The Tonga Magistrates Bench Book

Produced by the Pacific Judicial Education Programme, in collaboration with the Tonga National Judicial Education Committee, and with generous assistance from the governments of Australia, New Zealand and Canada.

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Foreword

It is a privilege for me to be invited to write the introduction to Tonga's first Bench Book for the Magistrates' Courts.

The production of the Bench Book has been a major undertaking. Now that the task is complete, I have no doubt that the finished product will become as indispensable to serving Magistrates as, to use an analogy put to me by a witness in a recent case, a crescent spanner is to a mechanic.

The production of the Tonga Magistrates Bench Book is part of an overall project by the Pacific Judicial Education Programme (PJEP) to provide Bench Books for many jurisdictions in the Pacific. It has been an inspirational project, which is now near completion. The provision of Bench Books will undoubtably enhance the administration of justice and adherence to the Rule of Law in those Pacific countries for years to come.

PJEP was established five years ago by the Pacific Judicial Conference, the Biennial Conference of Chief Justices from the various Pacific jurisdictions. These days, PJEP is funded by AusAID and NZAID, the respective aid agencies of the Australian and New Zealand governments. We are enormously indebted to those organisations for their valuable financial support. In the case of this particular project, I also gratefully acknowledge the assistance provided by the Government of Canada through the Canada Fund, the Department of Foreign Affairs and International Trade as well as the University of Saskatchewan Native Law Centre.

I would like to pay special tribute to the project director Afioga Tagaloa Enoka Puni, Executive Officer of PJEP and his Administration Manager, Verenaisi Bakani. I would also like to acknowledge the significant contribution made, from a Tongan perspective, in bringing the whole project together by Chief Justice Gordon Ward, Chief Magistrate Samiu Palu, Tonga's NJEC Co-ordinator, and Magistrate Salesi Mafi. I also commend the outstanding work of Tina Pope, the Bench Book Consultant, and Paul Logan, the Legal Researcher and Co-Author.

It must be remembered by users of the Bench Book that the publication is not intended to be a textbook of the relevant law. The material is provided as a guide only. It will still be up to individual Magistrates to keep themselves abreast of the law and to ensure that all their directions, rulings and decisions are appropriate to the facts and circumstances of the particular case before them.

The Bench Book has been produced in loose leaf format to enable on-going revision and updating. Any suggestions for improvement or amendment are always welcome and should be notified to Chief Magistrate Palu.

Hon. Justice A. Ford
Acting Chief Justice

18 May 2004

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Pacific Judicial Education Programme

BENCHBOOK PROJECT 2003/2004

Team Members

Tagaloa Enoka Puni (Samoa)	**Project Director**
Salesi Mafi (Tonga)	**Co-author**
Tina Pope (New Zealand)	**Consultant, Editor and Co-author**
Crystal Reeves (Canada)	**Researcher and Co-author**
Paul Logan (Canada)	**Researcher and Co-author**
Verenaisi Bakani (Fiji)	**Logistics and Support Services**

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A:

THE CONSTITUTIONAL AND COURT FRAMEWORK OF TONGA

A1 The Constitutional Framework of Tonga

A1.1 The *Constitution* of the Kingdom of Tonga

The *Constitution of Tonga* was granted on 4 November 1875. Amendments have been made since that time and have been incorporated in accordance with the *Laws Consolidation Act* on 31 December 1988; and in 1990, 1991, 1997, 1999 and 2003.

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

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

A1.2 The Branches of Government in Tonga

According to the *Constitution*, the Government is divided into three bodies:

- the King, Privy Council and Cabinet (Ministry);
- the Legislative Assembly; and
- the Judiciary: *cl. 30 Constitution*.

The Ministry

The King:
The Sovereign is King Taufa'ahau Tupou IV. He is Head of State, Head of the Executive and Commander-in-Chief of the Forces.

The Monarchy has secured perpetual succession: *cl. 31 Constitution*.

The Privy Council:
The King appoints a Privy Council, consisting of the Cabinet, Governors and any others whom the King sees fit: *cl. 50 Constitution*.

The Privy Council is the chief instrument of Executive power.

Cabinet:
The Cabinet consists of the Prime Minister, the Minister of Foreign Affairs, the Minister of Land, the Minister of Police and other such Ministers as the King appoints. According to the *Constitution*, individual Ministers are also responsible for their portfolios: *cl. 51, 52 Constitution*.

The Legislative Assembly of Tonga

The Legislative Assembly is composed of Privy Councillors and Cabinet Ministers sitting as nobles, nine representatives of the nobles, and nine representatives of the people.

The Legislative Assembly:

- consists of a single chamber, based on the Westminster model;
- has a life of three years, subject to the King's power to revoke or dissolve the Assembly at any time: *cl.38 Constitution*;
- is presided over by the Speaker of the Legislative Assembly ,who is appointed by the King; and
- makes its own rules of procedure.

The Legislative Assembly has the power to:

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

The Judiciary

The Judiciary is composed of the Court of Appeal, the Supreme Court , the Magistrates' Courts and the Land Court.

The Judiciary:

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

Gubernatorial Government

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

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

A2 The Court System

A2.1 General Characteristics of the Tongan Court System

Tonga has five types of Courts:

- the Privy Council sitting with the Court of Appeal (on hereditary titles and estates only);
- the Court of Appeal;
- the Supreme Court;
- the Land Court; and
- the Magistrates' Courts.

Most judicial work is carried out by the Magistrates' Courts, consisting of the Chief Police Magistrate and five Magistrates, dealing with criminal and civil matters.

A2.2 Jurisdiction

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

An example where the Court would be acting outside its jurisdiction would be if the Magistrates' Court heard a murder case, which carries a death sentence, as the Magistrates' Court is only permitted to hear criminal cases for which the maximum sentence is three years: *s2 Magistrates Court s (Amendment) Act 1990*.

Jurisdiction Derived from Legislation

Statutes normally define a Court's power and authority. The power and authority of the Magistrates' Court is set out in *ss8* and *11* of the *Magistrates' Courts Act 1988*.

Inherent Jurisdiction

Inherent jurisdiction allows a Court to fill in any gaps left by Statute or case law. This jurisdiction is normally reserved for the higher Courts in a country.

Original Jurisdiction

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

- the Supreme Court has been given power to try all divorce, probate and admiralty matters;

- the Magistrates' Court has been given power to try all summary offences where the maximum sentence is $1000 or 3 years imprisonment: *s11 amending s2 1990.*

Concurrent Jurisdiction

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

***For example, legislation provides that defamation cases should be dealt with in the Magistrates' Court while the* Constitution *provides that, for offences in which the penalty exceeds $500, an accused is entitled to a jury trial. Depending on whether an accused chooses to be tried by jury will determine which Court hears the case*.**

In some instances, a criminal case will give rise to more than one offence, one being summary and another being indictable.

