

# Kiribati Magistrates Court Bench Book



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## I. Constitutional and Court framework

# 1 The constitutional framework of Kiribati

## 1.1 The Constitution of the Republic of Kiribati

The *Constitution of Kiribati*, established on 12 July 1979, defines the structure of the government, citizenship requirements, and individual rights in Kiribati.

## 1.2 The branches of government

The *Constitution* outlines three branches: Executive, Legislative, and Judicial.

### 1.2.1 The Executive

The Executive power is exercised by the Cabinet, which includes the President (Beretitenti), Vice-President (Kauoman-ni-Beretitenti), appointed Ministers, and the Attorney-General.

#### Te Beretitenti

The President of Kiribati serves as both Head of State and Head of Government. Elected from 3-4 nominees by the Maneaba (parliament), they can serve up to three terms: s [30\(2\)](#) and [32\(5\)](#) *Constitution*.

#### Powers of Beretitenti

The President can act independently in most decisions but may consult others for reconsideration in some cases. They can also withhold assent to bills if they believe they conflict with the Constitution: s [46\(1\)](#) *Constitution* or refer it to the High Court for a ruling on its consistency (s [66\(3\)-\(5\)](#)).

Where the Beretitenti must act with another's advice, they may refer the matter back for one reconsideration before deciding: s [46\(2\)](#) *Constitution*.

If the Beretitenti believes a Bill from the Maneaba contradicts the Constitution, they may withhold assent and, in some cases, refer it to the High Court for a ruling on its consistency: s [66\(3\)-\(5\)](#) *Constitution*.

#### Prerogative of Mercy

The President can pardon or reduce punishments for individuals convicted of offences, following the advice of the Cabinet: s [50](#) *Constitution*.

#### Kauoman-ni-Beretitenti

The Vice-President, appointed by the President from the Ministers, steps in if the President is removed or incapacitated. They also assist with assigned government duties: ss [35](#) and [36](#) *Constitution*.

#### Cabinet

Consists of the President, Vice-President, and up to 12 Ministers: s [41\(1\)](#) *Constitution*.

The Attorney-General was removed as a member of Cabinet in the 2016 amendment: s [40](#) *Constitution* as amended by s [2](#) *Constitution (Amendment) Act 2016*.

### Attorney-General

The Attorney-General acts as the government's chief legal advisor, with the power to initiate or discontinue criminal cases independently: ss 42 and 46 *Constitution*.

#### 1.2.2 The Legislature

The Mwaneaba ni Maungatabu, Kiribati's legislature, passes laws for the nation. It consists of 35 elected members and a member representing the Banaban community in Fiji. Members enjoy certain immunities, though some protections were removed in recent amendments: ss 52-79 *Constitution*.

In 2013, members of the Mwaneaba lost their immunity from civil or criminal proceedings for statements made or written reports submitted to the Mwaneaba: s 3 *Constitution (Amendment) Act 2013*.

#### 1.2.3 The Judiciary

The Judiciary interprets laws, creates case law, and resolves disputes. It includes the Magistrates' Courts, High Court, Court of Appeal, and, in some cases, the Judicial Committee of the Privy Council.

## 2 The court system

### 2.1 General characteristics of the court system

Kiribati has four types of Courts:

- the Judicial Committee of the Privy Council (only on issues involving Banaban rights under *Chapters III and IX Constitution*);
- the Court of Appeal;
- the High Court; and
- the Magistrates' Courts.

### 2.2 The structure of the Kiribati court system

Here is a table with the structure of the court system.

Judicial Committee of The Privy Council (UK)	Sits in the UK. Deals only with appeals from High Court on issues relating to Banabans under <i>Chapters III or IX Constitution</i> .
Court of Appeal	<p>Composed of the Chief Justice along with all members of the High Court and other appointed judges of the High Court.</p> <p>The Judges of this court are appointed by the Beretitenti (President) based on the advice of the Chief Justice and the Public Service Commission. These people must meet certain qualifications: <i>s 90 and s 81(3) Constitution</i>.</p> <p>The President of the Court of Appeal is chosen by the Beretitenti with advice from the Cabinet, after consulting the Public Service Commission: <i>s 91(3) Constitution</i>.</p> <p>The Chief Justice can also serve as the President of the Court of Appeal: <i>s 91(7) Constitution</i>.</p> <p>Any three judges of the Court of Appeal can exercise the court's powers. Decisions are made based on the majority of judges: <i>s 91(4) and (5) Constitution</i>.</p> <p>The Court of Appeal usually meets once a year for about a week to hear appeals from the High Court.</p>

	<p><b>Jurisdiction</b></p> <p>The Court of Appeal handles all criminal and civil appeals from the High Court that involve questions of law. It also hears all appeals from the High Court in land matters</p>
High Court	<p>Composed of the Chief Justice along with any other appointed judges and commissioners.</p> <p>The Beretitenti (President) appoints the Chief Justice after getting advice from the Cabinet and consulting the Public Service Commission. Other High Court judges are appointed by the Beretitenti based on the advice from the Chief Justice and the Public Service Commission: s <a href="#">81(1)</a> and <a href="#">(2)</a> <i>Constitution</i>.</p> <p>If there are not enough judges for the High Court, the Beretitenti can appoint a barrister or solicitor from Kiribati as a Commissioner of the High Court. This appointment is made based on advice from the Chief Justice and the Public Service Commission: s <a href="#">84</a> <i>Constitution</i>.</p> <p><b>Jurisdiction</b></p> <p>The High Court has unlimited authority to hear any civil or criminal case, including those handled by the Magistrates' Court. It also hear appeals from the Magistrates' Court in civil, criminal, and land cases: s <a href="#">67(1)</a> <i>Magistrates' Courts Ordinance</i>.</p> <p>The High Court reviews decisions and handles stated cases from the Magistrates' Courts: s <a href="#">285(1)</a> <i>Criminal Procedure Code</i>; s <a href="#">81(2)</a> <i>Magistrates' Courts Ordinance</i>.</p>
Magistrates' Courts	<p>Single Magistrates on all matters; or</p> <p>3 Magistrates on civil and criminal matters</p> <p>5 Magistrates on land matters.</p> <p>The Magistrates' Courts are lower courts under the authority of the High Court: s <a href="#">3(1)</a> <i>Magistrates' Courts Ordinance</i>.</p> <p>Magistrates are appointed by the Minister with the approval of the Beretitenti (President), based on the recommendation of the Chief Justice. The Minister also decides who will be the presiding Magistrate and who the ordinary Magistrates will be: s <a href="#">7(2)</a> <i>Magistrates' Courts Ordinance</i>.</p>

	<p>If a Magistrate cannot perform their duties, the Minister can appoint a temporary Magistrate, again based on the Chief Justice’s recommendation: s <a href="#">7(2)</a> <i>Magistrates’ Courts Ordinance</i>.</p> <p><b>Jurisdiction</b></p> <p>Magistrates’ Courts handle most civil and criminal cases, except the most serious ones, which go to the High Court. They also deal with all original land-related cases.</p> <p>For more detailed information on the Magistrates’ Courts’ powers , see <a href="#">Chapter 7</a> Jurisdiction.</p>
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## II. The Law

## 3 Sources of law

### 3.1 Five main sources of law

Kiribati law comprises five main sources:

- the Constitution,
- acts, Ordinances, and subsidiary legislation,
- customary law,
- common law,
- applied laws: [s 4 Laws of Kiribati Act 1989](#)

#### 3.1.1 The Constitution

The Constitution is Kiribati's supreme law; any conflicting law is void: [s 2 Constitution](#); [s 4\(1\) Laws of Kiribati Act](#).

The Constitution defines the government structure, citizenship, fundamental rights, and Banaban protections. Constitutional amendments follow a distinct process: [ss 69 and 124 Constitution](#).

#### 3.1.2 Legislation

Legislation includes Acts and Ordinances passed by the Maneaba ni Maungatabu, plus subsidiary laws (eg: schedules and rules). Schedules and other Rules are valid legislation and must be followed.

#### 3.1.3 Customary law

- Customary law, based on customs and usages, existing from time to time of the natives of Kiribati, is recognised in Kiribati: [s 5 Laws of Kiribati Act 1989](#). It is applied according to rules in [Schedule 1](#) and varies by case type.
- Civil cases: Rules found in [s 4 Schedule 1](#).
- Land cases: Decisions guided by the High Court and Court of Appeal on appeal from the Magistrates' Courts.
- Criminal cases: Customary law may only inform criminal cases in aspects like state of mind, reasonableness, and sentencing: [Schedule 1, s 3 Laws of Kiribati Act 1989](#).

#### Inquiring into questions on customary law

Questions about the existence, application, or relevance of customary law are treated as legal questions and can be raised by the court itself: [Schedule 1, s 1\(1\) Laws of Kiribati Act](#).

If such a question arises you should:

- Request submissions from the parties or their counsel and review them.
- Consult case law, legal texts, or similar sources,
- If uncertainty remains, conduct an inquiry during proceedings: [Schedule 1, s 1\(1\)-\(3\) Laws of Kiribati Act 1989](#).

In conducting such an inquiry, you:

- do not have to follow strict legal procedure or technical rules of evidence,
- may call such evidence or require the opinions of people you think fit,
- must admit and consider available evidence (including hearsay and opinion evidence),
- must otherwise inform yourself as you think fit,
- must consider submissions on the question made on behalf of the parties,
- may consult reported cases, books, treaties, works of reference, official reports or statements made by local government councils,
- may accept any matter or thing stated in such sources as evidence on the question: *Schedule 1, s 1(4) Laws of Kiribati Act.*

#### 3.1.4 Common law

Common law is judge-made law based on judicial precedent.

#### Judicial precedent

All courts in Kiribati must follow the decisions of the Judicial Committee of the Privy Council in appeals from Kiribati. Decisions from other countries serve only as persuasive authority: *s 13(1) Laws of Kiribati Act.*

Courts must also adhere to legal rulings from superior courts. The Magistrates' Court must follow decisions of the High Court, Court of Appeal, and Privy Council: *s 13(3) Laws of Kiribati Act.*

#### Common law of Kiribati

The common law of Kiribati includes English common law and doctrines of equity, adapted to local circumstances ("inherited rules"): *s 6(1) Laws of Kiribati Act.*

Kiribati has modified these inherited rules through local legislation and court rulings, making some English rules inapplicable. Because of this:

- rules that were made for England that unsuitable for Kiribati do not apply,
- laws of England made after 1 January 1961 are not applicable to Kiribati, unless Kiribati chooses to adopt them: *s 6(2) Laws of Kiribati Act.*

The common law applies unless it conflicts with:

- the Constitution,
- an enactment or applied law, or
- customary law: *s 6(3) Laws of Kiribati Act.*

#### 3.1.5 Applied laws

Applied law in Kiribati consists of English law as it stood at independence, modified as needed to fit local circumstances: *s 5 The Kiribati Independence Order 1979.*

The Attorney-General can amend these laws to ensure they align with the Constitution, statutes, and customary law: [s 8](#) *Laws of Kiribati Act*.

Once the process of adapting the legislation is complete, the transcript is presented to the Maneaba ni Maungatabu for approval. Once all changes are made and approved by the Maneaba it is published and becomes part of the law of Kiribati: [s 10](#) *Laws of Kiribati Act*

## 4 Interpreting legislation

Your role is to interpret and apply legislation. Typically, statutes include a definitions section at the start. If a term is not defined, use its natural and ordinary meaning.

When interpreting a word or phrase, consider:

- definitions in the Act (if any),
- any relevant definitions in the [Interpretation Act](#),
- a dictionary,
- how it has been used in the particular Act and section (ie: the context it has been used in),
- what purpose Parliament had in passing the law.

When an Act states the Court “may” do something, it grants discretion to act or not. Conversely, if the Act uses “shall,” the action is mandatory.

For any uncertainties in interpreting a section or wording, consult the Chief Registrar for guidance, or seek assistance from a Judiciary member or a lawyer present in court.

## 5 Legal terms

Term	Meaning
Access to justice	Fundamental to upholding and promoting the rule of law. All people should be able to access the courts in order to resolve their disputes.
Adjournment	When a case is put off to another date.
Applicant	A person who applies to a court for an order, direction or decision.
Balance of probabilities	The standard of proof required in civil and family cases. The person bringing the claim has to prove it on the balance of probabilities. This means "more likely than not".
Beyond reasonable doubt	The standard of proof required in criminal cases. The prosecution has to prove all the elements of the offence beyond reasonable doubt. This means you are left in no real doubt at all that the person is guilty.
Burden of proof	This means, who has the responsibility to prove something? In a criminal case, the prosecution has the burden of proving the accused is guilty, beyond reasonable doubt. In a civil case, it is the person bringing a claim who must prove it, on the balance of probabilities.
Cause of action	In civil cases, the type of claim brought by a person against another person, and which explains why that other person should pay money or do something.
Charge	In a criminal case, this is the allegation which the Police make against the accused.
Civil wrong	An act or omission which gives rise to a dispute between individuals or companies. Not a crime.
Common law	Law developed by the Courts through their decisions.
Contested or defended hearing	In a criminal case, a hearing in front of Magistrate(s), where the prosecution tries to prove the accused is guilty. A defended hearing follows on from a not guilty plea.  In a civil case, a hearing in front of Magistrate(s), where the applicant tries to prove their claim. It follows on from the other party not admitting the claim.
Contract	An agreement between two or more people. It can be oral or written.
Crime	An act forbidden by the laws of Kiribati.

Term	Meaning
Customary law	Cultural practice which is relevant to an issue before you.
Decision	The formal process of saying, at the end of the case, what the result is, and what your reasons are.
Defendant	A person charged with a criminal offence.
Discharge	When someone is guilty of a charge, but you do not want to enter a conviction.
Fair and just	Free from favour toward either side and not allowing personal opinions to influence.
Fine	A sum of money you may order an offender to pay in a criminal case, and this must not be more than \$500 on a particular charge.
Hearsay evidence	Indirect, usually second hand evidence.
Human rights	Rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status.
Identification	The formal process of showing that the person before the Court is the correct person.
Impartial/Impartiality	Being free of any interest or bias in a case.
Injunction	A court order saying that a person must do or not do a particular act. Injunctions can be temporary ('interim injunctions') or permanent.
Judgment	The final order or set of orders made by a court after a hearing, often accompanied by reasons which set out the facts and law applied to the case.
Jurisdiction	The lawful power to hear a case, and act.
Lawful justification or excuse	A defence to having done a crime, which is allowed for in Statute or the common law.
Legislation	Law passed by the Maneaba ni Maungatabu, called statutory law, Acts, Ordinances, enactments or Statutes.
Litigant	A person who is involved as a party to the case before you.
Plaintiff	The party making a claim in a civil case.
Plea	In a criminal case, the formal statement as to whether the person admits or denies the charge. Will be either guilty or not guilty.

Term	Meaning
Plea in mitigation	The speech given before sentence, by an offender, or by the offender's lawyer, in which they will give reasons to try to justify a lesser sentence.
Precedent	Previous decisions of the higher Courts which are binding.
Previous convictions	When, at an earlier time, an offender has been found guilty and been convicted of a charge.
Protection orders	An order to prevent domestic violence and facilitate safety and protection for people who experience and fear domestic violence. See chapter 61.
Respondent	The person against whom an application to the court is made (or the opposing party to an appeal).
Right of appeal	In any case you hear, and after your decision has been given, the right a person has to come before a higher Court and have the matter reconsidered.
Sentence, and sentencing	The penalty that an offender must pay or do. You pass sentence after you have either found someone guilty, or that person has pleaded guilty. Usually a fine or imprisonment.
Standard of proof	In criminal cases, the standard of proof is beyond reasonable doubt.  In civil cases, the standard of proof is on the balance of probabilities (more likely than not).
Summary offences	Lower type of offences, usually heard by the Magistrates' Courts.
Summons	A formal document advising someone to come to Court.
To convict	The formal process of recording the guilt of the accused after either a guilty plea or decision of guilt by you.
Ultra vires	Acting ultra vires means acting outside the authority or power legally granted to a court. If a court makes a decision beyond its jurisdiction, that decision is invalid

### III Criminal law and human rights

## 6 Introduction

The *Constitution* guarantees fundamental rights and freedoms for everyone in Kiribati. This chapter focuses on the particular rights which have bearing on the criminal law.

Judges and magistrates must ensure these rights are upheld in the justice system.

Some of the rights particularly important to your role as a magistrate are:

- the right to personal liberty,
- protection from inhuman treatment,
- protection from deprivation of property,
- protection for privacy of home and other property, and
- right to secure protection of law: ss [5](#), [7](#), [8](#), [9](#) and [10](#) *Constitution*.

Kiribati is a party to several international human rights treaties including the Convention on the Elimination of All Forms of Discrimination against Women (CEDW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CTTP), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).

## 7 Right to personal liberty

No person in Kiribati may be deprived of his or her personal liberty, except:

- as a result of his or her unfitness to plead to a criminal charge,
- in execution of the sentence or order of a court in Kiribati or some other country in respect of a conviction for a criminal offence,
- in execution of a court order punishing him or her for contempt of court,
- in execution of a court order made to secure the fulfilment of that person's obligations under the law,
- for the purposes of bringing the person before a court in execution of a court order,
- upon reasonable suspicion of the person having committed or being about to commit a criminal offence under the law of Kiribati,
- in the case of a person under 18 years, with the consent of a parent or guardian or under court order for the purpose of his or her education or welfare,
- for preventing the spread of infectious or contagious disease,
- for the purpose of treatment or protection of the community in the case of a person who is reasonably suspected of being of unsound mind, addicted to alcohol or drugs or is a vagrant,
- for the purpose of preventing unlawful entry of persons into Kiribati or for effecting removal of that person or restricting movement while being conveyed through Kiribati, or
- to such extent as may be necessary in the execution of a lawful order for restricting movement as may be reasonably justifiable where his or her presence would otherwise be unlawful: *s 5(1) Constitution*.

### 7.1 Procedure on arrest

The very strong protections of personal liberty in Kiribati require certain procedural steps to be followed during arrest or detention. You should make yourself aware of these so that you can ensure that all police and court procedures obey the [Constitution](#).

Any person who is arrested or detained must be informed as soon as reasonably practicable of the reasons for his or her arrest or detention, in a language he or she understands: *s 5(2) Constitution*. Any person arrested or detained in execution of a court order or on reasonable suspicion of having committed or being about to commit a criminal offence who is not released, must be brought without undue delay before a court: *s 5(3) Constitution*.

After being brought before a court on suspicion of having committed or being about to commit an offence, if not tried within a reasonable time, then he or she must be released unconditionally or upon reasonable conditions to ensure that he or she appears at a later date for trial: *s 5(3) Constitution*.

Any person unlawfully arrested or detained is entitled to compensation from that other person: *s 5(4) Constitution*.

## 8 Protection from inhuman treatment

No one may be subjected to torture, inhuman, or degrading punishment or treatment: s 7(1) *Constitution*.

However, this does not cover all punishments, like whipping, that were lawful before Independence: s 7(2) *Constitution*.

It is a good idea to be mindful of this right to ensure that police and prison officers act in compliance with constitutional standards.

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987. Kiribati ratified the CAT in 2019. The CAT requires states to prevent and punish torture and other cruel, inhuman, or degrading treatment or punishment within their jurisdictions. States are required to take effective measures to prevent these acts, prosecute or extradite suspected torturers, and provide protection and compensation to torture victims.

## 9 Protection from deprivation of property

For the purposes of criminal law, exceptions to the protection from deprivation of property mostly arises:

- in situations which concern public safety, public order, public morality or public health;
  - this includes confiscating illegal weapons, obscene materials, etc; and
- in situations which concern payment of Court-ordered penalties;
  - this includes fines, compensation, or warrants for distress to pay fines on default, etc: [s 8 Constitution](#).

For the full range of protections and exceptions from the protection from deprivation of property, see [s 8 Constitution](#).

## 10 Protection for privacy of home and other property

For the purposes of criminal law, individuals are protected from searches of their person, property, or unauthorized entry onto premises without consent, except in specific cases:

- in the interests of public safety, public order, public morality,
- to protect others' rights and freedoms,
- to enforce a judgment or court order, or
- to prevent or detect criminal offences: *s 9 Constitution*.

For the full list of exceptions to the right of privacy of home and property, see *s 9 Constitution*.

This right is often relevant when issuing search warrants.

Because constitutional protection of this right is so strong, you should be mindful when granting search warrants. Demand a high level of professionalism from the police and ensure proper procedures are followed when granting search warrants.

## 11 Right to secure protection of law

Section [10](#) of the Constitution outlines several key rights to ensure justice in criminal cases. For this reason you should become very familiar with [s 10](#) and the important rights it confers. These relate to:

- the presumption of innocence,
- the right to be informed of the nature of the offence charged,
- the right to adequate preparation of a defence,
- the right to present a defence, either personally or through an advocate,
- the right to call and examine witnesses,
- the right to an interpreter, if necessary,
- the right to be present during trial,
- the right to a copy of the proceedings,
- protection against retrospective laws,
- the right not to be tried twice for the same offence,
- the right against self-incrimination,
- the right to an independent and impartial adjudicator, and
- the right to a public hearing: [s 10 Constitution](#).

### 11.1 The presumption of innocence

Every person who is charged with a criminal offence is presumed innocent until he or she is proved or pleads guilty: [s 10\(2\)\(a\) Constitution](#).

While all accused persons are innocent until proved guilty, the law may still impose on an accused the burden of proving particular facts: [s 10\(11\)\(a\) Constitution](#).

### 11.2 The right to be informed of the nature of the offence charged

Every person who is charged with a criminal offence must be informed as soon as reasonably practicable of the nature of the offence charged in detail and in a language he or she understands: [s 10\(2\)\(b\) Constitution](#). This ensures they can adequately prepare a defence.

### 11.3 The right to adequate preparation of a defence

Every person who is charged with a criminal offence must be given adequate time and facilities for the preparation of his or her defence: [s 10\(2\)\(c\) Constitution](#).

Allowing adequate time and facilities acts as a counterbalance to the power of the State (which has resources to investigate and prosecute criminal offences) and gives an accused the chance to present their best case. The time and facilities needed depend on case complexity, need for consultation, and evidence quality.

### 11.4 The right to present a defence personally or through an advocate

The accused has the right to defend themselves in person or through a chosen representative: s [10\(2\)\(d\)](#) Constitution.

For serious cases, advise the accused to seek help from the Office of the People's Lawyer/Public Legal Service.

### 11.5 The right to call and examine witnesses

The accused can examine prosecution witnesses and present their own witnesses on equal terms as the prosecution: s [10\(2\)\(e\)](#) Constitution.

The adversarial system is based on each side having the opportunity to present its evidence and to question the evidence of the other side through cross-examination. To maintain this balance, the accused has the right to call and examine witnesses on the same terms as the prosecution. To do otherwise would disadvantage the accused and would disrupt justice.

### 11.6 The right to an interpreter

If the accused does not understand the trial language, a free interpreter must be provided: s [10\(2\)\(f\)](#) Constitution. Without this, they cannot mount a proper defence.

If you believe that an accused does not sufficiently understand the proceedings, stop the proceedings and use the clerk, or find another interpreter to help the accused.

### 11.7 The right to be present during trial

Except with the accused's consent, the trial of a criminal offence must not take place in his or her absence unless:

- the accused's conduct renders the continuance of the proceedings in his or her presence impracticable; and
- the court has ordered his or her removal and the trial to proceed in the accused's absence: s [10\(2\)](#) Constitution.

### 11.8 The right to a copy of the proceedings

Upon request and payment of a reasonable fee, the accused or their representative is entitled to a copy of any record of the court proceedings: s [10\(3\)](#) Constitution.

The court is a public place and so are the proceedings unless the court has been closed for exceptional reasons, which are rare. As a consequence the court record should be available for examination.

### 11.9 Protection against retrospective laws

No one can be found guilty of a criminal offence if the act or omission was not a crime at the time it occurred: s [10\(4\)](#) Constitution.

This rule ensures that individuals are not held criminally liable for an act which was not criminal at the time the act was done.

No penalty shall be imposed for any criminal offence that is more severe in degree or description than the maximum penalty that might have been imposed at the time the offence was committed: [s 10\(4\) Constitution](#).

For this reason, if a new law increases the penalty before sentencing, the lesser, earlier penalty must apply.

Justice demands that individuals know or be able to find out the penalty for an offence beforehand.

### 11.10 The right not to be tried twice for same offence

A person who has been tried and either convicted or acquitted by a competent court cannot be retried for the same offence or any related offence they could have been convicted of in that trial. There are only two exceptions:

- A new trial may be ordered by a superior court during an appeal or review: [s 10\(5\) Constitution](#).
- A member of a disciplined force may face a criminal trial even if already tried under disciplinary law, but any previous sentence must be considered in sentencing: [s 10\(11\)\(c\) Constitution](#).

Additionally, a person who has been pardoned for an offence cannot be retried for that offence: [s 10\(6\) Constitution](#).

This protection, known as the “rule against double jeopardy”, ensures that once a person is acquitted or convicted, they are not subjected to multiple trials for the same matter.

However, if several charges stem from the same set of facts or form part of the same series of offences, the person may still be tried for a different charge after conviction or acquittal of another: [ss 118\(1\), 122 Criminal Procedure Code](#).

### 11.11 The right not to give evidence and against self-incrimination

A person on trial for a criminal offence cannot be forced to give evidence: [s 10\(7\) Constitution](#).

In the adversarial system, no one can be compelled to testify at trial, as the burden of proof rests solely on the prosecution. You should not consider an accused’s choice not to give evidence as any indication of guilt.

An accused also has a right against “self-incrimination” from the moment they are arrested or detained. This means he or she has the right not to say anything, if doing so would indicate they were guilty or had done something wrong.

Of course, if an accused chooses to testify at trial, the prosecution is allowed to cross-examine the accused as with any other witness.

### 11.12 Right to be free from discrimination

Laws must not be discriminatory in intent or effect: s [15\(1\)](#) *Constitution*. For exceptions, see ss [15\(4\)](#), [\(5\)](#) and [\(6\)](#).

No one should face discrimination by those acting under the law or performing public duties: s [15\(2\)](#) *Constitution*. For exceptions, see ss [15\(6\)](#), [\(7\)](#) and [\(8\)](#).

A law or action is considered “discriminatory” if it treats someone differently in a way that disadvantages them based on race, origin, political views, color, or creed: s [15\(3\)](#) *Constitution*.

## IV. Judicial conduct

## 12 Chief Justice's "Guidelines for Judicial Conduct"

In 2002 the Chief Justice circulated *Guidelines for Judicial Conduct* for the guidance of judicial officers and for the information of lawyers and the people of Kiribati. These guidelines should be followed at all times:

### 12.1 A Code of Conduct for Judicial Officers in Kiribati, being the Judges and Commissioner of the High Court, the Chief Registrar, Single Magistrates and Magistrates

1. The prime duty of a judicial officer is to present before the public an image of justice
2. A judicial officer must be a person of integrity and act accordingly.
3. A judicial officer administers justice to all without prejudice or favour.
4. A judicial officer executes official duties objectively, competently and with dignity, courtesy and self-control.
5. A judicial officer acts at all times both in an official and private capacity in a manner which upholds and promotes the good name, dignity and esteem of the office of judicial officer and the administration of justice. In particular a judicial officer shall be punctual and be in court on time, mindful of the formal courtesies, careful to preserve the dignity of the Court, while maintaining equal respect towards all litigants as well as their lawyers.
6. A judicial officer obeys the laws of the land.
7. A judicial officer does not accept any gift, favour or benefit of whatsoever nature which may possibly influence him or her in the execution of official duties or create the possible impression that this is the case.
8. A judicial officer refrains from acting in an official capacity, especially sitting in court, in any matter wherein he or she has a direct or indirect interest.
9. A judicial officer does not discuss any confidential information which has come to his or her knowledge in an official capacity, except in so far as it is necessary in the execution of duty.
10. A judicial officer executes official duties diligently, thoroughly and speedily. A judicial officer should not long delay in delivering judgment.
11. A judicial officer maintains good order in court and requires dignified conduct from litigants, witnesses, court staff, lawyers and the public.
12. A judicial officer shall report unprofessional conduct on the part of lawyers or prosecutors to the Chief Justice.
13. A judicial officer shall refrain from public support for any political party or grouping.
14. A judicial officer shall not act to the detriment of the discipline or the efficiency of the administration of justice.
15. In judicial work, and in his relations with others a judicial officer should act always for the maintenance of harmony. Disagreement with the opinion of any other judicial officer whether of equal or inferior status, should be expressed in terms of courtesy and restraint.

## 13 Ethical principles

Upon appointment as a Magistrate you have sworn the following oath:

"I,....., do swear by Almighty God that I will well and truly serve the Independent and Sovereign Republic of Kiribati as a judicial officer, and will do right to all manner of people after the laws and usages of Kiribati, without fear or favour, affection or ill will. So help me God.": [s5 Oaths Ordinance](#).

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

### 13.1 "Well and truly serve"

#### 13.1.1 Diligence

You should be diligent in the performance of your judicial duties. This means you should:

- devote yourself to your judicial duties, including presiding in court, making decisions and carrying out other tasks essential to the court's operation,
- bring to each a case a high level of competence and preparation, and
- take steps to enhance your knowledge and skills necessary for your role.

Serving diligently means delivering decisions to the best of your ability while avoiding unnecessary delays. To achieve this, you should:

- be familiar with common offences, the extent of your jurisdiction and court procedures, and
- prepare as much as possible before sitting in court.

### 13.2 "Do right"

#### 13.2.1 Integrity

You should conduct yourself with the utmost integrity to sustain and enhance public confidence in the judiciary.

This means you should:

- make every effort to ensure that your personal and public conduct is above reproach,
- avoid behavior incompatible with the discharge of your role, and
- encourage and support your judicial colleagues to observe the same high standards.

### 13.3 “All manner of people”

#### 13.3.1 Equality

You should conduct yourself and court proceedings in a way that ensures equality under the law. This requires you to:

- treat all individuals (parties, witnesses, court staff, and colleagues) with fairness and without discrimination;
- strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background;
- avoid joining any organization that engages in illegal discriminatory practices;
- address and reject inappropriate comments or behavior, including sexist, racist, or discriminatory language, from court staff, lawyers, or anyone under your direction.

### 13.4 “After the laws and usages of Kiribati”

#### 13.4.1 Lawfulness

You must always act within the authority of the law. This means you should:

- not take into account irrelevant considerations when making decisions. Your decisions should only be influenced by legally relevant considerations;
- not abdicate your discretionary powers to another. **You** must make the decision;
- defend the constitutionally guaranteed rights of the people of Kiribati.

