminatory findings of guilt and sentences, contrary to obligations under the Convention. People with mental illness or mental impairment are also more likely to lack secure housing and therefore more likely to find themselves denied bail or detained due to a lack of secure housing or appropriate medical facilities. Those found unfit to stand trial may find themselves detained without regular court oversight of their detention and held for longer than they would have served had they been tried and sentenced.

Victims of crimes who have disabilities can also face discrimination based on assumptions they are less reliable witnesses of truth, resulting in less weight being given to their evidence or additional requirements of corroboration being imposed. Failure to assess a victim's capacity to consent to sexual contact could result in the incorrect legal test being applied to the defendant and result in the victim being denied an effective remedy.

Thus, the rights of people with disabilities are highly relevant to criminal proceedings wherever any party has a disability, whether they be the defendant, the victim, or a witness.

Provisions of the CRPD most relevant to criminal law proceedings include:

- equality and non-discrimination before the law: Art 5;
- a duty for courts to make 'reasonable accommodations' for people with disabilities, to ensure they do not experience discrimination due to their disability: Art 5(3);
- equal recognition before the law: Art 12;
- access to justice on an equal basis with others, including procedural accommodations to facilitate their effective role in justice processes: Art 13;
- recognition that existence of a disability does not justify deprivation of liberty: Art 14(1)(b);
- the right for victims of exploitation, violence, and abuse to have their cases identified, investigated and prosecuted: Art 16(5).

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

It is important to understand human rights as it has a direct bearing on your work in upholding human rights as set out in the Constitution and in human rights instruments.

The Constitution of Tonga sets out some of the fundamental rights and freedoms that are to be protected for all persons in Tonga. It is the responsibility of all judges and magistrates to ensure that these rights are respected in the administration of justice.

Some of the rights include:

- the same law for all;
- the writ of Habeas Corpus;
- the defendant must be tried;
- set procedures on indictment;
- protection against being tried twice for the same offence;
- the charge cannot be altered;
- the trial must be fair;
- protection against retrospective laws;
- the court must be unbiased.

The rights and freedoms set out in Part I of the Constitution are particularly important for conducting criminal trials. Some of these rights and freedoms are discussed below.

4.2 Same law for all people in Tonga

Clause 4 Constitution

Tongan law applies to all chiefs and commoners and foreigners without any differences. The provision includes the wording: "The law shall be the same for all the people of this land" which may be interpreted to mean that all people are entitled to equality before the law, not only people of different classes but also including women, children, people with disabilities and other vulnerable people within Tongan communities.

4.3 Habeas corpus writ and the right to challenge unlawful detention of defendant

Clause 9 Constitution

The writ of habeas corpus allows a person to challenge the detention of anyone in official custody or privately. If the court decides that the detention appears to be unlawful, the custodian must appear to justify the detention and, if they cannot do so the detained person is released.

In *Fifita v Fakafanua* [1998] Tonga LR 127 (CA), the Court of Appeal referred to two questions as stated in *Castorina v Chief Constable of Surrey* (1988) Times, 15 June 1988 when deciding whether detention is lawful:

> "(1) Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely upon the findings of fact as to the officer's state of mind.

> (2) Assuming the officer had the necessary suspicion, was there reasonable cause for that suspicion? This is a purely objective requirement to be determined by the judge if necessary on facts found by a jury."

In addition to the constitutional right of habeas corpus, other individual protections against arbitrary arrest or detention exist. For the extent of police powers of arrest and the application of habeas corpus see Part 4 of the Tonga Police Act.

Arbitrary detention is also prohibited under Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) and is universally binding on all countries (and their courts) under customary international law.

Lawful detention, such as pre-trial detention, can become unlawful and arbitrary if it becomes protracted. It is the responsibility of magistrates to tightly limit any pre-trial detention to the shortest possible time, which is a part of the defendant's right to a fair trial, to ensure it does not become an unlawful breach of human rights committed by the court itself.

4.4 Defendant must be tried before sentencing

Clause 10 Constitution

This fundamental right protects individuals from arbitrary and illegal punishment by requiring a court with the relevant jurisdiction to first hear and determine the case according to law.

4.5 Procedural requirements for a criminal trial

Clause 11 Constitution

Clause 11 sets out several procedural requirements to ensure a fair prosecution takes place: see *Attorney General v Ikamanu* [2021] TOCA 3; AC 7 of 2020, 30 March 2021. Together, these rules help ensure the fair administration of justice by ensuring a defendant has time to prepare a case and the opportunity to present that case once at trial.

The Court of Appeal confirmed that clause 11 requires the Crown to bring evidence to prove the elements of the relevant charge. However, clause 11 does not limit or prescribe the extent to which the Crown bears the legal or evidentiary onus, nor does it limit or prevent any other Acts which may alter the legal or evidentiary onus by requiring a defendant to prove any legal defence or reverse it entirely by requiring a defendant to disprove any particular element of a charge.

The procedural requirements on a criminal indictment include:

- no one may be tried or summoned to appear or punished for non-appearance unless first receiving a written indictment (except for minor offences within the jurisdiction of the magistrate and contempt of court while the court is sitting);

- the written indictment must clearly state what offence is charged and the grounds for the charge: See *R v Fakatava* [2001] Tonga LR 76 which affirms that the particulars of the charge must be sufficient to inform the defendant of the substance of their offending. If not, further particulars can be applied for and, if not disclosed voluntarily, the Court can make an order for such;
- at trial, the defendant shall be brought face to face with witnesses (except according to law) to hear their testimony when not disallowed by law, and the defendant shall be allowed to question them;
- the defendant may bring forward witnesses and make a statement regarding the charge against them;
- the defendant may elect trial by jury for all indictable offences. All claims for large amounts must be decided by a jury and the Legislative Assembly must decide what shall be the amount of claim that may be decided without a jury. See also clause 99 which affirms the right of any person committed for trial before the Supreme Court for any criminal offence to elect trial by jury.

4.6 Defendant cannot be tried twice for the same offence

Clause 12 Constitution; Article 14(7) ICCPR

This rule, also called the "double jeopardy" rule, prevents individuals from being prosecuted for the same offence once a final decision on guilt or innocence has been given by a competent court. It is essential that the offence for which the person faces trial is the same as the offence for which they have already been tried:

Fisi'inaua v R [1995] Tonga LR 62 and *R v Pahulu* [2021] TOSC 135; CR 107 of 2021, 20 August 2021.

4.7 Charge can only be changed in limited cases

Clause 13 Constitution

Clause 13 effectively states the defendant can only tried on the charge(s) set out in the indictment, summons or warrant and for which they are brought to trial.

This rule ensures that a defendant knows the charges before going to trial so that they have a real opportunity to answer the charges. See the chapter "Judicial Conduct" for more information about the defendant's right to know the case against them. In *R v To'ia* [2004] TOSC 52; CR 270 2001, 14 December 2004, the Supreme Court clarified that clause 13 does not prevent changes to details of an indictment made according to the law so that there is no injustice to the defendant.

There are also exceptions to this rule set out in clause 13 where:

- the complete commission of an offence is not proved. The defendant may be convicted of the attempt to do so if proven on the evidence;
- an attempt to commit an offence is charged. The defendant may be convicted of only the attempt, even if the evidence proves the full offence;
- embezzlement or fraudulent conversion is charged. The jury may find the defendant not guilty of embezzlement but guilty of theft and vice versa if charged with theft they may be found guilty of embezzlement or fraudulent conversion;

- the defendant is acquitted of the offence charged. They may still be found guilty of a lesser offence of the same nature from the same circumstances. For example, a defendant acquitted of grievous bodily harm may still be found guilty of common assault.

4.8 Presumption of innocence and defendant's right to silence

Clause 14 Constitution; s 24(6) Magistrate's Court Act (MCA); s 121(1)(c) Evidence Act (EA); Art 14(2) ICCPR; Art 40(2)(b)(i) CRC

Every person is entitled to the presumption of innocence until proven guilty according to law as a fundamental common law principle: Art 14(2) ICCPR, Art 40(2)(b)(i).

You must ensure that:

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

Silence is the right of the defendant. There is no onus on the defendant at any stage to prove their innocence. The presumption of innocence means that the defendant does not have to give or call any evidence and does not have to establish their innocence. It is for the prosecution to prove beyond reasonable doubt the defendant is guilty. There is no obligation for the defendant to give an explanation to prove their innocence.

For the right to silence:

- you should caution a defendant who is not legally represented before the prosecution evidence is given at trial, that they are not obliged to give or call evidence: cl 14 Constitution; s 24(6) MCA;
- no adverse comment may be made where the defendant or their spouse refrains from giving evidence as a witness: s 121(1)(c) EA.

Sometimes before or after a defendant is charged with a crime, they are asked by the police (and sometimes by friends or family) what they have to say in response to the charge. Some defendants may reply and if relevant this is admissible in court as an exception to the hearsay rule. Some defendants refuse to say anything in response, according to their right to remain silent.

This approach is also shown by police in most countries who are obliged to give a warning to a person suspected of a crime when the police ask the suspect to make a statement. The warning is in these words or similar:

> "You do not have to say anything but anything you do say may be recorded and may be given in evidence."

4.9 Right to legal counsel

Clause 14 Constitution; Art 14 ICCPR

Part of the right to a fair trial (cl 14 Constitution) and under the International Covenant on Civil and Political Rights is the right to an effective legal defence. This includes the right to have legal assistance assigned "in any case where the interests of justice so require, and without payment" where the person "does not have sufficient means to pay for it": Art 14(3)(d).

The lack of a national legal aid system presents a real problem for the courts in Tonga as the whole process is premised on the assumption of an 'equality of arms' between the prosecution and a legally represented defendant. It may in some instances be impossible for magistrates to conduct a fair trial where legal aid is not available.

While courts provide what assistance they can to unrepresented litigants, this does not compensate for the inherent unfairness caused to unrepresented defendants by lack of access to independent legal advice and assistance, especially for people facing charges for which they may face imprisonment, or for children or other vulnerable people facing any kind of charges.

In such cases, magistrates should either directly appoint a lawyer to represent the person or make a referral to the Law Society for appointment of a lawyer on a pro bono basis, rather than proceeding with the case.

4.10 Unbiased court for criminal hearing

Clause 15 Constitution; Article 14(1) ICCPR, Article 40(2)(b)(iii) CRC

Clause 15 ensures fairness in legal proceedings by making it illegal for any judge, magistrate or juror to:

- adjudicate or sit in any case in which one of their relations is involved as a plaintiff, defendant, or witness, or concerns themselves;
- receive any present or money or anything else from anyone who is about to be tried nor from any of the defendant's friends.

All judges, magistrates and jurors must be free, not interested in or biased in the discharge of their duties.

Remember you are exercising a public function which must always be in open court, unless special circumstances apply.

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

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

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

See the chapter "Judicial Conduct".

4.11 Premises cannot be searched without warrant

Clause 16 Constitution

This clause acts as a check on both individual and state power as the forcible entry of an individual's house or premises for the purposes of a search can only be lawfully achieved through due legal process.

It is at the point of the application for a search warrant before a magistrate that the court may exercise its jurisdiction to prevent arbitrary abuses of power. See *R v Bowe* [2003] Tonga LR 24.

4.12 Protection against retrospective laws

Clause 20 Constitution; Article 15(1) ICCPR

It is illegal to enact any retrospective laws in so far as they may limit or take away or affect rights or privileges existing at the time of the passing of such laws.

Clause 20 of the Constitution does not prevent the passing of retrospective laws but only to the extent that they do not "limit, take away or affect" the rights of persons which exist at the time the laws are enacted. See *Bennett v Bennett* [1989] Tonga LR 45.

Upholding this right prevents a person from being tried for something that is not an offence in law at the time they committed an act or omission. If there is no law, there is no offence. This right also prevents a person from being tried for an act or omission they committed before the legislation making it unlawful came into existence.

5. Principles of criminal responsibility

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5.1 Introduction

In Tonga, every criminal offence is created by a statute, regulation or by-law but not the common law. The Criminal Offences Act (COA) is the main statute that sets out acts or omissions regarded as criminal offences.

Part III of the COA sets out:

- the exemptions to criminal responsibility; and
- the grounds for criminal responsibility for causing criminal acts of involuntary agents.

5.2 Principles of criminal law

5.2.1 Presumption of innocence

Section 46 Evidence Act (EA); Cls 10, 11 and 14 Constitution

One of the most important principles in criminal law is that the defendant is innocent until proved guilty: s 46 EA, cls 10, 11 and 14 Constitution.

Unless and until the prosecution proves beyond reasonable doubt that the defendant is guilty of all the elements of the offence, they are innocent in the eyes of the law. Acting on this principle, you may, for example, grant defendants bail allowing them to remain in the community while they await trial. See the chapter on Bail.

Silence is the right of the defendant. The defendant does not have to give or call any evidence and does not have to establish their innocence. It is for the prosecution to prove beyond reasonable doubt the defendant is guilty.

5.2.2 Defendant cannot be tried twice for the same offence

Clause 12 Constitution

Another important principle is that a person cannot be prosecuted and punished for the same crime more than once. This rule prohibits double punishment, but also protects individuals from repeated attempts by the State to prosecute them for the same offence: cl 12 Constitution.

5.2.2 Burden of proof

Sections 104-108 EA

The prosecution has the burden, or responsibility, of proving their case. They must prove all the elements of the offence, beyond reasonable doubt. If, at the end of the prosecution case, the prosecution has not provided evidence of all the elements of the offence, then there is no case to answer and the prosecution has failed: ss 104-108.

If the prosecution has provided evidence of all the elements of the offence, then the defence has a chance to present their case and then you must decide whether the prosecution has proved their case beyond reasonable doubt, taking into account what the defence has shown.