> "The proper procedure is still that stated by Martin CJ in Practice Direction number 1 of 1991 and referred to by Dalgety J in *R v Palanite*, 126/93. Offences arising from the same incident must be tried by the same Court . If one is indictable and is committed to the Supreme Court , the other case cannot be dealt with by the Magistrate and should be remitted to the higher Court to be dealt with at the same time."
> *R v Veamatahau* [1999] TOSC 31; CR 619 99.

Territorial Jurisdiction

Territorial jurisdiction refers to the geographic area in which a particular Court has competence. The Magistrate appointed to each of the five districts shall preside over the Magistrates' Courts in the district to which he or she is assigned: *s3(2) Magistrates' Courts Act*.

The five districts are:

- Tongatapu and 'Eua;
- the Ha'apai group including Nomuka;
- the Vava'u group;
- Niuafo'ou (currently vacant); and
- Niuatoputapu (currently vacant): *s3(1) Magistrates' Courts Act*.

Appellate Jurisdiction

This is the right of a Court to hear appeals from a lower Court. The Court of Appeal and the Privy Council sitting with the Court of Appeal each have some type of appellate jurisdiction under The *Constitution* as does the Supreme Court under the *Magistrates' Courts Act*.

Criminal Jurisdiction

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

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

Civil Jurisdiction

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

For example, family matters, contract and torts.

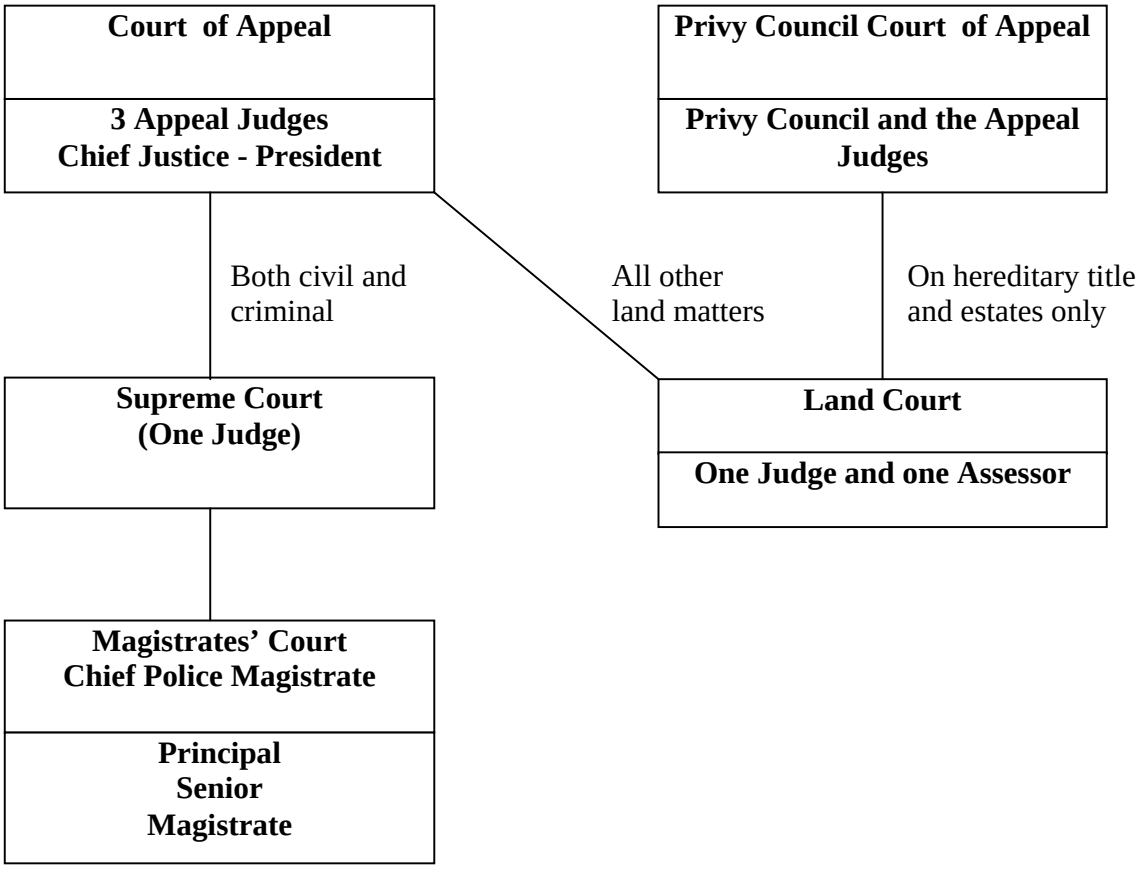
Supervisory Jurisdiction

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

A2.3 The Structure of the Tongan Court System

The diagram on the next page shows the Court structure in Tonga.

Tongan Court System



A2.4 A Brief Description of the Courts

The Privy Council

The Privy Council sitting with the Court of Appeal hears cases on hereditary titles and estates only.

The Court of Appeal

Clauses *84* and *85* of the *Constitution* create the Court of Appeal and provide for the qualifications required for appointment of Judges to the Court .

With the exception of those matters which may be excluded through another Act, clauses *91* and *92* of the *Constitution* mandate that appeals from the Supreme Court be heard in the Court of Appeal.

The Court of Appeal may also deliver opinions on questions of law to the Supreme Court which is then bound by those opinions in its proceedings: *s3 Court of Appeal Act*.

The Court of Appeal may only hear and determine appeals with three or more sitting members except that rules of Court may allow for the hearing of interlocutory applications and specified cases by only two members: *s6 Court of Appeal Act*.

Determination of all appeals is by majority.

Civil Jurisdiction

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

- on all final orders, judgments and decisions, with the exception of orders made by consent or as to costs unless special leave has been given by the Judge of first instance or the Court of Appeal;
- judgments made in the course of any cause of matter, by special leave of the Judge of first instance or the Court of Appeal on all interlocutory orders: *s10 Court of Appeal Act*.

With concurrence in writing by both the appellant and respondent, the Court of Appeal may determine the appeal on written submissions alone in accordance with the provisions set out at *s15* of the *Court of Appeal Act*.

Criminal Jurisdiction

Under *s16* of the *Court of Appeal Act*, a person may appeal a conviction in the Supreme Court:

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

Upon hearing the appeal, the Court of Appeal must allow the appeal:

- if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence; or
- if they think that the appellant was convicted on grounds of a wrong decision of any question of law or that there was a miscarriage of justice: *s17(1) Court of Appeal Act*.

Even if the Court of Appeal is of the opinion that the point raised in the appeal might be decided in favour of the appellant, the Court may still dismiss the appeal if they consider that no substantial miscarriage of justice has occurred: *s17(1) Court of Appeal Act*.