### 13.5 “Without fear or favour, affection or ill-will”

#### 13.5.1 Judicial independence

Judicial independence is essential for ensuring justice. You must uphold and demonstrate this independence both personally and institutionally by:

- exercise your judicial functions independently and free from irrelevant influence,
- reject any attempts to influence your decisions outside of the court,
- uphold arrangements and safeguards to ensure judicial independence,
- promote high standards of judicial conduct.

#### 13.5.2 Impartiality

Justice demands that you not only be impartial but also **appear** impartial in your decision-making.

Impartiality requires you to refrain from hearing cases in which you have a personal involvement, either through the parties involved or through the subject of the case.

To ensure impartiality, you should:

- not let decisions be influenced by:
  - bias or prejudice, or

- personal or business relationships or interests;
- as much as reasonably possible, manage your personal and business affairs to reduce situations where you might need to disqualify yourself from hearing cases.

Impartiality affects various aspects of your conduct, including:

### 1. Judicial conduct

Maintain control of court proceedings and treat everyone with courtesy and respect.

### 2. Civic and charitable activities

You may engage in community, charitable, or religious activities, but avoid:

- activities that interfere with your duties or reflect poorly on your impartiality.
- using your judicial role to advance the causes of others.
- participating in groups likely to be involved in legal cases.
- offering legal advice.

### 3. Political activities

You must avoid any behaviour that, to a reasonable and fair-minded person, could cast doubt on your impartiality regarding matters that may come before the court.

Specifically, you should not:

- join political parties or engage in political fundraising;
- attend political events;
- donate to political parties or campaigns;
- participate in public political debates, except on issues affecting the judiciary or fundamental aspects of the administration of justice.

### 4. Conflict of interest

- If you believe you cannot be impartial, you must disqualify yourself from the case.
- Do not preside over cases involving close family members, friends, or where you have a direct interest.
- For more distant relatives or acquaintances, consider whether your relationship might create a perception of bias. If a reasonable person could suspect bias, disqualify yourself.
  - For example, do not sit on a case involving a distant relative if you have a particularly close relationship with them.
- Avoid cases where you have preconceived views about the issues, witnesses, or parties involved.
  - For example, if you witnessed an accident, do not handle any case related to that incident, as you may favor your own recollection over the evidence presented in court.

Disqualification is not required if:

- the perceived conflict is minor and does not provide a strong basis for disqualification,
- there are no other magistrates available to handle the case, or
- urgent circumstances exist where not acting could result in a miscarriage of justice

If disqualification is necessary, procedures are in place to appoint a replacement, ensuring the case proceeds fairly and without bias: See [s 11 Magistrates' Courts Ordinance](#).

If too many magistrates need to disqualify themselves, report the situation to the Chief Justice.

## 14 Leaders Code of Conduct

[The Leaders Code of Conduct Act 2016](#) established the Code, which applies to the Chief Justice, Judges, Magistrates, and court registrars: s 3.

Leaders must maintain the dignity and independence of their roles, act in the public interest, and avoid decisions driven by self-interest: s 2.

Obligations on leaders under the Code are:

- Respect for the law: s4.
- Respect for the people: s5.
- Economy and efficiency in public resource use: s6.
- Merit-based appointments: s7.
- Give and accept gifts in accordance with custom, but do not accept bribes: s8.
- Declare and avoid conflicts of interest: s9.
- Avoid involvement in government contracts where there is a personal interest: s10.

The Leadership Commission handles complaints, investigates allegations, and educates the public on the Code: ss 13 – 16.

## 15 Conduct in court

### 15.1 Preparing for a case

Before court proceedings, thoroughly review and understand the case files and have the relevant legislation on hand.

#### 15.1.1 Criminal jurisdiction

- Familiarize yourself with the offences and the elements that need to be proven.
- Be prepared for interlocutory applications that may arise in the course of proceedings.
- Be prepared to deliver rulings at short notice.

#### 15.1.2 Civil jurisdiction

- Study the file, affidavits, etc.
- Identify the issues in dispute and the relief sought.

### 15.2 Right to be heard

A core principle of natural justice, developed from common law, requires that all parties affected by a decision have a full and fair opportunity to be heard. This procedural rule aims to guarantee that all relevant information is considered before a decision is made.

To uphold this principle, you must:

- provide adequate notice for the person to prepare their case;
- allow time for the person to gather supporting evidence;
- permit time for the person to rebut the opposing party's claims.

**Note:** While parties must be heard, you are not obliged to accept their views and may weigh their relevance and credibility.

This principle involves three key aspects:

#### 15.2.1 Prior notice

- Ensure that adequate legal notice has been given to the parties.
- If the accused or respondent does not appear, verify that documents (warrant or summons) have been properly served.
- Notice must allow sufficient time for preparation; if not, adjourn the matter to provide more time.

#### 15.2.2 Fair hearing

- Manage the hearing and witness examination to ensure all parties have a chance to be heard.

- Hear all sides, allowing parties to address, contradict, or correct any unfavourable material, and allowing further time to deal with any new and relevant issues that arise.
- Ensure you have all relevant facts and evidence before making a decision.

### 15.2.3 Relevant material disclosed to parties

All relevant information should generally be shared with the parties. Those likely to be affected by a decision must be given a chance to address any unfavourable material you intend to consider.

Before a hearing is concluded, you should ask yourself:

“Has each party had a fair opportunity to state his or her case?”

## 15.3 Courtroom conduct

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

- Be punctual, sit at the time appointed, do not be late.
- Be courteous and patient.
- Be dignified.
- Be humble:
  - If a mistake is made you should apologise - there is no place on the Bench for arrogance.
- Continually remind yourself that a party is not simply a name on a piece of paper:
  - The parties are looking to the Court to see justice is administered objectively, fairly, diligently, impartially, and with unquestionable integrity.
- Never make fun of a party or witness.
  - A matter which may seem minor to you, may be very important to a party or witness.
- Show appropriate concern for distressed parties and witnesses.
- Never state an opinion from the Bench that criticises features of the law:
  - Your duty is to uphold and administer the law, not to criticise it.
  - If you believe that amendments should be made, discuss the matter with the Chief Justice.
- Never say anything or display conduct that would indicate you have already made your decision before all parties have been heard.
- Do not discuss the case or any aspect of it outside of the judiciary.

## 15.4 Maintaining the dignity of the court

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

- Keeping order in court;

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

Deal effectively with unruly accused persons, parties, witnesses and spectators by:

- being decisive and firm;
- dealing promptly with interruptions or rudeness;
- clearing the court or adjourning if necessary.

## 15.5 Communication in court

### 15.5.1 Speaking

- Use simple language without jargon.
- Make sure you know what you want to say before you say it.
- Avoid a patronising and/or unduly harsh tone.
- Generally, do not interrupt counsel or witnesses.
- Always express yourself simply, clearly and audibly. It is important that:
  - the party examined and every other party understands what is happening in the Court and why it is happening;
  - the Court Clerk is able to hear what is being said for accurate records; and
  - the public in the Court are able to hear what is being said.

### 15.5.2 Actively listening

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

### 15.5.3 Questioning

You may ask witnesses questions to clarify any ambiguities in the evidence. However, avoid conducting the case on behalf of the parties. After your questions, allow each party to re-examine the witness, and if needed, consider granting an adjournment to give them time to prepare for re-examination: s 133 Criminal Procedure Code.

### 15.5.4 Questioning in criminal cases

You have broad authority to ask questions but should use it sparingly, as the criminal justice system is adversarial, with the prosecution responsible for proving the case. Your role is to listen and decide, not to conduct the case for the parties.

You should generally not ask questions while the prosecution or defence are presenting their case, examining, cross-examining or re-examining witnesses.

You may ask questions at the conclusion of cross-examination or re-examination, but only to attempt to clarify any ambiguities appearing from the evidence. If you do this, you should offer both sides the chance to ask any further questions of the witness, limited to the topic you have raised.

Never ask questions to fill in gaps in the evidence.

#### **15.5.5 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.

#### **15.5.6 Assisting parties who do not understand**

You will often encounter unrepresented parties who may not fully understand the proceedings.

It is your responsibility to ensure that the accused understands:

- The criminal charges (for criminal cases) or the issues in dispute (for civil cases); and
- the procedures of the court.

For unrepresented accused persons, you should explain:

- the nature of the charge;
- the possible legal consequences, including a potential prison sentence;
- the availability of legal representation;
- that he or she has an obligation to put his or her case.

## 16 Actions against Magistrates

As a Magistrate, you are protected from civil actions for any act taken or orders made in the course of your judicial duties, regardless of whether the act was within your jurisdiction, as long as you acted in good faith, believing you had the authority to do so: s [14](#), Magistrates' Courts Act.

## 17 Working with the court clerk

The court clerk is a vital member of the court system and should be treated with respect and dignity. Collaboration and open communication with the clerk will enhance your effectiveness as a Magistrate and strengthen the justice system in Kiribati.

While the clerk follows your directions in court, they also answer to rules set by the Chief Registrar and Chief Justice.

Sometimes a clerk will interrupt you to correct a problem in court, or give you advice about law or procedure. This is not a sign of disrespect but is simply the clerk doing his or her job. Always carefully consider the clerk's advice even if you do not agree.

### 17.1 Duties of the clerk

Some of the most important duties include:

- keeping accurate minutes of all court proceedings, including minutes of all evidence, judgment, convictions and orders of the court;
- preparing all summonses, warrants, orders, convictions, recognisances, writs of execution, and other documents for your signature;
- attending all Magistrates' Court sessions;
- handling and recording transactions, fees, fines, penalties, and other money paid or deposited in respect of court proceedings;
- translating legislation and other materials into I-Kiribati; and
- performing other duties as assigned by the Chief Justice: s [12\(2\)](#) Magistrates' Courts Act.

These are only some of the many duties which a clerk is required to perform. For further reference, see the [Appendix B: Clerks' Handbook](#).

There are also many things a clerk cannot do. Most importantly, the clerk must not decide or even suggest any decision in a case. Deciding guilt or innocence and the sentence on conviction are matters only you may decide. The clerk may only explain the law and offer advice.

## 18 Sitting in panels

Criminal cases heard by a panel of three Magistrates can present challenges, particularly when disagreements arise.

In order to maintain the dignity of the court, you should always do your best to present a unified front. The following advice will assist:

- Regardless of your role, every Magistrate shares equal responsibility for the decision—it is not solely up to the Presiding Magistrate.
- If you are the Presiding Magistrate, encourage active participation from the other Magistrates. Ensure they stay attentive and engaged.
- If you are sitting as a Magistrate, pass your questions to the Presiding Magistrate to ask, or wait until your turn to ask questions.
- Avoid public arguments. If necessary, adjourn the case so that all the Magistrates can discuss any disagreements in private.
- Draft the judgment in private. If unanimous agreement cannot be reached, the majority decision stands: *s 8 Magistrates' Courts Act*. Once the judgment is drafted, it is final and there should be no arguing when it is presented.

## V. Evidence

## 19 Introduction

Evidence is information used to prove or disprove the facts in a trial. In criminal trials, the prosecution bears the burden of proof to establish the accused's guilt, unless specified otherwise by law.

The subject of evidence and the rules related to it are a complex area of law. This chapter offers a brief overview of evidence and common rules in criminal trials but is not a substitute for detailed study.

Understanding evidence classification is essential for applying these rules effectively.

## 20 Classification of evidence

Evidence is classified based on its form (how it is presented) and content (its relevance to the facts). Both aspects must be considered. For example, oral evidence (which is a form of evidence) given during a trial may be direct or circumstantial (which is the content of the evidence).

### 20.1 Classification by form

This refers to how evidence is presented in court and it is divided into three main categories.

#### 20.1.1 Documentary evidence:

- Information in written or visual documents.

#### 20.1.2 Real evidence:

- Usually, a material object or thing (eg: weapons) 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.

#### 20.1.3 Oral evidence:

- Statements or representation of facts given by witnesses, the most common category of evidence in criminal cases.

### 20.2 Classification by content

Classification by content refers to the way the evidence is relevant to the facts in issue. This classification divides evidence into three categories.

#### 20.2.1 Direct evidence

Evidence that, if believed, directly establishes a fact in, such as seeing events firsthand.

#### 20.2.2 Circumstantial evidence

Circumstantial evidence allows facts in issue to be inferred rather than directly proven. 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.

While individual pieces may be insufficient to establish the facts in issue, multiple pieces often work together cumulatively to form a stronger case.

### 20.2.3 Corroborating or collateral evidence

Corroborating or collateral evidence does not directly or indirectly relate to the facts in issue but supports the credibility or admissibility of other evidence, such as direct or circumstantial evidence (including witnesses). It should come from another independent source, such as an analyst or medical report.

## 21 Documentary evidence

Documentary evidence refers to information contained in written or recorded documents, including:

- public documents (Statutes, parliamentary material, judicial documents, public registers);
- private documents (business records, agreements, deeds);
- plans and reports;
- certificates;
- statements in documents produced by computers (subject to specific rules);
- tape recordings and photographs.

Documentary evidence will always consist of 'out of court' statements or representations of facts. It often raises the issue of hearsay and is usually admissible under exceptions to the hearsay rule.

Original documents are preferred at trial, but copies may be accepted depending on the circumstances. The [Evidence Act](#) outlines the rules for the admissibility of documentary evidence. See [Part II Evidence Act](#).

### Secondary evidence

Secondary evidence refers to evidence that is not original. Examples of secondary evidence include:

- shorthand writing;
- photocopy; or
- fax copy.

In specific instances the *Evidence Act* does provide for copies to be treated in the same manner as originals without having to prove the truth of the copy. See [s 18 Evidence Act](#).

## 22 Real evidence

Real evidence usually refers to material objects or items which are produced at trial. Documents can also be considered real evidence when:

- Their contents are used to identify or confirm their existence; or
- Their physical characteristics (eg: fingerprints, material, appearance) are relevant rather than their contents.

The following may also, in some circumstances, be regarded as real evidence.

- a person's behaviour;
- a person's physical appearance; and/or
- a person's demeanour or attitude, especially when relevant to credibility or hostility as a 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.

When it is inconvenient or impossible to bring some evidence to Court, you may inspect a material object out of Court.

When the inspection of any real or personal property may be material to the determination of the case, you may order the inspection of the property and give directions for the inspection: s [54](#) Magistrates' Courts Ordinance.

## 23 Exhibits

When real or documentary evidence is introduced in court, it becomes an exhibit. Before accepting an exhibit, you should check:

- Has the witness seen the item?
- Has the witness been able to identify the item to the court?
- Has the party seeking to have the item become an exhibit formally asked to tender it to the court?
- Has the other party been put on notice about the existence of the exhibit?

Once an article is accepted as an exhibit, the court must preserve and retain it until the trial concludes. Alternatively, the court may mark and record the item and entrust it to the clerk for safekeeping.

The court's responsibilities include:

- ensuring the exhibit is protected from loss or damage; and
- allowing the defence reasonable access for inspection and examination if the item is entrusted to the police.

## 24 Oral evidence

Oral testimony consists of statements or representations of fact. These statements may be 'in court' statements or 'out of court' statements.

In court statements are defined as those made by a witness who is giving testimony. If a witness wants to mention in his or her testimony a statement made outside of the court, the other statement is an 'out of court' statement.

The distinction between 'in court' statements and 'out of court' statements is very important in the law of evidence. If a witness wants to refer to 'out of court' statements in his or her 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 should be 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 demeanour of the witness,
- 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 or the clerk takes down in writing oral evidence given before the court or that which you deem material.

## 25 Evidentiary issues relating to witness testimony

Key issues related to witness testimony in criminal trials include:

1. competence and compellability including spouses, children and the accused,
2. examination of witnesses,
3. leading questions,
4. refreshing memory,
5. lies,
6. corroboration,
7. warnings against self incrimination, and
8. identification evidence.

### 25.1 Competence and compellability of witnesses

A witness is **competent** if he or she is legally allowed to testify. In Kiribati, all witnesses are competent unless specified otherwise.

**Compellability** means that the Court can require or compel a witness to testify. You may compel a witness to give material evidence in a criminal trial, subject to certain just exceptions.

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

#### 25.1.1 The accused

The accused is competent, **but** he or she is not a compellable witness, meaning that an accused cannot be forced to testify against himself or herself.

#### 25.1.2 Spouses

##### Definition of “spouse”

In order to promote strong marital relations, the law has developed to prevent spouses from having to testify against one another in court, except in specific circumstances.

The definition of spouse includes married, common-law, or customary partnerships: [s 2\(9\) Evidence Act](#).

Former or separated spouses are treated as never married: [s 2\(5\) Evidence Act](#).

##### Evidence for the accused spouse

A spouse is competent and compellable to testify on behalf of the accused unless jointly charged: [s 2\(1\) and \(4\) Evidence Act](#).

### Evidence for the prosecution against the spouse

In the Magistrates' Court, the wife or husband of the accused are compellable to give evidence for the prosecution or on behalf of any person jointly charged with the accused in cases involving assault, injury, or threats to the spouse, minors or dependents under 16 years of age at the time of the offence: *s 2(3) Evidence Act*.

Where the husband and wife are jointly charged with an offence, neither is competent or compellable for the prosecution unless the spouse is no longer liable to be convicted of that offence as a result of pleading guilty or for any other reason: *s 2(4) Evidence Act*.

Spouses may only be compelled to testify for the prosecution in cases involving sexual offences under *Part XVI Penal Code*, which is outside your hearing jurisdiction.

The English case *R v Pitt [1983] QB 25*, 65-66, sets out a number of points relating to a spouse who is competent but not compellable for the prosecution. These points are:

- the decision to testify lies with the spouse, who can refuse;
- if the spouse waives the right of refusal, he or she becomes an ordinary witness and, in some cases, may be treated as a hostile; and
- although not a rule of law or practice, it is desirable that when a spouse is determined a competent but not a compellable witness, that the judge [or Magistrate] explain that he or she has the right to refuse to give evidence but if he or she does choose to give evidence, he or she will be treated like any other witness.

#### 25.1.3 Children

A child under 14 may give evidence without an oath if you determine that the child:

- has sufficient intelligence to justify the reception of the evidence; and
- understands the duty of speaking the truth: *s 3(1) Evidence Act*.

This allows children to serve as competent witnesses even if they do not grasp the implications of an oath. However, if the child gives false evidence, such as would constitute perjury if it had been under oath, he or she may be found guilty of a misdemeanor: *s 3(2) Evidence Act*.

## 25.2 Examination of witnesses

### 25.2.1 General

At any stage of any inquiry, trial or other proceeding, you **may**:

- summon or call any person as a witness;
- examine any person in attendance though not summoned as a witness; or
- recall and re-examine a previously examined person: *s 133 Criminal Procedure Code*.

If a person's evidence is crucial to the just decision of a case, you **must** summon, examine, recall and re-examine any such person: *s 133 Criminal Procedure Code*.

Non-compliance with a summons may result in penalties, including fines (up to \$40) or contempt of court actions: *s 132(1) and s 133 Criminal Procedure Code*.

All evidence should be taken in the presence of the accused, or if his or her personal attendance has been dispensed with, in the presence of his or her advocate (if any): s [179](#) *Criminal Procedure Code*.

### 25.2.2 Examination-in-chief

The purpose of examination-in-chief is to obtain evidence supporting the case of the party calling the witness. It must follow rules regarding hearsay, opinion, and character evidence. Other rules include:

- the prosecution must present all evidence before closing their case,
- restrictions on leading questions, and
- procedures for refreshing memory.

### 25.2.3 Cross-examination

The object of cross-examination is to:

- gain evidence supporting the cross-examining party's version of events;
- challenge the accuracy of the evidence given during examination-in-chief; and
- raise questions about the witness's credibility, if appropriate.

## 25.3 Leading questions

A general rule is that leading questions may not be asked of a witness during examination-in-chief. A leading question is one which either:

- suggests to the witness the answer which should be given; or
- assumes the existence of facts which are in dispute.

Leading questions may be allowed in the following circumstances:

- in regard to formal or introductory matters, for example, the name, address and occupation of the witness;
- with respect to facts which are not in dispute or introductory questions about facts which are in dispute;
- for the purpose of identifying a witness or object in Court; and
- in cases where the interests of justice requires it, at your discretion.

## 25.4 Witness credibility

An important part of both examination-in-chief and cross-examination is establishing or trying to diminish the credibility of the witness being examined.

### 25.4.1 Previous convictions

Witnesses may be questioned about prior convictions unless prohibited by law. If denied, the conviction may be proven: [s 6 Evidence Act](#).

### 25.4.2 Examination-in-chief

Parties may not generally attack their own witness's credibility unless the witness is hostile or adverse, frustrating their case. With the court's permission, credibility may be challenged by showing prior inconsistent statements: [s 7\(1\) Evidence Act](#).

When deciding whether or not to grant leave, you must consider (among other things):

- whether the witness is adverse or hostile to the party or to the party's interest;
- whether the inconsistency sought to be exposed is material to the case: [s 7\(2\) Evidence Act](#).

### 25.4.3 Cross-examination

Questions aimed only at injuring the witness's character are subject to court approval. If necessary, you may warn the witness that he or she is not obliged to answer the question: [s 10\(1\) Evidence Act](#).

Such questions are proper if the accusation's truth would significantly affect the court's view of the witness's credibility: [s 10\(2\) Evidence Act](#).

Such questions are improper if:

- the accusation implied is too remote or irrelevant to credibility, or
- the accusation is trivial compared to the importance of the witness's testimony: [s 10\(2\) Evidence Act](#).

## Inconsistent statements

A witness's credibility can be challenged through prior inconsistent statements without court leave during cross-examination: [s 8 Evidence Act](#).

Before presenting proof of a prior inconsistent statement, the cross-examining party must first outline the circumstances of the statement to the witness and ask whether he or she made such a statement. Only if the witness does not clearly admit making the prior statement may proof of the statement be given: [s 8 Evidence Act](#).

A witness can generally be cross-examined on written statements without seeing the document. If, however, the purpose of cross-examination on the writing is to contradict the witness, his or her attention must be specifically called to those portions of the writing being used: [s 9 Evidence Act](#). You may also require the production of such writing for your inspection: [s 9 Evidence Act](#).

In addition to undermining credibility, a witness proved to have made inconsistent or contradictory statements may be guilty of an offence under [s 105 Penal Code](#).

## 25.5 Refreshing memory

A witness may refer to a document in order to refresh his or her memory, provided that:

- the notes were made by the witness or under their supervision,
- the notes were created at or near the time of the incident (notes made days later are usually inadmissible), and
- the witness uses the notes to jog their memory, not read directly from them—unless the notes are lengthy or complex.

If requested, the accused or counsel has the right to inspect the notes.

## 25.6 Lies

A proven deliberate falsehood (not a genuine mistake) by the accused or a witness affects his or her credibility but does not necessarily indicate guilt. Lies may be motivated by reasons unrelated to guilt. Witnesses proven to have lied may face perjury charges under [s 96 Penal Code](#).

## 25.7 Self-incriminating evidence

A witness may object to providing evidence that could incriminate him or her in Kiribati or any foreign country or expose him or her liable to a civil penalty.

The witness may be required to answer the question, but is protected from the use of the evidence against himself or herself through a certificate of protection.

Evidence, and any derived information, cannot be used against the witness, except for charges of giving false evidence: [s 5\(5\) Evidence Act](#).

If there are reasonable grounds for a witness' objection to giving some evidence, you must inform the witness:

- that if he or she gives the evidence, the court will issue a certificate, and
- the effect of the certificate: [s 5\(2\)\(b\) Evidence Act](#).

Once the witness gives the evidence, ensure that the certificate of protection is given to the witness in respect of the evidence so given: [s 5\(3\) Evidence Act](#).

### 25.7.1 Application to accused

The provisions for issuing a certificate of protection do not apply to an accused giving evidence on:

- the doing of an act which is a fact in issue; or
- the state of mind of the accused which is a fact in issue: [s 5\(6\) Evidence Act](#).

## 25.8 Identification evidence by witnesses

The visual identification of the accused by witnesses needs to be treated with caution, as even honest witnesses can make mistakes. The weight of such evidence depends on the circumstances under which the identification occurred.

The authority on the issue is the English case of [R v Turnbull and Others \[1977\] QB 224](#), where the Court made the following guidelines for visual identification:

- How long was the accused observed, and at what distance?
- What were the lighting conditions?
- Were there obstacles (eg: traffic, crowds) affecting the observation?
- Had the witness seen the accused before? If so, how often and under what circumstances?
- If only occasionally, had they any special reason for remembering the accused?
- How much time passed between the observation and the identification?
- Were there discrepancies between the initial description and the accused's actual appearance?

## 26 Rules of evidence

### 26.1 Introduction

The rules of evidence, developed through common law and statute, are numerous and complex. This section provides a brief overview of key rules commonly encountered in defended criminal proceedings.

### 26.2 Burden and standard of proof

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

#### 26.2.1 Legal burden

The legal burden is the burden imposed on a party to prove a fact or facts in issue. The standard of proof depends on who bears this burden:

- **Prosecution:** Must prove facts 'beyond reasonable doubt.'
- **Accused:** Must prove facts 'on the balance of probabilities', meaning that the person deciding a case must find that it is more probable than not that a contested fact exists.

The general rule is that the prosecution bears the legal burden of proving all the elements in the offence necessary to establish guilt. There are only two categories of exception to the general rule.

#### Insanity

If the accused raises this defence, he or she will bear the burden of proving it, on the balance of probabilities.

#### Express statutory exceptions

The accused must prove any exception, exemption, proviso, excuse or qualification to an offence that is expressly specified in legislation. No proof on behalf of the complainant is required on any of these matters: s [200](#) *Criminal Procedure Code*.

#### 26.2.2 Evidential burden

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 for proving all elements of an offence necessary to establish guilt.

Where the accused bears the legal burden of proving insanity or some other issue, by virtue of an express or implied statutory exception, they will also bear the evidential burden. However, for some common law and statutory defences, once the accused meets the evidential burden, the prosecution assumes the legal burden to disprove the defence.

## 26.3 Presumptions

Presumptions allow certain facts to be accepted without requiring evidence, streamlining trials. Some presumptions are conclusive and cannot be challenged while other presumptions are rebuttable by contrary evidence.

### 26.3.1 Judicial notice

Judicial notice is a specific type of presumption where the court treats certain facts as established without evidence, to save time. This applies to facts that are self-evident or widely recognized in the community, or of which the judge has personal knowledge.

### 26.3.2 Evidence of *mens rea*

The prosecution always bears the burden of proving the accused's required state of mind (*mens rea*) for a criminal conviction.

## 26.4 Admissibility of evidence

You have the discretion to admit, receive and act on such evidence as you deem appropriate. However, during proceedings, objections to evidence may arise and must be addressed systematically. If there are questions or objections to the admissibility of evidence, the parties will be called upon to make submissions to the court.

The submissions on the admissibility of evidence should be dealt with in the following manner:

- the party objecting must state the grounds of the objection;
- the other party must be given an opportunity to reply;
- you should then rule on the objection;
- if you disallow the objection, the objecting party may request it be noted;
- if you allow the objection and hold that evidence to be inadmissible, you must take great care to disregard that part when making your decision at the conclusion of the hearing; and
- in your decision at the conclusion of the case, you should record the objections to evidence and whether you ruled the evidence admissible or inadmissible and on what basis.

If you allow such submissions, use common law rules on admissibility to aid your discretion.

### 26.4.1 Relevance

You may refuse to receive any evidence, even if admissible at common law, if you consider it irrelevant or needless.

### 26.4.2 Weight

Upon evidence being ruled admissible, you must then determine what weight (ie: the amount of importance) the evidence should be given.

### 26.4.3 Discretion to exclude at common law

Every person charged with a criminal offence has the right to a fair trial before a court. To ensure a fair trial, you may exclude admissible prosecution evidence if it is highly prejudicial to the accused.

The discretion to exclude evidence has developed on a case by case basis in relation to particular types of otherwise admissible evidence. The judicial discretion to exclude prosecution evidence has been most commonly used in cases where evidence was unlawfully, improperly or unfairly obtained by the Police or prosecution.

### 26.5 Best evidence rule

The best evidence rule applies to documentary 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 is unavailable due to loss, destruction, or another valid reason, a copy may be produced as it is the best evidence available.

### 26.6 Hearsay rule

Hearsay evidence is information relayed by a witness who did not directly observe the matter in question. For example, a witness telling the court what his friend told him about what she saw the accused do. The witness did not see the accused do anything. It was his friend who saw it, and who should give evidence.

Hearsay evidence is inadmissible if it is presented to prove the truth of a statement made by someone who is not giving evidence.

Despite the general rule, in order to determine whether evidence is hearsay, you must:

- determine the purpose for which the evidence will be used before ruling it hearsay evidence:
  - 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;
  - 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;
  - it would not be hearsay and would be admissible when the statement is used to establish not the truth of the statement itself, but the fact that it was made;
- ensure that the witness who gives the evidence has direct personal knowledge of the evidence contained in the statement if the prosecution relies on the evidence as being the truth of what is contained in the statement.

Hearsay is excluded because the original speaker cannot be cross-examined, making it impossible to test their truthfulness or accuracy. See [Teper v R \[1952\] 2 All ER 447](#) at 449.

While fundamental, the hearsay rule is subject to exceptions under common law.

#### 26.6.1 Exceptions to the hearsay rule

Some of the exceptions to the hearsay rule which exist at common law include:

- confessions;

- dying declarations;
- *res gestae* (certain statements made in the course of, or soon after, a transaction that is the subject of the court's inquiry); and
- telephone conversations.

## 26.7 Opinion evidence

Witnesses may only provide evidence about facts they have personally observed, not their opinions, which are inferences drawn from those facts.

Sometimes the borderline between fact and opinion is a very narrow one, and you must exercise ordinary common sense in deciding whether or not the evidence is admissible and (if so) what weight you should give it.

There are two exceptions to the rule on opinion evidence.

- experts;
- non-experts or lay persons.

### 26.7.1 Experts

Expert witnesses are allowed to give opinion evidence if:

- they are qualified to do so; and
- if the matter requires such expertise.

In order to give opinion evidence, an expert witness must relate to the court his or her background, qualifications and experience, to establish their credentials to speak as an expert in a specific field. Once qualified, they may offer opinions on relevant issues within their expertise.

Expert opinions are admissible only when the issue requires knowledge or skills beyond those of an ordinary person.

Some examples of expert opinion evidence include:

- a registered medical practitioner giving an opinion about a patient's health;
- a registered architect giving an opinion about a building's structure; and
- a qualified motor mechanic giving an opinion about the condition of a motor vehicle.