The defence does not have to prove anything unless they raise a defence of insanity or another statutory defence (which they must prove on the *balance of probabilities*). The defendant should give written notice of such defence to the prosecution within seven days of committal for trial.

If the defence wish to rely on an alibi in their defence the notice must provide details of the place they were at the time of offending and the names and addresses of witnesses. If the defendant does not furnish the prosecution with this notice, the evidence is admissible only with your leave: s 108(2) EA.

If you have a reasonable doubt on any of the elements, after hearing the evidence of the defence (if any) or submissions without evidence, then the prosecution has failed, and the defendant should be found not guilty.

5.2.3 Standard of proof: beyond reasonable doubt

You decide the guilt or innocence of the defendant by reason and not by emotion.

The standard of proof, on which the prosecution must satisfy you, is beyond reasonable doubt. Taking into account the evidence of the prosecution and the evidence (if any) of the defence and the submissions, you must be sure that the defendant is guilty. If you have a reasonable doubt about that then you must acquit the defendant.

See the chapter "Dealing with evidence" to find out more about the burden and standard of proof.

5.2.4 What must be proved

Physical act (actus reus)

Most offences require proof of a physical act or series of acts, conduct or omission (actus reus):

- which is not allowed by law; or
- where the result is not allowed by law.

These acts or omissions are the physical elements of the offence, all of which must be proved by the prosecution.

See the chapter "Common Offences" for examples of the elements of some common offences.

Mental capacity (mens rea)

Most offences require the prosecution to prove the defendant had a particular state of mind in addition to the actus reus requirement. It is an essential element of every offence, unless specifically not required by the statute creating the offence.

The state of mind could be:

- **Intention:** the defendant means to do something, or desires a certain result (it can include deliberate or negligent acts or omissions).
- **Recklessness:** although the defendant does not intend the consequences, the defendant foresees the possible, or probable, consequences of their actions and takes the risk.

- **Knowledge:** knowing the essential circumstances which constitute the offence.
- **Belief:** mistaken conception of the essential circumstances of the offence.
- **Negligence:** the failure of the defendant to foresee a consequence that a reasonable person would have foreseen and avoided.

It is then open to the defendant to point to an absence of intention, knowledge or recklessness (mens rea) or bring sufficient evidence on which a finding of absence of intention could reasonably be based. The defendant does not have to prove that there was no intention, knowledge, or recklessness (mens rea)—it is for the prosecution to prove there was such an intention, knowledge, or recklessness, beyond reasonable doubt.

In most cases, proof that the defendant did the prohibited act is also sufficient on first impression (prima facie) of evidence of intention. You can infer intention from the fact that the defendant committed the essential act, presuming that individuals intend the natural consequences of their actions: see *R v Lemon* [1979] 1 All ER 898.

If the issue is whether an act was accidental, intentional or done with particular knowledge or intention, evidence may be given that the act formed part of a series of similar occurrences, in each of which the defendant was involved: s 7 EA.

If, after hearing the defence evidence, you are not satisfied beyond reasonable doubt that the defendant had the necessary mens rea (intention, knowledge, recklessness, etc) then you must dismiss the charge.

5.2.5 Criminal responsibility

A defendant may be exempt from criminal responsibility if any of the provisions of Part III (ss 16-23) COA apply (details of these offences are set out below). Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

All common law rules which provide for a justification, excuse or defence still apply to an offence under the COA, or under any other statute, unless they are altered by or are inconsistent with that statute or any other statute.

Generally, a defendant's case will rely on one of the following:

- The prosecution has not proved all the elements beyond reasonable doubt.
- They have a specific affirmative defence, specified in the actual offence (for example without lawful excuse, reasonable excuse, or reasonable cause or lawful justification).
- They were not criminally responsible under Part III of the COA or the common law.

In the case of a specific defence or lack of criminal responsibility under Part III of the COA or the common law, the defendant must provide some evidence in support of the defence. It is then the prosecution that must exclude that defence beyond reasonable doubt.

The exception is *insanity*. In this case, it is for the defendant to prove, on the balance of probabilities, that they were insane at the time of the offence and therefore did not have the required intention for the offence.

Exemptions from criminal responsibility in Part III of the COA or under the common law can be divided into two categories:

1. The defendant did not have the mental intent or was acting involuntarily. These defences include:
   - limited or no criminal liability of children;
   - ignorance of the law;
   - negligence, involuntary actions and accidents;
   - mistake of fact;
   - consent;
   - intoxication;
   - insanity.

2. Excuses or circumstances which justify, in law, the conduct of the defendant. In these cases, the defence need only point to evidence in support and then the prosecution must disprove that defence beyond reasonable doubt. These include:
   - compulsion (or duress);
   - defence of a person (eg: self defence) or property;
   - claim of right;
   - other statutory defences.

5.2.6 Children and criminal responsibility

Section 16 COA

If the defendant is a child or young person under the age of 18 years, you will need to transfer the matter to the Youth Court. The Youth Court deals with all 'summary offences' committed by children and young persons. All indictable offences will go to the Supreme Court.

Nothing done by a child under the age of seven years is deemed to be an offence: s 16(1). This means a child under the age of seven cannot be charged, tried, or sentenced for any crime as they are incapable of forming the intent necessary for a criminal act.

Nothing done by a child above seven years of age and under 12 years of age is deemed to be an offence, unless in the opinion of the court or jury, the child had sufficient maturity of understanding to know the nature and consequences of their conduct about the act in question: s 16(2).

In cases where the defence of "immature age" is raised, evidence as to the child's age should be given.

It is for the prosecution to prove, beyond reasonable doubt, that when committing the offence, the child knew that their act was seriously wrong or contrary to law.

Capacity or understanding may be proven by:

- calling any person who knows the child and is able to show that the child did know that they ought not to commit the offence (eg: teachers, parents, relatives);
- the investigating officer asking the following questions:
  - Did you know that what you did was seriously wrong?
  - Why did you know it was seriously wrong?
  - Would you have done what you did if a police officer, your parents, teachers, village elders or your pastor could see you?

The Convention on the Rights of the Child (CRC) requires that there be a stated minimum age of criminal responsibility and the CRC committee provides non-binding guidance that this age should be between 14 and 16 years. The global average age of criminal responsibility is 12.

Tonga's age of criminal responsibility, being age seven or ages 7-11 years where the additional capacity threshold is met, is below international guidance. This means that to read the Criminal Offences Act consistently with the CRC, magistrates (including those working within the Youth Court) should *require the prosecution to provide a high standard of proof* that children aged 7-11 had capacity to know they were doing wrong, through applying a strong presumption they did not have capacity to form the relevant intent.

It is also incumbent on magistrates to apply adapted, restorative approaches tailored to the circumstances of all children, including those aged between 12 and 17 years. This includes maximising diversion from prosecution and if the criminal matter does proceed, ensuring the child has legal representation and that the procedure and the sentence reflect the young age of the offender.

5.2.7 Ignorance of the law

The fact that a defendant is ignorant of the law is not an excuse. The prosecution does not have to prove the defendant's knowledge of the law to prove its case. However, you may take this into account when determining the appropriate sentence.

The exception to this rule is where knowledge of the law is expressly set out in a statute as being an element of an offence, in which case:

- the defendant may raise evidence that they did not know that their acts or omissions were against the law at the time of the offence; and
- the prosecution is required to prove beyond reasonable doubt that the defendant had such knowledge of the law.

5.2.8 Negligence, involuntary acts, automatism, and accidents

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

For example: Robert was thrown out of a shop window by his enemies and landed on a car window. Robert would not be criminally responsible for the damage to the car because it was not Robert's voluntary action that led to the damage of the car (there would be no charge).

Negligent acts or omissions

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

Involuntary actions

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

Automatism

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

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

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

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

Accidents

A person is generally not criminally responsible for an event that occurs by accident and was not intended. The question is whether such an event would have been easily foreseen by an ordinary person in the same circumstances. The prosecution must prove that the act or omission was not an accident, beyond a reasonable doubt. However, the defendant must supply some evidence to support the defence of accident if they raise this.

5.2.9 Mistake of fact

Under the common law, if an ingredient of an offence includes (expressly or by implication) a requirement of intention, knowledge or subjective recklessness, the defendant is entitled to be acquitted if such a state of mind is absent at the time of the conduct. Even if this results from a mistake of fact which may not have been reasonable or based on reasonable grounds: *R v Wood* [1982] 2 NZLR 233 (CA) at 237, *R v Metuariki* [1986] 1 NZLR 488 (CA), *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) (cited in Robertson Finn (Ed) *Adams on Criminal Law - 2013 Student Edition* (Brookers, Wellington)) at pp 59 and 60.

This is so even though the defendant may have thought of the risk, but honestly concluded that it would not eventuate: *R v Hay* (1987) 3 CRNZ 419 (HC).

The conscious taking of a risk which is unreasonable will remain reckless even though the offender mistakenly believed that the degree of risk had been reduced: *Jefferson v Ministry of Agriculture and Fisheries* (High Court, Rotorua, M286/85, 12 August 1986, Barker J).

In all cases, the reasonableness or otherwise of a supposed mistake, or ignorance, will be relevant to the credibility of the claim, but reasonableness is not essential: *R v Metuariki* [1986] 1 NZLR 488 (CA).

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

- the prosecution must prove the unlawfulness of the defendant's action;
- the defendant must have been under an honest, but mistaken, belief as to the existence of any state of things;
- it is does not matter that, the mistake was unreasonable; and
- the offence must have been committed while holding that honest but mistaken belief.

Whether the defendant was under an honest but mistaken belief is taken from the evidence presented: did the defendant have a genuine and honest belief as to the state of things, even though they were mistaken in that belief?

Where, owing to a mistake of fact, the defendant did not intend to do the prohibited act the defence is made out if the mistake was honestly made by him. However, where the defendant intended the prohibited act and asserts that he was mistaken to facts which, had they existed, would afford justification or excuse, the general rule is that his mistake affords a defence only if it was honestly made and there were reasonable grounds for making it.

See 11 Halsbury's Laws of England, 4th Ed, para 21 and authorities there cited in *Director of Public Prosecutions v Morgan* [1976] AC 182; [1975] 2 All ER 347.

See also: *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 667 and 668, *R v Wood* [1982] 2 NZLR 233 (CA) at 237, *R v Metuariki* [1986] 1 NZLR 488 (CA).

5.2.10 Consent

The defence of consent is an example of a common law defence. For all assault-type offences, it is covered by the common law: see *R v Lee* [2006] 3 NZLR 42 (CA). In a case where no more than bodily injury was intended – as opposed to grievous bodily harm – consent will almost inevitably be a defence: see *Barker v R* [2009] NZCA 186, [2010] 1 NZLR 235 at [55].

Where no more than bodily harm was intended, consent will only be excluded if there are good public policy reasons to forbid it and those policy reasons outweigh the social utility of the activity in question and the value that society places on personal autonomy: see *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [50(d)].

Where the issue of consent arises, the Crown must prove that there was no consent and that the defendant did not believe that the complainant consented. The belief in question is an "honest" one. An unreasonable, or mistaken, yet honest belief in consent is sufficient for the purposes of the defence: see *R v Lee* [2006] 3 NZLR 42 (CA) at [311]. Whether there are reasonable grounds is relevant only to the extent that it goes to whether the defendant actually held the belief in question: see *R v Nazif* [1987] 2 NZLR 122 (CA) at 128.

5.2.11 Intoxication

Section 21 COA

Intoxication (usually known as drunkenness) only serves as a defence where, due to intoxication, the defendant did not know the act or omission was wrong or did not know what they were doing, and (s 21(2) COA):

- the state of intoxication was caused without the defendant's consent by the malicious or negligent act of another person; or
- the defendant was by reason of intoxication temporarily or otherwise insane at the time of the act or omission.

Except as outlined above, intoxication is not a defence to any charge: s 21(1) COA.

Where the defence of intoxication is established under s 21(2)(a) the defendant must be discharged but if the defence falls under s 21(2)(b) the provisions of this Act relating to insane persons apply: s 21(3) COA.

Intoxication must also be taken into account when determining whether the defendant had formed any intention, in the absence of which they would not be guilty of the offence: s 21(4) COA.

People may do things when intoxicated that they would not do when sober. But the law holds people responsible for their intentional acts, even if they are drunk at the time. However, if you think it is a reasonable possibility that the defendant was so grossly intoxicated that they did not form any conscious intent at all, then the prosecution has not proved intent to the required standard. See *Rex v Toma* [2000] TOLawRp 37; [2000] Tonga LR 400 (9 November 2000); R v Kamipeli [1975] 2 NZLR 610 (CA) and R v Clarke [1992] 1 NZLR 147 (CA).

Intoxication also includes states produced by narcotics or drugs: s 21(5) COA.

5.2.12 Mental disease (insanity)

Sections 17 and 21 COA

Due to the requirements to prove the defendant's criminal state of mind, those who are unable to appreciate the quality or nature of their acts due to mental disease should not be held criminally liable for those acts.

No person is responsible for an act or omission that would otherwise be an offence, if at the time of the act or omission, the person was suffering from a *mental disease* that deprived them of the capacity to understand either (s 17(1) COA):

- the physical nature and quality of the act or omission; or
- that the act or omission was wrong.

In *R v Taufa* [2005] Tonga LR 456 it was noted that the onus of proof was on the defendant to establish a defence of insanity on the balance of probabilities. This meant that unless the court could say it was more likely than not that the defendant was insane, the defence must fail.

Under s 21(2)(b) there is also a defence of insanity by reason of intoxication if a person is temporarily or otherwise insane at the time of such act or omission and did not know the act or omission was wrong or did not know what they were doing. See *R v Manu* [2020] TOSC 82; CR 86 of 2020, 23 October 2020.

'Mental disease' is an old-fashioned term used in the Criminal Offences Act to describe many different circumstances leading to a person lacking capacity to understand what they have done, or that it is wrong.