If the Court allows an appeal against conviction, the Court shall:

- either quash the conviction and direct a judgment and verdict of acquittal; or
- order a new trial if it is in the interests of justice: *s17(2) Court of Appeal Act*.

On an appeal against sentence, if the Court of Appeal is of the opinion that a different sentence should have been passed, they shall either:

- quash the sentence and pass other such sentence as warranted in law by the verdict; or
- dismiss the appeal: *s17(3) Court of Appeal Act*.

The Court of Appeal also has a number of other powers as outlined in *s18 Court of Appeal Act*.

The Supreme Court

The existence, composition and powers of the Supreme Court are briefly set out in the *Constitution*: *cl.86-90 Constitution*. Further details on practice and procedure are set out in the *Supreme Court Act 1988* and in the accompanying *Supreme Court Rules*.

Civil Jurisdiction

The Supreme Court has jurisdiction in all civil cases in which the amount claimed exceeds $1000. Whenever any issue of fact is raised in any civil action triable in the Supreme Court, any party to such action may claim the right of trial by jury: *cl.99 Constitution*.

Criminal Jurisdiction

The Supreme Court has jurisdiction in all criminal cases for which the maximum penalty exceeds $1000 or three years imprisonment.

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

Magistrates' Court

Clause 84 of the *Constitution* gives judicial power to the Magistrates' Court. The *Magistrates' Courts Act* confers upon the Magistrates' Courts criminal and civil jurisdiction.

The Magistrates' Court includes the Chief Police Magistrate, who may preside over any Magistrates' Court in Tonga and over the five district Magistrates' Courts.

Civil Jurisdiction

Magistrates' Courts are permitted to hear civil actions where the amount or value of something being claimed as debt, balance of account, or damages does not exceed $1000: *s6(a) Magistrates' Courts (Amendment Act 24/1990).*

The Chief Police Magistrate is permitted to hear civil actions where the amount claimed does not exceed $2000: *s6(b) Magistrates' Courts (Amendment) Act*.

Magistrates' Courts are also permitted to hear civil actions over the title of goods where one person detains the goods of another and refuses to give them up, provided the value of the goods does not exceed $1000: *s60 as amended by s2 Magistrates' Courts (Amendment Act 11/1992)*.

Criminal Jurisdiction

Magistrates are permitted to hear cases where the punishment does not exceed $1000 or 3 years imprisonment: *s2 Magistrates' Courts (Amendment Act 24/1990)*. Such cases are called summary cases.

The Chief Police Magistrate is permitted to hear cases where the punishment does not exceed $1500: *s2(c) Magistrates' Courts (Amendment Act 24/1990)*.

Any cases where the punishment is greater than a $1000 fine or 3 years imprisonment (with the exception of those cases heard before the Chief Police Magistrate in some circumstances) is heard in the Supreme Court. Such cases are called indictable cases.

Magistrates also have jurisdiction over all criminal cases which they are expressly empowered to hear and determine by any law.

Other Jurisdiction

In addition to hearing criminal and civil cases, Magistrates' Courts may also:

- bring before them through summons or warrants all persons charged with criminal offences;
- issue search warrants;
- investigate all charges or criminal offences not triable in the Magistrates' Court and to discharge the accused or commit him or her for trial before the Supreme Court ;
- admit to bail persons charged with committing offences;
- make orders of maintenance against husbands who have deserted or omitted to maintain their wives;
- issue subpoenas requiring the attendance of witnesses in criminal and civil cases;
- bind over prosecutors and witnesses to prosecute and give evidence;
- enforce by distress or imprisonment the payment of any fine imposed by a Magistrate;
- take affidavits or administer oaths;
- hear and determine all civil proceedings as set out in *Part V* of the *Magistrates' Courts Act*;
- exercise other such powers not specified in the *Magistrates' Courts Act* as may be prescribed by other laws when specified by His Majesty in Council; and
- make a temporary order, upon the application of a party to a dispute, a District Officer, a Town Officer or member of the Police Force where prompt action is needed either in the

interests of justice or to preserve peace and order in the area: *s8 Magistrates' Courts Act;* and

- other Acts may provide special jurisdiction for Magistrates, for example, the Police Tribunals and Mental Health Review Tribunals.

Land Court

The Land Court is established under *s144 Land Act 1988*.

The Land Court has jurisdiction to:

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

Appeals

A party may appeal any order or judgment of the Land Court. If the matter relates to hereditary estates or titles, then the appeal goes to the Privy Council, pursuant to *cl.50 Constitution*. All other appeals go to the Court of Appeal: *s140 Land Act* as amended by *s2 Land Amendment Act 13 of 1990*.

B:

THE LAW

B1 Sources of Law

The sources of law for Tonga are:

- the *Constitution*;
- statutes and subsidiary legislation of Tonga;
- English common law; and
- English statutes (where necessary).

B1.1 The *Constitution*

The *Constitution* is the supreme law of Tonga. Any other law which is inconsistent with the Constitution is, to the extent of the inconsistency, void: *cl.82 Constitution* as amended by *cl.10 Constitution.*

The Courts have upheld the supremacy of the *Constitution* and have shown that all other Acts must be read subject to it. See *Pedras v R* [2000] TOCA 4; CA 10 00 (21st July, 2000).

Amendments to the *Constitution* require:

- passage by the Legislative Assembly; and
- unanimous support by the Privy Council and Cabinet.

Amendments do not take effect until the King has given assent and signed it. However, amendments shall not affect:

- the law of liberty;
- succession to the Throne; and
- titles and hereditary estates of the nobles: *cl.79 Constitution*.

Interpretation of the *Constitution*

While the *Constitution* is the supreme law of Tonga, it must be remembered that even the *Constitution* is subject to interpretation and must be read in light of its context: See *Edwards v Kingdom of Tonga* [1994] TOCA; CA 907/93 (15 April, 1994). See also *Sione Tu'ifua Vaikona v Teisina Fuko (No. 2)* TOSC Civil Case No. 14/1990.

In interpreting the *Constitution*, you must:

- pay proper attention to the words actually used in the particular context of the clause;
- look at the *Constitution* as a whole;

- consider further the background circumstances in which the *Constitution* was granted in 1875 (if applicable); and
- be flexible to allow for changing circumstances: *Tu'itavaka Sunia Mafile'o v Porter & another* TOSC 24/89.

B1.2 Legislation

Acts of the Tongan Legislative Assembly

The Legislative Assembly is the main law-making body in Tonga, with Acts being passed by majority after three readings in the Assembly and assent by the King.

The *Constitution,* Acts, Ordinances and subsidiary legislation were consolidated in 1988 and the resulting volumes are deemed to be the law as of 31 December 1988 according to the *Laws Consolidation Act 1988*.