### 26.7.2 Non-experts

Non-experts may give a statement of opinion on a matter in order to convey relevant facts personally perceived by him or her.

In order for a non-expert or layperson to give evidence of opinion, there must be a factual basis for their opinion.

The witness should be asked to describe the persons or circumstances prior to being asked for his or her opinion.

For example, non-experts have given evidence of opinion in regards to:

- the identity of an object;
- the handwriting of which he or she was familiar;
- a person's age;
- the speed of a vehicle;
- the weather;
- whether relations between two persons appear to be friendly or unfriendly.

## 26.8 Character evidence

### 26.8.1 Admissibility of evidence of bad character

As a general rule, the prosecution is prohibited from presenting evidence of the accused's bad character. This includes previous convictions of the accused that may not form part of the case against him or her, previous misconduct, his disposition towards wrongdoing or immorality, or his bad reputation in the community in which he or she lives.

The only way that evidence of bad character of the accused can be introduced is by exceptions to the rule.

Some of the exceptions to this rule at common law are:

- if evidence of other misconduct forming part of the same transaction of the offence charged is also be admissible at common law; or
- if the accused puts his or her character in issue, evidence of bad character may be admitted at common law; or
- where the accused gives evidence, he or she may in certain circumstances face cross-examination on his character.

### 26.8.2 Admissibility of evidence of good character

An accused may introduce evidence to show that he or she is of good character. However, by doing so, they put their character in issue allowing the prosecutor to cross-examine or, in some cases, question the accused 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 accused, as well as to point to the improbability of guilt. Evidence of good character also becomes very important when sentencing the accused upon conviction of an offence.

## VI. Criminal responsibility

## 27 Introduction

The [Penal Code](#) is the main Statute that sets out those acts or omissions which should be regarded as criminal offences and the rules related to the criminal law in Kiribati.

This chapter will discuss the:

- important principles of the criminal law which govern the conviction of criminal offences in Kiribati,
- defences that can be raised which excuse an accused from criminal responsibility,
- parties which should be held criminally responsible for those acts or omissions,
- attempts to commit an offence, and
- lesser and different offences.

## 28 Principles of criminal law

### 28.1 Burden and standard of proof

The prosecution has the burden, or responsibility, of proving its case. The prosecution must prove **all** the elements of the offence, beyond reasonable doubt.

If, at the end of the prosecution's case, the prosecution has not produced evidence of all the elements of the offence, then there is no case to answer and the prosecution has failed.

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

Remember that the defence does not have to prove anything. It is for the prosecution to prove all elements beyond reasonable doubt. If, after hearing the defence evidence (if any), you have a reasonable doubt on any of the elements, then the prosecution has failed.

### 28.2 Beyond reasonable doubt

You must be certain the accused is guilty based on the prosecution's evidence. If you have any doubt, the accused must be found not guilty, as the prosecution has not met its burden.

### 28.3 What must be proved

All offences involve the:

- actus reus, and
- mens rea.

#### 28.3.1 *Actus reus*: the physical act or omission

This refers to the action or failure to act that breaks the law or causes an unlawful result.

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

An offence may consist of one act or omission or a series of acts or omissions. The prosecution must prove all elements of the actus reus. Failure to do so means no conviction.

#### 28.3.2 *Mens rea*: mental capacity

Most offences also require the prosecution to prove the accused's mental state. This is called the *mens rea*, which may include:

- **intention**: The accused meant to commit the act or desired a specific result;
- **recklessness**: The accused foresaw the possible or probable consequences of his actions and although did not intend the consequences, took the risk;
- **knowledge**: The accused knew the essential facts of the offence;

- **belief:** The accused had a mistaken understanding of the circumstances; or
- **negligence:** The accused failed to foresee a consequence that a reasonable person would have foreseen and avoided.

The two main presumptions regarding *mens rea* that operate in the criminal law are:

- *mens rea* is an essential element of every offence, unless specifically excluded; and
- individuals intend the natural consequences of their actions.

It is presumed that every offence requires a mental element (*mens rea*), even if terms like “knowingly” are not explicitly mentioned in the law. This principle was settled in the English case of [Sherras v De Rutzen \(1985\) 1QB 918](#).

This presumption does not apply if the law clearly states that only the act (*actus reus*) is necessary to constitute the offence.

### Individuals intend the natural consequences of their actions

While the prosecution must prove every element of the offence through evidence, you can presume that individuals intend the natural consequences of their actions: See *R v Lemon* [1979] 1 All ER 898.

## 29 General exemptions to criminal responsibility

Where a person is not criminally responsible for an offence, he or she is not liable for punishment for the offence.

*Part IV* of the [Penal Code](#) sets out the exemptions to criminal responsibility. It may also be necessary from time to time to refer to the [Criminal Procedure Code](#) when dealing with issues of criminal responsibility.

Generally, an accused will argue that he or she should not be punished for an offence because:

- the prosecution has not proved one or more elements of the offence beyond a reasonable doubt; or
- he or she has a specific defence specified in the actual offence (eg: lawful excuse); or
- that he or she was not criminally responsible, relying on one of the defences in *Part IV* of the *Penal Code*.

Where the accused is arguing one of the defences from *Part IV Penal Code*, he or she must point to some evidence to support such a defence. Then it is the prosecution that bears the burden of proving that such evidence should be excluded or that the accused was criminally responsible for his or her act or omission.

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

## 30 Specific exemptions to criminal responsibility from *Part IV Penal Code*

### 30.1 Ignorance of the law

Generally speaking, ignorance of the law is not a valid defence. This is because if knowledge of the law was necessary for conviction, it would encourage people to ignore the law.

The only time that ignorance of the law is a valid defence is if knowledge of the law is expressly declared to be an element of the offence: [s 7 Penal Code](#).

### 30.2 *Bona fide* claim of right

For offences related to property, an accused is not criminally responsible if the act was done with an honest claim of right and without an intention to defraud: [s 8 Penal Code](#).

For example, if Anatatia takes a mat from Bureti, believing it to be the one she lent to him but it was not the same mat, Anatatia is not criminally responsible for theft.

This defence requires the accused to point to some evidence to make out his or her defence, which the prosecution must then overcome to secure a conviction.

### 30.3 Intention

#### 30.3.1 Accident

With the exception of offences which specifically exclude *mens rea* as an element (absolute liability offences), an accused is not criminally responsible for an act which occurs independently of his or her free will or through an accident: [s 9\(1\) Penal Code](#).

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

#### 30.3.2 Intending result

Intention also relates to intending a particular result of an act. Unless expressly declared to be an element of an offence, the result intended by the accused is immaterial: [s 9\(2\) Penal Code](#).

For example, if Bureti tickles Anatatia hard, intending her to laugh and play fight back, and Anatatia suffers a broken rib, then the fact that Bureti intended an innocent result does not matter. He is guilty of an assault causing actual bodily harm.

#### 30.3.3 Motive

Unless expressly declared to be an element of an offence, the reason or motive an accused has for doing an act is immaterial: [s 9\(3\) Penal Code](#).

Even in cases where the accused is acting out of a good motive, the motive does not diminish responsibility, although it may have a bearing on the sentence imposed. For example, if Anatatia steals from a store in order to feed her children, it does not diminish Anatatia's criminal responsibility for the theft.

### 30.4 Mistake of fact

Unless specifically provided, where an accused acts (or omits to do an act) under an honest and reasonable but mistaken belief in any state of things, he or she is not criminally responsible to any greater extent than if that mistaken belief was true: [s 10\(1\) Penal Code](#).

This is because the law tries to punish only blameworthy acts, not those where the accused is acting honestly, even if the accused is mistaken.

For example, if Anatatia takes a mat from Bureti, believing honestly and reasonably, but incorrectly, that Bureti consented to her taking the mat, Anatatia is not guilty of theft.

For some offences, the defence of mistake of fact is not available. For example, a reasonable but mistaken belief as to the age of the complainant for most sexual offences is immaterial: See [s 160 Penal Code](#).

### 30.5 Insanity

An accused is not criminally responsible by reason of insanity if, by reason of a disease of the mind at the time of the act in question, he or she was incapable of understanding the nature of the act or knowing that the act was wrong: [s 12 Penal Code](#).

The *Penal Code* presumes every person is sane until proved otherwise: [s 11 Penal Code](#). For a successful insanity defence, the accused must prove on the balance of probabilities that he or she was insane at the time of the offence and therefore did not have the required *mens rea* for the offence.

If the accused had a disease of the mind but the disease did not in fact render the accused incapable of understanding the nature or wrongfulness of the act, then he or she may still be found criminally responsible: [s 12 Penal Code](#).

#### 30.5.1 Insanity defence

If an accused is found to be not criminally responsible by reason of a disease of the mind, you must make a special finding that the accused is guilty of the act charged but was insane at the time: [s 146\(1\) Criminal Procedure Code](#).

When you make such a finding, you must:

- order the accused to be kept in custody as a criminal lunatic in such place and manner as you direct; and
- report the case to the Beretitenti who will then be responsible to order the person confined to a mental health hospital, prison or other suitable place of custody: [s 146\(2\), and \(3\) Criminal Procedure Code](#).

See [Chapter 8](#) Management of Proceedings for how to deal with an accused who appears to be suffering from mental disease.

### 30.6 Intoxication

Intoxication will serve as a defence to criminal responsibility only if the intoxication made the accused incapable of knowing what he or she was doing or knowing the act was wrong, **and**:

- the state of intoxication was caused **without** his or her consent by the malicious or negligent act of another person; **or**
- the accused was, by reason of intoxication, insane at the time of the act in question: [s 13 Penal Code](#).

If the issue is whether the accused was, by reason of intoxication, insane at the time of the act, the question to consider is, was the accused's mind was so intoxicated that he or she could not have formed the intention to do the act or that the mind of the accused was so affected by alcohol that he or she did not know what he or she was doing at the time.

Intoxication includes states produced by narcotics or drugs: [s 13\(5\) Penal Code](#).

If the accused is not criminally responsible through intoxication caused by the malicious or negligent acts of another, the accused must be discharged.

If the accused is not criminally responsible through intoxication amounting to insanity, he or she must be dealt with according to the provisions for insanity: [s 13\(3\) Penal Code](#). See 4.5 above.

Intoxication must also be taken into account for the purpose of determining whether an accused had formed an intention, specific or otherwise, in the absence of which he or she would not be guilty of the offence: [s 13\(4\) Penal Code](#).

### 30.7 Immature age

#### 30.7.1 Under 10 years of age

Because the law only seeks to punish those who do wrongful acts, a child under 10 years is not criminally responsible for any act or omission: [s 14\(1\) Penal Code](#). This is because the law treats children under 10 years as being incapable of knowing right from wrong.

#### 30.7.2 Under 14 years of age

A child under the age of 14 years is not criminally responsible for an act or omission unless it is proved that, at the time of the act in question, he or she had capacity to know the act was wrong: [s 14\(2\) Penal Code](#).

#### 30.7.3 Sexual intercourse

A male under 12 years is presumed to be incapable of having sexual intercourse: [s 14\(3\) Penal Code](#).

### 30.8 Judicial officers

In order to allow judicial officers to do their job fearlessly, judicial officers are not criminally responsible for any act or omission in the exercise of judicial functions, unless specifically prohibited by the *Penal Code*: [s 15 Penal Code](#).

### 30.9 Compulsion

Generally, those forced to do acts by another person are not held criminally responsible as they are not acting of their own free will.

Specifically, an accused is not criminally responsible if:

- an offence is committed by two or more offenders; and
- the act is done only because, during the whole of the time of the act, the accused is compelled to do the act by threats from one or more of the other offenders; and
- the threats are to instantly kill or cause grievous bodily harm to the accused if he or she refuses to do the act: [s 16 Penal Code](#).

This is a very complicated defence and it is worthwhile to become familiar with its limits through a criminal textbook such as *Criminal Laws of the South Pacific* by Mark Findlay.

#### 30.9.1 Compulsion by husband

If the offence is not treason or murder, a woman may not be criminally responsible if she proves the offence was committed in the presence of and under the coercion of her husband: [s 19 Penal Code](#). For this defence, the accused must prove that she was under the coercion of her husband. It is not enough to simply prove the offence was done in his presence.

### 30.10 Defence of person or property

The common law recognises a right for individuals to defend themselves and their property from others. For this reason, what would otherwise be offences such as assault or murder may not be if the accused was acting in defence of himself or herself or property.

The use and limits of this defence in Kiribati are the same as the principles of English common law, subject to any other law in operation in Kiribati: [s 17 Penal Code](#).

#### 30.10.1 Principles

- A person may use such force as is reasonable in the circumstances if he or she honestly believes them to be in the defence of him or herself or another: [Beckford v The Queen \[1988\] AC 130](#).
- What force is necessary is a matter of fact to be decided on consideration of all the surrounding factors.
- The state of mind of the accused should also be taken into account. This is a subjective test: [R v Whyte \(1987\) 85 CrAppR 283](#).

- Force may include killing the aggressor, but there must be a reasonable necessity for the killing or at least an honest belief based on reasonable grounds that there is such a necessity.
- It would only be in the most extreme circumstances of clear and very serious danger that a Court would hold that a person was entitled to kill simply to defend his or her property, as there are many other effective remedies available.
- The onus is on the prosecution to prove that the accused did **not** act in self-defence or in defence of property, once the issue has been raised by the accused and evidence has been presented: *Billard v R* (1957) 42 CrAppR 1, and [R v Moon \[1969\] 1 WLR 1705](#).

## 31 Parties

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

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

### 31.1 Principal offenders

A principal offender is the person(s) whose actual conduct satisfies the definition of the particular offence in question.

It must be proved that the accused had both the *mens rea* and *actus reus* for the particular offence that they have been charged with, in order to be a principal offender.

In cases where there is only one person who is involved in the offence, he or she will be the principal offender. For example, if Anatatia punches Bureti on the face, Anatatia would be considered the principal offender for the offence of assault.

### 31.2 Accessories

Anyone who commits any of the following acts may be charged with, and found guilty of actually committing the offence:

- anyone who does any act for the purpose of enabling or aiding another person to commit the offence,
- anyone who aids or abets another person in committing the offence, and
- any person who counsels or procures any other person to commit the offence: s [21\(1\)](#) *Penal Code*.

An accessory may be found criminally responsible for all offences unless it is expressly excluded by Statute.

The *actus reus* of an accessory involves two concepts:

1. aiding, abetting, counselling and procuring;
2. the offence.

The mental element (*mens rea*) for an accessory is generally narrower and more demanding than that required for a principal offender. The mental element for principal offenders includes less culpable states of mind such as recklessness or negligence, while the mental elements required for an accessory are:

- knowledge: he or she must know at least the essential matters which constitute the offence; and
- intention: he or she has an intention to aid, abet, enable, counsel or procure. This does not necessarily mean that he or she had the intention as to the principal offence that was committed. Note that a common intention is not required for procuring.

### 31.2.1 Enabling or aiding: s 21(1)(b) Penal Code

Every person who does or omits to do any act for **the purpose of** enabling or aiding another person to commit the offence is:

- deemed to have taken part in committing the offence and to be guilty of the offence; and
- may be charged with actually committing it: [s 21\(1\)\(b\) Penal Code](#).

Enabling or aiding is different from aiding and abetting in two respects:

1. criminal responsibility is attached to those who do not **in fact** aid in the commission of an offence but who engage in conduct **for the purpose** of aiding or enabling. Therefore, the person could be found guilty for an offence because they **tried to aid** even though they did not actually succeed in aiding. See, for example, [R v William Taupa Tovarula & Others \[1973\] PNGLR 140](#); and
2. a person can be found guilty for an offence by **failing or omitting to do something** that enables or aids the person committing an offence.

### 31.2.2 Elements for enabling or aiding

- An offence must have been committed by the principal.
- The accused must have done something (or omitted to do something) for the purpose of assisting or encouraging the principal offender (but need not in fact have assisted or encouraged the principal offender).

### 31.2.3 Aiding or abetting: s 21(1)(c) Penal Code

Every person who aids or abets another person in committing the offence is:

- deemed to have taken part in committing the offence and to be guilty of the offence; and
- may be charged with actually committing it: [s 21\(1\)\(c\) Penal Code](#).

The term “to aid and abet” generally means to give assistance and encouragement at the time of the offence.

To prove the offence of aiding and abetting another person in the commission of an offence, it must be established that he or she:

- is present (actual or constructive), and
- knows the facts necessary to constitute the offence, and
- is actively encouraging or in some way assisting the other person in the commission of the offence.

Actual knowledge of, or wilful blindness towards, the circumstances which constitute the offence is required. This does not mean the same mental state as that required by the principal party in the commission of the substantive offence. Rather, the secondary party must know of the principal's mental state and the facts which would make his or her purpose criminal.

In [Attorney-General Reference \(No 1 of 1975\) \[1975\] 2 All ER 684](#), it was found that some sort of mental link is required between the principal offender and the secondary party in order for there to be aiding and abetting. This requires that the principal offender and the secondary party were together at some stage discussing the plans made in relation to the alleged offence.

In [Wilcox v Jeffrey \[1951\] 1 All ER 464](#), the Court held that mere presence alone is insufficient to act as an encouragement. There must, on behalf of the secondary party, be an intention to encourage, or actual encouragement, beyond an accidental presence at the scene of the crime.

In [R v Allan \[1965\] 1 QB 130](#), the Court held that, to be a principal in the second degree to an affray, there must be some evidence of encouraging those who participated. Courts cannot convict a man for his thoughts unaccompanied by any other physical act beyond his presence.

See also: [Johnson v Youden \[1950\] 1 KB 554](#) per Lord Goddard, [Gillick v West Norfolk and Wisbeach Area Health Authority \[1986\] 1 AC 112](#), and [R v Clarkson \[1971\] 3 All ER 344](#).

#### 31.2.4 Elements for aiding or abetting

- An offence must have been committed by the principal.
- The accused was acting in concert with the principal offender (encouragement in one form or another is a minimal requirement).
- There was some sort of mental link or meeting of the minds between the secondary party and the principal offender regarding the offence.

### 31.3 Counselling or procuring: s 21(1)(d) Penal Code

Every person who counsels or procures any other person to commit an offence is:

- deemed to have taken part in committing the offence and to be guilty of the offence; and
- may be charged with actually committing it or may be charged with counselling or procuring its commission: s [21\(1\)\(d\)](#) and [\(2\) Penal Code](#).

A conviction of counselling or procuring the commission of an offence entails the same consequences as a conviction for the offence as a principal offender: s [21\(3\) Penal Code](#).

The term "to counsel or procure" generally describes advice and assistance given at an earlier stage in the commission of the offence.

#### 31.3.1 Counselling

The normal meaning of counsel is to incite, solicit, instruct or authorise.

Counselling does **not** require any causal link. As long as the advice or encouragement of the counsellor comes to the attention of the principal offender, the person who counselled can be convicted of the offence. It does not matter that the principal offender would have committed the offence anyway, even without the encouragement of the counsellor: [Attorney-General v Able \[1984\] QB 795](#).

The accused must counsel **before** the commission of the offence.

When a person counsels another to commit an offence and the offence is committed, it is immaterial whether:

- the offence is committed in the way counselled or in a different way:  
eg: if Anatatia counsels Bureti to murder Kotoa by shooting, Anatatia can still be found guilty of murder if Bureti uses a knife to kill Kotoa;
- the offence actually committed is the same as the one that was counselled or a different one:  
eg: if Anatatia counsels Bureti to murder Kotoa, but Bureti only caused grievous bodily harm, Anatatia can be found guilty of causing grievous bodily harm.

The one who counselled will be deemed to have counselled the offence actually committed by the principal offender, provided the facts constituting the offence actually committed are a **probable consequence** of the counselling: s [23 Penal Code](#).

See *R v Calhaem* [1985] 2 All ER 226.

### 31.3.2 The elements for counselling

- An offence must have been committed by the principal; and
- The accused counselled the principal to commit an offence; and
- The principal acted within the scope of his or her authority: *R v Calhaem* [1985] 2 All ER 267.

### 31.3.3 Procuring

To procure means to bring about or to cause something or to acquire, provide for, or obtain for another.

Procuring must occur prior to the commission of the offence.

Procuring was defined in [Attorney-General's Reference \(No. 1 of 1975\) \[1975\] 2 All ER 684](#):

- Procure means to produce by endeavour.
- You procure a thing by setting out to see that it happens and taking appropriate steps to produce that happening.
- You cannot procure an offence unless there is a causal link between what you do and the commission of the offence.
- There does not have to be a common intention or purpose but there must be a causal link.

Any person who procures another to do or omit to do any act that, if he or she would have done the act or made the omission themselves, that act or omission would have constituted an offence on his or her part:

- is guilty of the offence of the same kind; and
- is liable to the same punishment as if he or she had done the act or made the omission; and
- may be charged with doing the act or the omission: *s 21(4) Penal Code*.

#### 31.3.4 The elements for procuring

- An offence must have been committed by the principal; and
- The accused procured the principal to commit an offence; and
- There is a causal link between the procuring and the commission of the offence.

For other case law on parties, see *John v R* (1980) 143 CLR 108, *R v Clarkson* (1971) 55 Cr App R 455, *Ferguson v Weaving* (1951) 1KB 814, and *National Coal Board v Gamble* [1958] 3 All ER 203.

### 31.4 Offences committed in pursuit of common purpose

When two or more persons form a common intention to carry out an **unlawful** purpose with one another and, in carrying out that unlawful purpose, an offence is committed that was the probable consequence of carrying out that unlawful purpose, each of them is deemed to have committed the offence: *s 22 Penal Code*.

*Section 22 Penal Code* does **not** apply in circumstances where the offenders form a common intention to commit an offence and, in fact, do nothing further than commit the offence. In this case, *s 21 Penal Code* would be applied because both are equally culpable for the offence that was proposed and committed.

*Section 22 Penal Code* applies when, during the commission of the intended, original offence, an additional offence is carried out.

#### Example

Anatatia and Bureti decide to commit a robbery. Anatatia is inside the store taking the money while Bureti is holding the door and making sure no one comes into the bank. Anatatia will be liable for the offence of robbery as the principal offender under *s 21(a)*, while Bureti will be liable for the offence of robbery as a secondary party under *s 21(c)*.

If during the course of the robbery, Anatatia assaults the shopkeeper, Anatatia will be liable as the principal offender for assaulting the shopkeeper.

Whether Bureti will be held liable for assaulting the shopkeeper, which was not part of the common purpose of robbing the shop, will depend on whether Bureti knew or ought to have known that assaulting the shopkeeper would be a probable consequence of robbing the shop.

If Bureti knew or ought to have known that assaulting the shopkeeper was a probable consequence of carrying out the common purpose of robbing the shop, he will be liable for the assault as a secondary party under *s 22 Penal Code*. Both Bureti and Anatatia will be jointly charged with assault under *s 22 Penal Code* and the relevant provisions for assault.

### 31.4.1 Elements for prosecution of a common purpose

- A common intention between the accused;
- Carrying out an unlawful purpose;
- An offence is committed while carrying out that unlawful purpose;
- The offence is a probable consequence arising from carrying out the unlawful purpose.

See *R v Anderson and Morris* (1966) 1QB 110, [Police v Faisaovale and Ors \(1975\) WSLR 118](#), [Chan Wing-sui v R \[1984\] 3 All ER 877](#), and [R v Hyde \[1990\] 3 All ER 892](#).

## 31.5 Conspiracy

### 31.5.1 Conspiracy to commit a felony

Any person who conspires with another to commit any felony, or to do any act in any part of the world that if done in Kiribati would be a felony and which is an offence in the place where the felony is proposed to be done, is:

- guilty of a felony; and
- liable to imprisonment for:
  - seven years if no other punishment is provided for; or
  - if the punishment for the person convicted of the felony is less than seven years, then that lesser punishment: s [376 Penal Code](#).

### 31.5.2 Conspiracy to commit a misdemeanour

Any person who conspires with another to commit a misdemeanour, or to do any act in any part of the world that if done in Kiribati would be a misdemeanour and which is an offence in the place where the misdemeanour is proposed to be done, is guilty of a misdemeanour: s [377 Penal Code](#).

### 31.5.3 Other conspiracies

Any person who conspires with another to effect any unlawful purpose by unlawful means is guilty of a misdemeanour.

### Actus reus of conspiracy

Agreement is the essential element of conspiracy. It is the *actus reus* of conspiracy. There is no conspiracy if negotiations fail to result in a firm agreement between the parties: *R v Walker* [1962] Crim LR 458.

The offence of conspiracy is committed at the moment of agreement: *R v Simmonds & Others* (1967) 51 CrAppR 316.

An intention between two parties is not enough for a charge. What is required is an agreement between two or more to do an unlawful act by unlawful means: *R v West, Northcott, Weitzman & White* (1948) 32 CrAppR 152.

At least **two** persons must agree for there to be a conspiracy. However, a single accused may be charged and convicted of conspiracy even if the identities of his or her fellow conspirators are unknown.

### Mens rea of conspiracy

Conspiracy requires two or more people to commit an unlawful act with the intention of carrying it out. It is the intention to **carry out the crime** that constitutes the necessary *mens rea* for conspiracy: [Yip Chieu-Chung v The Queen \[1995\] 1 AC 111](#).

Knowledge of the facts is only material, in so far as such knowledge throws light onto what was agreed to by the parties: [Churchill v Walton \[1967\] 2 AC 224](#).

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

#### 31.5.4 The elements for conspiracy

The elements of conspiracy are as follows:

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

### 31.6 Accessories after the fact

A person is said to be an accessory after the fact to an offence when he or she:

- has knowledge that a person is guilty of an offence; and
- receives or assists another so that he or she is able to escape punishment: [s 379\(1\) Penal Code](#).

Any person who becomes an accessory after the fact to a felony, is guilty of a felony, and shall be liable to imprisonment for three years if no other punishment is available: [s 380 Penal Code](#).

Any person who becomes an accessory after the fact to a misdemeanour, is guilty of a misdemeanour: [s 370 Penal Code](#).

A woman does **not** become an accessory after the fact for an offence of her husband if she:

- receives or assists her husband in order to help him escape punishment; or
- receives or assists, in the presence and authority of her husband, another person who is guilty of an offence the husband took part in: [s 379\(2\) Penal Code](#).

#### 31.6.1 The elements for accessories after the fact

The elements for accessories after the fact are as follows:

- the principal offender was guilty of a felony, and
- the defendant knew of the principal offender's guilt, and
- the defendant received or assisted the principal offender, and

- The defendant received or assisted the principal offender in order to enable the principal to escape punishment.

#### Points to note

- The principal offender received or assisted must have been guilty of a felony.
- The assistance must be given to the felon personally.
- The assistance must be given in order to prevent or hinder him or her from being apprehended or being punished.
  - Assistance given indirectly or for motives other than hindering arrest of the principal offender, such as avoiding arrest him or herself or to make money for him or herself, would not make the person guilty as an accessory after the fact: *Sykes v Director of Public Prosecutions* (1961) 45 CrAppR 230.
- The Court must be satisfied that the accused knew that an offence had been committed by the principal offender.
- An accessory cannot be convicted if the principal offender has been acquitted ([Hui Chi-Ming v R \[1991\] 3 All ER 897](#)), so the guilt of the principal offender should be determined before a plea of guilty is taken from an accessory (*R v Rowley* (1948) 32 CrAppR 147).

### 31.7 Withdrawal

Sometimes there may be a period of time 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.

What is required for withdrawal varies from case to case but some of the common law rules set down are:

- withdrawal should be made before the crime is committed,
- withdrawal should be communicated by telling the one counselled that there has been a change of mind,
- withdrawal should be communicated in a way that will serve unequivocal notice to the one being counselled that help is being withdrawn,
- withdrawal should give notice to the principal offender that, if he or she proceeds to carry out the unlawful action, he or she will be doing so without the aid and assistance of the one who withdrew.

## 32 Attempts

A person may be held criminally responsible for attempting to commit an offence.

This is because the basis of criminal responsibility is the punishment of blameworthy behaviour coupled with a blameworthy state of mind.

Any accused charged with an offence may be convicted of attempt for that offence, although not specifically charged with the attempt: s [158](#) *Criminal Procedure Code*.

### 32.1 Definition of attempt

An attempt to commit an offence is an overt act done in execution of the offence, with the intention to commit an offence: s [371\(1\)](#) *Penal Code*.

An attempt requires:

- some actual act or omission that forms part of the full offence; and
- intent to commit that offence; and
- interruption of the offence either voluntarily by the offender or otherwise.

It does not matter (except as to regards punishment) whether or not:

- the offender does everything necessary to complete the commission of the offence; or
- the offender is prevented by outside circumstances or from his or her own motion from carrying out his or her intention to commit the offence: s [371\(2\)](#) *Penal Code*.

#### 32.1.1 Impossibility

In some cases, it would be impossible for the offender to commit the full offence as he or she intended. Mere impossibility alone is not enough to acquit the offender: s [371\(3\)](#) *Penal Code*.

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

### 32.2 Punishment

Use the following rules for the punishment of attempts:

- if applicable, use the punishment for a conviction of an attempt specifically set out in the offence section. For example, attempts to commit arson are punishable by maximum 14 years imprisonment: s [313](#) *Penal Code*;
- if the offence attempted is a felony punishable by 14 years imprisonment or more, the offender is guilty of a felony and is liable to imprisonment for up to 7 years;
- all other attempts to commit a felony or misdemeanour are misdemeanours: ss [372](#), [373](#) *Penal Code*.

### 33 Lesser offences

An accused may be convicted of a lesser offence though not specifically charged with it, when:

- the offence charged consists of several particulars;
- a complete lesser offence consists of a combination of only some of those particulars; and
- the evidence proves only the combination of the fewer particulars and not all particulars of the larger offence: [s 157\(1\) Criminal Procedure Code](#).

For example, if an accused is charged with assault causing actual bodily harm but the evidence proves only common assault, the accused may still be convicted of the common assault.

When an accused is charged with an offence and the facts proved reduce it to a lesser offence, he or she may be convicted of the lesser offence though not charged with it: [s 157\(2\) Criminal Procedure Code](#).

## 34 Different offences in some situations

The [Criminal Procedure Code](#) also provides for the possibility of conviction for an offence not specifically charged through specifically outlining a different offence. These different offences may have quite different particulars from the offence charged. See ss [159-173](#) *Criminal Procedure Code*.

For the Magistrates' Court, the most important of such offences are:

- an accused charged with stealing may be convicted of receiving, embezzling, obtaining by false pretences or, of possessing or conveying stolen property: s [169](#) *Criminal Procedure Code*;
- an accused charged with obtaining by false pretences may be convicted of stealing: s [170](#) *Criminal Procedure Code*;
- an accused charged with embezzlement may be convicted of stealing: s [172](#) *Criminal Procedure Code*.