A person may suffer from a mental illness, such as schizophrenia, psychosis, bipolar disorder, depression, or dementia. Mental illness often varies over time and may be episodic or, like dementia, may be degenerative over time. Some people may suffer from intellectual disabilities or fetal alcohol syndrome caused by brain damage prior to birth, which are not reversible and will affect people throughout their lives. Others may acquire brain injuries during their lives, such as during car accidents or caused by long-term alcohol or drug abuse.

In Tonga many of these conditions may go undiagnosed, which make it particularly challenging for courts to properly take these conditions into account in deciding whether someone should be held criminally culpable for what they have done.

The key guidance is to identify possible mental illness, intellectual disability of acquired brain injuries as early as possible in the process and if necessary, order an assessment by an expert (either a psychiatrist or a psychologist) so that the court has the information it needs to decide whether, on the balance of probabilities, the person understood what they did, and that it was wrong.

These steps are important because people with mental impairments are heavily overrepresented in pre-trial detention and in prisons, highlighting how courts may not always properly take these conditions into account in criminal justice processes, resulting in unfairness and even unlawful discrimination against people due to their disabilities.

In any of these scenarios, the condition must so severely impair the defendant's mental faculties and lead them not to know the nature and quality of the act that they were doing, or that they did not know that what they were doing was wrong: see the McNaughten Rules.

The term 'disease of the mind' has often been defined by what it is not. It is not:

- a temporary problem of the mind due to an external factor such as violence, drugs, or hypnotic influences;
- a self-inflicted incapacity of the mind;
- an incapacity that could have been reasonably foreseen due to doing or omitting to do something, such as taking alcohol with pills against medical advice.

Even if the disease is shown to have affected the defendant's mind, the prosecution must still show, on the balance of probabilities that the defendant was incapable of either:

- understanding the nature and quality of their actions; or
- knowing what they did was wrong.

The second limb of this test (knowing what they did was wrong) is judged by the commonly accepted standards of right and wrong of reasonable people.

The focus is on the state of mind of the defendant and whether they appreciated that what they were doing was wrong. See *R v Macmillan* [1966] NZLR 616 (CA).

5.2.13 Procedure where defendant appears to have a mental impairment

Arraignment

If the defendant appears to be insane on arraignment in the Supreme Court, a jury may be sworn to see whether the defendant has capacity to stand trial. If a person is found to lack capacity, this does not prevent the defendant from later being tried for the offence if he or she subsequently re-gains their capacity: s 18 COA.

At trial

If, at trial in the Supreme Court, the jury finds that the defendant appears to have lacked capacity at the time of the act or omission, the jury must return a special verdict that the defendant is not guilty because they lacked capacity for reasons of insanity at the time of the act or omission: s 19 COA.

Custody

If a person is found to lack capacity, either on arraignment or at trial, the court must order the defendant to be retained in safe custody. The judge must then report the finding to the Prime Minister who must refer the matter to the Privy Council who decide the place and mode of detention of the defendant.

This status can lead to the person being incarcerated without regular court review or oversight for lengthy periods, sometimes even longer than they may have served had they been tried and sentenced to the crime. This highlights the risks facing people with mental impairments on either scenario, which is why this area of decision making requires particular care and a solid medical basis for reaching conclusions either way.

5.3 Rules relating to excuses or special circumstances

5.3.1 Duress or compulsion

Section 19 EA; s 22 COA

To protect a defendant, no evidence may be given of any admission made under illegal compulsion: s 19 EA.

A married woman who commits an offence in the presence of her husband shall not be presumed to have committed it under his compulsion: s 22 COA.

Aside from the gender inequality clearly expressed, this provision confirms that the marital status of a woman does not alter the ordinary presumption that people act of their own free will unless it is specifically proven to be otherwise in an individual case. There may well be cases where a threat of family violence is used by a husband to compel his wife to commit an offence, but that needs to be proven on its facts.

Generally, under the common law those forced to do acts by another are not held criminally responsible as they are not acting of their own free will. This is an extremely complicated defence and it is only briefly summarized here.

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

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

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

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

In *R v Talivakaola* [1997] Tonga LR 1 the Supreme Court discussed duress and compulsion. The Court stated that:

> "[d]uress or compulsion is on the basis that the defendants will has been overborne by threat of death or serious personal injury,and the threat of lesser harm or a threat to property are not sufficient."

The threat must be operative and effective at the time of the act charged.

See also: *Tapa'atoutai anor v Police* [2004] Tonga LR 108.

5.3.2 Defence of person or property

For some offences there may be a valid legal justification for the act or omission based on the defence of person or property. For example, if a person was to strike another who was attempting to steal their property, they would not be guilty of assault. Any action taken in defence of person or property must be reasonable considering all the circumstances.

The defence must point to some evidence to raise the defence. The prosecution may then prove, beyond reasonable doubt, that the act was not done in self-defence or defence of property or another person (as the case may be) and/or that the force used was unreasonable.

The law has always recognised a reasonable right to self-defence as a form of lawful justification of force used: see *Beckford v The Queen* [1988] 1 AC 130. At page 144 his Lordship stated that:

> "[t]he test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in defence of himself or another".

In *R v 'Osai* [2006] Tonga LR 147 the Supreme Court stated there were three factors the Court must consider when determining self-defence at common law:

- what the defendant, from their point of view, believed was happening at the time;
- bearing that in mind, whether the defendant was acting from their point of view to defend themself; and
- whether the force used was reasonable given what the defendant believed was happening at the time.

R v Makafilia [2005] Tonga LR 448 in citing *R v Whyte* [1987] 3 All ER 416 (CA) at 418 stated that:

> "A man who is attacked may defend himself but may only do what is reasonably necessary to effect such a defence. Simply avoiding action may be enough if circumstances permit. What is reasonable will depend on the nature of the attack. If there is a relatively minor attack, it is not reasonable to use a degree of force which is wholly out of proportion to the demands of the situation. But if the moment is one of crisis for someone who is in imminent danger, it may be necessary to take instant action to avert that danger".

Gendered aspects of the right to self-defence may also need to be considered, especially the requirement that the threat faced be imminent. Women's ability to act in the moment in self-defence may be limited where they are physically weaker than the abuser, or due to the coercive control the abuser exercises within the relationship.

Defence of property may similarly amount to lawful justification: see *Giles v Police* [1999] Tonga LR 102, *R v Tau'atevalu* [2003] Tonga LR 38. In *R v Tau'atevalu*, this defence was not successful on the facts.

A person is justified in using reasonable force in defence of their property, for instance in removing a trespasser or preventing entry or restraining another from taking or destroying their goods. No more force may be used than is necessary for the purpose.

5.3.3 Claim of right

Claim of right is a common law defence of an honest belief that the act was lawful. The test is subjective. It falls within the overall defence of mistake of fact (above).

For example, this defence may be raised for the offence of theft. When successful, a claim of right means the conduct does not attract criminal (or civil) liability. A defendant may have a valid defence if they have an honest belief that they had a legal right to take the goods in question.

5.3.4 Other statutory defences

There are some offences within your jurisdiction where the provision creating the offence also specifies a defence. For example, where provisions make it an offence to do something:

- "without reasonable excuse"
- "without reasonable cause"
- "without lawful justification"

Once the elements of the offence have been proved by the prosecution, the burden of proof shifts to the defendant to prove on the balance of probabilities that they had a reasonable excuse.

5.4 Parties

Different people may be held responsible for an offence, as parties. Parties to an offence include:

- principal offenders and joint enterprise;
- abettors;
- conspirators;
- those who compound crimes;
- those who harbour criminals; and
- accessories after the fact.

5.4.1 Principal offenders and joint enterprise

A principal offender is the person(s) who carries out the offence in question.

There may be more than one principal offender where two or more defendants form a "joint enterprise". When multiple defendants set out together to commit an offence they then have embarked on a "joint enterprise" with a shared objective.

In such cases, each defendant may be criminally responsible for the acts of the others even if one party is not involved in the act itself.

The parties must share a common purpose and make it clear by their actions that this was their common intention, as gauged from their conduct: see *R v Fakatava* [2001] Tonga LR 76.

5.4.2 Abettors

Sections 8-12 COA

Any person who directly or indirectly, commands, incites, encourages or procures the commission of an offence by any other person or who knowingly does any act for the purpose of facilitating the commission of an offence is an abettor: s 8.

According to *R v Makahununiu* [2001] Tonga LR 127, an abettor is someone who:

> "is present (presence, in this context, may be either actual or constructive) at the time when a crime is committed by another person who intentionally aids or gives encouragement to the offender in the commission of the crime. The mere passive presence of the accused at the scene of the crime is not sufficient to make him an abettor. It must be shown that there was also some intentional aid or encouragement of the principal offender in the commission of the crime".

The elements for 'inciting' are:

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

The term 'to procure' generally describes advice and assistance given before the offence is committed.

The Supreme Court or the Magistrate's Court has jurisdiction to hear the case against an abettor depending on the relevant jurisdiction for the main offence: s 9 COA.

An abettor may be tried before with or after the defendant; even if that defendant has died or is otherwise not brought to justice: s 10 COA.

A person may be an abettor even though the offence is committed differently to how the offending was counselled: s 11 COA.

For example, if A incites B to murder C by shooting him, A will still be an abettor if B commits C's murder by poisoning.

Every person (abettor) who counsels, incites or procures another to commit an offence is (s 12 COA):

- a party to every offence committed by the defendant due to their counselling, inciting or procuring; and which offence they knew or ought to have known would be likely to follow such counselling, inciting or procuring.

5.4.3 Conspirators

Section 15 COA

Conspiracy requires two or more people to act together with a common purpose to commit or abet an offence, with or without any previous agreement or deliberation: s 15(1).

If guilty of conspiracy to commit or abet an offence, each conspirator will be liable if the offence is committed. If the offence is not committed, the defendant would be liable as an abettor: s 15(2).

The elements of conspiracy are:

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

5.4.4 Compounding

Section 14 COA

A person may compound a crime by (s 14(1)):

- offering or agreeing to not prosecute, or give evidence against a person for money, any other valuable thing, or some advantage for themselves or another person; or
- accepting or agreeing to accept any reward under pretence, or restoring to any person or helping any person to recover any items stolen by any crime under Part X COA on the understanding that they will not be prosecuted.

The maximum penalty for this type of compounding is two years imprisonment.

A person may also compound a crime through wasting police time by knowingly making a false report (s 14(2)):

- that an offence has been committed;
- showing false concern for the safety of persons or property; or
- showing that they have information material to any police inquiry.

The maximum penalty for this type of compounding is six months imprisonment or $500.

5.4.5 Harbouring

Section 13 COA

It is an offence for any person (without lawful authority or reasonable excuse) to do any act with intent to impede the apprehension, prosecution or the execution of the sentence of another person whom they know or believe has committed an offence or been summoned or charged with or remanded by a court for any offence or convicted of any offence.

In the case law individual parties who help others evade justice are sometimes referred to as 'accessories after the fact'.

The maximum penalty for harbouring is imprisonment for three years.

5.4.6 Withdrawal

Sometimes there is a gap between the act of an accessory and the completion of the offence by the principal offender. An accessory may escape criminal responsibility for the offence, if they change their mind about participating and take steps to withdraw their participation in the offence before it is completed by the principal offender.

Under the common law withdrawal should be:

- made before the crime is committed;
- communicated by telling the one counselled that there has been a change of mind (if the participation of counsellor is confined to advice and encouragement);
- communicated in a way that will serve unequivocal notice to the one being counselled that help is being withdrawn: *R v Becerra and Cooper* (1975) 62 Cr App R 212.

Withdrawal should give notice to the principal offender that, if they proceed to carry out the unlawful action, they will be doing so without the aid and assistance of the person who withdrew.

5.4.7 Accessories after the fact

A person is an accessory after the fact when they:

- know that a person is a party to an offence; and
- receives, comforts, or assists another, or tampers with or actively suppresses evidence against them, so that they can avoid arrest or conviction, or escape after arrest.

The elements for accessories after the fact are:

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

6. Judicial conduct

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6.1 Judicial conduct generally

Clause 83A Constitution.

You must conduct yourself to avoid both any compromise in carrying out your obligations, as well as giving the appearance of doing so. The judicial role is a public one and your conduct will be under public scrutiny.

The respect and confidence of the public in the justice system requires you to respect and comply with the law and conduct yourself in a manner which will not bring you or your office into disrepute.

All judicial officers have a collective obligation to maintain respect for the judiciary and for the law. These obligations extend beyond judicial work and carry into social responsibilities that can (at times) be more onerous for judicial officers than are expected of others in the community.

Clause 83A of the Constitution sets out the underlying principles that guide all judicial conduct:

- the rule of law: everyone is subject to clearly defined laws;
- judicial independence: your conduct is governed only by the law and by the judicial oath.

6.2 Judicial Code of Conduct

Tongan magistrates and judges adopted the international Bangalore Principles of Judicial Conduct as part of their *Judicial Code of Conduct* (2010): O.1 Rule 1. The rules in the Code of Conduct (Code) are in addition to those principles.

The Bangalore principles take the form of six core values that should guide you in office, namely: independence, impartiality, integrity, propriety, equality, and competence and diligence.

The guiding principles in the Code are to (O.3 Rule 1):

- observe the highest standards of conduct;
- uphold the independence of the judiciary; and
- maintain the impartiality of the judiciary.

You should consult with your colleagues if there may be differing views about an appropriate course of action and if any doubt persists, consult with your Court Leader: O.3 Rule 2.

More details about the standards of conduct both outside and in the courtroom are set out below.

6.3 The rule of law

The rule of law, in its simplest form, means that we are all subject to clearly defined laws and legal principles (rather than the personal whims of powerful people) and that those laws apply equally to all people, all the time.