Some Acts of the Parliament of the United Kingdom

In the absence of Tongan law, current English statutes may be drawn upon only so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary: *s4(b) Civil Law Act 1983*.

Other times, Tongan Acts will make specific reference to using United Kingdom law as a supplementary tool. For example, *s67(f) Evidence Act* allows admitting certain documentary evidence to be admitted if it complies with any Act currently in force in the United Kingdom.

Understanding and Interpreting Legislation

When interpreting Tongan statutes, you must consider:

- the *Constitution*;
- the *Interpretation Act*;
- the preamble to the specific Act itself;
- any definitions or rules of interpretation provided in the specific Act; and
- common law rules of statutory interpretation.

You must recognise and understand the terms used in statutes to convey a particular meaning, for example:

- when an Act says the Court "may" do something, that means the power may be exercised or not, at your discretion; and
- when an Act says the Court "shall" do something, this means you must. You have no choice.

It is important to note that the meaning of words and phrases in a statute is a question of law and not a question of fact.

There is a procedure that you use to determine the meaning of words as follows;

1. Refer to the definition section of the statute.
2. Refer to relevant Tongan cases that have given a definition for that word or phrase.
3. Refer to overseas case law in some instances.
4. Refer to a respected legal dictionary or legal textbook.

B1.3 Customary Law

The *Constitution* and the statutes do not recognise the legitimacy of unwritten customary Tongan law. Most customary law has been transformed into legislation and only rarely does custom play a role, most notably with respect to kinship relations, mitigation of sentence or local land matters.

B1.4 Common Law

The *Civil Law Act* provides that, subject to the words written in any Act, the Tongan Courts should apply the common law of England and the rules of equity in force in England: *s3 Civil Law Act*.

English common law is applied only so far as:

- no other Tongan Act or Ordinance is in force;
- the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary: *s.4(b) Civil Law Act*.

Judges and Magistrates can make and develop the law:

- by interpreting existing legislation including the *Constitution*; and
- by dealing with matters which are not dealt with by statute.

The development of the common law does not mean that Judges and Magistrates may make arbitrary decisions. They must follow the doctrine of Judicial Precedent and must give reasons for their decision.

Doctrine of Judicial Precedent

According to the Doctrine of Judicial Precedent, Judges and Magistrates in lower Courts are bound to follow like decisions of higher Courts. This doctrine is one of the most important principles of the common law.

Binding Authority

This means that lower Courts are bound to or must apply the legal principles announced in the decision of a higher Court in any cases following the decision of a higher Court.

Persuasive Authority

This means that the Court may apply the decision of another Court, but are not required to do so. This usually occurs if the decision comes from a Court of the same level in Tonga or from a Superior Court of other Commonwealth Territories: *s166 Evidence Act*. You should carefully consider the decision of the other Court but, if the reasoning of the decision does not persuade you, do not apply it.

C:

CRIMINAL LAW AND HUMAN RIGHTS

C1 Introduction

The *Constitution* sets out numerous fundamental rights and freedoms that are to be observed for all persons in Tonga.

It is the responsibility of all Judges and Magistrates to ensure that these rights are respected in the administration of justice.

Some of the rights include:

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

C2 Same Law for all Classes

Clause 4 of the *Constitution* states:

> "There shall be but one law in Tonga for chiefs and commoners, for non-Tongans and Tongans. No law shall be enacted for one class and not for another class, but the law shall be the same for all the people of this land."

C3 Habeas Corpus

Clause 9 of the *Constitution* states:

> "The law of the writ of Habeas Corpus shall apply to all people and it shall never be suspended excepting in the case of war or rebellion in the land when it shall be lawful for the King to suspend it."

The writ of Habeas Corpus allows an individual to challenge the detention of a person in official custody or in private hands. If the Court decides that the detention appears to be unlawful, the custodian is ordered to appear to justify the detention and, if he or she cannot do so the detained person is released.

In *Fifita v Fakafanua* [2000] LRC 733, the Court said that there are two relevant questions when deciding whether detention is lawful:

> "Firstly, did the arresting officer suspect that the person arrested was guilty of the offence?

The answer to this question depended entirely upon findings of fact as to the officer's state of mind.

> "Secondly, assuming that the officer had the necessary suspicion, were there reasonable grounds for that suspicion?

This was a purely objective requirement.

In addition to the constitutional right of habeus corpus, other individual protections against arbitrary arrest or detention exist. For the extent of Police powers of arrest and the application of habeus corpus, see *ss21, 22 Police Act* and *Fakafanua v Edwards* [1999] TOSC 23; CR APP 959 98 & 958 98.

C4 Accused Must be Tried

Clause 10 of the *Constitution* states:

> "No one shall be punished because of any offence he may have committed until he has been sentenced according to law before a Court having jurisdiction in the case."

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

C5 Procedure on Indictment

Clause 11 of the *Constitution* sets out a number of requirements that must be followed for a legal prosecution to take place. They are:

- no one may be tried or summoned to appear or punished for non-appearance unless first receiving a written indictment, with the exception of small offences within the jurisdiction of the Magistrate and contempt of Court while the Court is sitting;
- the written indictment must clearly state what offence is charged and the grounds for the charge;
- at trial, the accused shall be brought face to face with witnesses to hear their testimony when not disallowed by law, and the accused shall be allowed to question them;
- the accused may bring forward witnesses and make a statement regarding the charge against him or her; and
- the accused may elect for a trial by jury for all indictable offences.

Together, these rules help ensure the fair administration of justice by ensuring an accused has time to prepare a case and the opportunity to present that case once at trial.

In accordance with the second requirement of *clause 11*, *R v Fakatava* [2001] TOSC 13, CR 90-93 00 (26 April 2001) shows that the particulars of the charge must be sufficient to inform the accused of the substance of what he or she allegedly did and, if further particulars are considered necessary, they can be applied for and, if not disclosed voluntarily, the Court can make an order for such.

The last requirement of *clause 11* confers the right to a trial by jury for all indictable offences. This must be interpreted in light of *clause 99* of the *Constitution* which limits the right to a jury trial in criminal cases to those offences punishable by a term of imprisonment exceeding 2 years or a fine of 500 pa'anga or both. This gives rise to the possibility of concurrent jurisdiction for some offences.

For an explanation of the right to a jury trial for indictable offences, see *Police v Pohiva* [1999] TOSC 33; CR APP 593 99.

C6 Accused Cannot be Tried Twice

Clause 12 of the *Constitution* states:

> "No one shall be tried again for any offence for which he has already been tried whether he was acquitted or convicted except in cases where the accused shall confess after having been acquitted by the Court and when there is sufficient evidence to prove the truth of his confession."