For all these offences, the accused may be convicted of the different offence although not charged with it, so long as the evidence wholly proves the different offence.

## VII. Jurisdiction

## 35 Jurisdiction defined

Jurisdiction means 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.

An example where a court would be acting outside its jurisdiction would be if the Magistrates' Court heard a murder case, which can only be heard by the High Court.

### Original jurisdiction

Original jurisdiction means that a court is given power to hear certain kinds of cases **in the first instance**, for example:

- the High Court has original jurisdiction to hear murder and treason cases;
- the Magistrates' Court has original jurisdiction to hear some criminal and civil cases and all land matters: s [34](#) *Magistrates' Courts Ordinance*.

### Territorial jurisdiction

Territorial jurisdiction refers to the geographic area in which a particular court has competence. For example, every Magistrates' Court may only exercise jurisdiction within the limits of the district in which it is situated: s [4\(1\)](#) *Magistrates' Courts Ordinance*. This jurisdiction also extends over any adjacent territorial waters and over lagoon and inland waters within or adjacent to the district: s [4\(2\)](#) *Magistrates' Courts Ordinance*.

### Appellate jurisdiction

This is the right of a court to hear appeals from a lower court.

The Court of Appeal and the Judicial Committee of the Privy Council each have some type of appellate jurisdiction under the *Constitution* as does the High Court under the [Magistrates' Courts Ordinance](#).

### Criminal jurisdiction

A crime (also called an offence) is the commission of an act that is forbidden by legislation or the omission of an act that is required by legislation.

The *Penal Code* sets out most crimes in Kiribati. Other Statutes, such as the [Public Order Ordinance](#) and the [Traffic Act](#), also set out a number of offences you will deal with.

### Civil jurisdiction

This covers disputes between individuals and between individuals and the state, that are not criminal matters.

## 36 Jurisdiction of the Magistrates' Court

### 36.1 Territorial jurisdiction

Subject to the express provisions of any Act, a Magistrates' Court must only exercise jurisdiction within the limits of its district, including any territorial, lagoon or inland waters within or next to its district: s [4](#) *Magistrates' Courts Ordinance*.

The Chief Justice may:

- provide for delimitation of districts;
- direct how many Magistrates' Courts will be in a district; and
- distribute business between Magistrates' Courts within a district: ss [3\(2\)](#), [4\(1\)](#) *Magistrates' Courts Ordinance*.

There are currently 24 Magisterial districts in Kiribati. To determine your district, see the *Delimitation of Districts Order 1978*.

#### 36.1.1 Vessels

If an offence is committed or a civil matter arises on a vessel, a Magistrates' Court has jurisdiction to try the case if it is an offence or civil matter it is normally allowed to hear, and:

- the offence is committed or the matter arises while the vessel is in its district; or
- the vessel calls at its district after the offence was committed or the matter arose: s [29](#) *Magistrates' Courts Ordinance*.

### 36.2 Criminal jurisdiction

Criminal cases are normally heard by a panel of three Magistrates sitting together, but the Chief Justice has exercised his power to create courts where single Magistrates sit alone: s [7\(3\) and \(5\)](#) *Magistrates' Courts Ordinance*.

There are two aspects to criminal jurisdiction:

- jurisdiction to hear a matter; and
- jurisdiction to sentence upon conviction.

#### 36.2.1 Hearing

[Schedule 2](#) of the *Magistrates' Courts Ordinance* sets out the jurisdiction of the Magistrates' Court in criminal cases: s [23\(1\)](#) *Magistrates' Courts Ordinance*.

Under [Schedule 2](#), Magistrates' Courts may hear:

- any offence which carries a maximum penalty of \$500 fine and/or 5 years imprisonment; and
- any offence in an Ordinance or Act in which jurisdiction is expressly conferred on the Magistrates' Court; and

- offences under ss 118, 254, 262, 271, 292, 293, 294, 295, 306, 307, 348(5), 349(1)(b), 376 Penal Code; and
- all offences in the Penal Code, except Part VII, Part VIII, Part XVI and ss 64 to 80: Schedule 2 Magistrates' Courts Ordinance.

The Chief Justice may increase or decrease the jurisdiction of Magistrates to hear criminal matters by:

- amending or deleting any part of Schedule 2: s [23\(2\)](#) *Magistrates' Courts Ordinance*.
- making an order extending the criminal jurisdiction of the Magistrates' Court: s [28](#) *Magistrates' Courts Ordinance*.

For this reason, you should read all Orders from the Chief Justice.

As at June 2026, under order of the Chief Justice, Magistrates' Courts may also hear:

- s [312](#) Penal Code (Arson);
- s [313](#) Penal Code (Attempted arson);
- s [314](#) Penal Code (Setting fire to crops and plants);
- s [315](#) Penal Code (Attempting to set fire to crops and plants);
- s [319\(1\)](#) Penal Code (Destroying or attempting to destroy property);
- s 319(6)(a) Penal Code (Attempting to destroy or damage property); and
- s 47 Customs Act: Orders for Extension of Criminal Jurisdiction of Magistrates' Courts (30 July 2003), (20 September 2001), (10 January 2003).

Magistrates' Courts may **not** hear:

- Part VII, Part VIII, Part XVI and ss 64 to 80 [Penal Code](#);
- any Ordinance which specifically excludes the jurisdiction of the Magistrates' Court: Schedule 2 Magistrates' Courts Ordinance.

### 36.2.2 Sentencing

Where an accused is convicted, the Magistrates' Court may sentence him or her to:

- imprisonment up to a maximum of 5 years,
- a fine up to a maximum of \$500,
- both imprisonment up to a maximum of 5 years and fine up to a maximum of \$500,
- any sentence or order authorised by law,
- any lawful sentence combining any of the sentences or orders: s [24\(1\)](#) and [\(2\)](#) *Magistrates' Courts Ordinance*.

Note that there are a number of offences which you may hear, but the maximum penalty set out for the offence is greater than your sentencing jurisdiction. For example, although you may hear an arson case which carries a maximum penalty of life imprisonment, upon conviction you are still limited to a sentence of 5 years imprisonment and \$500 fine or both.

### 36.2.3 Two or more offences arising out of the same facts

For two or more distinct convictions, a Magistrates' Court may pass **consecutive** sentences of imprisonment (to be served one after another), unless it directs that the sentences should run **concurrently** (at the same time): s [24\(4\)](#) *Magistrates' Courts Ordinance*.

A Magistrates' Court may impose consecutive sentences for two or more offences arising out of the same facts, up to a total of twice their normal sentencing jurisdiction, that is, 10 years imprisonment, or \$1,000, or both: s [9\(2\)](#) *Criminal Procedure Code*. This means that you may **not** impose a period of imprisonment longer than 10 years or \$1000 fine.

For more information on sentencing see section 36.2.2 [Sentencing](#).

## 36.3 Civil jurisdiction

The civil jurisdiction of the Magistrates' Courts is set out in Schedule 1 of the Magistrates' Courts Ordinance: s [23\(1\)](#) *Magistrates' Courts Ordinance*.

Civil cases are normally heard by a panel of three Magistrates sitting together, but the Chief Justice has exercised his power to create Courts where single Magistrates sit alone: s [7\(3\)](#) and [\(5\)](#) *Magistrates' Courts Ordinance*.

A Magistrates' Court may:

- hear any action in **contract or tort** if:
  - the value claimed is under \$10,000; and
  - the accused lives in the Court's district or the cause of action arose in the district: s [1\(b\)](#) *Schedule 1 Magistrates' Courts Ordinance*;
- hear **divorce** matters under the *Native Divorce Ordinance*, if:
  - the petitioner lives in the Court's district; and
  - both the petitioner and respondent are domiciled in Kiribati: s [1\(a\)](#) *Schedule 1 Magistrates' Courts Ordinance*.
- grant **injunctions** (upon application by a party to a suit) to:
  - preserve the status quo; or
  - prevent the subject matter of a claim from being interfered with, or destroyed: s [3](#) *Schedule 1 Magistrates' Courts Ordinance*.

The Chief Justice may, by notice, amend or delete any part of *Schedule 1* to increase or decrease your jurisdiction: s [23\(2\)](#) *Magistrates' Courts Ordinance*. For this reason, you should read all Orders from the Chief Justice.

## 36.4 Lands jurisdiction

Magistrates' Courts hear all land cases at first instance.

Land cases are normally heard by a panel of five Magistrates sitting together, but the Chief Justice has exercised his power to create Courts where single Magistrates sit alone: s [7\(4\) and \(5\)](#) *Magistrates' Courts Ordinance*.

Of the five Magistrates on the panel, at least three must be on the Lands Magistrates' Panel for the district in which the matter arose or the land in question is situated: s [7\(4\)](#) *Magistrates' Courts Ordinance*.

The High Court may transfer land cases to another Magistrates' Court or to the High Court. See s [23\(3\)](#) *Magistrates' Courts Ordinance*.

### 36.5 Other jurisdiction

Magistrates have jurisdiction to carry out many other tasks to assist them to carry out their judicial functions.

Subject to any Act, the Rules of Court or any order of the Chief Justice, Magistrates have the power to:

- issue writs of summons,
- administer oaths and take affirmations and declarations,
- receive production of books and documents,
- make decrees and orders,
- issue process, and
- exercise judicial and administrative powers in relation to the administration of justice: s [30](#) *Magistrates' Courts Ordinance*.

Magistrates are also Justices of the Peace: s [16\(2\)](#) *Magistrates' Courts Ordinance*. As such, they may:

- issue summonses and warrants for compelling any accused or witness to attend court;
- exercise any other powers and rights as conferred or imposed by Rules of Court made under the *Magistrates' Courts Ordinance* or any other Act not involving the trial of causes or the holding of preliminary investigations into criminal matters: s [17](#) *Magistrates' Courts Ordinance*.

Magistrates also have the same powers as the High Court to deal with contempt: s [6](#) *Magistrates' Courts Ordinance*.

## 37 Transfer of cases

In some instances, you may realise that a criminal case is outside your jurisdiction. For example, this could occur:

- when the offence appears to have taken place in another district,
- where one offence was charged but it becomes clear that a more serious charge beyond your jurisdiction should have been laid, or
- where you feel an offence which you can properly hear deserves a higher penalty than you can give.

In these instances, the case must be transferred to another Magistrates' Court which has jurisdiction or to the High Court.

### 37.1 Territorial jurisdiction problems

Generally, a case should be heard in the jurisdiction in which the offence is alleged to have been committed or the accused was apprehended or has appeared in answer to a summons: [s 58 Criminal Procedure Code](#).

If, during an inquiry or trial, it appears that the offence occurred outside your district:

- stay the proceedings; and
- submit the case with a brief report to the High Court: [s 66 Criminal Procedure Code](#).

### 37.2 Hearing / sentencing jurisdiction problems

If it appears that the offence is one outside your hearing jurisdiction, use the following procedure:

- By your own motion or on the application of any person concerned, report to the Chief Justice any cause or matter which you believe should be transferred to another Magistrates' Court or to the High Court: [s 37 Magistrates' Courts Ordinance](#).
- The Chief Justice will then order in what mode and where the case will be heard.
- Once the case has been ordered for transfer, you must:
  - stop all applicable processes and proceedings in the Magistrates' Court; and
  - send an attested copy of all entries in the books of your Court to the Court where the case is transferred: [s 39\(1\) Magistrates' Courts Ordinance](#).

This could occur, for example, when an accused was originally charged with assault, but during the hearing it appears to you that the accused should have properly been charged with indecent assault.

This could also occur if you find that your sentencing jurisdiction is not enough to deal with a serious crime for which you have hearing jurisdiction. For example, this could happen when you are hearing an arson case that turns out to be much more serious than it originally appeared.

## VIII. Management of proceedings

## 38 General organisation for court

Before going to court:

- Ensure your clerk has prepared the case list for the day;
- try to have a Police orderly present, (this is desirable although not essential);
- if there are Chamber matters, deal with them quickly so that Court can start at the appointed time.

In court:

- Start court on time and rise at the expected time This is not only for your benefit but also for counsel, the prosecutors and court staff.

## 39 Order of calling cases

To make the best use of court time and resources, consider prioritizing cases based on their nature and the people involved, rather than strictly following the case list. Here are some practical guidelines:

- Young offenders: Ensure their privacy by hearing their cases at the end of the day or excluding the public.
- Short cases: Address cases that require less time, like guilty pleas for minor offences, before complex matters like contested trials.
- Custody cases: Prioritize cases involving accused persons in custody to free up police and prison officers.
- Multiple matters for counsel: Group cases where the same counsel is involved to help them manage their schedule efficiently.

## 40 Bail

The subject of bail is extremely important as it deals with the individual's constitutionally guaranteed right to liberty: *s 5(1) Constitution*. For this reason, you should be familiar with the procedure for granting bail and ensure that you and the police follow it precisely.

### 40.1 Bail after arrest without warrant

For situations when the police may arrest a person without a warrant, see *ss 18, 51 Criminal Procedure Code*.

On the arrest of a person without warrant for an offence (other than murder or treason), a police officer must, without unnecessary delay bring the person before:

- a Magistrates' Court having jurisdiction in the case,
- a Police officer of or above the rank of Sergeant, or
- the officer in charge of the nearest police station: *s 20 Criminal Procedure Code*.

#### 40.1.1 Arrested person brought before Magistrate

If the person is brought before you, and is prepared to give bail, you may use your discretion to admit the person to bail, with or without sureties: *s 106(1) Criminal Procedure Code*.

- If you allow bail, the amount must not be excessive and must be determined with regard to the circumstances of the case: *s 106(2) Criminal Procedure Code*.
- Before releasing anyone on bail, you must take the recognisance of the person and his or her sureties (if any). The recognisance must direct the person to appear at the time and place mentioned in the recognisance: *s 107 Criminal Procedure Code*.

Once the recognisance has been entered into, the person must be released, unless the person is being held on some other matter: *s 108(1) Criminal Procedure Code*.

#### 40.1.2 Arrested person brought before police

If the person is brought before a police officer (of the rank of Sergeant or above, or the officer in charge of the police station) for an offence other than murder or treason, the officer must, if it does not appear practicable to bring the person before a Magistrates' Court within 24 hours after being taken into custody, inquire into the case: *s 23 Criminal Procedure Code*.

Unless it appears to the police officer that the offence is serious, the officer must release the person upon entering into a recognisance, with or without sureties, to appear before a Magistrates' Court at a time and place named in the recognisance: *s 23 Criminal Procedure Code*.

If, after due inquiry, the police officer is of the opinion that there is insufficient evidence on which to proceed with the charge, the officer may release the person: *s 23 Criminal Procedure Code*.

If the person is released, the police officer authorising the release must report the release to the nearest Magistrates' Court as soon as reasonably possible: *s 24 Criminal Procedure Code*.

## 40.2 Bail after arrest on warrant

Upon arrest of a person under a warrant, the person must be brought before the Magistrates' Court that issued the warrant: *Rule 11(1) Magistrates' Courts Rules*.

Upon being brought before you, he or she must be:

- committed to prison by warrant, or
- committed to the custody of the apprehending police officer by your oral order,
- committed to other safe custody as you think fit,
- admitted to bail on such conditions as you order: *Rule 11(1) Magistrates' Courts Rules*.

You may then order the person to be brought before you at a certain time and place and, if so, you shall give notice of this time and place to the person who laid the charge: *Rule 11(1) Magistrates' Courts Rules*.

No matter which method of committal you choose, the period must not be longer than seven days: *Rule 11(1) Magistrates' Courts Rules*.

You also have the power to hear and determine the matter immediately when the arrested person appears before you, provided that:

- the person who brought the charge requests it; and
- the arrested person consents: *Rule 11(2) Magistrates' Courts Rules*.

## 40.3 Bail on appeal

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

- order that he or she be released on bail, with or without sureties; or
- deny bail: *s 277(1) Criminal Procedure Code*.

If you deny bail, you must order that the execution of the sentence or order being appealed against be suspended until the determination of the appeal, if the convicted person requests: *s 277(1) Criminal Procedure Code*.

## 40.4 Relevant factors for bail

There are a number of factors relevant to the grant of bail. These include:

- the protection of the right to personal liberty contained in *s 5(1) Constitution*,
- whether the accused will abscond while on bail,
- the nature and circumstances of the offence charged, including the possibility of a sentence of imprisonment,
- the weight of the evidence against the accused, bearing in mind the presumption of innocence,

- the history and characteristics of the accused, including character, physical and mental condition, family ties, employment, financial resources, length of residence in community, community ties, past conduct, criminal history and record concerning appearances at court proceedings,
- whether at the time of the current offence or arrest, the accused was subject to a sentence or awaiting trial,
- the nature and seriousness of any possible danger to any person or the community if the accused is released,
- whether the accused will interfere with prosecution witnesses and police investigation,
- the possibility of a repetition of the offence or of further offences,
- any danger posed by the accused to the alleged victim,
- the accused's record of past convictions and any evidence indicating prior failure to appear for scheduled court hearings,
- the length of any delay,
- the family needs of the accused.

## 4.1 Adjournments

### 4.1.1 Adjourning the court

It is the policy of the Magistrates' Court (court) to provide justice for citizens:

- without unnecessary delay;
- without undue waste of time;

without undue waste of the court's resources, the litigants and other participants (see "*Adjournment Policy*").

Every Magistrates' Court has the power to adjourn the court from day to day or to any convenient day: s [45\(1\)](#) *Magistrates' Courts Ordinance*.

If sitting in a panel and one or more of the Magistrates required is not present, the sitting may be adjourned to some other time by oral or written public notice. All persons bound to be present at the adjourned sitting are then bound to be present at the time appointed by the public notice.

If none of the required Magistrates are present, any officer of the court or authorised person may adjourn the sitting to some other time by oral or written public notice. All persons bound to be present at the adjourned sitting are then bound to be present at the time appointed by the public notice.

A strict adjournment policy is pivotal as the court endeavours to reach its Time Goals.

The court expects the cooperation and commitment of the legal profession and parties as it seeks to prevent delay and provide timely justice for citizens.

### 4.1.2 Requests for adjournment

Motions or requests for adjournment must be in writing. The request must be signed by both attorneys/parties before the Magistrate's Court clerk and state a reason. The said clerk must deliver the signed request to the presiding Magistrate.

In scheduled trial matters, the application must be made more than two weeks before the scheduled trial. This will permit the court to consider scheduling other cases and ways to save precious resources (see "*Adjournment Policy*").

### 4.1.3 Grounds for adjournment

See "*Adjournment Policy*"

The court will only grant an adjournment where good cause is shown.

As a guide, the following will **generally NOT** be considered sufficient cause to grant an adjournment:

- lawyers or the parties agree,
- the case has not previously been continued,

- the case will probably settle if an adjournment is granted,
- discovery has not been completed,
- there is a substitution of counsel and a new lawyer needs to enter an appearance,
- a party wants a new lawyer,
- a party or counsel has not prepared the case adequately,
- if the prime witness, party or counsel is off island and has had due notice to attend,
- if overseas counsel is unavailable,
- plaintiff has not yet fully recovered from injuries when there is no competent evidence available as to when the plaintiff will be fully recovered,
- a party or lawyer is unprepared to try the case for reasons including, but not limited to, the party's failure to maintain necessary contact with his/her lawyer,
- a police officer or other witness is either in training or is scheduled to be on vacation unless the court is advised of the conflict soon after the case is scheduled and sufficiently in advance of the trial date, and
- any adjournment of a trial beyond a second trial date setting.

The **following WILL** generally be considered sufficient cause to grant for adjournment:

- sudden medical emergency (not elective medical treatment) or death of a party, counsel, or material witness who has been subpoenaed. This must be supported by a doctor's certificate directed specifically to the court about the fitness to attend the court of that person. The doctor signing the certificate may be required to attend court to answer further questions concerning the fitness of the party;
- a party did not receive notice of the setting of the trial date through no fault of that party or the party's lawyer;
- facts or circumstances arising or becoming apparent too late in the proceedings to be fully corrected and which, in the view of the court, would likely cause undue hardship or possibly miscarriage of justice if the trial is required to proceed as scheduled;
- unanticipated absence of a material witness for either party.

#### 41.4 Adjourning a case

Before or during the hearing of any case, you may adjourn the hearing to a certain time and place then appointed and stated in the presence and hearing of the parties or their advocates: *s 189 Criminal Procedure Code*.

You may then:

- allow the accused person to go at large;
- commit the accused to prison; or
- release the accused upon a recognisance with or without sureties, conditioned on his or her reappearance at the adjourned time and place: *s 189 Criminal Procedure Code*.

If the accused has been committed to prison, the adjournment must be for no longer than 15 days and in all other cases 30 days (the day after the adjournment being counted as the first day): s 189 *Criminal Procedure Code*.

The grant of an adjournment must be made on the court record. The record should contain information about who made the application and the reasons for granting it.

#### 41.5 Non-appearance after adjournment

Subject to the *Constitution*, if the accused does not reappear at the adjourned time and place, and the offence is **not** a felony, you may proceed to hear the case as if the accused were present: s [190\(1\)](#) *Criminal Procedure Code*.

Subject to the Constitution, if the accused does not reappear at the adjourned time and place for a felony charge, or you decide to not hear the case in the absence of the accused, you must issue a warrant for the apprehension of the accused to be brought before the Court: s [190\(2\)](#) *Criminal Procedure Code*.

If the complainant does not reappear at the adjourned time and place, you may dismiss the case with or without costs: s [190\(1\)](#) *Criminal Procedure Code*.

#### 41.6 Monitoring and review

The magistrates must ensure the consistent application of the *Adjournment Policy* and report on adjournments as a part of its performance reporting requirements.

Special attention to reporting will be given to adjournments where cases are listed for trial.

## 42 People who appear in proceedings

### 42.1 The mentally-ill accused

If at any time during the case you have reason to believe that the accused is of unsound mind making him or her incapable of making a defence, stop the proceedings and inquire into whether the accused is of unsound mind: s [144\(1\)](#) *Criminal Procedure Code*.

If you are of the opinion that the accused is of unsound mind, you must postpone further proceedings in the case: s [144\(2\)](#) *Criminal Procedure Code*.

If an accused raises an insanity defence at trial, stop the proceedings and seek guidance on criminal responsibility from the *Penal Code* and s [146](#) *Criminal Procedure Code*. If needed, seek advice from the Chief Magistrate.

### 42.2 Victims

Victims of crime are usually the main prosecution witnesses. There is no specific legislation dealing with victims, but Magistrates are expected to treat them with courtesy and compassion.

In particular, you should restrain defence lawyers from humiliating victims of crime in court. You may tell counsel to rephrase their questions if you do not think the witness understands, or you can tell counsel that the question is inappropriate and that the witness does not have to answer.

Especially vulnerable witnesses, such as the very young, very old, or disabled, are entitled to special measures when they are giving evidence. Consider allowing a family member or friend to sit with a child victim or elderly victim while giving evidence.

#### 42.2.1 Consideration of victim's statement

Ensure that you acknowledge any statements by the victim in your sentencing remarks. A brief summary is appropriate.

Be careful about "blaming" the victim, for example, if she was drunk, unless the victim's actions are clearly relevant to mitigate the offence and you are certain about the facts.

### 42.3 Child witnesses

For the provisions on dealing with oaths and affirmations of children appearing as witnesses, see s [3](#) *Evidence Act*.

In order to ensure that a child witness is best able to give evidence, special steps may be taken to ensure the child is not distracted or frightened.

For example, a parent or guardian may be allowed to sit with the child while the child gives evidence, or you may ask the child to face you rather than look at the accused.

When cross-examination of the child is conducted, you are expected to be sensitive to the child's special vulnerability in deciding whether or not you should allow the questions to be asked. If counsel asks a question that you think is inappropriate, you may tell the child that they do not need to answer it, and that counsel should move onto the next question. You may also ask counsel to rephrase their questions if the child does not clearly understand what is being asked.

#### 42.4 The accused

The accused is entitled to be present in court during the whole of his or her trial. Although a party may be represented by counsel, he or she must still appear in court, unless personal appearance is specifically dispensed with.

Where an accused is required to appear in court, but fails to do so, you may:

- issue a warrant for his or her arrest, or
- adjourn the proceedings to such time and conditions as you think fit.

#### 42.5 The unrepresented accused

Most litigants appear in Magistrates' Court on their own. Most have little or no idea of court procedures and rely on the court system to assist to some extent.

If possible, all accused persons charged with an offence carrying imprisonment as a penalty should be legally represented. However, if legal representation is not available, then you should ensure the accused understands:

- the charge(s); and
- if found guilty, whether there is a probability of an imprisonment term.

To assist in the smooth running of any hearing, you should give an initial explanation outlining:

- the procedure,
- the obligation to put their case,
- the limitation of providing new evidence,
- the need to ask questions and not make statements, and
- any issues arising out of the evidence.

#### 42.6 The prosecution

The criminal justice system relies on the adversarial model to find justice. Only by both sides vigorously putting their cases can a just outcome be reached. With such considerations, a high level of professionalism is expected from police prosecutors.

In order to ensure the fairness and effectiveness of the prosecution, prosecutors should strive to cooperate 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 he or she appears before you in court. If the accused or a witness does not show up, the prosecutor should be prepared to prove service of a summons to that person as a witness.

Asking for a new summons instead of proving service the first time wastes court and police time and must be strongly discouraged. Simply reading the facts from the charge sheet is not a vigorous prosecution.

The prosecutor should know the elements of the offence and have evidence to prove each element. The facts should be complete enough so you do not have to ask too many questions.

If you must ask a lot of questions to establish the prosecution's case, it could appear you are conducting the case for the prosecution and that you may be biased.

The prosecutor should have a basic understanding of court procedure and be prepared to deal with issues that commonly arise. The prosecutor has a duty to faithfully represent the Republic of Kiribati and should only give a strong prosecution on the facts.

The prosecutor should not try to help the accused by making the offence appear more minor than it was, nor should they embellish the facts to make the offence sound worse than it was.

At sentencing, the prosecutor should have previous convictions ready and be ready to prove them if denied by the accused, as well as any reports or statements of aggravating or mitigating factors.

## 43 Misbehaviour in court

### 43.1 Contempt of court

Occasionally, you may consider it necessary to find a witness, accused or member of the public in contempt of court.

As a Magistrate, you have the same powers to deal with contempt as the High Court: s [6](#) *Magistrates' Court Ordinance*.

In addition to your power to deal with contempt in the same manner as the High Court, there are also a number of offences relating to the administration of justice under *Parts XI* and *XII* [Penal Code](#).

Contempt is established when any person:

- by words or actions, shows disrespect for the proceedings of the court or to any Magistrate within the premises or nearby the place of court;
- fails, without good cause, to appear on the date and time specified in a court summons, the proof of showing good cause is on the person failing to appear;
- refuses to be sworn or to make an affirmation when called upon to give evidence;
- refuses without lawful excuse to answer a question or produce a document in his or her power to produce, once they have been sworn or affirmed;
- if they are in attendance as a witness, remains in the room after all witnesses have been ordered to leave;
- causes an obstruction or disturbance during a judicial proceeding;
- makes use of any speech or writing misrepresenting any pending judicial proceeding or capable of prejudicing any person for or against any parties to such proceeding or calculated to lower the authority of any person before whom such proceeding is being taken; or
- commits any act of intentional disrespect to any judicial proceeding or to any Magistrate: s [115\(1\)\(a\), \(b\), \(c\), \(d\), \(e\), \(f\), \(g\) and \(l\)](#) *Penal Code*.

All the above acts of contempt are punishable by one months' imprisonment if proved by a prosecutor at trial. If, however, the offence is committed in view of the court, you may order the offender to be detained in custody, and at any time before the rising of the court that day, you may sentence the offender to a fine of \$40 or in default of payment, imprisonment for one month: s [115\(1\)\(2\)](#) *Penal Code*.

Less common instances of contempt occur when any person:

- publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private;
- attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence;
- dismisses an employee or servant for giving evidence on behalf of a party to a judicial proceeding; or

- wrongfully retakes possession of land from any person who has recently obtained possession by Court order: s 115 (h), (i), (j) and (k) *Penal Code*.

Unlike the earlier types of contempt, you cannot deal with these immediately in court if you witness them. These types of contempt are punishable by 3 months' imprisonment only after prosecution: s 115(1) *Penal Code*.

### 43.2 Refractory witness

A refractory witness is any person who has been verbally called upon by the court to give evidence, and without sufficient excuse:

- refuses to be sworn,
- having been sworn, refuses to answer any lawful question,
- refuses or neglects to produce any document or thing required to be produced, or
- refuses to sign his or her deposition: s [135\(1\)](#) *Criminal Procedure Code*.

When dealing with a refractory witness you may adjourn the case for up to eight days and may commit the witness to prison unless he or she sooner consents to do what is required: s 135(1) *Criminal Procedure Code*.

If the refractory witness is brought before the court at the later time and again refuses to do what is required, you may adjourn the case again and commit the witness for another eight days and again from time to time until the person consents to do what is required of him or her: s [135\(2\)](#) *Criminal Procedure Code*.

The power to punish a refractory witness is in addition to any other punishment or proceeding for refusing or neglecting to do what is required of him or her: s [135\(3\)](#) *Criminal Procedure Code*.

Even without the evidence of the refractory witness, if possible you may still dispose of the case based on other sufficient evidence: s [135\(3\)](#) *Criminal Procedure Code*.

## 44 Particular orders

In addition to any sentence you may impose as punishment for an offence, there are a number of other orders that may be useful.

### 44.1 Costs

#### 44.1.1 Costs against the accused

If the charge is prosecuted by a private individual, in addition to any other penalty, you may order the offender to pay the prosecutor reasonable costs, up to a maximum of \$50: [s 152\(1\) Criminal Procedure Code](#).

#### 44.1.2 Costs against the prosecution

In cases of frivolous or vexatious charges against the accused which you have dismissed, you may order the complainant to pay to the accused a reasonable sum as compensation for the trouble and expense to which he or she has been put in addition to his or her costs: [s 154 Criminal Procedure Code](#).

In certain cases where you have dismissed the charge, you may also order the Republic to pay a reasonable sum to the accused for trouble and expense. See [s 154 Criminal Procedure Code](#).

### 44.2 Restoration of property

#### 44.2.1 Property found on accused

Where an accused is apprehended and is found with any property, you may order that:

- the property or any part be restored to the person who appears to be entitled to it (including the accused himself or herself); or
- the property or any part be applied to the payment of any fine, costs or compensation ordered to be paid by the accused: [s 155 Criminal Procedure Code](#).