The rule of law provides checks and balances for all three branches of government including the executive (the government), legislature (Parliament), and the judiciary.

In a criminal justice system, the "separation of powers" principle means that:

- Parliament is responsible for passing laws about what acts are crimes;
- the executive government is responsible for investigating and prosecuting crimes and enforcing court sentences; and
- independent courts are responsible for interpreting the laws, deciding whether a person is guilty or not guilty and sentencing.

The separation of powers is provided for in the Tongan Constitution: cl 30.

6.4 Judicial independence

O.5 Rule 1, Judicial Code of Conduct; cl 15 Constitution (Court to be unbiased); cl 87 (Judges to hold office during good behaviour); cl 94 (Judge may not hear appeal from own decision).

Justice requires all judicial decision-makers to exercise their judgment based on law and evidence. You must be and be seen to be independent of the executive and legislative branches of government: O.5 Rule 1.

Judicial independence requires you to:

- determine disputes impartially without fear or favour;
- ensure that your conduct, both in and out of Court, does not undermine judicial independence or give the appearance of doing so;
- reject any attempt, direct or indirect, to influence you by any means and report any such attempts to the Court Leader if appropriate;
- when acting judicially, be immune from the effects of media publicity or outside influence regarding a case before you;
- act fearlessly, irrespective of popular acclaim or criticism.

You may "pick the brain" of a colleague but it is your own responsibility to make the final decision.

You may not receive any present, money or anything else from a party or the friend of a party in any case recently tried or about to be tried: s 88 MCA; cl 15 Constitution.

You must not allow the opinions of any of the lawyers (in this case the prosecution who made statements beyond the facts of the offence) to affect your decision. See *Lui v Police* [1994] Tonga LR 100.

6.5 The judicial oath

Clause 95 Constitution; s 84 Magistrate's Court Act.

Upon appointment as a magistrate you have sworn the following two oaths:

> Oath of allegiance
> "I swear by almighty God that I will be loyal and bear true allegiance to his Majesty King Tupou VI the lawful King of Tonga, His Heirs and Successors according to Law. So help me God."

> Official oath
> "I swear by Almighty God that I will well and truly serve His Majesty King Tupou VI in the office of Magistrate and will righteously and impartially administer justice in accordance with the Constitution and Laws of this Country without fear or favour. So help me God."

The official oath of office sets out the principles of judicial conduct. These are also reinforced by several rules in the Judicial Code of Conduct 2010. To illustrate these principles, it is useful to break down the oath into a number of parts.

6.5.1 "Well and truly serve"

You should diligently and faithfully carry out your judicial duties.

This means you should:

- devote your professional activity to all your judicial duties;
- bring to each case a high level of competence and be sufficiently informed so you can provide adequate reasons for each decision; and
- deliver all decisions, rulings and judgments as soon as possible and with as much efficiency as circumstances permit. To do this you should:
  - be familiar with common offences, jurisdiction and procedure;
  - prepare before sitting in court;
  - take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for your role;
  - not engage in conduct incompatible with the diligent discharge of judicial duties or approve such conduct in colleagues.

You must also be diligent when overseeing the conduct of the court in assuring that each party is given the full opportunity to present their case efficiently.

6.5.2 "Righteously and impartially administer justice"

This part of the oath of office covers two main aspects of judicial conduct:

- integrity; and
- impartiality.

Integrity

You should try to conduct yourself with the utmost integrity to keep public trust and confidence in the judiciary. Judicial officers make decisions that affect peoples' lives. You are expected to put the obligations of judicial office above your own personal interests. You should demonstrate a good and moral character so you can be trusted and respected. This means you should:

- make every effort to ensure that your personal and public conduct is above reproach; and
- encourage and support your judicial colleagues in observing the same high standard.

Impartiality

O.6 Rule 1, Judicial Code of Conduct; cl 15 Constitution.

You must be, and should appear to be, impartial with respect to your decisions and decision making: O.6 Rule 1. The appearance that you are not impartial can be given by apparent conflict of interest, by judicial behaviour on the bench, and by your associations and activities off the bench.

Being impartial applies not only to the decision itself but also to the process by which the decision is made. Sometimes you may have to disqualify yourself from sitting on a case.

To ensure judicial independence and impartiality, you should:

- not allow your decisions to be affected by bias or prejudice, or personal or business relationships or interests;
- exhibit and promote high standards of judicial conduct to reinforce public confidence;
- conduct your personal and business affairs so as to minimise occasions where it will be necessary to disqualify yourself from hearing cases;
- review your membership in all commercial, social and political groups to determine whether your involvement compromises your position as a Magistrate; and
- not adjudicate cases in which you have a personal involvement, either through the parties involved or through the subject of the case.

Impartiality must exist both as a matter of fact and as a matter of reasonable appearance. The appearance of impartiality is measured by the standard of a reasonable, fair-minded, and informed person. The question in each case is whether, to a reasonable and informed observer, there would appear to be a real danger of bias: see *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142.

You should not allow your decisions to be affected by bias, prejudice or irrelevant considerations.

Bias or conflict of interest

Section 87 Magistrate's Court Act (MCA); cl 15 Constitution; O.6 Rules 2-4 Judicial Code of Conduct

A conflict of interest is any situation where your decision-making could be affected by some other relationship, obligation or duty that you have. You must disqualify yourself in any case in which you believe that you will be unable to judge impartially: cl 15 Constitution.

You must not adjudicate in any case in which you are personally concerned or in which any of your kindred are concerned as plaintiff or defendant. "Kindred" means wife, child, grandchild, parent, grandparent, brother, sister, nephew, niece, uncle, aunt, cousin: s 87 MCA.

Do not preside over a case where you may have or appear to have preconceived or pronounced views relating to issues, witnesses or parties.

Given that Tonga is a relatively small jurisdiction, you should also be careful not to let personal or local knowledge of individuals before you affect your judgment. You may know something about the facts of the case already. That also means you have a conflict of interest. You must disqualify yourself wherever you have personal knowledge of disputed facts in proceedings, or wherever you have a personal view concerning a party or witness of disputed fact in the case.

Bias arises when you are leaning towards a particular result, or that it may appear to the party that that is the case. There may be:

- a monetary or other interest;
- some relationship with a party or witness; or
- a personal prejudice or predetermination of an issue.

Each case depends on its own factual and legal circumstances, and these—and the evidence advanced about them—must be the only basis for your decision.

If you are affected by actual bias, disqualification must follow. This includes the situation where your decision would lead to the promotion of a cause which you are involved in promoting together with one of the parties: O.6 Rule 2.

Bias is presumed if you have a monetary or propriety interest in the outcome of the case and you are automatically disqualified. This includes the situation where you have a substantial shareholding in one of the parties and the outcome of the case might be such as could realistically affect your interest: O.6 Rule 3, cl 15 Constitution

Apparent bias: even if there is no actual conflict, you should also disqualify yourself if a reasonable, fair-minded and informed person would have suspicion of conflict between your personal interest (or that of your immediate family or close friends or associates) and your duty. This is the test for apparent bias: O.6 Rule 4.

Disqualifying yourself from a case is *not* appropriate if:

- the matter giving rise to a possibility of conflict is insignificant or a reasonable and fair-minded person would not be able to argue for disqualification;
- no other magistrates are available to deal with the case; or
- because of urgent circumstances, failure to act could lead to a miscarriage of justice.

Justice must not only be done but must be seen to be done. It is the appearance to others that is important. If, you have any interest in a case or if it looks as though you may have an interest, disqualify yourself from presiding.

Be careful not to:

- discuss the case outside the courtroom;
- receive any information about the case privately. If you receive information privately, you must disqualify yourself; and
- conduct your own research into questions of fact.

The question of disqualification is for you to decide after applying the apparent bias test. It is sensible for you to decline to sit in cases of doubt. Be alert to any appearance of bias arising out of connections with litigants, witnesses or their legal advisors. You should always inform the parties of facts that might reasonably give rise to a perception of bias or conflict of interest as early as possible before the hearing and you may hear submissions from the parties. You may also consult with colleagues.

Advance disclosure often may not be possible due to listing arrangements with disclosure on the day of the hearing. The parties should be given an opportunity to make submissions on recusal after full disclosure of the circumstances giving rise to the question of disqualification. It is not enough to get the parties' consent if an actual conflict of interest exists. You must make your own decision: O.6 Rule 4.

In any situation of actual, presumed or apparent bias, a party may waive their right to object. This waiver must be clear, unequivocal and made with full knowledge of all relevant facts. You should not give any impression of exerting any pressure on the parties to consent to your hearing the matter. Even if there is a waiver, it is ultimately for you to decide whether to sit: O.7 Rule 5.

6.5.3 "In accordance with the Constitution and Laws"

You must always act within the authority of the law. This requires you to:

- not take into account irrelevant considerations when making decisions. Your decisions should only be influenced by legally relevant considerations;
- make the decision. You should not abdicate your discretionary powers to another; and
- defend the constitutionally guaranteed rights of the people of Tonga and ensure that all laws are in accordance with the Constitution. This means that where a provision in a national law is inconsistent with constitutionally protected rights, you should not apply it to the extent of the inconsistency.

6.6 Conduct out of court

O.4 Rule 1 Judicial Code of Conduct.

You should conduct yourself both in and out of court, in a way that maintains the standing and dignity of the judicial office. This means you should *not*:

- be a member or associate of any political organisation or activities;
- use your judicial office for personal advantage or for the benefit of family and friends or to get yourself out of legal or bureaucratic difficulties;

- use judicial stationery except to write in an official capacity or for a letter of reference when the Judge's personal knowledge of the individual concerned has arisen in the course of judicial work;
- give legal advice (except for close family members or friends, you may offer personal advice on a friendly, informal basis, without pay and you make it clear that this is not to be treated as giving legal advice and that if legal advice is needed the person should be referred to a lawyer);
- hold directorships in commercial companies (public or private) who aim to make a profit;
- become involved in personal litigation or start legal action without consulting the Court Leader;
- accept free legal advice but you should pay at a proper rate for all legal services except for services provided by a spouse or close relative;
- have social contact with a law practitioner who is currently appearing or is in a case due imminently to be heard before you (but if such contact does take place, talk of the case should be avoided);
- express views in public on controversial political or legal issues which may come before the courts in one way or another; and
- engage in any criminal conduct or any conduct which constitutes domestic violence (physical, sexual or mental abuse) against a person with whom you are in a domestic relationship (as defined under the Family Protection Act 2013).

You may:

- be a member of a community non-profit making organisation (but not if the organisation's objects are political or if its activities are likely to involve it in frequent litigation or expose you to public controversy); and
- act as executors or trustees of estates of family members or close friends (whether or not you are a beneficiary of the estate) without being paid.

6.7 Conduct in the discharge of judicial duties

O.4 Rule 2 Judicial Code of Conduct.

The Code sets out various rules that apply in the courtroom in O.4, Rule 2. You should:

- maintain order and decorum in all proceedings in court and be patient, dignified and courteous towards litigants, witnesses, lawyers and other persons whom you deal with in an official capacity. You should require similar conduct from counsel and others under your influence, direction or control;
- perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness; and
- speak only through your judgments in dealing with the case being decided and not answer media criticism of a decision.

You should *not*:

- communicate with any of the parties or counsel in the absence of the others unless the consent of those absent has first been obtained. If you do receive any such private communication the other parties must be fully and promptly informed;
- alter the substance of reasons for any decision given orally or of the transcript of any summing up to a jury;
- communicate privately with an appellate Court or appellate Judge in respect of any pending appeal from that Judge's determination; and
- enter into any contentious correspondence with the author of any letter or other communication criticising a judicial decision. The Court Leader may authorise the Registrar to acknowledge the communication in a non-contentious manner.

If there is media misreporting of court proceedings or a judgment and you consider that the error should be corrected, then consult the Court Leader. The judiciary may issue a press release (preferably through the Chief Registrar) to state the factual position or take steps for an appropriate correction to be made.

6.8 Conduct in court

6.8.1 Preparing for a case

Ensure you have studied and understood the cases you will be dealing with. Before court starts you should:

- arrive in good time—at least half an hour beforehand;
- study the court list;
- read any reports that are relevant for that day;
- ensure you know the relevant sections of Acts and penalties (especially for infringement matters) and have these at hand;
- if possible, check the list of defendants or other parties to see if you know any of them and to ensure you can pronounce all names correctly;
- ask the Registrar any questions you may have.

For criminal matters, make sure you know what elements of the offence must be proved, ie: the essential parts an offence. Each essential element must be proved beyond reasonable doubt by the prosecution before the charge is proven. See the chapter on "Common Offences" to find out more about the elements for common offences.

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

6.8.2 "Affected parties have the right to be heard"

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

A party whose interests or property may be affected by a decision has the right to be heard before the decision is made. This principle focuses on the procedures followed by the decision-maker and its effect on the parties.

There are three parts to this principle:

- prior notice;
- fair hearing;
- relevant material disclosed to parties.

If the defendant:

- is not represented by a solicitor;
- is clearly not familiar with procedures;
- is not fluent in English; or
- has other difficulty in good self-expression;
- is a child; or
- is a person with a disability

they may be unable to put forward their side of the case. These questions require your judgement of the situation and of the degree of disadvantage. If you have doubts, consider taking an adjournment. If a person needs legal advice or representation to ensure 'the interests of justice' then see if a duty lawyer is able to assist or refer a case to the Law Society to seek appointment of a pro bono lawyer.

6.8.3 Prior notice

You should:

- allow each party sufficient notice to prepare their case including: submissions collecting evidence to support their submissions and to rebut or contradict the other party's submissions;
- be satisfied that adequate notice has been given, as required by law or otherwise adjourn the case; and
- if the defendant or respondent does not take any steps or appear at the hearing, you will need some evidence that the documents have been served before proceeding with the hearing.