This rule, often referred to as the "Double Jeopardy" rule, prevents individuals from being prosecuted for the same offence once a final pronouncement on guilt or innocence has been given by a competent Court. For *clause 12* to be triggered, it is essential that the offence for which the person faces trial is the same as the offence for which he or she has already been tried: *Fisi'inaua v R* [1995] Appeal 21/94 CA (3 March, 1995).

C7 Charge Cannot be Altered

Clause 13 of the *Constitution* provides that:

> "No one shall be tried on any charge but that which appears in the indictment, summons or warrant and for which he or she is being brought to trial".

This rule ensures that an accused knows the charges before going to trial so that he or she has a real opportunity to answer the charges. See D: Judicial Conduct for a greater explanation of the accused's right to know the case against him or her.

However *Clause 13* does provide circumstances which are exceptions to this rule. These exceptions are:

- where the complete commission of an offence is not proved but the evidence establishes an attempt to commit that offence, the accused may be convicted of the attempt;
- where an attempt to commit an offence is charged but the evidence proves the commission of the full offence, the accused may be convicted of only the attempt;
- where embezzlement or fraudulent conversion is charged, the jury may find such person not guilty of embezzlement but guilty of theft and where theft is charged the jury shall be able to find such person guilty of embezzlement or fraudulent conversion; and
- where an accused is acquitted of the offence charged, he or she may be found guilty of a lesser offence of the same nature arising out of the same circumstances. For example, an accused acquitted of grievous bodily harm may still be found guilty of common assault.

C8 Trial to be Fair

Clause 14 of the *Constitution* states:

> "No one shall be intimidated into giving evidence against himself nor shall the life or property or liberty of anyone be taken away except according to law."

This clause enshrines two rights:

- the right against self-incrimination; and
- the right to due legal process before punishment.

The right against self-incrimination exists so that the burden of proving the case against an accused lies with the prosecution.

The Judiciary ensuring that due legal process is followed acts as a check on the arbitrary use of state power against individuals. See D: Judicial Conduct for a more in-depth study of the right to due legal process.

For a good view on how *clause 14* of the *Constitution* may act as a limit on other parts of the *Constitution,* see *Minister of Police v Moala* [1997] TOCA 1; CA 19 96 (29th June, 1997).

C9 Court to be Unbiased

Clause 15 of the *Constitution* ensures fairness in legal proceedings by:

- disallowing Judges, Magistrates or jurors from sitting in any case in which a relation sits as a party to the case or as a witness;
- disallowing Judges, Magistrates or jurors from sitting in any case in which they may have an interest in the outcome;
- disallowing Judges, Magistrates or jurors from receiving presents or money from parties involved or a party's friends in any case in which they sit; and
- ensuring that all Judges, Magistrates and jurors are entirely free and have no interest or bias in any case before them.

It is imperative that Judges, Magistrates and jurors be impartial in the cases before them so that every case is decided only upon its merits. See D: Judicial Conduct.

C10 Premises Cannot be Searched without Warrant

Clause 16 of the *Constitution* prohibits anyone from forcibly entering the house or premises of another to search for or take anything except according to law. If one believes that lost property is concealed in such premises, then an affidavit can be made before a Magistrate who may then issue a search warrant to the Police to search the premises.

This clause acts as a check on both individual and state power as the forcible entry of an individual's house or premises for the purposes of a search can only be lawfully achieved through legal process. It is at the point of the application before a Magistrate that the Court may exercise its jurisdiction to prevent arbitrary abuses of power.

C11 Protection against Retrospective Laws

Clause 20 of the *Constitution* states:

> "It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws."

This right ensures certainty in action by preventing an individual from being punished for an act which was not a crime at the time the act was committed. As an example, in *R v Fakauho*, the maximum sentence for manslaughter had been increased from 15 years to 25 years between the time of the offence and the time of trial. Relying on clause 20 of the *Constitution*, Justice Finnigan ensured Mr. Fakauho's sentence was in accordance with the lesser penalty existing at the time of the offence. See also *Edwards v Kingdom of Tonga* [1994] TOCA App No. 907/93 (15 April, 1994).

D:

JUDICIAL CONDUCT

D1 Ethical Principles

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

Oath of Allegiance

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

Official Oath

"I…….. swear by almighty God that I will well and truly serve His Majesty King Taufa'ahau Tupou IV in the office of Magistrate and will righteously and impartially administer justice in accordance with the Constitution and Laws of this Country without fear or favour. So help me God."

While the oath of allegiance is a solemn and important undertaking, it is also an official oath of office that bears on the principles of judicial conduct. To illustrate these principles, it is useful to break down the oath into a number of parts.

D1.1 "Well and Truly Serve"

Diligence

This part of the oath requires you to be diligent and loyal in the performance of your judicial duties.

This means you must:

- devote yourself to your professional 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;
- take positive steps to enhance your knowledge, skills and personal qualities necessary for your role; and
- not engage in conduct incompatible with the discharge of your role or encourage such conduct among other members of the Judiciary.

Serving diligently also requires you to deliver decisions to the best of your ability, but also with regard to avoiding any unnecessary delay. To ensure 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.

D1.2 "Righteously and Impartially Administer Justice"

To administer justice righteously and impartially encompasses two main aspects of judicial conduct:

- integrity; and
- impartiality.

Integrity

You should conduct yourself with the utmost integrity to keep public trust and confidence in the Judiciary.

This means you should:

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

Impartiality

Justice requires you to **in fact** be impartial, but also requires you to **appear** to be impartial in your decision making.

To ensure impartiality, you should:

- not allow your decisions to be affected by:
  - bias or prejudice; or
  - personal or business relationships or interests;
- as much as reasonably possible, conduct your personal and business affairs so as to minimise occasions where it will be necessary to disqualify yourself from hearing cases;
- review your membership in all commercial, social and political groups to determine whether your involvement compromises your position as a Magistrate.

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

Impartiality touches on several different aspects of your conduct.

1. Judicial Demeanour

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

2. Civic and Charitable Activity

You are free to participate in civic, charitable and religious activities, subject to the following considerations:

- avoid any activity or association that could interfere with the performance of your judicial duties or could endanger your impartiality;
- do not use your judicial office to advance the causes of other groups;
- avoid involvement in causes or groups likely to be involved in litigation; and
- do not give legal or investment advice.

3. Political Activity

You should refrain from conduct which, in the mind of a reasonable, fair-minded and informed person, would undermine confidence in your impartiality with respect to matters that could come before the Courts.

Specifically, you should refrain from:

- membership in political parties and political fundraising;
- attendance at political gatherings;
- contributing to political parties or campaigns; and
- taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the Courts, the independence of the Judiciary or fundamental aspects of the administration of justice.