### 44.3 Security for keeping the peace

#### 44.3.1 Complaint dismissed

Even if the complaint is dismissed you may still:

- bind both the complainant and the accused, with or without sureties, to keep the peace and be of good behaviour for a period not exceeding one year; and
- order that any person so bound be imprisoned in default of compliance for three months or until such time as he or she complies: [s 35\(2\) Penal Code](#).

You may not bind an accused under this section who has been sentenced to more than six months' imprisonment, nor may you bind a complainant unless he or she has been given an opportunity to address the court as to why he or she should not be bound over: [s 35\(2\) Penal Code](#).

## 45 Search warrants

Although not strictly part of the process of hearing a case, search warrants are a necessary part of the investigation of crime. Search warrants allow the Police to gather evidence for the trial. It is important that you are aware of the procedure to follow when a search warrant is sought.

Note that the *Constitution* recognises an individual's right to privacy of home and other property: s [9\(1\)](#) *Constitution*.

The right to privacy is subject to laws permitting search.. The exceptions most applicable to criminal law are those laws which are:

- in the interests of defence, public safety, public order or public morality,
- for the purposes of protecting the rights and freedoms of other persons, or
- for the purposes of preventing or detecting criminal offences: ss [9\(2\)\(a\)](#), [\(b\)](#) and [\(e\)](#) *Constitution*.

The most common applications for search involve allegations that an individual has another person's goods on his or her property.

### 45.1 Granting the search warrant

You may issue a search warrant when it is proved to you on oath that anything in respect of an offence necessary to the conduct of the investigation can, in fact or on reasonable suspicion, be found in any:

- building
- ship
- vehicle
- box
- receptacle, or
- place: s 101 Criminal Procedure Code.

If anything searched for or any other thing which is reasonably suspected to have been stolen or unlawfully obtained is found, the police officer conducting the search must seize it and bring it before the court: s 101 Criminal Procedure Code.

#### 45.1.1 Procedure

To apply for a search warrant, the police officer must swear or affirm the information which provides the grounds for the search warrant. See *Form [36](#) Magistrates' Courts Ordinance*.

This information should be sworn before you personally by the requesting police officer.

If you are satisfied on oath that reasonable grounds exist for the search, you should give the authorisation for the search through. See *Form [37](#) Magistrates' Courts Ordinance*.

A person who believes that his or her goods may be found on another person's property should not apply directly to you for a search warrant. He or she should take their complaint to the police, who will then apply to you for a search warrant if they deem it necessary.

## 46 Case management

Maintaining an efficient court must not interfere with the substantive decisions you make but, where possible, avoiding delay and dealing quickly with cases will improve justice.

The goals of case management are to:

- ensure the just treatment of all litigants by the court,
- promote the prompt and economic disposal of cases,
- improve the quality of the litigation process,
- maintain public confidence in the court, and
- efficiently use the available judicial, legal and administrative resources.

The following points should be kept in mind to improve case-flow management:

- unnecessary delay should be eliminated,
- it is the responsibility of the court to supervise the progress of each case,
- the court has a responsibility to ensure litigants and lawyers are aware of their obligations,
- the system should be orderly, reliable and predictable,
- early settlement of disputes is a major aim, and
- procedures should be as simple and understandable as possible.

### 46.1 Pre-trial conferences

*Practice Direction 1/24*

On 30 January 2024, the Acting Chief Justice issued Practice Direction 1/24 on the use of pre-trial conferences. This was part of the Court's movement to reduce long-pending cases in both the Magistrates and High Court.

Pre-trial conferences started being used in 2024 for the following reasons:

- expedite disposition of the case,
- help the court establish managerial control over the case,
- discourage wasteful pre-trial activities like mentions,
- ensure the case is only listed to the judicial officers when the case is ready,
- improve the quality of the trial with thorough preparation, and
- facilitate a settlement of the case.

#### 46.1.1 Application

Counsel responsible for active cases from 2022 and prior, must ensure that such cases are ready before advising the High Court that the case(s) should to be listed.

Upon receipt of advice from the lawyer, the case will be listed for pre-trial conference (PTC). Idle cases from 2022 and prior were listed for striking out if there was no development or communication from Counsel after 30 days from the date of issue of the Practice Direction.

Cases filed in 2023 and later are listed for PTC once the pleadings are closed or the case is ready for listing.

#### 46.1.2 Process of a pre-trial conference

All cases should go through the PTC process before it is listed to a judicial officer.

The PTC will be conducted by the:

- Registrar and High Court Case Manager of the High Court,
- Senior Court Clerk, Case Managers and Justices of the Peace of the Magistrates Court.

The officers of the court charged to do the PTC are only able to do the following:

- Send Notices of PTC to the parties,
- Discuss with the parties what they should do to ensure that their case is ready for hearing,
- Remind parties to comply with directions under the Rules,
- Direct parties to file relevant documents (checklist) under the Rules before the case is listed before the judicial officer,
- When the parties resolve their dispute, to list the file to the judicial officer for endorsement of consent orders,
- When the plaintiff or applicant fails to comply with the directions during the PTC and that the case/application should be struck out, to list the case to the judicial officer for striking out.

The parties to the case should:

- Attend (either the lawyer or clerk) the PTC when notice of PTC served,
- Provide all relevant documents for their case and other necessary documents required by the PTC officer,
- Comply with the directions issued by the PTC officer for compliance to have the case ready as soon as possible, and
- File with the court a signed consent order by both sides with relevant terms to be endorsed by a judicial officer when it reaches settlement.

## 47. Miscellaneous: Management of proceedings

This section consolidates and complements the provisions related to case management, emphasizing effective procedural management in Magistrates' Courts.

### 47.1 Representation and legal support

Courts should ensure that parties are represented appropriately, especially in cases involving public interest, and may rely on the Attorney-General, Crown Counsel, or other authorized representatives: *s 83 Magistrates' Courts Ordinance*.

Courts should facilitate access to legal practitioners, especially for defendants facing complex or severe charges. All parties have the right to legal representation in all proceedings unless specifically excluded: *s 84 Magistrates' Courts Ordinance*.

### 47.2 Management of fees and costs

Courts must:

- Ensure fees are paid by the initiating party unless exempted due to poverty or other valid reasons.
- Provide mechanisms for public officers to initiate cases without fee barriers when acting in an official capacity: *ss 85 and 86 Magistrates' Courts Ordinance*.

Courts should maintain accurate records and ensure transparency in their financial dealings: *s 87 Magistrates' Courts Ordinance*.

### 47.3 Efficient case management

Courts must prioritize the efficient handling of cases. To this end:

- **Scheduling:** Assign hearing dates considering the complexity and priority of cases, ensuring minimal delays for urgent or time-sensitive matters.
- **Timely notifications:** Notify all parties of changes in schedules or adjournments promptly, leveraging electronic communication tools where feasible.
- **Adjournments:** Adjournments must only be granted when absolutely necessary and not as a tool for delay.

### 47.4 Procedural integrity

Courts must ensure compliance with Section 88 of the Magistrates' Courts Ordinance, which grants the Chief Justice authority to establish procedural rules.

### 47.5 Support for vulnerable participants

Courts must:

- Provide special accommodations for victims, child witnesses, and individuals with disabilities to ensure their effective participation.
- Ensure interpreters are available when language barriers may impede justice: s [41](#) *Magistrates Courts Ordinance*

#### 47.6 Dispute resolution and early settlement

You encourage alternative dispute resolution mechanisms to reduce court caseloads, particularly for civil disputes within the monetary jurisdiction outlined in [Schedule 1](#) of the *Magistrates' Courts Ordinance*.

#### 47.7 Handling of financial penalties and compliance

Courts should provide clear guidelines for enforcing monetary judgments and other court orders: ss [25](#) and [26](#) Magistrates' Courts Rules.

You should:

- Apply fair and proportionate measures, such as instalment plans, for debt recovery.
- Avoid excessive use of imprisonment for non-compliance, ensuring it is a last resort after determining the defaulter's means to pay.

#### 47.8 Record-keeping and transparency

Accurate and secure record-keeping is critical for procedural integrity. Courts should adopt digital tools for maintaining records where possible.

## IX. Pre-trial matters

## 48 Definition of pre-trial matters

Pre-trial matters refer to all procedural steps and preparations undertaken before the formal hearing or trial begins in any jurisdiction, including criminal, civil, and land cases. These steps ensure the efficient progression of a case and adherence to legal requirements. They are distinct from pre-trial conferences, which focus on streamlining specific trial-related issues between parties (as to which, see chapter 47.1).

Pre-trial matters often include:

- Criminal cases: Instituting proceedings, filing charges, determining the validity of charges, ensuring the accused's attendance, and deciding bail applications.
- Civil cases (eg: debt, maintenance, land disputes): Filing claims, verifying documentation, and confirming jurisdiction.
- Land cases: Handling issues like registration, boundary disputes, and verifying evidence.

Pre-trial procedures ensure proper case preparation, compliance with legal standards, and that all parties are informed and ready for the main hearing. This is essential to maintaining fairness and efficiency across all types of cases heard in court.

## 49 Criminal process

Each step of the criminal process is explained in detail over the next three chapters.

- Pre-trial matters: Explains how cases reach the Magistrate’s Court and the steps to be taken up to the first appearance of the accused.
- First appearance: Outlines the procedures when the accused first appears in court.
- Defended hearings: Details the steps for trials when the accused pleads not guilty.

## 50 How a case comes to the Magistrates' Court

Criminal proceedings can be instituted by:

- complaint, or
- bringing a person arrested without warrant before the court: *s 76(1) Criminal Procedure Code*.

Any person who believes with reasonable and probable cause that an offence has been committed may make a complaint to a Magistrate: *s 76(2) Criminal Procedure Code*.

If instituted by the police or other public officer in the course of their duty, a formal charge signed by the officer is considered a valid complaint: *s 76(3) Criminal Procedure Code*.

If not a formal charge from the police, the complaint may be made on oath, either orally or in writing. It must be reduced to writing and signed by both you and the complainant: *s 76(3) Criminal Procedure Code / Rule 3 Magistrates' Courts Rules*.

Once reduced to writing, you must have the complaint drawn up into a formal charge containing a statement of the offence with which the accused is charged: *s 76(4) Criminal Procedure Code*.

### 50.1 Initial steps

How the accused is dealt with by the police will determine the steps that are taken by the court. The accused may be:

- issued with a Police Notice, under *s 78 Criminal Procedure Code*,
- charged and released on police bail,
- at large, or
- in police custody.

### 50.2 Police Notice to attend court – *s 78 Criminal Procedure Code*

A Police officer may personally serve a notice upon any person who is reasonably suspected of having committed an offence specified in *s 78 Criminal Procedure Code* requiring him or her to:

- attend court at a specified time and place (at least 10 days after service), or
- appear by advocate, or
- enter a written plea of guilty; and
- if he or she does not intend to appear in person, to provide a written consent to the trial taking place in his or her absence: *s 78(1) Criminal Procedure Code*.

The police files a Notice of Prosecution in the Magistrate's Court and serves the Notice on the accused no later than 14 days from the date of the alleged offence: *s 78(1) Criminal Procedure Code*. The Notice should state:

- the place, time and date (not less than 10 days from the date of service) in which the accused is required to appear and answer the charge,
- the full name of the informant and the capacity in which they are acting (eg: Police Constable),
- the accused's name, address, occupation and age,
- the date and nature of the alleged offence, and
- a summary of facts, sufficient to inform the accused fully and fairly of the allegations made.

The printed Notice should also contain notice of the accused's right to enter a plea of guilty in writing. The court clerk will insert a date in the Notice (at least 10 days away) by which time the accused must exercise his or her rights: s 78(1) *Criminal Procedure Code*.

If the accused does nothing, denies the charge or wishes to appear before the court, the court will prepare a summons for the accused. The case then proceeds as any other case.

If the accused pleads guilty in writing, **and** consents to the matter being dealt with in his or her absence, it may be dealt with in the absence of the accused.

The offences to which this process applies are:

- any offence under the [Traffic Ordinance](#) which is punishable only by a fine or by imprisonment not exceeding three months, or both;
- any offence under Part III Importation of Animals Ordinance: s [78\(3\)](#) *Criminal Procedure Code*.

### 50.3 Accused charged and released on bail and/or recognisance

An accused in custody without a warrant can be released if:

- The alleged offence is not murder or treason;
- the offence is not of a serious nature; and
- the person is prepared to give bail.

The accused may be released on his or her entering a recognisance, with or without sureties, for a reasonable amount to appear before a Magistrate's Court at a time and place named in the recognisance: ss [23](#), [106](#) and [107](#) *Criminal Procedure Code*.

A signed copy of the charge will be forwarded to the court before the date on which the offence is to be heard.

### 50.4 Accused at large

A person at large may be served with a summons to attend court on a specified day to answer to the complaint.

## 50.5 Accused is in police custody

### Arrest or detention

- A person is arrested or detained without an order or warrant.
- If not released, he or she **must be brought before the court without undue delay**: s 5 Constitution; s [20](#) Criminal Procedure Code.

### Preparation of charge sheet

- Police prepare a **charge sheet**: s [76\(5\)](#) Criminal Procedure Code.
- Charge sheet may include an application for remand in custody.

### File registration by clerk

- Documents presented in advance to the **court clerk**.
- Clerk registers the case in the court record and submits it to the Magistrate.

### Hearing Before Magistrate

- Magistrate hears the matter at the **earliest opportunity**.
- Charge may occasionally be presented **directly to the Magistrate**.

See the section on bail in Chapter 8 Management of proceedings, for dealing with an accused arrested without warrant.

## 51 Dealing with the charge

### 51.1 Personal interest

At this stage, ask yourself whether there is any reason for you not to hear the matter. You should excuse yourself if you have or appear to have:

- bias or prejudice in the matter,
- a personal or business relationship with the accused or victim/complainant, or
- a personal or financial interest in the matter.

See [Chapter 4](#) Judicial Conduct, paragraph 1.5.

If you must disqualify yourself, procedures are in place for your replacement so that the case can be heard in accordance with the law and without the possibility of real or perceived bias. See *s 11 Magistrates' Courts Ordinance*.

Alternatively, if it appears impossible to hear a case in the jurisdiction because too many Magistrates must disqualify themselves, report the matter to the Chief Justice.

### 51.2 Transferring the case

If it appears that the cause of the complaint arose outside the district limits of your court, you may direct the case to be transferred to the court having jurisdiction: *s 65 Criminal Procedure Code*.

If you think the accused should remain in custody or be placed in custody, direct that the police take to the court having jurisdiction:

- the accused; and
- the complaint and recognisances taken, if any.

Issue a warrant for that purpose.

If the accused is not to be held in custody, explain to him or her that you have directed the case be transferred to another court and grant bail on appropriate conditions.

### 51.3 Validity of the charge

#### 51.3.1 General requirements

A formal charge is an accusation of the commission of an offence.

Generally, a charge should be filed:

- at the court within the district in which the offence is alleged to have been committed (wholly or partly); or
- at the court within the district in which the accused was apprehended; or
- at the court within the district in which the accused is in custody or has appeared in answer to a summons: *ss 58 - 62 Criminal Procedure Code*.

Every charge must contain:

- a statement of the specific offence or offences with which the accused is charged;
- such particulars as may be necessary for giving reasonable information as to the nature of the offence charged: [s 117 Criminal Procedure Code](#).

*Section 120 Criminal Procedure Code* sets out how a charge is to be framed. However, unless the court considers that there has been a miscarriage of justice, you should not quash, hold invalid or set aside any information or complaint only because of any defect, omission, irregularity or want of form: [s 77\(2\) Criminal Procedure Code](#).

Generally, the charge should be set out in ordinary language and should avoid the use of technical terms wherever possible. It should include:

- a statement of offence, although it is not necessary that all the essential elements of the offence be included,
- a reference to the section of the enactment creating the offence, and
- particulars of the offence, unless specifically not required by enactment.

Where there is more than one count, they should be numbered consecutively, and may be put in the alternative: [s 118 Criminal Procedure Code](#).

Check that the charge does not improperly charge more than one offence for the same action (duplicity), unless put in the alternative. For example, separate counts for common assault and assault causing actual bodily harm arising from the same set of facts would have to be put in the alternative. If not, the charge will be defective for duplicity and will have to be amended at the first appearance.

The charge need not go into any exceptions or exemptions to the offence.

Generally, people and property should be reasonably identified, although names need not be given where they are not known.

There is a time limit for laying a charge for certain summary offences in the Magistrates' Court.

Offences cannot be tried by a Magistrate unless the charge is laid within:

- six months from the date the alleged offence was committed; or
- a longer time if specially allowed by law: [s 204 Criminal Procedure Code](#).

### 51.3.2 Check validity

Check that the charge sheet:

- is sworn,
- is within time, and
- sets out the offence, section and particulars of the offence sufficiently.

Refer to ss [58 – 62](#), [117](#), [120](#) and 204 *Criminal Procedure Code*.

Ensure that the charge sheet is accurately completed before you sign it.

If the charge is defective, raise it with the prosecution at the first appearance, for amendment or withdrawal.

If the only issue is that it is out of time according to s 204 *Criminal Procedure Code*:

- direct that a case file be opened, and
- at first appearance, declare that it is out of time and not triable, according to s 204, and
- discharge the accused.

#### 51.4 Joined charges

More than one offence may be charged together in the same charge as long as:

- they are founded on the same facts, or
- they form or are a part of a series of offences of the same or similar character: [Rule 5 Magistrates' Courts Rules](#); s [118\(2\)](#) *Criminal Procedure Code*.

Each offence must each be set out in a separate paragraph in the charge, called a count: [Rule 5 Magistrates' Courts Rules](#); s [118\(2\)](#) *Criminal Procedure Code*.

If an accused is charged with more than one offence in a charge or information, you may order that the offences be tried separately, if you believe that trying the offences together would harm the accused in his or her defence: s [118\(3\)](#) *Criminal Procedure Code*.

#### 51.5 Joined parties

The following persons may be joined in one charge and tried together:

- persons accused of the same offence committed in the course of the same transaction;
- persons accused of an offence and persons accused of abetment or of an attempt to commit the offence;
- persons accused of different offences committed in the course of the same transaction;
- persons accused of different offences provided that all offences arise from the same facts or form or are part of a series of offences of the same or similar character: s [119](#) *Criminal Procedure Code*.

## 52 Ensuring attendance of the accused

Once the charge or complaint is dealt with, you must ensure attendance of the accused at the High Court or a Magistrates' Court through either:

- a summons; or
- a warrant: [s 77\(1\) Criminal Procedure Code](#) / [Rule 4 Magistrates' Courts Rules](#).

### 52.1 Notice to appear

Instead of arresting someone or issuing a summons, the police may give the person a notice to appear: [ss 87 and 88 Police Powers and Duties Act 2008](#).

The notice must:

- state the offence believed to have been committed,
- state the name of the person alleged to have committed the offence,
- state whether the person was an adult or a child at the time of offending,
- require the person to appear before the Magistrates' Court at a specific time and place, and
- be signed by the issuing police officer.

The notice must be served personally on the accused: [s 89 Police Powers and Duties Act 2008](#). Once the notice has been served, it must be filed with the clerk of the court: [s 90 Police Powers and Duties Act 2008](#).

If someone fails to appear in court after being given a notice to appear, you may order a warrant for his or her arrest, or hear the matter in the absence of the accused. If you are not satisfied that the notice to appear was served properly, you may strike it out and continue to hear the case once the accused either is arrested, or presents voluntarily to the court: [s 91 Police Powers and Duties Act 2008](#).

### 52.2 Summons

A summons is a formal means of ensuring the attendance of a person before the court.

The summons must be directed to the person being summoned and must:

- require him or her to appear before the court having jurisdiction at a time and place mentioned in the summons;
- state briefly the offence with which the person is charged: [s 79\(2\) Criminal Procedure Code](#).

The summons must:

- be in writing, in duplicate;
- be signed by the presiding officer of the court or by some other officer directed by the Chief Justice;
- be directed to the person summoned and require him or her to appear at a stated time and place;

- state shortly the offence charged: [s 79\(1\) Criminal Procedure Code](#); and
- be in [Form 2 – Criminal \(Rule 6\)](#) in Magistrates’ Courts Ordinance (Schedule – Forms).

A summons will **not** be necessary where:

- the accused has been served a Police Notice under [s 78 Criminal Procedure Code](#); or
- the accused has been released on Police bail or recognisance.

The police will generally have prepared a summons in advance and attached it to the charge.

### 52.2.1 Service

Sections [80 – 84](#) Criminal Procedure Code detail how service may be effected.

## 52.3 Warrant

While both summonses and warrants serve the same role of ensuring the accused’s attendance in court, a warrant is a more forceful means of ensuring attendance.

Most often a warrant is issued when an accused does not obey a summons, or does not obey a recognisance of bail. You may, however, issue a warrant at this stage, rather than issuing a summons, **only** if you are satisfied that the person to be apprehended is within your jurisdiction when the charge is laid: [Rule 10 Magistrates’ Courts Rules](#). This would normally only be appropriate where you are satisfied that the accused will not for some reason attend on a summons.

Even if a summons has been issued, you may issue a warrant before the time appointed in the summons, only if a complaint has been made on oath: [s 87 Criminal Procedure Code](#).

An application for an arrest warrant by police must be sworn, and state the grounds on which the warrant is sought. For offences other than felonies, the application must also state why a notice to appear or summons would not be effective. You should only issue a warrant if you are satisfied that there are reasonable ground to suspect:

- the person has committed the offence; and
- for offences other than felonies, why an arrest warrant is necessary: [s 79 Police Powers and Duties Act 2008](#).

Every warrant must:

- state the applicant’s name, rank and station;
- state that any police officer can arrest the person named in the warrant;
- state the offence alleged to have been committed; [s 80 Police Powers and Duties Act 2008](#);
- be signed by the Judge or Magistrate issuing it: [s 89\(1\) and \(2\) Criminal Procedure Code](#).

For an offence other than murder or treason, you may direct the officer to whom the warrant is directed, to take security from the accused and release him or her from custody if the accused executes a bond with sufficient sureties for his or her attendance before the court at a specified time and thereafter until otherwise directed by the court: [s 90 Criminal Procedure Code](#).

You do this by endorsing the warrant. The endorsement must state:

- the number of sureties,
- the amount in which they and the accused are to be respectively bound, and
- the time at which he or she is to attend before the court: *s 90(1) Criminal Procedure Code*.

The officer must forward the bond to the court: *s 90(3) Criminal Procedure Code*.

Every warrant remains in force until it is executed or cancelled by the court issuing it: *s 89(3) Criminal Procedure Code; Rule 9(2) Magistrates' Courts Rules*.

### 52.3.1 Execution of warrant

Warrants are normally directed to all police officers, but if the immediate execution of the warrant is necessary and no police officer is available, the warrant may be directed to any person or persons: *s 91 Criminal Procedure Code*.

When executing a warrant, the police officer or other person must notify the person being arrested of the substance of the warrant: *s 92 Criminal Procedure Code*.

Once arrested, and if not released after providing security under *s 90 Criminal Procedure Code*, the person must be brought before the issuing court without unnecessary delay: *s 93 Criminal Procedure Code*.

If arrested outside the district of the court issuing the warrant, the person arrested must be brought before the Magistrates' Court in that jurisdiction, unless the court that issued the warrant is closer: *s 95(1) Criminal Procedure Code*.

### 52.3.2 Accused persons arrested under warrant

Once the accused is brought before you, you may:

- commit him or her to prison by warrant, or
- commit him or her to the custody of the police orally, or
- commit him or her to other safe custody: *Rule 11(1) Magistrates' Courts Rules*.

In all cases, you must order the accused to be brought before the Court at a certain time and place: *Rule 11(1) Magistrates' Courts Rules*.

Committal may not exceed seven days in any of the above situations: *Rule 11(1) Magistrates' Courts Rules*.

On the request of the person laying the charge and with the consent of the accused, you may also hear and determine the matter immediately: *Rule 11(2) Magistrates' Courts Rules*.

Upon request by the accused, bail can be granted in such conditions as you order. See also Chapter 8.

## 53 Ensuring attendance of witnesses

### 53.1 Summons

If it is clear from the charge that material evidence can be given by or is in the possession of any person, you may issue a summons requiring their attendance or requiring them to bring and produce documents as specified: s [127](#) *Criminal Procedure Code*.

[Form 6 – Criminal \(Rule 12\(1\)\)](#) in the *Schedule* relating to *FORMS*, is to be used for summoning a witness.

Where a witness refused to answer to the summons, [Form 7 – Criminal \(Rule 12\(2\)\)](#) should be issued to apprehend the witness.

The police will generally prepare any necessary summonses in advance and attach these to the charge.

### 53.2 Warrant

Like an accused, a warrant may be issued to compel the attendance of a witness in court at this stage. You may **only** issue a warrant for a witness at this stage if you are satisfied by evidence on oath that the witness will not attend court unless compelled to do so: s [129](#) *Criminal Procedure Code*.

#### 53.2.1 Witnesses arrested under warrant

If a witness is arrested under warrant:

- you may order his or her release from custody upon furnishing security by recognisance satisfying you of his or her appearance at the hearing; or
- you may order him or her detained for production at the hearing on failing to furnish security: s [130](#) *Criminal Procedure Code*.

## X. Children, Young People and Family Welfare Act 2013

## 54 Definitions

### 54.1 General

A “parent” is a father or mother, whether by birth or adoption, a guardian who has been given custody by court or by an agreement, or a caregiver who has the responsibilities of a father or mother.

A “caregiver” is someone who is not related to the child or young person, but who the child or young person lives with, or has primary responsibility for their daily care.

“Family” means a parent, grandparent, step-parent, siblings, aunts and uncles, or cousins of the child or young person, by birth or adoption. This also includes anyone who the child or young person has developed a psychological or emotional attachment to and it resembles a family relationship.

A child is aged under 14 years old, and a young person is someone between 14 and 18 years of age.

### 54.2 Care and protection definitions

A child or young person who is in need of care and protection means someone who:

- Has been orphaned, abandoned or without parental care and no appropriate arrangements have been made;
- Has been harmed, or is at risk of harm, from one or more of the following:
  - physical abuse,
  - sexual abuse or sexual exploitation,
  - emotional abuse,
  - neglect,
  - harsh or exploitative labour that interferes with health, development or schooling;

And his or her parents have not protected them, or are unlikely to protect them from that harm: s 2. “Physical abuse” is any act of violence or maltreatment, which causes physical wounds or bodily injury.

“Sexual abuse or sexual exploitation” means:

- inducing a child or young person to engage in any unlawful sexual activity;
- involving the child or young person in prostitution;
- using a child or young person in pornographic performances and materials; and
- the child or young person is involved in a sexual activity that they:
  - do not fully understand,
  - are not able to give informed consent to, or
  - are not developmentally prepared for and cannot give consent.

“Emotional abuse” is acts or omissions that cause, or are likely to cause, mental or emotional suffering. This includes patterns of behaviour that may be belittling, threatening, scary, ridiculing or other forms of non-physical treatment that is degrading to that child or young person.

“Neglect” is inattention, or an omission, by a caregiver to provide for the development of a child or young person, which causes harm to a child or young person’s health or physical, mental, moral or social development. This can be in relation to health, education, emotional development, nutrition, shelter and safe living conditions. This must be considered in the context of what resources are available to the family.

## 55 Purpose and principles of the Act

### Purpose of The Act

- Align with the [Convention on the Rights of the Child \(CRC\)](#) to protect children's rights
- Strengthen families and promote traditional practices: s [3\(a\)](#) and [\(c\)](#)
- Provide care/support for children if families are unable: s [3\(f\)](#)
- Promote environments that ensure:
  - Safety, stability, and nurturing
  - Positive relationships with families and communities
  - Healthy growth and education
  - Play, recreation, cultural pride, and responsibility
  - Freedom from discrimination, abuse, and neglect: s [4](#)
- Define parental responsibilities to safeguard children: s [5](#)

## 56 Wellbeing and protection of children and young people

“Wellbeing” is defined as including the care, development, health and safety of a child or young person: s [2](#).

When making any decisions under this Act, you should consider the following principles:

- every child and young person should be cared for and protected from harm;
- the preferred environment for children and young people is their own home;
- children, young people, relevant family members and community members should be involved in decisions about wellbeing, except if their involvement would be detrimental;
- families and communities should be supported to respond to concerns about wellbeing and protection;
- court intervention should only happen where the family and community are not able to safeguard the child or young person;
- the safety, wellbeing and best interests of the child or young person are the most important consideration;
- any decisions must be appropriate for the age, character, condition, status, disability and any other circumstances of the child or young person; and
- the rights under CRC should be promoted and respected as much as possible: s [6](#).

### 56.1 Intervention services and programmes

The Director of the Ministry responsible for child and family welfare will lead and coordinate the development of services and programmes to support families and communities, in partnership with government agencies, non-governmental organisations, church, other faith-based organisations, and community leaders: s [14\(1\)](#).

Early intervention services will be developed to strengthen families and communities, help them recognise problems early on and equip them with support, share information on how to access support services, and aim to prevent the recurrence of risk factors in the lives of children and young people: s [16](#).

### 56.2 Reports of concern

Anyone who is concerned for the wellbeing of a child or young person, or is aware of a child or young person in need of care and protection, can report to the Director, a social welfare officer, or a police officer: s [18](#).

If police receive a report under section 18, or they become aware of a child or young person who is in need of care and protection, they must ensure that person is safe and notify the Director or a social welfare officer as soon as possible: s [22\(1\)](#).

Reports under section 18 can be done anonymously: s [19](#).

No criminal, civil or disciplinary proceedings can be brought against someone who makes a report of concern. Making a report also is not considered a breach of any professional ethics, or a departure from accepted professional conduct, unless the information was disclosed in bad faith: s [20\(1\)](#).

### 56.2.1 If you become aware of any concern during proceedings

If you become aware during any court proceedings that a child or young person is in need of care and protection, you must contact the Director for an assessment to be completed. You may also order that the child or young person be held in a temporary safe place if you believe this is necessary for their safety and wellbeing: s [23](#).

“Place of safety” is a shelter, health care facility, private home, or any other place approved by the Director, which can temporarily care for a child or young person: s [2](#).

## 56.3 Assessment and intervention

Where the Director receives any request for assistance, or information that raises concern, they shall make any inquiries as reasonably necessary to determine whether intervention is needed: s [24\(1\)](#). Inquiries may include: visiting the child or young person’s home, interviewing anyone involved, and requesting information from agencies and organisations: s [24\(2\)](#).