For criminal matters, you will need proof of service of the warrant or summons. For civil and family matters, you will need proof of service of the writ with particulars of the claim.

6.8.4 Natural justice or a fair hearing

Natural justice is the duty to act in a procedurally fair manner. A decision made in a court, although it may be justified on the evidence before it, can be appealed against or judicially reviewed because of procedural unfairness (see also "Impartiality").

Clause 14 of the Constitution protects the right of any person to a fair hearing, to determine their rights and obligations before any tribunal or authority according to the law.

The way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard. The general rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with a new and relevant issue. The parties must be given an opportunity to respond to everything that is said to you by the other side.

6.8.5 Relevant material disclosed to parties

Section 32(3)-(4) Magistrate's Court Act (MCA).

Generally, all relevant material should be disclosed to the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you may take into account.

Before a hearing is concluded, you should ask yourself, "has each party had a fair opportunity to state their case?"

Any decision on whether adequate disclosure has been made is up to your judicial discretion. You may order the party holding the relevant information to disclose all or part of it to the defendant or refuse to make the order. You must consider what effect this will have on the fairness of the trial or hearing process.

Section 32(3) MCA provides that for every preliminary inquiry the prosecutor must make pre-trial disclosure at least five days before the date of inquiry.

6.8.6 Avoid delay or adjournments

While the parties must be provided with adequate notice and reasonable time to undertake steps of the process, the magistrate is responsible for ensuring momentum is maintained to complete the case as quickly as possible. This is especially important for prioritized case types, such as those involving people held in pre-trial detention, children or vulnerable complainants.

Providing the parties with early notice of your expectation that timing aspects of court directions will be followed by the parties and that adjournments will only be granted in truly exceptional circumstances, can help to prevent time blow-outs in cases, maintaining the efficiency and fairness of the court process.

6.8.7 Conduct of judicial officers

You should treat everyone before the Court with appropriate courtesy while acting decisively, maintaining firm control of the process and ensuring cases are dealt with quickly.

You should exhibit a high standard of conduct in court to reinforce public confidence in the judiciary. This can be done as follows:

- be courteous, patient and dignified;
- be humble: if a mistake is made you should apologise;

- continually remind yourself that a defendant or other party is not simply a name on a piece of paper. They want to see justice administered fairly, objectively and impartially;
- remember going to court is nerve-wracking for most people;
- never make fun of a defendant or witness;
- show appropriate concern for distressed parties and witnesses;
- never state an opinion that some features of the law are unsatisfactory. If you believe that amendments are needed, discuss this with the Chief Magistrate;
- never say anything or display conduct that would indicate you have already made your decision before all parties are heard.

If sitting as a panel, do not discuss the case or any aspect of it outside of the panel. This includes other judiciary who are not sitting on the case.

6.8.8 Maintaining dignity in the courtroom

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

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

Manage unruly defendants, parties, witnesses and spectators by:

- being decisive and firm;
- dealing promptly with interruptions or rudeness;
- clearing the court or adjourning if necessary;
- allowing a disaffected person to speak briefly before intervening;
- ensuring that unrepresented defendants conducting cross-examination of witnesses/complainants are not bullied or intimidated and only permitted to ask relevant questions.

Manage lawyers by:

- exercising your authority in the courtroom;
- asking for an explanation from those who have caused delay;
- ensuring that witnesses are not bullied or intimidated and only permitting lawyers to ask relevant questions;
- dealing promptly with discourteous or unhelpful advocates.

6.8.9 Communication in court

When speaking:

- use simple language without jargon;
- make sure you know what to say before you say it;
- avoid a patronising or unduly harsh tone;
- generally, do not interrupt counsel or witnesses;

- always express yourself simply, clearly and audibly.

It is important that:

- the party examined and every other party understands what is happening in the court and why it is happening. Take the time to explain repeatedly if necessary and throughout the proceeding, especially for unrepresented or vulnerable parties;
- the court clerk is able to hear what is being said for accurate note-taking;
- the public in the courtroom are able to hear what is being said.

When listening:

- be attentive and be seen to be attentive in court;
- make accurate notes;
- maintain eye contact with the speaker.

Questioning in criminal cases

- your role is not to conduct the case for parties but to listen and determine;
- generally, you should not ask questions or speak while the prosecution or defence are presenting their case, examining or cross-examining witnesses;
- you may ask questions at the conclusion of cross-examination, but only to try to clarify any unclear matters arising from the evidence. If you do this, you should offer both sides the chance to ask any further questions of the witness, limited to the topic you have raised;
- never ask questions to plug a gap in the evidence.

See also *Halalupe v Police* [1994] Tonga LR 122:

> "The magistrate may and should ask questions to clarify matters which he considers unclear or to clear up apparent ambiguities. In a criminal case he should ensure the accused has been able to put his case fully but, where the accused is represented, he should assume the lawyer is doing so. He should not ask more than is necessary and should certainly not "descend into the arena", or there is a danger, as has been stated by one judge, that he will have his vision obscured by the dust of the conflict."

Where the defendant is not represented, then the magistrate will need to explain to the defendant the process, elements, their legal choices and the legal consequences of those choices and to ask relevant neutral (non-leading) questions, in order to maintain the fairness of the process.

Questioning in civil cases

- You may ask questions. If parties are unrepresented, you might do this to indicate what is needed to satisfy you and clarify what they are saying.
- Be careful to be neutral when asking questions. Your questions must not show bias to either side.
- Avoid interrupting during submissions. If possible, wait until the party has finished their submissions.

6.8.10 Dealing fairly and impartially with all court users

- Ensure courtesy to all court users.
- Demonstrate a non-prejudicial attitude.
- Address the defendant in an appropriate manner.
- Ensure that all those before the court understand what is going on.
- Show appropriate concern for distressed parties and witnesses.

6.8.11 Dealing with parties who do not understand

You may often have unrepresented defendants and parties who do not appear to understand what the proceedings are about. You must ensure that the defendant or party understands:

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

Criminal cases

When dealing with an unrepresented defendant, you should explain to them:

- the nature of the charge;
- the procedure and formalities of the court; and
- the legal implications of the allegations.

At any stage in the proceedings, you may take the time to satisfy yourself that the defendant knows:

- why they are appearing in court;
- what their rights are;
- what the court is doing; and
- why the court is following that course.

Civil cases

You will need to be attentive to an unrepresented party's needs. Take care to explain:

- the nature of the hearing and what will occur;
- what is expected when the party comes to speak;
- to an applicant, that they have to tell you what they want and why.

6.8.12 Dealing with language problems

Ideally, an interpreter should be obtained and sworn in when there is a language problem. Often, however, one is not available. In this case:

- explain the nature of the charge or issues as slowly, clearly and simply as possible; and

- if you are in any doubt about whether the defendant or a party properly understands what is happening, adjourn the hearing until an interpreter is available.

Fit but compromised – dealing with communication or learning difficulties or mental health issues

People with communication difficulties might find it hard to:

- express themselves through speaking, writing or non-verbal communication;
- understand the spoken or written word;
- understand body language, facial expressions and other ordinary social cues;
- listen to what is being said directly to them or around them;
- remember the information they receive;
- express their feelings and emotions in an appropriate way;
- relate to others in socially acceptable ways; or
- think clearly.

A person with communication difficulties, learning difficulties, or mental health issues might benefit from the following changes to the hearing:

- taking breaks at very regular intervals, especially while the person is giving evidence –for example, every 20–30 minutes;
- shortening the day. Allowing late start times and early finish times;
- ensuring the courtroom is quiet and without distractions;
- speaking slowly and clearly;
- making one point at a time in short sentences;
- allowing time for the defendant to process information and respond;
- allowing pauses for the person to process what has been said and respond;
- be ready to calmly repeat instructions and questions; and
- for a litigant in person, frequently summing up the current stage of the court process and what is expected.

If a mentally ill person does appear before you, the police doctor will be able to advise you on the best way forward. These cases are easily managed as the next steps have usually been decided by all concerned before appearance. If bail bonds need to be signed, they can be organised away from the cells if that is not an appropriate environment.

Section 60 of the Mental Health Act (MHA) provides that when a person is arrested and before the person is charged with an offence a police officer may determine on reasonable grounds that the person may benefit from admission to and treatment in a mental health facility. If so, the police officer must arrange for the person to be examined as soon as practicable by a medical practitioner for assessment and determination as to whether the person meets the criteria for involuntary admission to a mental health facility on the grounds of mental illness, mental disorder or involuntary treatment in the community.

Section 61 gives a police officer authority to determine whether or not to charge a person who has been examined by a medical practitioner under section 60.

If after an assessment a person is not made subject to an order or recommendation in accordance with the MHA, the police officer must deal with the defendant according to law as soon as practicable.

6.9 Appeals

Clause 94 Constitution; O4 Rule 2(6) Judicial Code of Conduct.

It is illegal for any magistrate or judge to sit or adjudicate upon an appeal from their own decision: cl 94 Constitution. You must not do anything to obstruct an arguable appeal, whether by making findings of fact more conclusive than the evidence justifies or by passing an unduly lenient sentence in the hope that this will deter an appeal. The litigant must not be deprived of the rights provided by the justice system.

You should not communicate privately with an appellate court that is hearing an appeal of a determination you have made: O4 Rule 2(6).

6.10 Actions against magistrates

Section 92 Magistrate's Court Act (MCA).

As a Magistrate, you are exempt from civil actions for damages against you in respect of acts done within your jurisdiction unless it is proved that the act complained of was done maliciously and without reasonable and probable cause: s 92(a) MCA.

Such legal actions must be commenced through the Supreme Court within six calendar months from the date of the act complained of: s 92(b) MCA.

7. Judicial skills

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7.1 Managing the court and record keeping

On the day before you are sitting:

- read the summons for the matters you will be dealing with;
- check that you have jurisdiction to hear the matters;
- if necessary, read the relevant legislation; and
- ensure court staff have made any necessary arrangements to avoid adjournments and ensure appropriate court support is in place (such as arrangements for interpreters, other aid/support necessary for any parties with physical or mental disabilities, arrangements for vulnerable/child complainants/witnesses to attend court with support persons, arrive and wait safely in a separated area or to give their evidence remotely or from behind a screen in the court room).

On the day you are sitting:

- meet the clerk in your chambers;
- confirm that any necessary arrangements as per above, are in place;
- don't enter the court room unless the clerk is present to lead you in; and
- there should be a police orderly in your court.

When you go into court:

- start proceedings on time and rise at the expected time (as a courtesy to everyone involved);
- if it is your practice, bow to counsel; and
- the clerk will formally commence proceedings.

Remember that those who follow you need to know what you have done. You should write on each case recorded in your Minutes Book:

- the action you have taken in court, with reasons for each order or decision; and
- your signature, at the conclusion of the proceedings.

Do all the above in court if that is possible. Neatness, precision and full information are essential. Use the stamps provided for various decisions.

It is good practice to keep reasonably detailed notes including what evidence is being presented, especially in a defended hearing. The clerk shall in every case take and keep a record in shorthand of the complaint, the evidence and the order(s) you make: s 24(10) MCA.

A suggestion is to note each element of the charge separately. As the evidence is given, record notes on it as they relate to each of these elements. This method can provide a helpful framework for your decision.

See the "Management of proceedings" chapter for more information on the general organization of court and note taking.

7.2 Maintaining proper conduct and dress code in court

It is important that there should be proper respect for the court. This will partly be achieved by ensuring that people conduct themselves appropriately. Make sure you are dressed in an appropriate way.

The clerk will usually ensure proper conduct in court, but it is your court and you should ultimately take responsibility for how your court is conducted.

The following are some suggestions:

- the defendant and witnesses should stand upright and not lean on the dock or witness box. If they have disabilities, they should be appropriately seated or accommodated;
- counsel also should stand upright and speak to you respectfully;
- when you speak to the defendant or a witness, they should face you and be standing unless they have disabilities;
- defendants or witnesses should dress properly, and in the case of males this usually means they should not wear singlets/tank tops, and for women they should not wear flowers in their hair; and
- mobile phones should be turned off and calls should not be made or taken in court.

7.3 Unrepresented defendants

Have no contact out of Court. Always be patient and courteous. It is difficult to strike the right balance between helping an unrepresented defendant and taking over their case or being seen to be biased. If you give too much help, you will take over their case, but also you need to know or understand their case.

You should:

- before the case begins, give a clear explanation of the process of hearing - for example which party starts, calling of witnesses, submissions etc;
- use simple language, not legal terms;
- be clear about what you expect;
- explain the charges, elements of the charge, legal choices defendants have and consequences of those choices; and
- if you can understand the unrepresented litigant's case, then you can at least direct the litigant toward relevant matters.

See the "Management of proceedings" chapter to find out more about dealing with unrepresented litigants in court.

7.4 Contempt of court: disruption and misbehaviour in court

s 70 MCA.

You have the inherent power to control your court and to deal with contempt of court.. However, this power should be exercised sparingly as it is much better to adjourn the case and have a responsible person talk to the defendant.

At your discretion, you may sentence someone who is guilty of contempt of Court, to be imprisoned for not less than one hour and not more than one month: s 70 MCA.

Any sentence for contempt of court must be passed by you on the spot after a warning has been given to the witness. The clerk should then immediately make out the warrant and hand it to the police so that they can detain the person. Because it is designed to advance proceedings, no person can be prosecuted for contempt at another sitting of the court.

Giving false evidence is a form of contempt and may additionally constitute the offence of perjury under s 63 of the Criminal Offences Act.

See "Management of proceedings" chapter to find out more about contempt of court.