4. Conflict of Interest

In any case in which you believe you will be unable to act impartially, you must disqualify yourself. This is an important principle and is contained in *cl.15* of the *Constitution*.

You should also disqualify yourself if a reasonable, fair-minded and informed person would have a suspicion that there is a conflict between your personal interest (or that of your immediate family or close friends and associates) and your judicial duty.

As a Magistrate, you are specifically prohibited from adjudicating in any case in which you are personally concerned or in which your kindred (relatives) are involved as plaintiff or defendant. For these purposes kindred is defined as:

- wife;
- child;
- grandchild;
- parent;
- grandparent;
- brother;
- sister;
- nephew;

- neice;
- uncle;
- aunt; or
- cousin: *s87 Magistrates' Courts Act*.

You must also be careful in deciding whether to adjudicate in a case that involves more distant relatives or friends if a close relationship exists.

You must also not preside over any case where you may have or appear to have preconceived or pronounced views relating to:

- the issues of the case;
- witnesses; or
- the people involved.

For example, if you witness an accident, you cannot preside over any case arising out of that accident as you may prefer your own memory over that of the evidence lawfully presented in Court.

However, disqualifying yourself is not appropriate if:

- the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification;
- no other Magistrates are available to deal with the case; or
- because of urgent circumstances, failure to act could lead to a miscarriage of justice.

D1.3 "In Accordance with the *Constitution* and Laws"

Lawfulness

You must always act within the authority of the law.

This requires you to:

- not take into account irrelevant considerations when making decisions. Your decisions should only be influenced by legally relevant considerations;
- make the decision. You should not abdicate your discretionary powers to another;
- defend the constitutionally guaranteed rights of the people of Tonga and ensure that all laws are in accordance with the *Constitution*.

D1.4 "Without Fear or Favour"

Judicial Independence

Justice requires all judicial decision-makers to exercise their judgment based on law and evidence. Decisions must not be affected by other factors. This requires you to:

- exercise your judicial functions independently and free from irrelevant influence;
- reject any attempts to influence your decisions outside the proper process of the Court;
- uphold arrangements and safeguards to maintain and enhance judicial independence; and
- promote high standards of judicial conduct to ensure continued judicial independence.

One aspect of judicial independcnce is written in the *Magistrates' Courts Act*, which prohibits a Magistrate from receiving any present, money or anything else from a party or the friend of a party in any case recently tried or about to be tried: *s88 Magistrates' Courts Act*.

You must not allow the opinions of legal representatives to affect your decision. See *Lui v Police* TOSC Crim App No. 773/94 (20 September, 1994).

D2 Conduct in Court

D2.1 Preparing for a Case

Ensure you have studied and understood the files you will be dealing with and have the relevant legislation at hand.

Criminal Jurisdiction

- Consider the offences – make sure you know what elements must be proved.
- Be prepared for interlocutory applications that may arise in the course of proceedings.
- Be prepared to deliver rulings at short notice.

D2.2 Principle that Affected Parties have the Right to be Heard

It is a well established principle of natural justice which has evolved from common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before the decision is made. This principle is often referred to in legal writing as *audi alteram partem*.

This principle focuses on the *procedural* steps implemented by the Court. The purpose of the principle is to ensure that you consider all relevant information before making a decision. To

give effect to this principle, you have to consider what has to be done to allow a person to be properly heard. This means:

- allowing the person sufficient notice to prepare his or her case;
- allowing sufficient time to enable the person to collect evidence to support his or her case; and
- allowing sufficient time to enable the person to collect evidence to be able to rebut or contradict the other party's submissions.

Note that a person should always be heard, however this does not mean you have to agree with them. You are entitled to reject the person's views or statements for what might be very good reasons. The relevance and weight of their statements are to be determined by you.

There are three aspects to the principle of 'being heard':

1. Prior notice

- You should be satisfied that adequate notice has been given to the accused about the charges against them, as prescribed by law.
- If the defendant or respondent does not take any steps or appear at the hearing, you will need some evidence that the documents have been served before proceeding with the hearing.
- You will need proof of service of the warrant or summons.
- Notice must be sufficient to allow the person to prepare their case. Where you are not satisfied that a party has been given sufficient notice for this, adjourn the matter to allow them more time.

2. Fair hearing

- The way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.
- The general rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with any new and relevant issues that arise.
- The principle of 'being heard' always requires you to ensure you have all the relevant facts and materials before deciding a case.

3. Relevant Material Disclosed to Parties

- All relevant material should be given to all the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you propose to take into rely on when you are passing judgement.

Before a hearing is concluded, you should ask yourself, "has each party had a fair opportunity to state his or her case?"

D2.3 Courtroom Conduct

You should exhibit a high standard of conduct in Court so as to reinforce public confidence in the Judiciary. You should at all times:

- 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;
- remind yourself often 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;
  - matters which may seem minor to you, may be very important to a party or witness;
  - remember there are no unimportant cases;
- 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 relevant authorities;
- never say anything or display conduct that would indicate you have already made your decision before all parties have been heard; and
- do not discuss the case or any aspect of it outside of the Judiciary.

D2.4 Maintaining the Dignity of the Court

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

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

Deal effectively with unruly defendants, parties, witnesses and spectators by:

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

D2.5 Communication in Court

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 legal representatives 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 Courtroom are able to hear what is being said.

Actively Listening

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

Questioning

According to the *Evidence Act*, you may ask any question in any form at any time of any witness, provided that:

- with your leave, any party may then cross-examine the witness upon any reply they give to your question; and
- a witness may not be compelled to answer any question they would be entitled to refuse to answer if asked by the adverse party under *ss128, 130-137 Evidence Act*: *s162 Evidence Act*.

In criminal cases you have wide-ranging power to ask questions but should you use it sparingly, as the criminal justice system is based on an adversarial procedure, which requires the

prosecution to prove the case. Your role is not to conduct the case for the parties, but to listen and make a decision on it.

- You should generally not ask questions or speak while the prosecution or defence are presenting their case, examining or cross-examining witnesses.
- You may ask questions at the conclusion of cross-examination, but only to 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 plug a gap in the evidence.

> "The Magistrate may and should ask questions to clarify matters which he considers unclear or to clear up apparent ambiguities. In a criminal case he should ensure the accused has been able to put his case fully but, where the accused is represented, he should assume the lawyer is doing so. He should not ask more than is necessary and should certainly not "descend into the arena", or there is a danger, as has been stated by one judge, that he will have his vision obscured by the dust of the conflict." *Halalupe v Police* TOSC Crim App No. 824/94 (25 October, 1994).

Dealing with Parties Who Do Not Understand

You may frequently be confronted with unrepresented defendants and parties who do not appear to understand what the proceedings are about.