If the Director decides action is required, they may do any one or more of the following:

- provide for advice or support services for the child or young person then their family;
- develop an agreed plan, in consultation with the child or young person, their family and community members;
- exercise emergency protection powers if needed;
- refer the matter to Police if a criminal offence may have been committed;
- seek care and protection orders from the court: s [25\(1\)](#).
- take no further action if proper arrangements have already been made: s [25\(2\)](#).

### 56.3.1 Agreed care and protection plan

As far as possible, decisions should be made in consultation with the child and young person and their family. The Director should consider the care and protection needs, and have everyone agree on a plan to meet these needs: s [26\(1\)-\(2\)](#). If the child or young person is not involved in the family mediation, the Director must take all reasonable steps to find out their views and ensure these are considered in reaching any decision: s [26\(4\)](#).

The agreed plan must be in writing, approved by the Director, and include information on how progress will be monitored: s [27\(3\)](#).

A care and protection plan may include:

- advice, encouragement or counselling for the child or young person;
- family or parenting counselling;
- regular monitoring and supervision by a social welfare officer or other appointed person;

- attendance by a parent at specific counselling or treatment for alcohol, drugs or other substances;
- participation in parenting programmes;
- prohibiting contact with the child or young person;
- an agreement on where the child or young person will reside: *s 27(1)*.

Where appropriate, a plan should be discussed with the family and community, including religious leaders or members of the church or other faith-based organisation, and any service providers involved: *s 27(2)*.

### **56.3.2 No agreement on a plan**

If the Director believes a child or young person needs care and protection, but no agreement can be reached on a plan, or the proposed agreement is not sufficient to protect the child or young person's wellbeing, they may apply to the court for a care and protection order: [s 28](#).

This also applies where a plan has been agreed on, but the parties have not complied with the plan: *s 28(c)*.

## 57 Orders and hearings

### 57.1 Emergency powers – Division 4

If, based on sworn information from a social welfare officer, you have reasonable grounds to believe a child or young person is in need of care and protection and no other courses of action are available, you may issue a warrant authorising the child or young person be brought to a place of safety. This may be carried out by a social welfare officer or a police officer: s [29](#).

If a police officer or child welfare officer believes that a child or young person's health or safety is in immediate danger, and there is substantial risk in waiting for a warrant to be issued, they may remove the child or young person to a place of safety: s [30\(1\)](#). A police officer must immediately notify the Director or a social welfare officer if they take this action: s [30\(3\)](#).

If a child or young person has been removed to a place of safety under either of the above provisions, they are considered to be in the care of the Director. This is until they are returned, or the court makes an interim care and protection order: s [32](#).

### 57.2 Interim care and protection order

Where a child or young person has been removed to a place of safety, as soon as practicable the Director should make an application to the court for an interim care and protection order: s [33\(1\)](#).

An interim order may include conditions necessary for the best interests of the child, such as placing them with other family members, authorising a medical examination, prohibiting named persons from having contact with them, and providing for interim maintenance: s [33\(2\)](#).

An interim order remains in place until a final order has been made under Division 5 of the Act: s [33\(3\)](#).

No interim order is required if the Director is satisfied circumstances have changed and the child or young person can return to their parents, or if an agreement is reached with the parents that the Director considers to be adequate for the protection of the child or young person: s [34](#).

### 57.3 Care and protection orders- Division 5

The Director, a social welfare officer, or any other person by leave of the court, may apply to you for a care and protection order: s [35](#). A time and date for the hearing should be fixed as soon as possible: s [36](#).

If you believe it is in the best interests of a child or young person to have legal representation, you must refer the matter to the Office of the People's Lawyer: s [37\(3\)](#).

You may make a care and protection order if you are satisfied that:

- the child or young person is in need of care and protection,
- court intervention is necessary, and
- the order is in the best interests of the child or young person: s [41](#).

You may make one or more orders that you consider are appropriate in the circumstances: s [42\(1\)](#).

### 57.3.1 Supervision order

The child or young person and their parent is placed under the supervision of a social welfare officer, or someone else designated by the court: s [42\(1\)\(a\)](#).

A supervision order must be put in place for a specified period of time, but not over 12 months: s [43\(1\)](#). You may impose any reasonable conditions in relation to the care and supervision of the child or young person. Conditions may include:

- that guidance, support or assistance be provided to the parents by the Director or any other organisation;
- participation of the parent in counselling, or specified treatment;
- the right of the Director or other specified person to visit, assist and advise the child or young person: s [43\(2\)](#).

### 57.3.2 Restraining order

A restraining order prohibits the named person from associating with the child or young person, and limits their access and contact with the child or young person: s [42\(1\)\(b\)](#).

You may order the person enter into a recognizance, with or without sureties, in an amount you consider necessary and reasonable: s [44](#).

### 57.3.3 Temporary custody order

Under a temporary custody order, the child or young person is placed in the custody of a family member or other suitable person approved by the Director: s [42\(1\)\(c\)](#).

A temporary custody may not exceed a period of 12 months: s [45\(1\)](#).

You may impose any conditions you consider reasonable in relation to the care and wellbeing of the child or young person, including:

- parental access to the child or young person, provided this is in the best interests of the child or young person;
- guidance, support and assistance to be provided to the child or young person;
- guidance, support and assistance be made available to the parents to address the situation that required the child or young person to be removed: s [45\(2\)](#).

You may also make a maintenance order, directing a parent to pay to the Director or a designated person an amount you consider reasonable, considering the needs and circumstances of the child or young person, the means of the parents, and any other matters you consider relevant: s [47](#).

### 57.3.4 Permanent custody order

Under a permanent custody order, the child or young person is placed in custody of a family member or someone else approved by the Director, or in the custody of the Director: s [42\(1\)\(d\)](#).

Before making any order that removes the child or young person from the custody of their parents you must be sure that less disruptive options would not adequately protect the child or young person: s [42\(2\)](#).

You should not make a permanent custody order unless the identity or location of the parents has not been found, the parent is unable or unwilling to resume custody, or the nature and extent of harm suffered by the child or young person is that returning them to their parent's custody is not in their best interests for the foreseeable future: s [42\(3\)](#).

If a permanent custody order is made, that person becomes the sole guardian for the child or young person. However, this does not affect any inheritance or succession rights of the child or young person: s [46\(1\)](#).

If permanent custody is granted to the Director, they must make appropriate arrangements for the care of the child or young person, and may consent to their adoption: s [46\(2\)](#).

You may also make a maintenance order, directing a parent to pay to the Director or a designated person an amount you consider reasonable, considering the needs and circumstances of the child or young person, the means of the parents, and any other matters you consider relevant: s [47](#).

#### 57.4 End and expiry of care and protection orders

Any order that places a child or young person in the custody of the Director or any other person ends when:

- the child or young person reaches the age of 18,
- the child or young person is adopted,
- the order expires, in cases of interim orders,
- the court varies or revokes an order: s [48](#).

You may also make a maintenance order, directing a parent to pay to the Director or a designated person an amount you consider reasonable, considering the needs and circumstances of the child or young person, the means of the parents, and any other matters you consider relevant: s [47](#).

#### 57.5 Varying or revoking orders

Any party to the initial proceedings can apply to the court to vary or revoke an order: s [49\(1\)](#).

If you are satisfied that it is in the best interests of the child or young person, you can confirm the order, vary the order or any condition of the order, revoke the order, or revoke the order and make another care and protection order: s [49\(2\)](#).

#### 57.6 Child Protection Hearings

These hearings are civil in nature, and therefore any other provisions that apply to civil cases will also apply: s [38\(2\)](#).

You should conduct these hearings in a way that includes all parties, including the child or young person and designed in a way that puts them at ease: s [38\(1\)](#).

The hearing should be in private and at a different time or different place from criminal court matters: *s 38(1)(d) and (e)(i)*.

Parties to care and protection proceedings include:

- the applicant;
- the Director, if they were not the applicant;
- the child or young person;
- parents; and
- any other person who is a caregiver: *s 37(1)*.

Before making any orders, you should have a written plan from the Director for the care and protection of the child or young person: *s 39(1)*. This plan should include:

- any attempts to agree on a plan under section 26;
- a description of the proposed care arrangements, including custody and supervision;
- a description of services to be provided to remedy the situation that led to the child or young person needing care and protection;
- a time estimate to achieve this;
- reasons why the child or young person needs to be temporarily removed from their home, if this has been proposed by the Director;
- if the proposal is to remove the child or young person permanently, what arrangements have been made: *s 39(2)*.

You should also obtain the views of the child or young person before making any orders: *s 40(2)*.

You should also have regard to the age and developmental capacity of the child or young person, and ensure they can participate in the hearing as much as possible: *s 40(1)*.

## 57.7 Appeals

Any party may appeal against an order made, or the refusal to make an order, to the court with jurisdiction to hear civil appeals from the Magistrate's Court: *s 50*.

## 58 Offences

### 58.1 Obstructing in execution of duty

Anyone who obstructs the Director, or a social welfare officer, in execution of their duty is guilty of an offence. The maximum penalty is a fine of \$5,000 or one year imprisonment, or both: s [13](#).

### 58.2 Contravention of care and protection order

Any person who violates a care and protection order is guilty of an offence and liable to a fine up to \$10,000, or 18 months imprisonment, or both: s [51](#).

### 58.3 Disclosing information about child or young person

Any person who publishes, or makes public, information that identifies a child or young person who is subject to proceedings under the Act is guilty of an offence and liable to a fine of \$5,000, 1 year's imprisonment, or both: s [54](#).

## XI. Te Rau N Te Mwenga Act 2014 (Family Peace Act)

## 59 Definitions

The Act defines a “child” as someone under the age of 18. Other legislation defines a child as someone under 14, and people aged between 14 and 18 are defined as young people (see [Children, Young People and Family Welfare Act 2013](#)).

CRC is the Convention on the Rights of the Child.

CEDAW is the [Convention on the Elimination of All Forms of Discrimination against Women](#).

### 59.1 Domestic violence

Domestic violence is defined under section 4 of the Act. It means any act, omission or threats to the complainant, or a person related to the complainant, by someone who they are in a domestic relationship with. These actions or omissions will constitute domestic violence if it harms, injures or endangers the health, safety and wellbeing of the complainant: s 4(1).

Domestic violence that causes harm includes physical abuse, sexual abuse, verbal, emotional and psychological abuse and economic abuse: s 4(2).

A single act on its own can be considered domestic violence. A number of acts that form a pattern of behaviour can also amount to domestic violence, even if any one act on its own may seem to be minor or trivial: s 4(3).

“Sexual assault” is any of the following:

- Sexual contact that involves intentional touching or penetration;
- A person in authority forcing another to touch them intimately;
- Coercing or inducing someone who is under the age of 13 or mentally impaired to perform sexual acts;
- Touching of clothing covering intimate parts;
- Intentionally causing seminal fluid or sperm to penetrate the complainant, or touch the complainant’s body or clothing: s 2.

“Sexual harassment” is any unwelcome sexual advance. This may be done verbally or physically, and may include intimidation, threats or other forms of coercion to the complainant. Sexual harassment may make sexual intercourse unavoidable for the complainant, it may create a hostile environment for the complainant, or cause damage to their employment, or their wellbeing in any way: s 2.

“Harassment” is defined as engaging in a pattern of behaviour that causes the complainant to feel fearful. This can include repeatedly:

- watching or loitering outside or near places where the complainant lives, works or spends time;
- making unwarranted phone calls, or getting someone else to make phone calls to the complainant;

- sending unwanted letters, packages, texts, emails or any form of communication: s 2.

“Intimidation” is defined as any word or action, done intentionally, that threatens a use of force or physical injury to someone else: s 2.

“Stalking” is repeatedly following the complainant in an unwanted and unwelcome way. This may be in person, or through phone calls and texts, or other forms of communication: s 2.

## 59.2 Domestic relationship

A domestic relationship between a complainant and the respondent will exist in any of the following situations:

- They are or were married, in accordance with law, custom or religion;
- They live or lived together in a relationship as if they were married, even if they were not married;
- They are the parents of a child, or who have had parental responsibility for the child;
- They are family members related by legal or customary adoption;
- They are or were engaged, in a courtship or customary relationship, which includes an actual or perceived intimate relationship of any duration;
- They share or recently shared the same residence; or
- Are wholly or partially dependent on ongoing care in the same household: s 5.

## 59.3 Culture and custom

Custom is specifically defined as "the customs and usages, existing from time to time, of the natives of Kiribati": s [5\(1\) Laws of Kiribati Act 1989](#).

It represents traditional practices with a legal dimension when recognized as customary law. These customs are applied in various legal matters, particularly those tied to native land, family relations, and community obligations: [Schedule 1 Laws of Kiribati Act 1989](#)

The recognition of customary law ensures the safeguarding of Kiribati’s cultural heritage, as it allows courts to incorporate indigenous customs into the legal framework, balancing justice with traditional practices.

Culture encompasses the broader societal framework these customs sustain. Both concepts are vital in maintaining Kiribati’s unique identity within its legal and communal systems.

## 6o Object and purpose

The Act was created to ensure the safety and protection of everyone who experiences domestic violence. It also aims to provide support and redress to victims, create programmes to support victims, facilitate court orders to stop domestic violence, and enact laws that are in line with CEDAW and CRC: s [3\(1\)](#).

The Act recognises that:

- Domestic violence is unacceptable;
- Statistics show it is almost always perpetrated by men against women and children;
- Domestic violence impacts all parts of a community;
- It extends beyond physical, sexual, psychological and economic violence, and can involve exploiting power imbalances and a pattern of abuse over many years;
- It occurs in traditional and non-traditional settings:
- Children are particularly vulnerable in exposure to domestic violence;
- A response to domestic violence requires a legal and social response to help victims and create measures to protect against and prevent violence: s [3\(2\)](#).

The Court of Appeal in [Toakarawa v Republic \[2006\] KICA 9](#) stated that:

[5] "On sentence the Chief Justice emphasised that domestic violence was not a private matter; that it was the concern of everyone; that it was shameful; that it was to be strongly condemned; that it was to be severely punished..."

[7] "...assaults on wives are to be treated as serious matters of public concern and that a wife's forgiveness of her husband does not affect the court's duty to impose a sentence appropriate to the gravity of the offence."

## 61 Jurisdiction

You have the jurisdiction to decide any application brought under this Act, and to perform any function or exercise any power required under this Act: s [6\(1\)](#).

Regardless of the district, you may hear and decide proceedings under this Act even if it has been started in another Magistrate's district: s [6\(2\)](#).

## 62 Protection orders

The purpose of protection orders is to prevent domestic violence and facilitate safety and protection for people who experience and fear domestic violence: s [10](#).

You must give priority to hearing applications for protection orders: s [11\(7\)](#).

### 62.1 Applications for protection orders

#### 62.1.1 Who may make an application

A complainant can apply to their nearest court for a protection order, or someone can apply on their behalf due to a lack of mental or physical capacity, or because of fear of harm: s [11\(2\)\(a\)-\(b\)](#). There is no civil or criminal liability on someone who makes an application for a protection order in good faith: s [11\(4\)](#).

If a complainant makes an oral or written application to withdraw a complaint against the respondent, you must:

- investigate why they have withdrawn the complaint;
- ensure the safety and wellbeing of the complainant and any dependents;
- make further directions; or
- grant the application to withdraw: s [37](#).

You may make a protection order of your own motion in any family or criminal proceedings, based on the circumstances of the case. You should take into account the safety, health and wellbeing of the complainant, and the interests of anyone who is dependent on the complainant: s [13](#).

#### 62.1.2 Form of application

An application can be made in person orally, in writing, by phone, or by text or email: s [12\(1\)](#). Written applications must comply with the template provided in Form 1 of the Schedule to the Act. If an application has not been made in writing, the court clerk must complete Form 1: s [12\(3\)](#).

If an application has been made by someone other than the complainant, then the appropriate template is [Form 2](#) of the Schedule.

The court must keep a written record of all applications for protection orders, all orders that have been granted, and if orders have been declined it must include the reasons for refusal: s [12\(5\)](#).

#### 62.1.3 Cross-applications

Sometimes the person named as the respondent in an application for a protection order may bring their own application against the original complainant, which is known as a "cross-application". If this cross-application was not served on the original complainant at least 1 business day before the hearing for the first application, you must adjourn the hearing: s [15\(1\)-\(2\)](#).

A new date must be set to hear the cross-application, to allow for a copy to be served on the original complainant: s [15\(2\)](#).

The original complainant can give their consent for you to hear the cross application before the original application, or hear both at the same time: [s 15\(2\)](#).

You may make a temporary protection order in the following circumstances:

- If the original complainant does not consent to have the matters heard together and wants a new hearing date;
- If the original respondent, or another person the respondent is seeking to protect, is in danger of personal injury or their property is at risk of substantial damage: [s 15\(3\)](#).

## 62.2 Grounds for granting a protection order

You may make a protection order if you are satisfied that:

- The respondent is, or has been, violent towards the complainant, a child, or another family member living in the same household; and
- The order is necessary for that person's protection: [s 14\(1\)](#).

In deciding whether to make an order, you must consider:

- the need to ensure the complainant is protected from domestic violence;
- the wellbeing and accommodation needs of the complainant, their children, and any other family member living in the same household;
- the principles under Section 3 of the Act;
- any other matters you consider relevant: [s 14\(2\)](#).
- whether there is evidence of a pattern of behaviour by the respondent that amounts to domestic violence: [s 14\(5\)](#).
- the views of the complainant, their children or family, of the nature and seriousness of the respondent's behaviour;
- the effect of the respondent's behaviour on the applicant, their child or other family members living in the same household: [s 14\(6\)](#).

You must not take into account any custom that may put the complainant, or anyone else, at risk of domestic violence: [s 14\(3\)](#).

When making a protection order, you must explain what the orders mean and the consequences of the order to all parties: [s 14\(7\)](#).

## 62.3 Types of orders

### 62.3.1 Emergency protection order

Where an ex parte application is made orally, or in written form on [Form 1](#), you should consider whether there are reasonable grounds for believing that if an emergency order is not made, the respondent may:

- cause physical, verbal, emotional, or psychological violence to the complainant, or to a child or other member of the household;

- remove or damage property, or cause death or injury of any animal belonging to the complainant;
- prevent or deter the complainant from pursuing a protection order: s [16\(2\)](#).

Unless there are exceptional circumstances, you must determine an application for an emergency order on the same day in which it is made: s [16\(6\)](#).

An emergency order has effect for no more than 28 days (including the day on which the order is made): s [16\(5\)](#). A copy of the order must be immediately sent to the Police in the area nearest to where the complainant resides at the time: s [16\(4\)](#).

You may include any conditions in an emergency protection order as set out in Division 4 of the Act: s [16\(3\)](#).

### 62.3.2 Temporary protection order

You may make a temporary protection order if you consider there is a risk of harm to the complainant if the order is not made immediately and it is in the best interests of the complainant: s [17\(1\)-\(2\)](#). You may include any conditions deemed necessary as listed under Division 4 of the Act.

Temporary protection orders are effective for 90 days: s [17\(6\)](#).

If you make a temporary protection order, you must direct the Police to immediately serve a copy on the respondent, along with a notice of the date of hearing in accordance with Form 3, and a notice which tells the respondent that the protection order will become final after 90 days if they take no further action: s [17\(3\)](#).

If the respondent does not appear at the hearing and you are satisfied that they were served a copy of the order and notice, then you can either give further directions, or order that the protection order becomes final after 90 days from the date on which it was made: s [17\(4\)](#).

### 62.3.3 Final order

Where an application on notice is made to the court for a final protection order, and you are satisfied that notice has been served on the respondent in accordance with [Form 3](#) of the Act, you may:

- give further directions; or
- make a final order, including any conditions you consider necessary under Division 4: s [18\(1\)](#).

You must take into consideration the best interests of the victim, and any dependent persons in the domestic relationship: s [18\(3\)](#).

A final protection order remains in force until it is varied or cancelled by the court on application by the respondent, provided there is good cause to do so: s [18\(2\)](#).

## 62.4 Conditions of orders (Division 4)

### 62.4.1 Standard conditions

Any protection order must include the conditions that the respondent must not:

- Physically or sexually abuse the complainant;
- Threaten to abuse the complainant;
- Damage or threaten to damage property, or cause death or injury to an animal belonging to the complainant;
- Engage, or threaten to engage in, other behaviour such as intimidation, harassment or stalking, which constitutes psychological abuse;
- Deprive, or threaten to deprive, the complainant of financial resources, or dispose of any property in which the complainant has a material interest;
- Encourage another person to engage in behaviour against the complainant, which is done by the respondent would be prohibited by the protection order;
- Approach the complainant while under the influence of kava, alcohol, or non-prescription drugs: s [19\(1\)](#).

It is also a mandatory condition that when the complainant and respondent are not living together, the respondent must not:

- watch, loiter, or prevent the complainant having access to their house, business, employment, school, or any other place the complainant often visits;
- follow the complainant or accost them;
- enter or remain in any place without the complainant's express consent;
- make any other contact with the complainant not permitted by the order, such as by phone, text, email or other correspondence: s [19\(2\)](#).

#### 62.4.2 Property and accommodation conditions

You may include as many of the following conditions as deemed necessary:

- Prohibit the respondent from taking, damaging, selling or giving away property that belongs to the complainant;
- Direct the respondent to return specific personal property to the complainant, or allow the complainant access to and use of any specified property;
- Grant the complainant temporary occupancy to a residence, or a specified part of it, whether or not the residence is owned or leased by the respondent: s [20](#).

#### 62.4.3 Weapons conditions

You may direct that the respondent surrender any weapon to the nearest police station, or dispose of the weapon in another way, if it has been used or threatened to be used to commit domestic violence: s [21](#).

#### 62.4.4 Custody, access and maintenance conditions

Where appropriate you may include any or all of the following conditions:

- Grant a temporary custody order in favour of the complainant over any child or other person, if you are satisfied this is in their best interests;

- Grant the respondent access to a child, on such terms considered appropriate for the best interests of the child;
- Order the respondent to pay maintenance (in cash or kind, or both) to the complainant and any dependent children: s [22](#).

If you consider that a complainant is in need of immediate financial assistance, you may make an order for urgent maintenance until you consider this is no longer necessary: s [23\(1\)](#). You may order maintenance to be paid weekly, monthly, or at any other reasonable intervals: s [23\(2\)](#).

## 62.5 Variation and cancellation of orders

A complainant or respondent may apply to vary or cancel a protection order. This requires written notice to the other party, as well as the Court, in the template of Form 3 in Schedule of the Act: s [24\(1\)](#).

If you are satisfied that good cause for variation or cancellation has been shown, and that the application has been made freely and voluntarily, you may make the order (see template in [Form 5](#)): s [24\(2\)](#).

The original order, and any variations made to the order, must be sent to the complainant and respondent by the Registrar or clerk: s [24\(3\)](#).

## 62.6 Service

Where you receive an application for a protection order, as soon as practicable you must issue a summons to the respondent, or issue a warrant if you are satisfied that the complainant's personal safety would be seriously threatened otherwise: s [36\(1\)-\(2\)](#).

Two copies of the summons or warrant must be given to the police officer in charge of the station nearest to where the respondent lives, and they must personally serve the application, and summons or warrant, on the respondent: s [36\(3\)-\(4\)](#). The officer must complete an affidavit confirming service, and provide this to the court: s [36\(5\)](#).

## 62.7 Hearings

A court hearing for an application for a protection order is closed to the public: s [43\(1\)](#). Those allowed in a domestic violence hearing include:

- any party to the proceedings,
- an officer of the court,
- a legal representative,
- a witness, or
- anyone else the court permits: s [43\(2\)](#).

In domestic violence proceedings, the prosecutor or person acting for the complainant must consult with the complainant. They must explain the proceedings and ensure the complainant understands court proceedings and any orders made: s [38](#).

The complainant is entitled to have a support person with them throughout the proceedings: s 43(3).

## 62.8 Application procedure for emergency or temporary protection orders

### 62.8.1 Incoming call on hotline: answered by Magistrate Court Clerk.

- Take down name, number and location of caller.
- Ask caller 'if call gets cut off, is it safe for the Court to call you back straight away on this number? Is there any other way we should contact you?'
- Ask how can be of assistance today.
- If talks about situation of family violence and needs protection from the court, ask caller if they are in any immediate danger and if so assist them by calling police on their behalf and explore with caller best options for immediate safety.
- Ask caller for consent to record conversation to keep an accurate record of their request for help.
- If caller is safe to talk, then listen to their explanation of their situation.
- Provide information about how protection orders work covering:
  - What they do (act as a 'shield' not as a 'sword') and duration
  - Criteria for grant and conditions available (sole occupancy, custody maintenance)
  - Process to apply, hearing and service on respondent
  - What happens in event of breach.
- Seek clarification/consent from caller that they want to go ahead with an application. Explain how long it will take.
- If they decide to apply, put Magistrate on notice that a protection order application is coming.
- Explain that you can assist them by writing what they say on the form and getting it to the Magistrate for over the telephone/in person hearing ASAP.
- Complete protection order application form:
  - Setting out history/patterns of violence and controlling behaviours as well as most recent event triggering application.
  - Include dependents and any violence/impacts on them of witnessing violence.
  - Complete risk assessment check list with person.
  - Add any further information from checklist into the application.
  - Read the full application back to applicant line by line confirming everything is true and accurate. Make any final changes.
  - If in person, applicant to sign application; If over the telephone, court clerk to sign 'taken by'.
- Email or hand deliver application and risk assessment form to the Magistrate.
- If in person, tell Magistrate ready for hearing.

- If on telephone, place caller on hold, call Magistrate and merge calls.

### 62.8.2 Protection order application hearing

- Court clerk announces proceeding.
- Applicant sworn in.
- Magistrate explains protection order purpose and process.
- Magistrate confirms the applicant is seeking emergency/temporary protection order.
- Magistrate goes through information on application and risk assessment checklist asking clarifying questions and confirming this is applicant's evidence and is all true and accurate.
- Magistrate decides whether to grant/not to grant protection order.
- Magistrate explains decision to applicant. If grant or not, and if not, why the applicant has not met the criteria and discuss the applicant should do now, especially if they remain fearful (*referral to relevant services as per below*).
- **If granted**, explains what will happen next:
  - Order will be written up,
  - Copy provided to applicant,
  - Court will arrange for police to serve and explain the order to the respondent,
  - Court will inform applicant once that has been done,
  - In the meanwhile applicant should remain in a safe place: discuss with applicant where they can stay while order being served.
  - If order includes support for victim to have sole occupancy of family home or to access home to retrieve belongings, explain to applicant the police will assist with those things to ensure applicant remains safe.
  - Explain what applicant should do if the order is breached by the respondent; also to emphasise the importance the applicant does not breach the order.
- Magistrate to explain Court Clerk will then liaise with applicant about the service of the order and also assist with any referrals the applicant may need to other services.
- Check if applicant has any questions or needs anything explained again.
- Close hearing (but if by telephone, keep applicant on telephone for next steps).

### 62.8.3 Post-hearing follow up

- Magistrate immediately finalises the protection order including any conditions, and signs, if by telephone, attaches electronic signature to order and emails order to the court clerk.
- Court clerk then discusses with applicant:
  - How to safely provide the order to the applicant: by email, photograph and send, or in person.
  - If applicant requires other assistance and discusses services available and referral process: KWCS, MWYSSA, other services in applicant's local area (need a complete referral list with all updated information to support referral process).
  - Obtain applicant's consent for any referrals to other services.

- Covers again what happens next:
  - Court will contact police to serve order on respondent.
  - Court will contact applicant to advise once order has been served.
  - Court will follow up with any referrals needed and those services will then directly contact the applicant.
  - Check again best means of contact.
- Final conversation about where applicant can be safe while order being served and what to do if order is breached.
- Check if applicant has any final questions.
- Seek feedback from applicant on the process.

#### 62.8.4 Service of the protection order

- Court clerk contacts by telephone relevant officer from closest police station to location of respondent and advises:
  - That a protection order has been granted by the Court and is about to be emailed to police.
  - Court is expecting prioritised swift service of the order and will be awaiting confirmation from police (including affidavit of service) when it has been served and explained to respondent by police.
  - Any aspects of the order that require police assistance (ie: accompanying applicant to re-occupy family home and monitor respondent departure, collect his/her possessions from family home, etc).
- Court clerk to email protection order to email of relevant police officer.
- Court clerk to call back police in a couple of hours to ensure that service is underway/reinforce expectation that Court is waiting to receive confirmation the order has been served.
- Court clerk to continue following up with police until confirmation received the order has been served.
- Court clerk to record how long it takes in total for police to serve the order.
- Court to contact applicant to advise them when the order has been served and to check applicant has a safety plan.
- Court clerk to develop safety plan with applicant if necessary, including especially if applicant is continuing to co-habit with the respondent.
- Court clerk to complete all fields of monitoring form and send to Magistrate to complete relevant fields of monitoring form.
- Court clerk to send monitoring form to Chairperson/Program officer for the Working Group for implementing Access to Justice program.

#### 62.8.5 Documents to be used or developed to support this procedure

- Forms to be completed by Court Clerk each time protection order application made (either by telephone or in person)

- **Risk assessment form** and provided to Magistrate as part of the order application.
- **Feedback form (attached)** as well as ensuring Magistrate completes their sections of the form.
- **National list of heads of police stations across all of Kiribati** including: their name, rank and contact details: direct telephone number (work and mobile) and email address (work and personal). It is very important all contact details are complete and list regularly updated through Court/police liaison meetings led by Chief Magistrate.
- **National referral list** of all social services available in Kiribati, organised by location, including scope of service, hours of service, contact details, preferred referral process. Include:
  - KWCSC,
  - MWYSSA,
  - Shelter services,
  - Police/other local safety services,
  - Health and counselling services,
  - Legal services (Public solicitor),
  - Civil society and church organisations that offer material or financial aid, food, clothing, household items etc, and
  - Any other relevant services.

## 63 Police Safety Orders and Police Duties

A police officer may issue a Police Safety Order (PSO) in [Form 6](#) of the Schedule if they suspect on reasonable grounds that a domestic violence offence has been committed, is about to be committed, or if a protection order has been breached, and an order is necessary to ensure the safety of the victim: [s 26\(1\)](#). A PSO may only be made where the police officer did not arrest the person in question for an offence.

In deciding whether to issue a PSO, the police officer must have regard to:

- The likelihood that the person will use domestic violence against the victim, or any other person in their household; the welfare of any children living with the victim; and
- Any other matter considered relevant: [s 26\(2\)](#).