7.5 Dealing with counsel

Remember that you are the court and that you should never be intimidated by either prosecution or defence counsel. Ensure all parties and their lawyers (if any) are present in court (or have had the chance to be present) when you hold a hearing about the case. You should not discuss any aspect of the case with counsel without the other counsel being present. You may discuss procedural matters with counsel in chambers.

A friendship with a lawyer is not prohibited and it is not necessary on appointment to give up friendship with lawyers. But you must never discuss a case before you with a lawyer other than in court. If you have a close friendship with a lawyer, then you will need to think carefully whether you should disqualify yourself in any case in which the lawyer friend appears in court based on the appearance of bias.

You set the tone in court. If you appear angry, aggressive, or nervous then this will be transmitted to the others in the court and the court will become a difficult place to manage. Be calm, talk quietly but firmly, take your time to consider matters, don't interrupt too often and generally wait until someone has had their say before questioning. Try to keep a balance between formality and informality. Always address lawyers/witnesses/parties formally – Mr, Mrs, Miss or whatever is preferred.

It is the job of the prosecution and defence counsel to ask questions of witnesses. You must not ask leading questions (questions which suggest the answer) of any witnesses. However, you may ask questions when:

- counsel has finished;
- counsel is not clear or does not get to the point;
- something needs to be clarified by the witnesses; and
- a party is self-represented

You may interject in the proceedings to:

- rule on any objection raised by either the defence or prosecution;
- disallow a question which you consider improper, even if no objection has been made by counsel;
- request that an unrepresented defendant cross-examining a complainant/witness direct their question to you, and then for you to ask the question;
- ensure that complainants/witnesses are not bullied, intimidated or disrespected during the court proceeding;
- maintain the proper order in the courtroom; and
- ensure the proper conduct of the proceedings.

When making comments from the bench or engaging in exchanges with counsel, you should not:

- show bias. The test of bias is "whether in all the circumstances the parties or the public might entertain a reasonable [fear] that the Judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him." (See *Grassby v The Queen* (1989) 168 CLR 1 at 20);
- intervene excessively with comments from the bench; and
- make any statement before the end of proceedings to indicate that you had taken a final view on any point in issue (subject to exceptions) but also not remain completely silent throughout the trial.

7.5.1 Prosecutors

Prosecutors should perform their duties fairly, consistently and according to the law. In conducting the proceedings, they should respect and protect human dignity and uphold human rights, to ensure a fair and smooth functioning of the criminal justice system.

They should always maintain the honour and dignity of their profession. The office of the prosecutor must be strictly separated from judicial functions. This means that you should not seek the advice of prosecutors on how to conduct legal proceedings or how to run the court.

To ensure the fairness and effectiveness of the prosecution, prosecutors should co-operate with other police force members, the courts, the legal profession and other government agencies or institutions.

You should expect the prosecutor to be prepared when they appear before you in court. Prosecutors (usually the police) should:

- know the elements of the offence and have evidence to prove each element;
- have a complete set of facts;
- if you ask a lot of questions to establish the prosecutor's case, it could appear that you are assisting them, giving the appearance of bias;
- have their witnesses ready or have a good explanation for why they are not;

- understand court procedure and be prepared to deal with issues that commonly arise; and
- have, at sentencing, any previous convictions of the defendant and any other reports or statements of aggravating and mitigating factors.

7.5.2 Defence counsel

The defendant has the right to retain and instruct a lawyer for their defence: s 20 MCA.

Defence counsel are also officers of the court and should:

- act with competence, skill, honesty and loyalty. They should preserve their own integrity and that of the legal profession;
- treat professional colleagues, officers and staff of the court and judicial officers with courtesy and fairness;
- not knowingly make an incorrect statement of material fact or law to the court or offer evidence that they know to be incorrect;
- know the elements of any defence and have evidence to prove each element;
- have their witnesses ready or have a good explanation for why they are not;
- understand court procedure and be able to deal with common issues; and
- represent a client diligently and promptly to protect the client's best interests.

At trial, defence counsel are entitled to put forward all relevant defences. Defence counsel must have the opportunity to cross-examine witnesses to test their truthfulness, their memory and their accuracy, however they should not be permitted to bully, intimidate, embarrass, delay, or burden victims or witnesses or be permitted to pursue irrelevant or impermissible lines of questioning.

7.6 Making a decision: reaching a verdict

Once a decision is delivered and reasons given, your decision-making power is at an end. The decision must then speak for itself. You may not later add reasons that were not included in the original decision. This is especially so if you reserve a decision. Judgments may be oral or reserved.

Decisions (whether oral or reserved) should:

- be ordered, logical and structured;
- make factual findings;
- apply the law;
- give reasons; and
- provide a decision.

See the "Decision making: oral or reserved judgments" chapter.

8. Management of proceedings

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8.1 Relevant legislation

- Constitution revised ed 2020 (Constitution): Part 1
- Criminal Offences Act revised ed 2020 (COA): ss 17-20, 63-65
- Evidence Act revised ed 2020 (EA): ss 11-12, 53, 54A-I, 65, 116, 162-167
- Magistrate's Court Act revised ed 2020 (MCA): ss 11, 19-25, 31, 68-70, 73A, 96

8.2 General organisation for court

s 19 Magistrate's Court Act (MCA).

Before going to court, you should make sure with your clerk that they have:

- prepared the case list for the day with the names of each defendant, the offence(s) with which they are charged, and the name of the prosecutor. The cases are to be called for hearing from the list: s 19(1) MCA; To ensure the privacy of children is protected (Art 16 of the Convention on the Rights of the Child (CRC)), public listings of cases involving children should be by an allocated pseudonym, rather than the name of the child;
- separately listed all criminal cases against children (under the age of 16). While the MCA requires separate listing only for children aged under 16, best practice (consistent with the CRC) would be to extend this to cases involving all children under the age of 18;
- listed cases involving adult and child defendants together only if you think it is appropriate that they should be heard together, but separate from other cases involving either children or adults: s 19(2) MCA;
- sworn in an interpreter and explained their role if there is a need to have an interpreter;
- checked that the police have an orderly present and that they are briefed about the order of proceedings;
- checked that the court holding cells are clean and provide humane conditions for detained defendants;
- made arrangements for any child defendants to be transported to court and held at court separately from adults (ie: in a room (under guard) rather than the holding cells);
- ensured the court room is arranged less formally for hearings involving children (eg: all seated around the bar table);
- ensured any supports or aids are in place needed for parties who have disabilities (eg: if an unrepresented party is blind or illiterate, ensuring court staff have read relevant court documents to them beforehand; if a party uses a wheelchair, ensuring that the most easily accessed court room is booked);
- ensured arrangements have been made for vulnerable/child complainants/witnesses to arrive and wait safely in a separated area; or to give their evidence remotely; or that a screen is available so they can give their evidence from behind a screen in the court room;
- ensured that if there are matters to be heard in chambers, these should not proceed beyond 9:30 am or when court starts; and
- started court on time and finish at the expected time. This is not only for your benefit but also for legal representatives, the prosecutors and court staff.

8.2.1 Court records

Remember that those who follow you need to know what you have done. You should ensure the criminal record (in the minute book) for each case includes:

- the action you have taken in court, with reasons for each order or decision; and
- your signature, at the conclusion of the proceedings.

You have a duty to ensure a record is properly and correctly kept by the clerk and that all procedural matters, such as taking of oaths by witnesses, are included: see *Taufa v Ma'u* [1994] Tonga LR 97.

8.2.2 Taking notes

Section 96 MCA.

The clerk is required to attend all sittings of court in their district and must record all the evidence and particulars of any trial or inquiry: s 96(1) MCA. As keeper of the record, the clerk:

- makes out all summonses, warrants, orders, commitments and other documents which you may direct;
- obeys all lawful orders that you give to them;
- has charge of the seal of the court;
- must furnish certified copies of your decisions to applicants, upon payment of the prescribed fee; and
- must furnish transcripts of the record in every case to the Supreme Court when required to do so by law or by order of the Chief Justice: s 96(1)-(3) MCA.

It is good practice to keep reasonably detailed notes including what evidence is being presented, especially in a defended hearing. The clerk shall in every case take and keep a record in shorthand of the complaint, the evidence and the order(s) you make: s 24(10) MCA.

A suggestion is to note each element of the charge separately. As the evidence is given, record notes on it as they relate to each of these elements. This method can provide a helpful framework for your decision.

8.2.3 Open court proceedings

Section 86 MCA.

All trials are held in public or open court, unless you order people to be excluded from the court (closed court proceedings) except those that you permit to remain.

Cases involving children should be held in closed court to protect their privacy (Art 16, 40(2)(vii) CRC).

Cases involving vulnerable complainants or sensitive cases, such as sexual or family violence offences, should be held in closed court in part, for the parts of the hearings when complainants/witnesses give their evidence.

Family protection order hearings must be held in closed court (s 39(1) Family Protection Act).

8.2.4 Name suppression

You have a discretion (usually under enhanced jurisdiction) to grant a name suppression order to prevent anyone publishing:

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

When deciding on name suppression you may ask the question:

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

Suppression should be made in all cases involving children under the age of 18, in both criminal and civil cases and in cases involving victims of sexual and family violence offences.

The suppression order (pseudonym) should be applied to all public references of the case, including in court listings and judgment.

8.3 Procedural matters

8.3.1 Who may prosecute

Section 197 Criminal Offences Act (COA).

All prosecutions under the Criminal Offences Act may be brought by the Attorney General or the complainant.

8.3.2 Disclosure to the defence

Clause 11 Constitution; s 90 MCA; ss 12, 53, 54A-I, and 65 Evidence Act (EA).

Natural justice requires that the defendant is entitled to know what the charge is and the grounds for that charge set out in a written indictment before they enter a plea to the charge: cl 11 Constitution.

At the hearing of the charge, if there are any minor irregularities or defects in the substance of the warrant or any variance between the warrant and the written complaint or charge which you may amend without injustice to the defendant, you may amend the charge. If you think that the defendant has been misled by the charge as originally stated, you may adjourn the hearing: s 90 MCA.

Defence counsel should know the evidence against their client before they advise them what to do. Whenever possible the defence should have the opportunity to make representations based on the fullest information which the prosecution has gathered and from which the prosecution has made its own selection of evidence to be led.

The court has an over-riding and supervisory role in such matters; and a court has a discretion to order disclosure by the prosecution.

A failure to disclose may result in a material irregularity in trial, justifying a conviction being set aside on appeal.

See *R v Fungavaka* [1997] Tonga LR 230 citing *R v Livingstone* [1993] Crim LR 597.

The prosecution should provide the following disclosure documents to the defendant as soon as practicable after the defendant is charged or at the preliminary inquiry:

- list of names and number of witnesses that are or are not required to testify at trial;
- any witness statements;
- expert reports;
- photographs; and
- other disclosure documents.

You may allow the prosecutor to tender as exhibits in a trial:

- expert reports, forensic accounts, photographs, maps or plans drawn by surveyors, electronically or digitally stored or transmitted data or record: ss 12, 53, 54A-I EA; and
- such other professional reports;

without requiring the maker of such report, photographer or the keeper of the records to personally appear in court to testify: s 65 EA.

The evidence so provided is for the purposes of establishing the existence of such evidence; and the contents of such evidence but the weight of such evidence is up to your discretion.

8.3.3 The mentally ill defendant

Sections 17-20 Criminal Offences Act (COA).

People suffering from mental illness are over-represented in criminal justice systems, and special care must be taken to ensure their rights are protected and that they are not subjected to unlawful detention or discrimination in the conduct or outcomes of their cases.

A defendant whose mental illness is such that it prevents them from understanding the physical nature or quality of their conduct and that it is wrong, cannot make a lawful plea: s 17 COA.

If the defendant is charged with a summary of offence and mental illness may be an issue, the matter is referred directly to the Mental Health Unit at Vaiola Hospital for assessment. A report is then filed and the matter will proceed depending on the outcome of the report.

For example, there have been cases where the report states that a mentally ill person is fit to enter a plea. The matter will proceed as normal with any relevant circumstances, such as mitigating factors concerning their mental health, taken into account in sentencing. Some reports request for the defendant to remain in the care of the unit for treatment etc.

Sections 18-20 of the COA set out the process in the Supreme Court for dealing with a defendant who has been found to be insane, or rather, lacks the capacity to form the relevant level of criminal intent.

Police have powers to divert people with mental illness away from criminal justice processes by referring them for medical assessment: s 60 Mental Health Act (MHA).

Part IX of the MHA deals with the detention of persons subject to the COA (forensic patients) and their criteria for admission to a mental health facility.

When a person is charged and brought to court, if the court determines that the person could benefit from mental health assessment and treatment, the court may order that a person be taken to a mental health facility for assessment: s 63 MHA.

If a person with mental illness is convicted of an offence, the court may make an interim treatment order for up to four weeks for assessment of the person's condition. The Court may then take the time taken for the assessment into account in sentencing: s 66 MHA.

Based on a certificate from a psychiatrist confirming the person meets the criteria for involuntary admission to a mental health facility, the court may decide to make a treatment order as part of a sentence, or instead of a sentence s 67 MHA.

Where a person has been found to be unfit to stand trial or not guilty of an offence, due to insanity, then the Supreme Court can order their admission to a mental health facility as a forensic patient: s 80 MHA.

Their status as a forensic patient will then be reviewed at minimum six monthly intervals by the Mental Health Review Tribunal: s 81 MHA.

8.3.4 Victims of crimes

Victims of crime are usually the main prosecution witnesses. While there is no specific legislation dealing with victims in Tonga, under international standards[1] victims are entitled to:

- be treated with compassion and respect for their dignity;
- a fast, fair, cheap and accessible judicial process;
- be informed of their rights, role and the progress of their cases;
- be heard at appropriate stages of the case;
- proper assistance and support throughout the legal process; and
- a process which protects their privacy, ensures their safety from intimidation and retaliation, avoids unnecessary delay and minimises inconvenience to them.