It is your responsibility to ensure that the defendant understands:

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

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

- the nature of the charge;
- the legal implications of the allegations, including the possibility of a prison term if he or she is convicted;
- that legal representation is available;
- that he or she has an obligation to put his or her case.

Dealing with Language Problems

Ideally, an interpreter should be obtained and sworn in when there is a language problem. However, when none is available, you should:

- explain the nature of the charge or issues as slowly, clearly and simply as possible; and
- if you are in any doubt about whether the defendant or a party properly understands what is happening, adjourn the hearing to enable an interpreter to be obtained.

D3 Actions Against Magistrates

As a Magistrate, you are exempt from civil actions against you in respect of acts done within your jurisdiction unless it is proved that the act complained of was done maliciously and without reasonable and probable cause: *s92(1) Magistrates' Courts Act*.

Such legal actions must be commenced through the Supreme Court within 6 calendar months from the date of the act complained of: *s92(2) Magistrates' Courts Act*.

E:

EVIDENCE

E1 Introduction

Evidence refers to the information used to prove or disprove the facts in issue in a trial. In criminal trials, it is generally the prosecution that bears the burden of proving or disproving the facts in issue, in order to establish the guilt of the accused.

Facts in issue are any facts, which become material for the Court to inquire into during any proceedings.

The subject of evidence, and the rules related to it, is a complex area of law. This chapter provides only a brief introduction to the subject of evidence and outlines some of the rules of evidence that you may see in a criminal trial. It should not replace in-depth study of the rules of evidence and their application in criminal trials. In order to properly apply the rules of evidence in a criminal trial, it is important to understand how evidence is classified.

E2 Classification of Evidence

Evidence is generally distinguished by reference to the form it takes or by reference to its content. You must take into account both the form of evidence and the content of the evidence in a criminal trial. 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).

E2.1 Classification by Form

Classification by form refers to the way evidence is presented in Court and it is divided into three main categories.

1. Documentary evidence:

- consists of information contained in written or visual documents.

2. Real evidence:

- is usually some material object or thing (such as a weapon) that is produced in Court and the object's existence, condition or value is a fact in issue or is relevant to a fact in issue.

3. Oral evidence:

- is the most important category of evidence in criminal cases; and
- consists of the statements or representation of facts given by witnesses.

E2.2 Classification by Content

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

1. Direct evidence:

- is evidence which, if believed, directly establishes a fact in issue. For example, direct evidence would be given by a witness who claimed to have personal knowledge of the facts in issue.

2. Circumstantial evidence:

- is evidence from which the existence or non-existence of facts in issue may be inferred;
- 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; and
- often works cumulatively and there may be a set of circumstances which, individually, would not be enough to establish the facts in issue but taken as a whole would be enough to do so.

3. Corroborating or collateral evidence:

- is evidence which does not bear upon the facts in issue either directly or indirectly but is relevant for the credibility or admissibility of other evidence in the case (either the direct or circumstantial evidence); and
- should come from another independent source, e.g., an analyst or medical report.

E3 Documentary Evidence

A document is any matter expressed or inscribed for the purpose of recording such matter upon any substance, by letters, figures or designs: *s2 Evidence Act*. They may be words printed or photographed or even an inscription on a metal plate or stone.

Examples of documents include:

- 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 (note that certain rules may apply to this form of documentary evidence);
- tape recordings; and
- photographs.

By definition, documentary evidence will always consist of 'out-of-Court' statements or representations of facts, and therefore the question of whether the document is hearsay evidence will always arise.

E3.1 Primary Evidence

With some enumerated exceptions, the contents of documents must be proved by primary evidence: *s62 Evidence Act*. It is best if all documents provided to the Court are originals.

Primary evidence means:

- the document itself produced to the Court; and
- each part of a document executed in several parts;
- each counterpart is primary evidence only against the parties executing it, in the case of documents executed in counterpart; and
- where a number of documents are all made by printing, photography or other uniform process, each is primary evidence of the contents of the others, but where they are all copies of a common original, they are not primary evidence of the contents of the original: *s63 Evidence Act*.

E3.2 Secondary Evidence

Secondary evidence refers to evidence that is not original. It may not be given as much weight as original evidence.

Secondary evidence includes:

- certified copies in compliance with *ss92, 93 Evidence Act*;
- copies made from the original by mechanical processes which insure accuracy of the copy and the copy compared with such copies:
  - for example, a photograph of an original is secondary evidence of its contents though the two have not been compared, provided the thing photographed is proved to be the original;
- copies made from or compared with the original:

- for example, a copy transcribed from a copy but then compared to the original is secondary evidence, but if the second copy is not compared to the original, it is not secondary evidence even if the first copy was compared to the original;

- counterparts of documents as against the parties who did not execute them; and
- an oral account of the contents of any document given by some person who has seen it: *s64 Evidence Act*:
  - for example, neither an oral account of a copy compared with the original nor an oral account of a photograph or mechanical copy is secondary evidence of the original.

There are some cases where secondary evidence is admissible. These are:

- where the person has a valid lawful objection to producing the original document under *s65 Evidence Act*;
- when the original has been lost or destroyed or is otherwise impossible or inconvenient to produce (see *s67 Evidence Act* for the entire list of possible situations): *ss66, 67 Evidence Act*.

Production of Document

Where a witness is about to make any statement as to the contents of a document, and you believe the document ought to be proviced to the Court, you may require the document to be produced or that proof be produced which will entitle the party who called the witness to give secondary evidence of the document: *s70 Evidence Act*.

E3.3 Attested Documents

Rules regarding the treatment of attested documents can be found in *ss71-75 Evidence Act*.

E3.4 Exclusion of Oral by Documentary Evidence

Rules regarding the exclusion of oral by documentary evidence can be found in *ss78-87 Evidence Act*.

E4 Real Evidence

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

Documents can also be real evidence when:

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

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

- a person's behaviour;
- a person's physical appearance; and/or
- a persons demeanour or attitude, which may be relevant to his/her credibility as a witness, or whether he/she should be treated as a hostile witness.

Often little weight can be attached to real evidence, unless it is accompanied by testimony identifying the object and connecting it to the facts in issue. In some cases, the Court may have to inspect a material object out of Court when it is inconvenient or impossible to bring it to Court.

E5 Exhibits

When real or documentary evidence is introduced in Court, it becomes an exhibit. When a party is tendering an exhibit in Court, 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 opposing party been put on notice about the existence of the exhibit?

Once an article has become an exhibit, the Court has a responsibility to preserve and retain it until the trial is concluded. Alternatively, the Court may mark and record the existence of the item, and entrust the object or document to the Police for safekeeping.

The Court must ensure that:

- proper care is taken to keep the exhibit safe from loss or damage; and
- that if the Police are entrusted with the item, that the defence is given reasonable access to it for inspection and examination.