A PSO must be served as soon as practicable, and if it is not served within 48 hours from the time of issue then it will lapse: [s 27\(1\) and \(4\)](#). It comes into effect immediately on being served: [s 26\(3\)](#). The police officer must explain the order to the person it is being served on: [s 26\(3\)](#).

A PSO may be made for a maximum of 14 days: [s 26\(4\)](#).

An order may be issued without the consent of the person at risk: [s 27\(2\)](#).

When a PSO is issued, the person in question must immediately surrender any weapons in his or her possession or control that have been used or are about to be used to commit domestic violence: [s 28\(1\)\(a\)](#). The person must also vacate any land or building occupied by the person at risk, regardless of whether they have a legal or equitable interest in the property: [s 28\(1\)\(b\)](#).

### 63.1 Conditions of a PSO

Conditions of any PSO are that the person who it is issued against must not:

- Physically or sexually abuse or threaten the person at risk;
- Remove, endanger or threaten damage to property or any animal belonging to the person at risk;
- Harass, stalk, sexually harass, intimidate, follow or verbally abuse the person at risk; or
- Make contact with the person at risk: [s 28\(2\)](#).

A "person at risk" means the person named in the PSO and any child dependent on them: [s 28\(3\)](#).

### 63.2 Contravention of a PSO

If the person who has been served a PSO fails to comply with the order or any of its conditions, a police officer must take them into custody, and apply to the Magistrate's Court for an emergency protection order: [s 29\(1\)](#).

When someone is taken into custody for contravention of a PSO, they must be brought before the Magistrate's Court within 24 hours: [s 29\(2\)](#).

If it is not practicable for the matter to be brought before the court within 24 hours, a police officer (rank of sergeant or above) must decide on the bail and release of the person, and serve them with a summons requiring them to appear before the Magistrate's Court: s 29(3). If the person does not appear in court on the specified time and date, you may issue a warrant for their arrest: s 29(4).

### 63.3 Police duty to prosecute domestic violence

Provided there is sufficient evidence that domestic violence has occurred, police must ensure that a charge or information is laid with the court to commence prosecution: s [30\(1\)](#).

Police officers must endeavour to not provide any counselling to the parties involved to try and reconcile or withdraw the charge or information: s [30\(2\)](#).

Where a charge is laid in court, the officer must provide information to the complainant about the court process and procedures in a language that he or she understands. They must also explain the remedies available, and the right to legal representation. Where necessary, the police officer must also make arrangements for the complainant, and any dependents, to find shelter, obtain medical treatment, or access counselling: s [30\(3\)](#).

Failure to comply with any obligations under the Family Peace Act will be considered misconduct under section 41 of the [Police Service Act 2008](#): s [30\(4\)](#).

## 64 Offences and penalties

A person who engages in domestic violence (as defined in *section 4* of the Act), breaches a protection order, or fails to comply with a PSO commits a domestic violence offence: [s 33\(1\)](#). A domestic violence offence is also committed by someone who instigates, counsels or procures another person to commit an act of domestic violence: [s 33\(6\)](#).

A domestic violence offence is punishable by up to 6 months' imprisonment or a fine of up to \$250: [s 33\(2\)](#).

If someone commits a second domestic violence offence, they are punishable by up to 12 months' imprisonment or a \$500 fine, or both: [s 33\(3\)](#).

If someone commits a third or subsequent domestic violence offence, they are punishable by up to 3 years' imprisonment or a fine up to \$1,000, or both: [s 33\(4\)](#).

It is not a defence for the respondent to have paid compensation or reparation to the complainant, or the complainant's family: [s 33\(5\)](#).

The following circumstances will be considered as aggravating, and result in higher penalties:

- Domestic violence is committed against a child, or performed in the presence of a minor;
- Domestic violence is committed against a person with special needs, a pregnant woman, or a woman who is incapable of resisting for any reason;
- The violence is severe or life threatening;
- A weapon is used; or
- The respondent has committed repeated acts of domestic violence: [s 34\(2\)](#).

A respondent may also be prosecuted under other criminal laws if the facts disclose the commission of another criminal offence: [s 34\(1\)](#).

In [Ioobi v Republic \[2016\] KIHc 4](#), the respondent was charged under [s 33\(1\)\(a\)](#), and under [s 237](#) of the Penal Code for common assault. The complainant applied to withdraw the charge, but the Magistrate declined this application as the charges were considered serious. The High Court held that a sentence of 3 months' imprisonment on each charge (served concurrently) was not excessive, and was maybe even a light sentence as the complainant had been hospitalised as a result of the assault.

The Court agreed with comments made by the Magistrate: "This is an offence which the law regarded as a serious offence, since it relates to abusing and the ill treatment of a woman."

## 65 Appeals

Appeals may be made by the complainant or respondent, and must be done within 28 days from the court's decision: s [39\(2\)](#).

An appeal can be made to the High Court on a decision of the Magistrate's Court to:

- make a protection order;
- vary or revoke a protection order, or any conditions; or
- refuse to make, vary or revoke an order: s [39\(1\)](#).

## XII. Kava Act 2018

## 66 Purpose

The purpose of this [Act](#) is to address social, economic and health problems that are associated with Kava drinking. The aim is also to protect and prevent underage people from drinking Kava.

The Act controls the regulation and licensing of Kava businesses, and dictates responsible practices for possession and supply of Kava: [s 3](#).

## 67 Definitions

Kava, prepared as a drink or in another form, is defined in the Act as:

- The plant, or part of the plant, piper methysticum;
- Kava lactone (an extract of the plant); or
- Any substance that has the same pharmacological effect as kava lactone: s [2](#).

The definition includes a substance that is not Kava, but that is used together with Kava as if it were Kava.

Note: Kava lactones are a group of bioactive lactone compounds found in the roots of the [kava plant](#) that are responsible for its [psychoactive effects](#), including [sedation](#) and a [euphoric feeling](#)

Under the Act, supply means:

- Give, distribute, sell, administer, or transport (or offering to do any of these);
- Doing, or offering to do, an act in preparation for any of the above things; or
- Having or keeping in possession, for the purpose of supplying: s [2](#).

Selling includes offering, or exposing for sale: s2.

A trafficable quantity is between 2 kg and 25kg of Kava: s2.

A commercial quantity is more than 25 kg of Kava, but does not include a quantity of Kava prepared as a drink: s 2.

## 68 Licences

In order to sell Kava, the person must have any of the following licences:

- Kava wholesale licence,
- Kava retail licence, or
- Kava bar licence: [s 5](#).

Anyone can apply for any of the three licences, provided they meet the conditions under the Act.

The Secretary of the Ministry of Culture Internal Affairs will establish a register of people licensed to sell and supply Kava: [s 12](#).

### 68.1 Kava wholesale licence

The holder of a wholesale licence must not sell kava in quantities less than 25kg, and must not sell kava as a drink: [s 6\(2\)](#).

A wholesale licence holder must not sell, supply, or deliver kava on Sundays or Public Holidays, or outside of the hours 8am to 9:30pm on any other day: [s 6\(3\)\(c\)](#).

It is an offence if the holder of a wholesale licence permits kava to be consumed on the premises: [s 6\(3\)\(b\)](#). Consuming kava on or near the premises where a wholesale licence is in force (unless the owner also has a kava bar licence) is also an offence: [s 6\(3\)\(a\)](#).

The penalty for breaching *Section 6* is a fine between \$250 and \$2,500.

### 68.2 Kava retail licence

A retail licence holder must not sell or supply kava on Sundays or Public Holidays, or outside the hours of 8am to 9:30pm any other day: [s 7\(3\)](#).

It is an offence to sell or authorise the sale of kava without holding a kava retail licence: [s 7\(3\)\(b\)](#).

Consuming kava on or near the premises where a retail licence is in force (unless the owner also has a bar licence), is also an offence: [s 7\(3\)\(a\)](#).

The penalty for breaching *Section 7* is a fine between \$250 and \$2,500.

### 68.3 Kava bar licence

A bar licence permits the selling or supplying of kava to be consumed either on the licensed premises, or to be taken away: [s 8\(3\)](#). The holder of a bar licence may also sell cigarettes, tobacco, matches and non-alcoholic drinks: [s 8\(1\)](#).

Licensed premises may be open at the following times:

- Monday to Thursday, 5pm to 1am.

- Friday, Saturday and Public holidays, 5pm to 2am.
- Sunday, 2pm to 1am.

The holder of a bar licence must ensure there is no unnecessary noise from the bar that interferes with the peace and quiet enjoyment of the neighbourhood during open hours: s [8\(4\)](#).

A bar licence holder must have their full name printed, along with the words "licensed Kava Bar", at the front of the premises in writing at least 2 inches high: s [8\(6\)](#). A copy of the permit must be put up in a clear place within the premises: s [8\(7\)](#). There must also be toilets available in the Kava Bar for customers.

The penalty for breaching *Section 8* is a fine between \$250 and \$2,500.

## 69 Kava licensing committee

The Minister may appoint licensing committees, which consist of a chairman and at least two other members: s [9\(1\)\(a\)](#). The committees will have authority over areas of Kiribati as defined by the Minister: s [9\(1\)\(b\)](#).

The committees consider and determine applications for granting and renewal of all Kava licences in their area: s [10\(1\)](#).

Before granting a licence, the committee must be satisfied that:

- The premises are fit and proper for the purpose of the licence applied for;
- The parts of the premises where Kava is to be stored or sold are sufficiently outlined in the application; and
- Premises for a Bar Licence have toilets for customer use: s [11\(2\)](#).

By notice, a committee may declare prohibited areas for drinking Kava: s [11\(3\)](#).

## 70 Offences and penalties

### 70.1 Underage persons

#### 70.1.1 Underage gatherings

If an individual or a group who are suspected to be under 18 years old are in public between 10pm and 6am, and are suspected to be there without reason except to drink Kava, a police officer may order that they disperse and leave the area, or that they return home immediately: s [19\(1\)](#).

If anyone refuses to follow the orders of a police officer, they may be given a warning. If they are a repeat offender, they must be taken to court and if they are under 18 years they will be penalised in accordance with the [Juvenile Justice Act 2015](#): s [19\(2\)](#).

#### 70.1.2 Underage selling

If the holder of any Kava Licence believes someone is under 18 years old, they may demand to see any form of identity card: s [21](#).

If a licence-holder identifies that someone is under 18 years old, they must not sell Kava to them. A Kava Bar Licence holder must demand that a police officer get the underage person to leave the licensed premises: s [22](#).

The penalty for selling to someone underage is a fine between \$100 and \$250, or 6 months' imprisonment: s [23](#).

If the amount of Kava is more than the "trafficable quantity", then the penalty is a fine between \$250 and \$2,500, or 2 months' imprisonment: s [23](#).

If the amount of Kava is a commercial quantity, the penalty is a fine between \$500 and \$5,000, or 5 years' imprisonment: s [23](#).

It is an offence for the holder of a Bar Licence to allow an underage female to be present for the purpose of consuming Kava, as well as for "Te Ue". The penalty is a fine between \$250 and \$2,500 or 2 years' imprisonment: s [23\(4\)](#).

### 70.2 Sale and supply

If Kava is supplied to another person not in accordance with a licence, the following penalties apply:

- For less than a trafficable quantity - a fine between \$100 and \$250, or 6 months' imprisonment.
- A trafficable quantity - a fine between \$250 and \$2,500 or 2 years' imprisonment.
- A commercial quantity - a fine between \$500 and \$5,000 or 5 years' imprisonment: s [20\(1\)](#).

Selling Kava outside of the licensed premises is an offence punishable by a fine between \$250 and \$2,500: s [20\(2\)](#).

If someone has been asked to leave the premises of a Kava Bar and refuses, they can be punished by a fine between \$100 and \$250.

If any justice of the peace, magistrate or other appropriate judicial officer have reasonable grounds to believe Kava is being sold or kept for sale at an unlicensed place, they may issue a search warrant authorising police to enter, and use reasonable force if needed: [s 20\(6\)](#). Any person found on unlicensed premises not there for a lawful purpose is liable for a fine of \$250.

### XIII. Cybercrime Act 2021

## 71 Introduction

This [Act](#) implements the government's Information Communication Technology (ICT) policy, which aims to strengthen the legislative framework governing cyberspace. The intention is to clarify the domestic law on cybercrime, provide the necessary powers to implement these laws, and ensure effective international cooperation.

The Act was developed to align with the Budapest Convention on Cybercrime. Kiribati became a party to the Convention in June 2024.

## 72 Definitions

Important definitions relevant to cybercrime are provided in *Section 2* of the Act. Some of these are as follows:

- 'Computer data' means any information in a form able to be processed by a computer, and includes a computer program that can make the computer perform a function.
- 'Computer program' means data in the form of instructions or statements that tell the computer to perform a function.
- 'Computer system' is a device, or a group of connected devices, and one of them processes computer data.
- 'Content data' is data that is the substance of a communication.
- 'Service providers' provide users with the ability to communicate through the use of a computer system. It also includes any entity that processes or stores computer data on behalf of other service providers.

## 73 Cybercrime unit

The Act establishes a Cybercrime Unit within the Police Service: *s 5(1)*.

The Cybercrime Unit is available on a 24/7 basis. It provides technical advice, preserves computer data on request, collects evidence and assists to locate suspects: *s 6(1) and (2)*.

## 74 Procedure

### 74.1 Search and seizure

A police officer may apply to the Court for a warrant if there are reasonable grounds to suspect that there is a computer system or computer data that:

- May be evidence in proving any offence under the Act;
- May be used to commit an offence under the Act; or
- Has been acquired as a result of an offence: s 22(1).

A person who is not a suspect but is in possession or control of a computer system or data must assist with any search where a warrant has been granted under s 22: s 23(1). Failure to assist is an offence punishable by a fine up to \$3,000 or 2 years; imprisonment, or both: s 23(2).

### 74.2 Production order

A police officer may apply to the court for a production order if they are satisfied that a person or service provider has possession or control over computer data required for the purpose of a criminal investigation: s 24.

### 74.3 Preservation and interception of data

A police officer may provide notice to a person or service provider in control of a computer system and order that they preserve specific data for a period of up to 60 days if the officer believes that data is reasonably required for the purpose of an investigation, and there is a risk that data may be destroyed or damaged: s 25.

An officer may apply to the court for a warrant if they are satisfied that the content data of a communication is required for a criminal investigation. The warrant may authorise the officer to collect or record data, and compel a service provider to assist: s 28.

### 74.4 Disclosure and collection of traffic data

A police officer may order disclosure of specific traffic data if they are satisfied that it is required for a criminal investigation: s 26.

An officer may apply to the court for a warrant if they are satisfied a person is engaged in conduct that may be in breach of the Act, or constitute a criminal offence committed by using a computer. The warrant may permit an officer to collect or record data, and compel a service provider to assist the Police in collecting data: s 27.

## 75 Offences and penalties

All offences and penalties created by the Act are provided under Part III in Sections 7- 20. Outlined below are some of the key offences to be aware of, but you should refer to the Act for an explanation of all of the offences.

### 75.1 Unauthorised access or interception

It is an offence for a person who is not authorised to access a computer program or computer data: s 7(1). It is also an offence for a person to intercept, or attempt to intercept, a non-public transmission if they do not have authority to do so: s 8(1).

Both of these offences require that the person either knowingly did the act, or was reckless. The penalty for both is a fine up to \$10,000 or 7 years' imprisonment, or both: s 7(3), s 8(1).

### 75.2 Unauthorised data or system interference

It is an offence for someone to damage or alter computer data, or obstruct, interrupt or interfere with the lawful use of computer data: s 9(1). It is also an offence for a person to hinder or interfere with the functioning of a computer system: s 10(1).

Both of these offences require that the person either knowingly did the act, or was reckless. The penalty for both is a fine up to \$20,000 or 10 years' imprisonment, or both.

### 75.3 Computer-related forgery or fraud

It is an offence for someone to alter, delete or suppress computer data with the intent that the data will be legally relied upon as being authentic: s 12. It is also an offence for a person to alter, delete or suppress computer data, or interfere with the functioning of a computer system, with the intent of dishonestly obtaining economic benefit: s 13.

Both of these offences require that the person either knowingly did the act, or was reckless. The penalty for both is up to 7 years' imprisonment.

### 75.4 Abuse and solicitation of children

It is an offence for someone to knowingly do any of the following:

- Produce material showing sexual abuse of a child;
- Offer, make available, distribute or transmit, or procure computer material that shows sexual abuse of a child;
- Possess material on a computer that depicts sexual abuse of a child;
- Obtains access on a computer to material showing sexual abuse of a child: s 14(1).

It is an offence to use a computer to communicate with a child with the intent of committing an offence, which includes soliciting or grooming the child: s 15.

The penalty for doing any of the above is up to 10 years' imprisonment.

## 75.5 Publishing sexual material or harassment

It is an offence to send or publish on a computer any material of someone's private parts without their consent: s 17.

It is also an offence to communicate with someone on a computer by coercing, intimidating, harassing or causing emotional distress to them, with the possibility that it could endanger their life: s 18.

The penalty for both of the above offences is a fine up to \$3,000 or 2 years' imprisonment, or both.

## 76 International cooperation

*Part V* of the Act governs how Kiribati will cooperate with foreign governments, networks or agencies to combat cybercrime. Kiribati may also make requests of other governments for assistance in investigations: s 30.

Any offences under the Act are extraditable offences: s 36.

## XIV. Juvenile Justice Act 2015

## 77 Introduction

The [Juvenile Justice Act 2015](#) aims to:

- Provide special protections for juveniles during legal proceedings, in line with their vulnerability and developmental stage.
- Prevent crime by addressing the underlying causes of juvenile offending.
- Rehabilitate and reintegrate juveniles into society as responsible members.
- Ensure fair accountability while considering juveniles' reduced maturity and dependency.
- Promote the long-term protection of the public by imposing meaningful consequences for offences.
- Uphold the rights of juveniles, including privacy and procedural protections.

### 77.1 Definitions

Key terms defined under this Act include: s [2](#).

- Child: A person under the age of 14 years.
- Young Person: A person aged 14 years or older but under 18 years.
- Juvenile: A child or young person as defined in the Act.
- Guardian: A person with charge or control of a child or young person.
- Place of Detention: Facilities designated by the Minister for juvenile custody.
- Serious Crime: Offences listed in the Schedule (eg: murder, rape).
- Court: Magistrates or High Court operating under this Act.

### 77.2 Principles

- Rehabilitation and reintegration of juveniles are prioritized.
- Juveniles must be treated fairly, with their privacy and rights respected.
- Parents and guardians are encouraged to participate in addressing juvenile behaviour.
- Victims are to be supported with information, minimal inconvenience, and opportunities to be heard.
- Separate juvenile proceedings from adults to emphasize protection and maturity-appropriate measures.

## 78 Juvenile Courts

- Juvenile courts are to sit separately from regular courts where possible.
- Attendance is limited to necessary participants (parents, guardians, legal representatives).
- Prohibits the publication of identifying information about the juvenile without court permission.
- Allows continuation of cases even if the individual is found to be above 18 years during proceedings.

### 78.1 Detention and custody

- Bail: Police officers must prioritize releasing juveniles on recognizance unless it involves serious crimes or risks justice.
- Custody: Juveniles not released on bail are to be detained in designated places separate from adults.
- Association Prevention: Ensure juveniles do not associate with adults while in detention.
- Remand: Juveniles unfit for detention due to unruly or depraved behaviour may be remanded in alternative facilities or, exceptionally, prison.

### 78.2 Court procedures

- Explain charges to juveniles in simple terms.
- Juveniles may enter pleas, question witnesses, and provide mitigation.
- The court gathers reports on the juvenile's background to ensure decisions serve their best interests.
- Cases involving juveniles are dealt with in-camera to protect their privacy in sensitive matters.

### 78.3 Sentencing

- No imprisonment for children: Children cannot be imprisoned for any offence. May be detained in approved facilities instead of prison for serious crimes.
- Alternative measures for young persons: Imprisonment is a last resort for young persons.
- Options for sentencing:
  - Dismiss the case.
  - Release on recognizance.
  - Commit to care of a fit person or guardian.
  - Impose fines or damages (paid by parents or guardians when appropriate).
  - Place in detention instead of prison.

## 79 Additional provisions

- Age Determination: The court's age determination is final for the purpose of proceedings, even if later evidence proves incorrect.
- Proceedings in Camera: Courts may exclude the public to protect the juvenile's privacy during sensitive cases.
- Repeals: *Section 26 of the Magistrates' Courts Ordinance*, which dealt with young offenders, is repealed.

## XV. Court of Appeal

## 8o Purpose

The Purpose of the Court of Appeal, as the highest appellate body for decisions of the High Court, is defined (powers, procedures, and scope) by the [Court of Appeal Act 1980](#), the [Court of Appeal \(Amendment\) Act 2003](#) and the [Court of Appeal \(Amendment\) Act 2010](#), which ensure:

- Access to justice through civil and criminal appeals.
- A mechanism for reviewing judicial decisions.
- A balance between appellants' rights and legal procedural fairness.
- Provisions for appeals by both convicted persons and the Attorney-General to safeguard justice.

### 8o.1 Interpretation

Key definitions under s2 include:

- Appeal: Includes motions for new trials or to set aside decisions.
- Appellant: Includes convicted persons and the Attorney-General appealing under this Act.
- Court: The Court of Appeal.
- Decision: Includes orders, judgments, or decrees.
- Sentence: Any penalty or order imposed by a court on conviction.
- Registrar: Registrar of the Court of Appeal.
- President: The President of the Court of Appeal as appointed under Section 91(3) of the Constitution.

## 81 Establishment and jurisdiction

### 81.1 General jurisdiction

- The Court has the authority to hear and determine appeals conferred by the Constitution, this Act, or other applicable laws: *s 3 Court of Appeal Act 1980*.

### 81.2 Composition and sessions

#### 81.2.1 Judges

- A minimum of three judges is required to constitute the Court.
- Specific cases may be determined by two judges per rules of Court.
- Decisions are by majority vote; if evenly split, the appeal is dismissed unless the President directs a re-hearing: *s 5 Court of Appeal Act 1980*.

#### 81.2.2 Sessions

- The Court sits at locations and times determined by the President: *s 6 Court of Appeal Act 1980*.
- Precedence: *s 4 Court of Appeal Act 1980*.
- Judges' precedence is based on seniority, as determined by the President.

#### 81.2.3 Registrar of the Court

- The Registrar of the High Court also serves as Registrar of the Court of Appeal: *s 7 Court of Appeal Act 1980*.

#### 81.2.4 Conflict of interest

- Judges cannot sit on appeals involving their own decisions or cases they adjudicated at the High Court: *s 8 Court of Appeal Act 1980*.

## 82 Civil appeals

### 82.1 Appeals in civil cases

Appeals may be filed from:

- Decisions of the High Court in the first instance.
- Appellate decisions of the High Court on legal grounds: *s 10 Court of Appeal Act 1980*.

### 82.2 Powers of the Court in civil appeals

The Court has all powers of the High Court, including to amend, execute, or enforce orders or decisions: *s 11 Court of Appeal Act 1980*.

### 82.3 Exclusions and leave requirements

*s 10(2) Court of Appeal Act 1980*

Appeals cannot be made on:

- Interlocutory orders.
- Cost-related orders.
- Consent orders without prior leave of the Court.

### 82.4 Additional provisions

Conditions of Appeal:

- Appeals are contingent on fulfilling procedural requirements: *s 14 Court of Appeal Act 1980*.

Judgments:

- Judgments may be delivered in writing or open Court: *s 16 Court of Appeal Act 1980*.

## 83 Criminal appeals

### 83.1 Right of appeal in criminal cases

A convicted person may appeal:

- Conviction on legal grounds.
- With leave, on factual or mixed grounds.
- Against sentences not fixed by law: [s 19 Court of Appeal Act 1980](#).

### 83.2 Attorney-General's referrals and appeals

Referrals on Points of Law: [s 20 Court of Appeal Act 1980](#)

- The Attorney-General may refer legal questions from acquittals or stays of proceedings for the Court's opinion.
- Appeals against sentence or acquittal: [s 19 Court of Appeal Act 1980](#).

The Attorney-General may appeal:

- Acquittals.
- Sentences deemed inappropriate or insufficient.
- Stays of proceedings or dismissal of charges: [Court of Appeal \(Amendment\) Act 2010](#).

### 83.3 Determination of appeals

Outcome of Criminal Appeal: [s 22 Court of Appeal Act 1980](#).

- Convictions may be quashed or substituted with new trials if a miscarriage of justice is found.
- Sentences may be adjusted as long as they remain lawful.

### 83.4 Supplementary powers

The Court may: [s 27 Court of Appeal Act 1980](#).

- Call for additional evidence or documents.
- Order new trials for miscarriages of justice: [s 9, Amendment 2010](#).

## 84 Rules and administrative provisions

### 84.1 Rules of Court

The Rules Committee may issue rules for the practice and procedure of the Court of Appeal, including adapting English appellate rules where necessary: *s 38 Court of Appeal Act 1980*.

### 84.2 Role of Registrar

The Registrar ensures timely processing of appeals and related documentation: *s 33 Court of Appeal Act 1980*.

### 84.3 Costs and legal aid

- Costs of appeals are borne by the Consolidated Fund: *s 31 Court of Appeal Act 1980*.
- Legal aid may be assigned to appellants without means: *s 29 Court of Appeal Act 1980*

### 84.4 Key Amendments

#### 84.4.1 Court of Appeal (Amendment) Act 2003

Appeals by the Attorney-General:

- Introduced the right for the Attorney-General to appeal against sentences and acquittals.
- Allowed the Attorney-General to refer points of law arising from acquittals.

#### 84.4.2 Court of Appeal (Amendment) Act 2010

The [amendment](#) expands the Powers of the attorney general. The Attorney-General may appeal:

- Acquittals.
- Stays of proceedings or dismissal of charges.
- Points of law arising from charge withdrawals may also be referred.

#### 84.4.3 New trial orders

- Explicit power to order new trials for miscarriages of justice: *s 9 Court of Appeal (Amendment) Act 2010*.
- Clarity on Appeals:
  - Specified time limits for appeals by the Attorney-General and convicted persons: *s 10 Court of Appeal (Amendment) Act 2010*.
- Enhanced sentence definition:
  - The definition of "sentence" includes alternative orders such as probation and care orders: *s 3 Court of Appeal (Amendment) Act 2010*.

## XVI. Appendix: Common offences

## 85 Common offences

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

Some of the offences contained in this chapter are indictable offences which normally are triable only in the High Court. However, you must be familiar with these offences because you may have to deal with them in the course of preliminary inquiry or in some cases summarily upon application during a preliminary inquiry.

Each offence contains:

- a reference and description of the offence itself;
- the elements of the offence, which the prosecution is required to prove;
- a commentary, which provides useful information you will need to consider; and
- the maximum sentence you may pass if the accused is found guilty.

### 85.1 Description

At the top of each offence there is a reference to where the offence is found in legislation, and a description of what the offence is.

### 85.2 Elements

The elements section lists all the general elements needed to prove any offence, and the specific elements required for the particular offence.

The elements section is very helpful as it provides a guide or method for you to make sure the prosecution has proved all that is required before a person can be found guilty. You should take careful notice that all the numbered elements are proved by the prosecution.

The elements contained in these offences are intended for use as a handy reference on the bench and in no way do they replace careful study of the legislation itself.

When you are hearing an offence which is not listed here, you will need to list your own elements before hearing the case. By checking the legislation and considering what has been done here, you will develop the ability to identify the elements of any offence yourself.

### 85.3 Commentary

Where appropriate useful case law and other commentary has been added to guide you further. The commentary contains information about the identification of the accused, what the prosecution and the defence need to prove and to what standard. Generally, the defence does not need to prove anything. Occasionally, the legislation requires the defence to specifically prove something. Where possible, definitions have been provided.

## 85.4 Sentencing

The sentencing section describes the maximum sentence for each offence. You do not have to pass the maximum sentence – that is reserved for the most serious breaches of the particular offence. Imprisonment should be used only for the most serious breaches and where an alternative sentence is not appropriate.

## 86 Cycling without a light

Traffic Act 2002, Schedule, Roads Rules, [Part X-Bicycles](#), r 62

### 86.1 Description

It is an offence for a person to ride a bicycle at night unless the bicycle, or the rider, displays:

- a flashing or steady white light that is clearly visible for at least 200 metres from the front of the bicycle; *and*
- a flashing or steady red light that is clearly visible for at least 200 metres from the rear of the bicycle; *and*
- a red reflector that is clearly visible for at least 50 metres from the rear of the bicycle when light is projected onto the reflector from a vehicle's headlight on low beam.

### 86.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in Court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused rode a bicycle at night;
5. The accused did not display, either on the bike or on himself or herself, one or more of the following:
  - a flashing or steady white light that was clearly visible for at least 200 metres from the front of the bicycle;
  - a flashing or steady red light that was clearly visible for at least 200 metres from the rear of the bicycle;
  - a red reflector that is clearly visible for at least 50 metres from the rear of the bicycle when light is projected onto the reflector from a vehicle's headlight on low beam.

### 86.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

**(2) Identification**

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

The prosecution must provide evidence to prove that it was **the accused** who committed the offence, ie: it was **the accused** who rode a bicycle without the prescribed reflecting lights.

**(3) Night**

'Night' is not defined in the [Traffic Act 2002](#), however, in previous legislation ([Traffic Ordinance 1998](#)) in relation to this offence, 'night' was described as the time between sunset and sunrise.

**(4) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

\$20 fine.

## 87 No driving licence

S 20 Traffic Act 2017

### 87.1 Description

It is an offence for a person to:

- drive a motor vehicle on any road, unless he or she holds a driver's licence for that class of vehicle; *or*
- let any other person drive a motor vehicle on any road, unless that other person holds a driver's licence which allows them to drive that class of vehicle at that time.

This does not apply if:

- the person holds a learner permit for that class of vehicle; *and*
- a holder of a driver's licence for the class of vehicle being used at the time is sitting next to the learner driver, (for a vehicle other than a motorbike).

### 87.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific under s 20(1)

4. The accused drove a motor vehicle on a road;
5. The accused did not have either:
  - a learners permit for the class of vehicle he or she was driving; *or*
  - an accompanying passenger who held a driver's licence for the particular class of vehicle sitting next to him or her while he or she was driving.

OR

#### Specific under s 20(3):

4. The accused let another person drive a motor vehicle on a road;
5. That other person did not have a driver's licence for that class of vehicle at the time of the offence.

## 87.3 Commentary

### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

### (2) Identification

In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, ie:

- it was *the accused* who did not have a driver's licence; *or*
- it was *the accused* who let another person, who did not have a driver's licence, drive.