[1] *UN Declaration Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)*

Magistrates are expected to treat victims with courtesy and compassion and create an environment where they can give their evidence in safety, both physical safety and psychological safety. You should make sure that victims can wait in safe, separate areas so that they are protected from intimidation prior to entering the court room. You should prevent defence lawyers or defendants from intimidating or humiliating victims of crime while in court.

Especially vulnerable witnesses, such as the young, very old, or disabled, are entitled to special measures as witnesses. You may use screens and allow people in wheelchairs to give evidence from the floor instead of the witness box and allow a family member or friend to sit with a child victim or elderly victim while giving evidence.

8.3.5 Victims of sexual offences

Section 11 EA.

For sexual offence victims the crime is more than an assault. Due to the sexual nature of the acts, the physical invasion of the person, cultural factors which shame victims and the re-traumatising impact of the legal process itself, victims often experience feelings that are not present in other types of crimes.

Some factors that make sexual offence trials particularly distressing for victims are:

- the nature of the crime;
- the role of consent, with its focus on the credibility of the victim;
- the likelihood that the defendant and victim knew each other before the alleged offence took place;
- the re-traumatising effect of the legal process; and
- cultural factors where judgement and shame projected onto victims is internalised by victims.

The role of consent makes adult sexual offence trials different from most other criminal proceedings. Behaviour that is ordinarily legal becomes illegal in the absence of consent. Often the trial comes down to the word of the victim against the word of the defendant. Therefore, the trial often turns on whether the victim is a credible witness. Where the credibility of the victim is at issue, the defence will cross-examine the victim to try and discredit them. This may further victimise the victim. Did the victim and defendant know each other before the offence occurred? This can increase the distress and difficulty experienced by the victim because they have been betrayed by someone they trusted and may still have on-going contact with.

The trial process adds to the difficulty that sexual offence victims experience because they:

- must face the defendant in court;
- are usually required to recount the offence against them in explicit detail in order to establish the elements of the offence; and
- may be subject to cross-examination by counsel or by the defendant if there is no defence counsel, which can be very intimidating and traumatic for the victim and their family.

In all criminal proceedings for rape or other sexual offences, evidence that the victim voluntarily made a statement about that offending at or shortly after the alleged crime, may be given to show that the person's conduct is consistent with their evidence at the trial: s 11 EA.

Note, the absence of a contemporaneous statement does not show the contrary (ie: that not reporting or providing a statement straight away cannot be taken to be conduct inconsistent with their evidence at the trial). Victims of sexual offences often find it difficult to disclose to anyone what has happened to them and may be understandably fearful of reporting the offence to the police, starting the legal process.

You should take special steps to ensure the physical and psychological safety of the victim when they come to court, so they can give their evidence without fear, including by:

- ensuring the victim will have a support person with them when they come to court;
- arranging for the victim to wait in a separated area so they are not at risk of intimidation by the defendant or others prior to them entering the court room;
- protecting the privacy of the victim by allowing them to give evidence in closed court or via video link and removing identifying details, such as their name, from public records of the court proceeding and the judgment;
- allowing a support person to sit with the victim while they give their evidence;
- reassuring them they are safe to say the truth about what happened;
- arranging for the victim not to face the defendant in court (use screens, video recordings etc);
- protecting the victim from being harassed or bullied;
- take regular court breaks to help the victim's concentration and take breaks if they become upset;
- be mindful of the limits on questions around prior sexual conduct when deciding which questions you should allow to be asked in cross-examination; and
- in cross-examination, ensure counsel does not intimidate or treat the victim with disrespect. If the defendant is unrepresented, do not allow them to directly question the victim, but rather ask the defendant to direct their questions to you, so you can ask the victim the questions.

8.3.6 Child witnesses

Section 116 EA

There are specific provisions on dealing with the evidence of children under section 116 of the Evidence Act (EA). They may provide unsworn evidence if you think they do not understand the nature of an oath but understand their duty to speak the truth.

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

This evidence must be corroborated by some other material evidence in support where it implicates the defendant, before you convict them.

It is an offence for a child to wilfully give false evidence and the maximum penalty is imprisonment for two years on conviction or if male, the defendant may be whipped.

You should take special steps to ensure the child is not distracted or frightened in court proceedings before you. These may include:

- ensuring the child will have a support person with them when they come to court;
- arranging for the child to wait in a separated area so they are not at risk of intimidation by the defendant or others prior to them entering the court room;
- protecting the privacy of the child by allowing them to give evidence in closed court and removing identifying details, such as their name, from public records of the court proceeding and the judgment;
- allowing a parent or guardian to sit with the child while the child gives evidence;
- reducing the formality of the setting and adjusting language and tone to put the child at ease as much as possible;
- explaining what is expected of the child simply and clearly and reassuring them they are safe to say the truth about what happened;
- arranging for a child victim not to face the defendant in court (use screens, video recordings etc);
- making sure the questioning of the child uses simple words that can be easily understood;
- not allowing a child witness to be harassed or bullied;
- taking regular court breaks to help the child's concentration. If the child becomes upset, take a break;
- being sensitive to the child's special vulnerability in deciding if you should allow the questions to be asked in cross-examination; and
- if cross examination questions are allowed, ensuring counsel does not intimidate or treat the child with disrespect. If the defendant is unrepresented, do not allow them to directly question the child witness, but rather ask the defendant to direct their questions to you, so you can ask the child the questions.

See the chapter on 'Evidence' to find out more about the rules of child witnesses.

8.3.7 Unrepresented defendant

Section 20 MCA; Part 1 Constitution

Both the complainant and the defendant are entitled to conduct their cases in person or by a licenced lawyer. But due to the expense of hiring lawyers to conduct proceedings, a significant number of litigants appear in the Magistrate's Court on their own behalf: s 20 MCA.

Where the defendant is representing themselves, consider their fundamental rights under Part 1 of the Constitution including:

- their right to a fair hearing in accordance with principles of fundamental justice by an independent and impartial court: clauses 14 and 15 of the Constitution;

- due process at any hearing under clause 11 of the Constitution; and
- the burden of proof that is on the police to prove the charge(s) beyond reasonable doubt (see the "Dealing with evidence" chapter).

Most have little or no idea of court procedures and what is involved and rely on the system to assist to some extent. If possible, all defendants charged with an offence punishable by imprisonment should be legally represented or it is very challenging to conduct a fair trial. In these situations, the court can refer the person's case to the Law Society to seek appointment of a pro bono legal representative, and where no lawyer is available, modify the regular process to ensure fairness.

A defendant who is appearing in court and is not legally represented may have the following issues:

- feeling fear, anxiety, frustration, impatience or annoyance;
- being unfamiliar with their surroundings;
- not knowing or understanding the laws, the court procedures or their rights;
- not knowing or understanding the rules of evidence; and
- feeling the process is unfair.

If legal representation is not available or if the defendant does not want it, then you are to ensure that they understand:

- the charge(s);
- that if found guilty, there is a probability of an imprisonment term (if this is likely); and
- the process, including any decisions they may need to make within the process and the legal consequences of those decisions (such as the decision whether to plead guilty or not). It is very difficult for unrepresented defendants to make such decisions without the benefit of independent legal advice.

Potential language difficulties may prevent the defendant from understanding the nature of the charges and the court process. You may have to adjourn their case until an interpreter is sworn in who can assist them.

Likewise, any learning or other disabilities may impact on their ability to understand the proceedings. They may need assistance from a duty solicitor or other respected elder or family member.

8.3.8 The defendant

The defendant is entitled to be present in court during the whole of their trial unless they behave so badly it is impractical for them to remain.

Where a defendant is required to appear in court, but fails to do so, if unrepresented you may:

- adjourn the hearing of the case to a later date; or
- after proof of service of the summons, hear and determine the case in the absence of the defendant; or
- after proof of service of the summons, issue a warrant for the arrest of the defendant and adjourn the hearing: s 21(1) MCA.

8.3.9 Contempt of court

Section 70 MCA, ss 63-65 COA

You have the inherent power to control your court and to deal with contempt of court by the defendant or other people. However, this power should be exercised sparingly as it is much better to adjourn the case and have a responsible person talk to the defendant.

There is much to be said for judicial blindness and deafness. Sometimes you see something objectionable or hear something. If it is not too serious or a direct challenge to your authority you may:

- be best to simply ignore it;
- adjourn the case and take the heat out of the issue;
- order the person be removed from court (assuming they are not the defendant or a litigation party). Before you do this, you must be sure there is someone, preferably a police officer, who can carry out your order.

People who do not behave in court will usually respond to polite but firm requests to stop. Failure to respond to your request should be followed by a warning and then you may want to consider contempt of court charges but only in serious cases.

Very occasionally, to bring uncooperative witnesses into line or to advance proceedings, it may be necessary to find a witness in contempt of court. You may find a witness in contempt when they:

- refuse to be sworn or affirmed;
- refuse to give evidence when ordered by you; or
- pretend to misunderstand the questions put to them: s 70 MCA.

First offer the witness the chance to take legal advice. The court should appoint legal counsel if necessary.

At your discretion, you may sentence someone who is guilty of contempt of court, to be imprisoned for not less than one hour and not more than one month: s 70 MCA.

Any sentence for contempt of court must be passed by you on the spot after a warning has been given to the witness. The court clerk should then immediately make out the warrant and hand it to the police so that they can detain the person. Because it is designed to advance proceedings, no person can be prosecuted for contempt at another sitting of the court.

Giving false evidence is a form of contempt and may additionally constitute one of the following offences under the COA:

- perjury: s 63;
- making a false statement: s 64;
- interference with the course of justice: s 65.

In *Attorney General v Namoa* [2000] Tonga LR 59, the Supreme Court confirmed:

> "The test, then [for contempt of court], is whether there is a real risk of undermining public confidence in the administration of justice. The types of contempt that will amount to scandalising the court are extreme and would go beyond any form of mere criticism. Scurrilous abuse of the court or judge may amount to scandalising the court if it is likely to undermine public confidence in the court's function. Similarly untrue allegations of bias or impropriety will amount to a serious contempt because of the tendency to undermine the very basis of the judge's function."

In *Attorney General v Moala (No 2)* [1996] Tonga LR 164 the Supreme Court found that contempt of court was committed. A newspaper article that claimed amongst other things, justice was not able to be obtained in the courts in Tonga, was held to be an attack on the courts as an institution thereby affecting the public confidence in the administration of justice.

The defence raised was the freedom to express an opinion, according to clause 7 of the Constitution, on a matter of public interest, but the Supreme Court observed those are not absolute rights.

> "Anyone exercising those rights must observe a duty to act responsibly. It is in that area of finding the balance between the right to freedom of speech and expression of opinion, and thereby to criticise courts on the one hand and of the protection of courts from being brought into disrepute on the other hand, that the hardest task of the court in this sort of case is to be found."

8.4 Case management

The principles of good case management include:

- unnecessary delays should be avoided;
- it is the responsibility of the court to supervise the progress of each case;
- the court must ensure defence, the prosecution, and counsel are aware of their obligations;
- the system should be orderly, reliable, predictable and ensure certainty;
- early settlement of disputes is a major aim;
- procedures should be simple and easily understood; and
- some case types should be prioritized and placed on accelerated time frames (including where the defendant is in pre-trial detention, or in cases involving children or vulnerable complainants).

The goals of case management are to:

- minimise the time anyone spends in pre-trial detention, bearing in mind they are presumed innocent;
- ensure the just treatment of all litigants by the court;
- ensure that the special legal rights of children and other vulnerable persons are upheld through prioritising swift resolution of their cases;
- promote the prompt disposal of cases;
- improve the quality of the litigation process;
- maintain public confidence in the court; and
- use efficiently the available judicial, legal and administrative resources.

8.5 Relevant legislation

- Bail Act (BA)
- Evidence Act (EA)
- Interpretation Act (IA)
- Magistrate's Court Act (MCA)
- Constitution of Tonga (Constitution)

8.6 Checklist

8.6.1 Fundamental rights of the defendant

Part I of the Constitution of Tonga sets out the defendant's fundamental rights for criminal trials including the right to:

- receive a written indictment (except in cases of impeachment, or for small offences within your jurisdiction, or for contempt of court while the court is sitting) which clearly states the offence charged against them and the grounds for the charge: cl 11;
- a fair trial, so that the defendant is not made to give evidence to incriminate themselves or have their life, property or freedom taken away except according to law: cl 14.

Note: When interpreting any Act, the Constitution takes precedence if there is any conflict between that Act and the provisions of the Constitution: s 34 IA.

8.6.2 Open court proceedings

All trials are held in public or open court, unless you order people to be excluded from the court (closed court proceedings) except those that you permit to remain: s 86 MCA.

8.6.3 Name suppression

You have a discretion (usually if you have enhanced jurisdiction) to grant a name suppression order to prevent anyone publishing:

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

When deciding on name suppression you may ask the question:

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

Suppression will not be common – it will be rare but is used in 'sensitive' cases involving young children, victims of sexual offences and so on.

8.6.4 Before you go to court

Make sure that the clerk(s) are present and ready for court to commence including the case list (all criminal cases) for the day with:

- the name of each defendant;
- the offence they are charged with;
- the name of the prosecutor;
- the cases to be called for hearing from the list: s 19(1) MCA;
- the cases against youth offenders listed to be dealt with separately in the "Youth" Court (where everyone below 18 years is dealt with), unless it is appropriate that cases involving children and adults as defendants should be heard together but separate from other cases involving either children or adults: s 19(2) MCA;
- if there is a need to have a court interpreter, then ensure that the person is duly sworn and their role is explained before the proceedings start;
- ensure that you have a police orderly for your court and that they are briefed about the order of proceedings;
- if there are chamber matters, they should be dealt with before the start of court.