### (3) Learner drivers

The offence of driving without a licence does not apply to persons who:

- hold a learner's permit, *and*
- have a person beside them at time at the time of driving (with the exception of those who are learning to drive a motor bike).

### (4) Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

### Maximum sentence

#### For offenders found guilty under s 20(1):

- 10 to 20 penalty units or 2 years' imprisonment or both.

OR

#### For offenders found guilty under s 20(3):

- 5 to 20 penalty units or 2 years imprisonment or both.

## 88 Untidy premises (Bylaw)

*S 3 Public Health Regulations r.2; r.15(1)*

### 88.1 Description

All houses, buildings and premises, and the land in which they stand, must be kept clean.

For any offence in contravention of this regulation, the person primarily liable shall be the occupier or the person in charge of the house, building, premises or lands. If there is no such occupier or person in charge, the owner of the house, building, premises or land, as the case may be, shall be liable.

Any other person who aids or abets any contravention of the provisions of this regulation, may also be liable under this regulation.

### 88.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused is:
  - an occupier or person in charge of a house, building, premises or land; *or*
  - an owner of a house, building, premises or land;
5. The accused did not keep the property clean.

OR

4. The accused aided or abetted another, who was an occupier, person in charge or owner of a house, building, premises or land, to not keep the property clean at the time of the offence.
5. The occupier, person in charge or owner of the house, building, premises or land, did not keep the property clean.

### 88.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

**(2) Identification**

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

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, ie: it was ***the accused*** who did not keep the house, building, premises or land clean, or aided and abetted another to do so.

**(3) Clean**

An objective standard should be followed in determining whether the house, building, premises or land was clean or not, (ie: the reasonable person standard).

The prosecution will need to provide evidence that the house, building, premise or land was not clean and that it fell below the objective standard.

**(4) Aid or abet**

See [Chapter 6](#), Criminal Responsibility, para 5.

**(5) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- \$20 fine or, in default of payment, 1 month imprisonment.
- \$50 fine in respect of any subsequent offence or, in default of payment, 3 months imprisonment.

## 89 Possession of admixture

S 76 *Liquor Ordinance*.

### 89.1 Description

Every person is guilty of an offence who consumes or has in his or her possession any mixture of sour toddy, other than a mixture of sour toddy and water.

### 89.2 Elements of offence

Every element (ie: numbers 1-4) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. At the time of the offence, the accused had consumed or had in his or her possession, a mixture of sour toddy, which was not a mixture of sour toddy and water only.

### 89.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was **the accused** who committed the offence, ie: it was **the accused** who had a mixture of sour toddy that was different to a mixture of sour toddy and water alone.

#### (3) Sour toddy

An important part of this offence requires the prosecution to prove that the sour toddy mixture that the accused had contained was something other than just sour toddy and water. The prosecution will need to provide evidence of some other substance contained in the sour toddy.

**(4) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- Not less than \$500 and not exceeding \$5,000 fine.

## 90 Selling liquor without a licence

S 57 Liquor Ordinance.

### 90.1 Description

Any person will be guilty of an offence who sells, or exposes for sale, any liquor without holding a license authorising the sale of that liquor.

### 90.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused either:
  - sold liquor; *or*
  - exposed liquor for sale.
5. The accused did not have a licence which authorised him or her to sell liquor.

### 90.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, ie: it was ***the accused*** who sold or exposed for sale any liquor.

#### (3) Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

Not less than \$500 and not exceeding \$5,000 fine.

## 91 Unlawful assembly

*S 20 Public Order Ordinance*

### 91.1 Description

Any person who takes part in an unlawful assembly commits an offence.

### 91.2 Elements

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused was among three or more assembled persons;
5. They assembled with an intention to commit an offence.

OR

4. The accused was among three or more assembled persons;
5. The conduct of the assembly intended to, or behaved in a manner likely to, cause another (commonly known as a “bystander”) to reasonably believe that the assembled group would either:
  - cause a breach of the peace; *or*
  - provoke others to breach the peace.

### 91.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, ie: it was ***the accused*** who was among three or more unlawfully assembled people.

It is irrelevant to this offence if the original assembling was lawful if, once they are together, they conducted themselves with a common purpose in such a manner as contained in the enactment.

### (3) “Unlawful assembly” defined

An unlawful assembly occurs when 3 or more people:

“assemble with an intent to commit an offence; or once assembled, conduct themselves in a manner intended to, or likely to cause any person to reasonably fear that the assembled persons will commit a breach of the peace or will by their conduct provoke others to commit a breach of the peace.”

### (4) Breach of the peace

A ‘breach of the peace’ means an incident that causes anxiety or major concern to one or more people, so that they may feel harm may be caused to them or another.

### (5) Bystander’s belief

If this ground is relied on, the prosecution must prove that at least one bystander was afraid that the assembly would commit a breach of the peace. The bystander’s fear must be reasonable in the circumstances (ie: any reasonable person in the circumstances would fear that a breach of the peace would be committed).

### (6) Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

### Maximum sentence

- \$100 fine and 1 year imprisonment.

## 92 Disorder in public

*S 15(1), (2) Public Order Ordinance*

### 92.1 Description

Any person is guilty of an offence who:

- at any public gathering acts, or incites others to act, in a disorderly manner with the aim of preventing the purpose of the public gathering; *or*
- behaves in a noisy or disorderly manner, with intent to provoke a breach of the peace or where a breach of the peace is likely to be caused; *or*
- uses, distributes or displays any writing containing threatening, abusive or insulting words, with intent to provoke a breach of the peace or where a breach of the peace is likely to be caused.

### 92.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific under *s15(1)*

4. The accused behaved in a disorderly manner at a public gathering;
5. The accused did this with the aim of preventing the purpose of the public gathering.

OR

4. The accused incited another to act in a disorderly manner;
5. The accused did this with the aim of preventing the purpose of the public gathering.

#### Specific under *s 15(2)*

4. The accused behaved in a noisy or disorderly manner;
5. The accused either:
  - did this with an intention of provoking a breach of the peace; *or*
  - was likely to cause a breach of the peace by doing this.

OR

4. The accused used or distributed or displayed writing containing threatening, abusive or insulting words;
5. The accused either:
  - did this with an intention of provoking a breach of the peace; *or*
  - was likely to cause a breach of the peace by doing this.

### 92.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who acted in the manner prescribed in the offence.

#### (3) Public gathering

“Public gathering” means a public meeting, a public procession and any other meeting, gathering or assembly of 10 or more persons in any public place: *s 2 Public Order Ordinance*.

#### (4) Breach of the peace

A breach of the peace means an incident that causes anxiety or major concern to one or more people, so that they may feel harm may be caused to them or another.

#### (5) With intention to provoke a breach of the peace

If the prosecution relies on this ground, they must show that the accused acted with the intention of provoking a breach of the peace. The prosecution does not have to prove that there actually was a breach of the peace.

#### (6) A breach of the peace was likely to be caused

Under this ground, the prosecution does not need to prove that the accused intended to cause a breach of the peace. The prosecution needs to show that the conduct by the accused was such that a breach of the peace would likely happen.

#### (7) Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- \$100 fine and 1 year imprisonment.

## 93 Fighting

*S 28 Public Order Ordinance*

### 93.1 Description

Any person who takes part in an unlawful fight is guilty of an offence.

### 93.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused took part in an unlawful fight;
5. The accused does not have a lawful defence for taking part in an unlawful fight.

### 93.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was **the accused** who committed the offence, ie: it was **the accused** who took part in an unlawful fight.

#### (3) Fighting

There needs to be clear evidence that the accused was a willing participant in the fight and not merely trying to defend himself or herself against an attack.

**(4) Unlawful**

The prosecution will need to provide evidence that the fight was unlawful. Only boxing, wrestling and some other sports events would seem to amount to a lawful fight.

Where two or more people agree to fight then this will be unlawful if it threatens public order, creating anxiety for others such that they believe that harm may be caused to them or others.

**(5) Place**

The fight may be in a public place or it may be on private premises. However, if it is on private premises, the threat to public order needs to be shown.

**(6) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law. Self-defence will be the most common defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- \$100 fine and 1 year imprisonment.

## 94 Possession of a weapon

*S 34(1) Public Order Ordinance*

### 94.1 Description

Any person is guilty of an offence who, without lawful authority or reasonable excuse, has with him or her any offensive weapon, in any public place.

### 94.2 Elements of offence

Every element (ie: numbers 1-6) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused was in a public place;
5. The accused had an offensive weapon;
6. The accused does not have lawful authority or a reasonable excuse for having an offensive weapon in a public place.

### 94.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, ie: it was ***the accused*** who had an offensive weapon into a public place.

#### (3) Public place

“Public place” means any place to which for the time being the public or any section of the public are entitled or permitted to have access (whether on payment or otherwise) and, in relation to any meeting, includes any place which is or will be used for a public meeting: *s 2 Public Order Ordinance*.

**(4) Offensive weapon**

An “offensive weapon” means any article made or adapted for use for causing injury to the person, or intended by the person having it with him or her for such use either for themselves or for another: [s 2 Public Order Ordinance](#).

**(5) Lawful authority**

A person will have lawful authority only if he or she, at the time of the alleged offence, is on duty as:

- a police officer; or
- a special constable; or
- a police or constabulary officer of another territory present in the Kiribati Islands in response to an application by the Government.

See [s 16\(3\) Public Order Ordinance](#).

**(6) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a reasonable explanation for possessing an offensive weapon in a public place or a defence in legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- \$100 fine and 1 year imprisonment.
- Where any person is convicted of this offence, the court may make an order for the forfeiture of any offensive weapon in respect of which the offence was committed.

## 95 Disobeying summons

*S 115(1)(b) Penal Code*

### 95.1 Description

Any person is guilty of an offence who, having been summoned by any court, fails without good cause to appear on the date and at the time of the summons. The proof of good cause lies with the defence.

### 95.2 Elements of offence

Every element (ie: numbers 1-4) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date or period of time when the offence charged is alleged to have taken place;

#### Specific

3. The accused had been summoned to court;
4. The accused failed to appear in court on the date and at the time specified in the summons.

### 95.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The prosecution does **not** have to show that there was no good cause for the accused to fail to appear.

Under this offence, it is up to the **accused** to provide evidence of good reasons as to why he or she failed to appear and those good reasons will need to be to your satisfaction and on the balance of probabilities (ie: more likely than not).

#### (2) Identification

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

The prosecution must provide evidence to prove that it was **the accused** who committed the offence, ie: it was **the accused** who disobeyed the summons.

#### (3) Summons to court

The prosecution will need to provide evidence that the accused had been summoned to court.

**(4) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- 3 months imprisonment.

## 96 Arson

S [312](#) Penal Code

### 96.1 Description

Every person is guilty of a felony who wilfully and unlawfully sets fire to:

- any building or structure, whether completed or not; *or*
- any aircraft, vehicle or vessel, whether completed or not; *or*
- any stack of cultivated vegetable produce, or of mineral or vegetable fuel; *or*
- a mine, or the workings, fittings or appliances of a mine.

### 96.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused set fire to one of the following:
  - any building or structure, whether completed or not; *or*
  - any aircraft, vehicle or vessel, whether completed or not; *or*
  - any stack of cultivated vegetable produce, or mineral or vegetable fuel; *or*
  - a mine, or the workings, fittings or appliances of a mine;
5. The accused set the fire wilfully and unlawfully.

### 96.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

**(2) Identification**

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

The prosecution must provide evidence to prove that it was **the accused** who committed the offence, ie: it was the accused who set the fire.

**(3) Wilfully and unlawfully**

“Wilfully and unlawfully” are important elements of this offence. The prosecution will need to provide evidence that the accused wilfully set fire to the property he or she is accused of (ie: on purpose). It must also show that there was no lawful reason for setting the fire.

**(4) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- 5 years imprisonment.
- The offence of arson carries a maximum term of life imprisonment but it may be that you may hear it under an *Order for Extension of Criminal Jurisdiction of the Magistrates' Courts*. You are still bound by your maximum sentencing jurisdiction and cannot sentence any person to more than 5 years imprisonment.

## 97 Common assault

S 237 Penal Code

### 97.1 Description

Every person is guilty of a misdemeanour who unlawfully assaults another.

### 97.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused used physical force on another person;
5. There was no legal excuse for the force being used.

### 97.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was **the accused** who used physical force.

#### (3) Definition of assault

The common law defines "assault" as "the merest touching of another in anger".

The context in which the alleged assault occurred is very important and you will need to give careful consideration to:

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

If the person assaulted is injured, then a more serious assault charge such as 'assault causing actual bodily harm' under s [238](#) *Penal Code* might be more appropriate.

#### (4) Unlawfully

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

#### (5) Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

If the defence provides a reason for the assault (eg: self defence), you will need to consider if it has any merit.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

#### Maximum sentence

- If the assault is not committed in circumstances for which a greater punishment is provided in the *Penal Code* the person will be liable for 6 months imprisonment.

## 98 Destroying or attempting to destroy property

S [319](#) Penal Code

### 98.1 Description

Every person is guilty of an offence who wilfully and unlawfully destroys or damages any property (whether it belongs to himself, herself or another), or intends to destroy or damage any property; or is reckless as to whether the property would be destroyed or damaged.

### 98.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused destroyed or damaged some property;
5. The accused did this wilfully and unlawfully.

OR

4. The accused intended to destroy or damage some property;
5. The accused did this wilfully and unlawfully.

OR

4. The accused destroyed or damaged some property;
5. The accused was reckless as to whether the property would be destroyed or damaged.

### 98.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was the accused who damaged or intended to damage the property.

**(3) Wilfully and unlawfully**

“Wilfully and unlawfully” are important elements of this offence. The prosecution will need to provide evidence that the accused wilfully (ie: on purpose) and unlawfully (ie: without lawful excuse) damaged or intended to damage the property.

**(4) Reckless**

If the prosecution is not able to prove that the accused intentionally (deliberately) destroyed or damaged the property, they will need to prove that the accused recklessly destroyed or damaged the property. A person behaves recklessly when they have no regard for the damage that might be caused by their actions.

**(5) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- \$500 fine and 5 years imprisonment.

## 99 Threatening behaviour/insulting words

*S 169(n) Penal Code*

### 99.1 Description

Every person is guilty of an offence who, in a public place, uses threatening, abusive or insulting words or behaviour, with intent to provoke a breach of the peace or where a breach of peace may occur.

### 99.2 Elements of offence

Every element (ie: numbers 1-6) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused was in a public place;
5. The accused used threatening, or abusive or insulting words or behaviour;
6. The accused did this:
  - with the intention of provoking a breach of the peace; *or*
  - in a way that might have caused a breach of the peace.

### 99.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, ie: it was ***the accused*** who used the words or behaviour.

**(3) Breach of the peace**

A breach of the peace means an incident that causes anxiety or major concern to one or more people, so that they may feel harm may be caused to them or another.

The prosecution does not have to show that a breach of the peace actually occurred as a result of the accused's words or behaviour. It is enough if the accused used words or behaved with the intention of causing a breach of the peace or in a way where a breach of the peace might occur as a result of the words or behaviour.

**(4) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- \$10 fine or 1 month imprisonment.

## 100 Shouting or making unpleasant noise in town

S [171](#) Penal Code

### 100.1 Description

Any person is guilty of an offence who, in any village or town area, wilfully and wantonly and after being warned to stop, shouts or beats any drum or tom-tom, or blows any horn or shell, or sounds or plays any musical instrument, or sings or makes any loud or unpleasant noise, to the reasonable annoyance or disturbance of the public.

### 100.2 Elements of offence

Every element (ie: numbers 1-8) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused was in a village or town;
5. The accused had been warned to stop making disturbing noise;
6. After that warning the accused either:
  - shouted or beat a drum or tom-tom; *or*
  - blew a horn or shell; *or*
  - sounded or played a musical instrument; *or*
  - sang; *or*
  - made an unpleasant noise;
7. The accused made the noise wilfully and wantonly;
8. A member of the public was reasonably annoyed or disturbed.

### 100.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

**(2) Identification**

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

The prosecution must provide evidence to prove that it was ***the accused*** who made the noise.

**(3) Village**

“Village” means any small assemblage of not less than 6 dwelling houses or buildings for business, or both, whether upon regularly laid out streets or roads or not: [s 171 Penal Code](#).

**(4) Town area**

“Town area” means any area within the area of authority of a town council and any other area to which the provision of this section may be applied by order of the Minister.

**(5) Asked to stop**

The offence does not commence until after the accused has been asked to stop, therefore the prosecution will need to provide evidence that the accused was asked to stop making the noise. Only after that does the behaviour become an offence.

**(6) Wilfully and wantonly**

“Wilfully and wantonly” are important elements of this offence. The prosecution will need to provide evidence that the accused wilfully (ie: on purpose) and wantonly (ie: wanting to annoy or disturb) made the noise after being asked to stop.

**(7) Reasonable annoyance or disturbance**

The prosecution must show that at least one member of the public was actually annoyed or disturbed. That annoyance or disturbance must be reasonable, ie: a reasonable person would be annoyed or disturbed in the circumstances.

**(8) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- \$10 fine or 1 month imprisonment.

## 101 Criminal trespass

*S 182(1) Penal Code*

### 101.1 Description

Any person is guilty of a misdemeanour, who:

- enters another person's property with intent to commit an offence, or intimidate or annoy that person; *or*
- having lawfully entered another person's property, unlawfully remains there with intent to intimidate, insult or annoy that person or commit an offence; *or*
- unlawfully persists in coming or remaining upon another person's property after being warned not to come on or to leave the property.

### 101.2 Elements of offence

Every element (ie: numbers 1- 6) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific under *s 182(1)(a)*

4. The accused entered in or on to property;
5. The property was in lawful possession of another;
6. The accused entered with the intention of either:
  - committing an offence; *or*
  - intimidating or annoying the other person.

OR

#### Specific under *s 182(1)(b)*

4. The accused lawfully entered in or on to a property;
5. The property was in lawful possession of another;
6. The accused then unlawfully remained there with the intention of:
  - intimidating or annoying the other person; *or*
  - committing an offence.

**Specific under s 182(1)(c)**

4. The accused continued to come onto property after being warned not to;
5. The property was in lawful possession of another;
6. The accused did not have a lawful right to come onto the property.

OR

4. The accused remained upon property after being warned to leave;
5. The property was in lawful possession of another;
6. The accused did not have a lawful right to remain on the property.

**101.3 Commentary****(1) Burden and standard of proof**

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

**(2) Identification**

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

The prosecution must provide evidence to prove that it was **the accused** who committed the offence ie: it was **the accused** who unlawfully trespassed.

**(3) Property in the possession of another**

This will include ownership and lease and any other kind of possession. The possession must be lawful. You can infer that a person in possession of property includes family members or others who live there, even if they are not the person named on the title or lease.

**Charges under s 182(1)(a)****Intention**

The prosecution must prove that the accused intended to commit an offence or intimidate, insult or annoy the other person. It is the accused's intention that is important. You may have to infer this from the circumstances. The prosecution does not have to prove that the accused actually committed an offence or intimidated, insulted or annoyed the other person —intention to do so is enough.

**Charges under s 182(1)(b)****Lawful entering**

The accused must have entered the property for a lawful purpose. This includes being invited onto the property by the other person, entering to deliver something or other good reason.

### Unlawfully remaining

The prosecution must prove that there was no lawful reason for remaining. If the other person asks the accused to leave and he or she does not, the accused is unlawfully remaining. If the lawful entering was something like making a delivery, as soon as that has been done, the accused should leave the property, otherwise he or she is unlawfully remaining.

### Intention

The prosecution must prove that the accused intended to commit an offence or intimidate, insult or annoy the other person. It is the accused's intention that is important. You may have to infer this from the circumstances. The prosecution does not have to prove that the accused actually committed an offence or intimidated, insulted or annoyed the other person —intention to do so is enough.

### Charges under s 182(1)(c)

#### Unlawfully persists or remains

The prosecution must prove that:

- the accused was warned not to come onto, or to leave, the property; *and*
- there was no lawful reason for coming onto or remaining on the property.

#### (4) Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

#### Maximum sentence

- 3 months imprisonment, *except* where the property in which the offence is committed is a building, tent or structure used as a human dwelling, or as a place of worship, or a place for the custody of property, then the offender shall be liable to 1 year imprisonment.

## 102 Theft (simple larceny)

Ss [250](#), [251](#), [254](#) Penal Code

### 102.1 Description

Every person is guilty of an offence who steals something.

A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with intent at the time of such taking to permanently to deprive the owner of the thing.

### 102.2 Elements of offence

Every element (ie: numbers 1-8) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused took and carried away something that did not belong to him or her;
5. That thing was capable of being stolen;
6. The accused did this without the consent of the owner;
7. The accused did this fraudulently and without a claim of right made in good faith;
8. The accused intended to permanently deprive the owner of the thing.

### 102.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, ie: it was ***the accused*** who stole the thing.

#### (3) Takes

The expression "takes" includes obtaining possession:

- by any trick;
- by intimidation;
- under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; or
- by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps: s 251(2)(a).

#### (4) Carries away

The expression “carries away” includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached: s 251(2)(b).

#### (5) A thing capable of being stolen

The prosecution must provide evidence to identify the thing. The thing taken must be capable of being stolen. See s 250 for a list of the things that are capable of being stolen.

#### (6) Owner did not consent

Under s 251(2)(c), the expression “owner” includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen.

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

#### (7) Bailee / part-owner

Such person may be guilty of stealing any such thing notwithstanding that he or she has lawful possession of the thing, if, being a bailee or part-owner of the thing, he or she fraudulently converts the thing to his or her own use or the use of a person other than the owner: s 251(1) *Penal Code*.

#### (8) Fraudulently and without claim of right made in good faith

The accused must have had an intention to defraud or steal and no good claim to the thing. Usually the intent to defraud will consist of an intention to steal but not always so. A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *R v Denning* [1962] NSWLR 175.

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

#### (9) Intention to permanently deprive the owner

The prosecution must prove that the accused had the intention of keeping the thing and using it as his or her own. If the accused later sells or gives it away, he or she has used it as his or her own. The prosecution must show that the accused intended this **at the time he or she took the thing**. It is the accused’s intention that is important. You may have to infer this from the circumstances.

**(10) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- Stealing for which no special punishment is provided under *s 254 Penal Code* or any other Ordinance is simple larceny and a felony punishable with 5 years imprisonment.
- If any person has been previously convicted of a felony, the offence of simple larceny is 10 years imprisonment. However, you cannot sentence more than 5 years imprisonment.
- If previously convicted of a misdemeanour under *Part XXVII* or under *Part XXXV Penal Code*, the offence of simple larceny is punishable by a maximum imprisonment of seven years: *s 254(3) Penal Code*. Again, you cannot sentence more than 5 years imprisonment.

## 103 Simple conversion

*S 271(c) Penal Code*

### 103.1 Description

Any person is guilty of a misdemeanour who fraudulently converts to his or her own use or benefit or the use or benefit of any other person, any part of property or proceeds, having:

- been entrusted solely, or jointly with another person, with the property in order that he or she may retain in safe custody, apply, pay or deliver to another any part of the property or proceeds from the property; *or*
- solely or jointly received the property for or on account of any other person.

### 103.2 Elements of offence

Every element (ie: numbers 1-6) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused was entrusted solely or jointly to, either:
  - retain, apply, pay, or deliver any part of the property or proceeds to another; *or*
  - receive property on the account of another;
5. The accused converted any part of the property or proceeds from the property to his or her own use or benefit or to the use or benefit of any other person;
6. The accused did this fraudulently.

### 103.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was **the accused** who committed the offence ie: it was **the accused** who fraudulently converted another person's property.

**(3) Non-application to trustees: s 271(2) Penal Code**

This sub-section does not apply or affect any trustee under any express trust created by a deed or will, or any mortgage of any real or personal property, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage.

**(4) Fraudulently**

The accused must have had an intention to defraud. A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *R v Denning* [1962] NSWLR 175.

**(5) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- 7 years imprisonment. Note that you may not sentence to more than 5 years imprisonment.

## 104 Assault causing actual bodily harm

S 238 Penal Code

### 104.1 Description

Every person who commits an assault, which results in actual bodily harm, is guilty of a misdemeanour.

### 104.2 Elements of offence

Every element (ie: numbers 1 – 5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused used physical force on another person;
5. As a result of the force used, actual bodily harm was caused to that person.

### 104.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was **the accused** who committed the offence, ie: it was **the accused** who used force (assault), which caused the actual bodily harm.

#### (3) Causing actual bodily harm

The person assaulted must be injured. This will require medical evidence to establish actual bodily harm. The injury caused need not be severe, but it must be more than just a bruise or soreness. The skin or a bone may be broken.

**(4) Intention**

The intention of the accused is not relevant.

**(5) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- 5 years imprisonment.

## 105 Assault with intent to commit a felony or resist/prevent apprehension or detention

S [240\(a\)](#) Penal Code

### 105.1 Description

Any person is guilty of a misdemeanour who assaults another person, with an intent to:

- commit a felony; *or*
- resist or prevent the lawful apprehension or detention of himself or herself or another person for any alleged offence.

### 105.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused used physical force on another person;
5. The accused intended to:
  - commit a felony; *or*
  - resist or prevent the lawful apprehension or detainment of himself, herself or any other person for an alleged offence.

### 105.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, ie: it was ***the accused*** who assaulted another with intent to do one of the prohibited actions.

**(3) Intent**

It is important to remember that the assault must be done with the intent to commit a felony, or to resist apprehension or detention. The prosecution must prove that the accused intended to commit a felony, **or** resist or prevent detention of himself or herself or another.

It is the intention of the accused that is important – you may have to infer this from the circumstances.

**(4) Felony**

“Felony” means any offence that is declared by law to be a felony, or if not declared to be a misdemeanour, is punishable, without proof of previous conviction with imprisonment for 3 years or more.

See definition in [s 4 Penal Code](#).

**(5) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- 2 years imprisonment.

## 106 Throwing objects

S 83A Penal Code

### 106.1 Description

Any person is guilty of a misdemeanour who wilfully throws or in any other way projects any object, fluid or substance at any dwelling house, vehicle or person.

### 106.2 Elements of offence

Every element (ie: numbers 1-6) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused threw or projected, either:
  - an object; *or*
  - fluid; *or*
  - substance;
5. The throwing or projecting of the object, fluid or substance was at a dwelling house, vehicle or person;
6. The accused did this action wilfully.

### 106.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, ie: it was ***the accused*** who threw or projected the thing.

**(3) Wilful**

It is important to remember that the offence in this instance requires 'wilfully throwing' or 'wilfully projecting' therefore the prosecution will need to prove that the accused threw or projected the object on purpose.

**(4) Object, fluid or substance**

The prosecution must provide evidence of the thing thrown or projected.

**(5) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- 2 years imprisonment and a fine: see s [41](#) *Penal Code*.

## 107 Unlawful wounding

S 223 Penal Code

### 107.1 Description

Any person who unlawfully wounds another person is guilty of a misdemeanour.

### 107.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused wounded another person;
5. The accused does not have a lawful reason to have wounded that other person.

### 107.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution will need to provide evidence that a person other than the accused was wounded, and that it was **the accused** who committed the offence, ie: it was the accused who wounded the other person unlawfully.

#### (3) No intention required

The prosecution does not need to prove the accused intended to wound the other person, just that the other person was wounded.

**(4) Unlawfully wounds**

The injury must be more than mere bruising or soreness. The skin or organ must be broken. The prosecution must provide evidence to prove the wound and that the accused did not have a lawful reason for wounding that other person in those circumstances.

**(5) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- 5 years imprisonment.

## 108 Drunk and incapable

*S 170 Penal Code*

### 108.1 Description

Every person who is found in a public place drunk, so as to be incapable of taking care of himself or herself, is guilty of an offence.

### 108.2 Elements

Every element (ie: numbers 1-6) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused was found in a public place;
5. The accused was drunk at the time;
6. The accused was sufficiently drunk as to not be able to take proper care of himself or herself.

### 108.3 Commentary

#### (1) Purpose

This section should not be used by the Police to arrest and remove anyone who has been drinking in public and who is making a nuisance of themselves. It is aimed at alcoholics, vagabonds and others whose drinking is so excessive that they are a danger to themselves, and it is usually applied to people who are asleep on the road.

#### (2) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (3) Identification

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

The prosecution must provide evidence to prove that it was ***the accused*** who was found drunk in a public place.

**(4) Found drunk as to be incapable of taking care of him or herself**

The prosecution must prove more than just that the accused was affected by alcohol or had been drinking. They must prove that the accused was drunk and good evidence of drunkenness must be given. The effect of the drunkenness must be such as to mean that the person was not in control and could not manage for themselves.

**(5) Public place**

The prosecution must prove by evidence that it was a public place that the accused was found in. Often a description of the place may be sufficient because you may know it. Otherwise it needs to be proved that the place was public in nature.

See the definition of a public place in [s 4 Penal Code](#).

**(6) Defences**

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

**Maximum sentence**

- \$20 fine.

## 109 Drunk and disorderly

*S 167(d) Penal Code*

### 109.1 Description

Any person is guilty of being an idle and disorderly person, who:

- is drunk and disorderly in any public place; *or*
- behaves in a riotous or disorderly manner on the premises of any Police station; *or*
- assembles together with others and while so assembled behaves in a riotous or disorderly manner in any place.

### 109.2 Elements of offence

Every element (ie: numbers 1-5) must be proved by the prosecution.

#### General

1. The person named in the charge is the same person who is appearing in court;
2. There is a date and/or period of time when the offence charged is alleged to have taken place;
3. There must be a place where the offence is alleged to have been committed;

#### Specific

4. The accused was in a public place;
5. The accused was drunk and disorderly.

OR

4. The accused was in a police station;
5. The accused behaved in a riotous or disorderly manner.

OR

4. The accused was assembled with others in any place;
5. While assembled, the accused behaved in a riotous and disorderly manner.

### 109.3 Commentary

#### (1) Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

#### (2) Identification

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

The prosecution must provide evidence to prove that it was ***the accused*** who behaved in the prescribed manner.

### (3) Public place

“Public place” includes any public way and any buildings, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court: *s 4 Penal Code*.

The prosecution must prove by evidence that it was a public place that the accused was found in. Often a description of the place may be sufficient because you may know it. Otherwise, it needs to be proved that the place was public in nature.

### (4) Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie: more likely than not).

### Maximum sentence

- \$20 fine or 2 months imprisonment.
- If the offender is not usually living in the area in which the offence took place, you can add or replace any fine or imprisonment imposed and can order that the offender must stay in the place he or she usually resides for a period up to 1 year. You must specify this time in the order.