8.6.5 When in court

- Start court on time and rise at the expected time. This is not only for your benefit but also for all parties and court staff. General rising times are set by the Chief Magistrate;
- court proceedings are open to the public unless you exclude certain people: s 86 MCA.

8.6.6 Keeping the court record

You should record the following details in the minute book:

- full name, address and date of birth of defendant;
- a photograph or photo identity, where available;
- if the defendant has previous convictions:
  - the court in which the person was convicted;
  - the case reference number given by the court; and
  - the nature of offences for which they were convicted
- date when charge was filed;
- election (if appropriate);
- plea;
- name of counsel;
- if the defendant is unrepresented, that you have raised the matter of legal counsel and they have declined or not arranged legal advice;
- all remands and any conditions;
- the grant of bail and any conditions;

- adjournments and details of any callovers;
- any amendment to the charge (or the Information);
- witness numbers and hearing time for a defended hearing;
- preliminary hearings – whether a prima facie case (on the face of the documents or other evidence) is established or not, committal to the Supreme Court;
- date of conviction (after pleading guilty or trial) or discharge;
- date of the sentence and full details (including reasons) and any award of costs;
- if there is a relevant report on the file, note on the court record:

"see report from ..... on file"

Always fill out, sign, and date the court record making sure that you note what you have done and the reasons for any decision in a case

Longer notes should be dictated and left on the file rather than recorded on the court record. If your reasons are recorded separately to the court record you can indicate this on the court record, for example:

"Bail refused – for reasons, see memo on file"

8.6.7 Suggested order of list cases

Call through:

- defended hearing cases to find out which are ready to proceed and stand down cases according to estimated time for hearing;
- cases where the defendant is in custody to free up police and prison officers;
- stand down cases according to estimated time for hearing;
- adjourned cases and those that had the defendant previously remanded;
- deal with cases so that legal representatives can appear consecutively;
- deal with sentencing matters and judgments near the end of the list;
- finally deal with the balance of the list, usually consisting of guilty pleas which may include closed-court proceedings.

8.6.8 Mentally unwell defendant

A mentally ill defendant cannot make a lawful plea: s 17 COA.

If the defendant is charged with a summary of offence and mental illness may be an issue, the matter is referred directly to the Mental Health Unit at Vaiola Hospital for assessment. A report is then filed and the matter will proceed depending on the outcome of the report.

8.6.9 Witnesses

A party may apply to:

- summon any person as a witness and will give their names and addresses to the clerk to prepare a separate subpoena for each witness for you to sign and seal: s 68 MCA;
- compel their attendance and have you issue a warrant for their arrest if they fail to appear on the due date and adjourn the case: s 69 MCA.

You may:

- ask any question in any form at any time of any witness provided that any party with your leave may then cross examine that witness: s 162 EA;
- require any person present to give evidence or produce any document in their possession and that person is subject to the same rules as if they had been summoned to appear (including being punished for refusal to obey the court): s 163 EA.

8.6.10 Child witnesses

There are special rules that apply to proceedings involving children including:

- closed criminal court proceedings if you decide this is appropriate: s 86(2) MCA;
- at all stages of the investigation or inquiry, the best interests of the child should be the primary consideration;
- child witnesses may give unsworn evidence if you think they do not understand the nature of an oath but understand their duty to speak the truth.
- but this evidence must be corroborated by some other material evidence in support where it implicates the defendant before convicting them: s 116 EA;
- allowing a parent or guardian to sit with the child while the child gives evidence;
- arranging for a child victim not to face the defendant in court (use screens, video recordings etc);
- be sensitive to the child's special vulnerability in deciding if you should allow the questions to be asked in cross-examination.

8.6.11 Victims

Victims of crime are usually the main prosecution witnesses. There is no specific legislation dealing with victims in Tonga. When dealing with victims:

- identify the victim/s;
- at all times treat the victim(s) with courtesy and compassion and respect their privacy and dignity;
- if the victim and offender both want a meeting, encourage that to occur;
- take into account the victim's views on a bail application;
- before sentencing, consider:
  - the impact on the victim;
  - giving the victim the opportunity to speak to the court;

- receiving a victim impact report.

- acknowledge the victim statements (brief summary) in your sentencing remarks;
- avoid "blaming" the victim, for example, stating words like "she was drunk" is not relevant or appropriate unless the victim's actions are clearly relevant to mitigate the offence and you are certain about the facts.

To minimise the distress of victims of sexual offences, you should:

- conduct the trial and control the behaviour of those in the courtroom in a manner that reflects the serious nature of the crime;
- ensure the safety of the victim in the courtroom;
- ensure that court staff understand the danger and trauma the victim may feel;
- consider allowing an advocate for the victim to sit with them during the trial to offer support;
- enforce motions that protect the victim during testifying, such as closing the courtroom and providing a screen to block the victim's view of the defendant. This is especially important where the victim is a juvenile;
- know the evidentiary issues and rules that apply in sexual offence cases to help you to rule on the admissibility of evidence and weigh its credibility eg: corroboration, recent complaint and the inadmissibility of previous sexual history;
- consider allowing a victim impact statement in sentencing.

In all criminal proceedings for rape or other sexual offences, evidence that the victim voluntarily made a statement about that offending at or shortly after the alleged crime, may be given to show that the person's conduct is consistent with their evidence at the trial: s 11 EA.

8.6.12 Unrepresented defendant

Both the complainant and the defendant are entitled to conduct their cases in person or by a law practitioner: s 20 MCA.

If the defendant refuses legal counsel, or legal counsel are unavailable, ensure that the defendant understands:

- the charge(s);
- that if found guilty, there is a probability of an imprisonment term (if this is possible); and
- the process.

Potential language difficulties may prevent the defendant from understanding the nature of the charges and the court process. You may have to adjourn their case until an interpreter is sworn in who can assist them. Likewise, any learning or other disabilities may impact on their ability to understand the proceedings. They may need assistance from a duty solicitor or other respected elder or family member.

8.6.13 Disclosure

Natural justice requires that the defendant is entitled to know what the charge is and the grounds for that charge set out in a written indictment before they enter a plea to the charge: cl 11 Constitution.

At the hearing of the charge, if there are any minor irregularities or defects in the substance of the warrant or any variance between the warrant and the written complaint or charge which you may amend without injustice to the defendant, you may amend the charge. If you think that the defendant has been misled by the charge as originally stated, you may adjourn the hearing: s 90 MCA.

8.6.14 Contempt of court

You have the inherent power to control your court and to deal with contempt of court by the defendant or other people. However, this power should be exercised sparingly as it is much better to adjourn the case and have a responsible person talk to the defendant.

In extreme cases, you may try and punish a witness for contempt of court if they:

- refuse to be sworn or affirmed;
- refuse to give evidence when ordered by you; or
- pretend to misunderstand the questions put to them: s 70 MCA.

9. Sources of law

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9.1 Introduction

The sources of law for Tonga are:

- The Constitution of Tonga;
- Statutes and subsidiary legislation of Tonga;
- English common law; and
- English statutes (where necessary).

9.2 The Constitution

Clause 82 Constitution.

The Constitution is the supreme law of Tonga. Any other law which is inconsistent with the Constitution is, to the extent of the inconsistency, void and of no effect: cl 82 Constitution.

The Constitution itself may be interpreted and therefore is affected by developments in the common law. The courts have upheld the supremacy of the Constitution and must interpret and apply all other laws according to what the Constitution provides: See *Pedras v Rex* [2000] TOCA 4; CA 10 of 2000, 21 July 2000.

9.2.1 Amendments to the Constitution

Clause 79 Constitution.

Amendments to the Constitution require:

- the Legislative Assembly to pass the amendments three times;
- unanimous support by the Privy Council and Cabinet; and
- the King to give his assent and sign the amendment.

However, amendments shall not affect:

- the law of liberty;
- succession to the Throne; and
- titles and hereditary estates of the nobles.

9.2.2 Interpretation of the Constitution

While the Constitution is the supreme law of Tonga, it must be remembered that even the Constitution is subject to interpretation and must be read in light of its context: See *Edwards v Kingdom of Tonga* [1994] TLR 10; CA 907/93, 15 April 1994. See also *Vaikona v Fuko (No 2)* [1990] TLR 68; TOSC 14 of 1990.

Taione anors v Kingdom of Tonga [2005] Tonga LR 67 cited *James v Commonwealth* (1936) 55 CLR 1, [1936] 2 All ER 1449 (PC) at 1464 (approved by the Court of Appeal in the subsequent appeal in *Fuko v Vaikona* [1990] Tonga LR 148 (CA)) where the Privy Council set out guidelines to follow when interpreting the Constitution. These are:

> "(1) first pay proper attention to the words actually used in context;
> (2) avoid doing so literally or rigidly;
> (3) look also at the whole Constitution;
> (4) consider further the background circumstances when the Constitution was granted in 1875;

(5) bear in mind established principles of international laws [not relevant here];
(6) finally, be flexible to allow for changing circumstances."

Human rights treaties can also provide guidance in interpreting constitutional rights and other national laws, especially concerning children's rights (as Tonga has ratified the Convention on the Rights of the Child (CRC)), and the rights of people with disabilities (as Tonga has signed the Convention on the Rights of People with Disabilities (CRPD)).

In *Tone anors v Police*, [2004] Tonga LR 144 the Supreme Court referred to Article 37 of the CRC requiring that the detention of children be used only as a last resort and for the shortest possible time.

Similarly, in *Fa'aoso v Paongo anors* [2006] Tonga LR 268 the Supreme Court also referred to Article 37 of the CRC regarding the police mistreatment of a detained child and the delay in bringing him before a court.

Other international human rights treaties or norms which have acquired the status of customary international law (jus cogens), such as the prohibition on torture, can also be referred to and used to guide interpretation of constitutional rights.

For example, in *R v Vola* [2005] Tonga LR 404 the Supreme Court made reference to Article 6(1) of the ICCPR, to which Tonga is not a party, in deciding to impose a sentence of life imprisonment, instead of the death penalty.

In *Fangupo v R; Fa'aoa v R* [2010] Tonga LR 124 (CA), the Court of Appeal referred to the Convention against Torture and other Cruel Inhumane or Degrading Treatment or Punishment and noted that the prohibition on torture is part of customary international law and is a jus cogens rule from which states cannot derogate, whether or not they are a party to the multiple treaties which prohibit it.

9.3 Legislation

Clause 56 Constitution, s 10 Interpretation Act (IA), s 4(b) Civil Law Act (CLA).

The Legislative Assembly is the main law-making body in Tonga, with Acts being passed by majority after three readings in the Assembly and assent by the King: cl 56.

Legislation in Tonga consists of:

- Acts (statutes);
- subordinate legislation, such as Regulations and Rules.

When any Act gives power to any authority to make rules or regulations this is to be applied according to the rules set out in section 10 of the IA including:

- the power to make forms if necessary;
- for the breach of any rule a fine not exceeding $10 if the rule-maker thinks fit;
- any rule or regulation may at any time be altered or removed by the same authority;
- no rule or regulation shall be inconsistent with the provisions of any Act;
- all rules or regulations must be published in the Gazette.

To see Tongan legislation online go *here*.

In the absence of Tongan law, the common law of England and the rules of equity in force in England may be drawn upon only so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary: s 4(b) CLA.

Otherwise, Tongan Acts will make specific reference to using United Kingdom law as an additional guide. For example, s 67(f) Evidence Act allows admitting certain documentary evidence to be admitted if it complies with any Act currently in force in the United Kingdom.

9.3.1 Understanding and interpreting legislation

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

When interpreting Tongan statutes, you must consider:

- the Constitution;
- the Interpretation Act;
- the preamble to the specific Act itself;
- any definitions or rules of interpretation provided in the specific Act;
- common law rules of statutory interpretation; and
- any relevant human rights treaty obligations (see above)

Where it appears to a court that the Tongan language version of a provision in an Act differs in meaning from the English language version of that same provision, the court may give the provision its correct meaning if it considers that there has been a simple clerical error or error in translation: s 21(a) IA.

But you must treat the Tongan language version of that provision as the true meaning of the law if you think that the difference in meaning goes beyond a simple clerical error or error in translation: s 21(b) IA.

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

Generally, the meaning of certain words and phrases in a statute are usually found in an interpretation or definition section at the beginning of each Act. If not, the word or phrase should be given its natural and ordinary meaning. It is important to note that the meaning of words and phrases in a statute is a question of law and not a question of fact.

When interpreting a word or phrase, consider:

- definitions in the Act (if any);
- relevant Tongan cases that have given a definition for that word or phrase;
- overseas case law in some instances if relevant;
- a legal dictionary;

- the context of how it has been used in the particular Act and section;
- the purpose of the Act.

When an Act says the court:

- "may" do something, this means the power may or may not be exercised, at your discretion;
- "shall" do something, this means you must exercise the power.

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

9.4 Common law

s 3 Civil Law Act (CLA).

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

The Civil Law Act provides that, subject to the words written in any Act, the Tongan Courts should apply the common law of England and the rules of equity in force in England: s 3 Civil Law Act. This applies to criminal law proceedings as well.

English common law is applied only so far as:

- no other Tongan Act or Ordinance is in force;
- the circumstances of the Kingdom and of its inhabitants permit, and subject to such qualifications as local circumstances render necessary: s 4(b) Civil Law Act.

Judges and magistrates can make and develop the law:

- by interpreting existing legislation including the Constitution; and
- by dealing with matters which are not dealt with by statute.

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

9.4.1 The doctrine of precedent

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

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

9.5 Customary law

Tonga does not have customary law. There are no statutes that recognize customary law but in sentencing, judges may take into consideration the custom of reconciliation between families, providing that does not breach the constitutional or human rights of vulnerable victims, such as women and children including those who are victims of family or sexual violence.