E6 Oral Evidence

Oral testimony consists of statements or representations of fact. These statements may be 'in Court' statements or 'out of Court' statements. Often, oral evidence will form the bulk of all evidence in a criminal trial.

E6.1 Rules Regarding Oral Evidence

All facts except the contents of documents may be proved by oral evidence: *s60 Evidence Act*.

Oral evidence must always be direct. This means that if it refers to a fact which could be seen, heard or otherwise perceived it must be the evidence of the person who says he or she saw, heard or otherwise perceived the fact in question: *s61(a)(b)(c) Evidence Act*.

Similarly, if the oral evidence refers to an opinion or to the grounds on which an opinion is held, it must be the evidence of the person who holds that opinion on those grounds: *s61(d) Evidence Act*.

E6.2 In Court Versus 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 which he or she, or somebody else made outside of the Court, the witness is making 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 is classified as hearsay evidence and will generally be ruled inadmissible, based on 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 demeanor 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 take down in writing oral evidence given before the Court or that which you deem material.

The Clerk of the Court

The clerk is required to attend all sittings of Court and must record all the evidence and particulars of any trial or inquiry. As keeper of the record, the clerk:

- has charge of the Seal of the Court;
- must furnish certified copies of your decisions to applicants, upon payment of the prescribed fee;
- must furnish transcripts of the record in every case to the Supreme Court when required to do so by law or by order of the Chief Justice: s96Magistrates' Courts Act.

With such responsibility, it is essential that the clerk take an accurate and complete record of the evidence in every case.

There is a need to keep records of all steps that occur in Court: See *Mataele v Havili* [1994] Civil Appeal No. 258/94 (21 July, 1994).

The Magistrate has a duty to ensure a record is properly and correctly kept by the clerk and that all procedural matters, such as taking of oaths by witnesses, are included: See *Taufa v Ma'u* [1994] Crim App No. 349/94 (26 August, 1994).

E7 Evidentiary Issues Relating to Witness Testimony

There are a number of important issues that relate specifically to witness testimony during the course of a criminal trial. These issues include:

1. the competence and compellability of witnesses including spouses, children, the accused and co-accused;
2. examination of witnesses;
3. leading questions;
4. refreshing memory;
5. lies;
6. corroboration;
7. hostile witnesses;
8. warnings to witnesses against self incrimination;
9. identification evidence by witnesses; and
10. visiting the scene.

E7.1 Competence and Compellability of Witnesses

Competence

A witness is competent if he or she may be lawfully called to testify. The general rule is that any person is a competent witness in any proceedings unless they fall under one of the exceptions in statute or at common law.

The general rule is that all persons are competent to testify unless you consider that they are prevented from understanding the questions put to them of from giving rational answers to those questions by reason of:

- very young of age;
- extreme old age;
- disease of body or mind; or
- any other cause of the same kind: *s118 Evidence Act*.

For example, a person who is insane is not incompetent to testify unless his insanity prevents him from understanding the questions put to him and giving rational answers to them.

Compellability

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

The Accused and Co-Accused

The general rule is the accused is not a competent witness for the prosecution.

No witness shall be compelled to answer any question which would tend to expose him or herself or their spouse to a criminal charge or to a penalty of forfeiture, except as provided by *ss121(e), 129 Evidence Act*: *s137 Evidence Act*.

The general rule is that every person charged with an offence is a competent witness for the defence at every stage of proceedings, whether the person is charged solely of jointly, provided that:

- an accused shall not be called as a witness except upon his own application;
- the failure of an accused to give evidence shall not be commented upon by the prosecution;
- an accused called as a witness may be asked any question in cross-examination notwithstanding that it would tend to incriminate him or her as to the offence charged;

- an accused called as a witness shall not be asked or required to answer any question tending to show that he or she has committed, been convicted of, or been charged with any other offence or is of bad character, unless:
  - the proof that he or she has committed or been convicted of such other offence is admissible to show that he or she is guilty of the offence in question (as in possession of stolen property);
  - the accused personally or through a lawyer has asked questions of the prosecution witnesses with a view to establishing his or her own good character, or the nature of the defence calls into question the character of the prosecutor or prosecution witnesses; or
  - the accused has given evidence against a co-accused;
- the accused shall give his or her evidence from the witness box or other place from which the witnesses give their evidence: *s121(1)(a)(c)(e)(f)(g) Evidence Act*.

It should be noted that nothing in the above affects the provisions of *s34(4) Magistrates' Courts Act* or any right of the accused to make a statement without being sworn: *s121(1)(h) Evidence Act*.

Where an accused is called as a witness for the defence, he or she shall be the first witness examined for the defence upon the close of the prosecution's case: *s121(2) Evidence Act*.

An accused called as a witness who gives evidence against a co-accused or whose evidence affects the defence of such other person may be cross-examined by such other person: *s121(3) Evidence Act*.

In any criminal proceeding the prosecution shall have a right of reply notwithstanding that the accused was the sole witness called for the defence: *s122 Evidence Act*.

Fellow Conspirator

Where you believe on reasonable grounds that two or more persons have conspired together to commit an offence, evidence may be then given against each accused of anything said, done or written by any one of the accused in furtherance of their common purpose: *s4 Evidence Act*.

For example, if A and B conspire to assault C with their fists and C is killed during the assault by a blow from B, both A and B are criminally answerable for C's death.

If, however, A and B conspire to kill C using their fists and B instead picks up an axe and kills C, A is not responsible for B's act as it was outside common purpose.

Spouses

It is a long-standing tradition of the common law that spouses, while competent, are not compellable witnesses for the prosecution against one another.

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

- the spouse of an accused shall not be called (with the exception of certain offences enumerated in the *Schedule*) except upon application of the accused;
- the failure of a spouse to give evidence shall not be commented upon by the prosecution;
- nothing in this section shall make a husband or wife compellable to disclose any communication made to him or her by the other spouse during the marriage;
- the spouse shall, unless otherwise ordered, give evidence from the witness box or other place where witnesses give evidence: *s121(1)(b)(c)(d)(g) Evidence Act*.

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

- proceedings against one spouse charged with an offence against the other spouse;
- proceedings against a husband or wife charged with an offence against any member of their family living with them at the time the offence was committed;
- proceedings for bigamy; and
- proceedings under *ss116-134 Criminal Offences Act*: *Schedule to s121(4) Evidence Act*.

Privileges of Witnesses

The above rules on spousal compellability are slightly modified by the provisions on *Privileges of Witnesses as to Certain Questions*. Under this, a spouse may not refuse to answer any question on the ground that the answer would disclose a communication made during marriage or that it would tend to incriminate the spouse as to the offence charged, where:

- one spouse is charged with an offence against the other spouse;
- a husband or wife is charged with an offence against any member of their family living with them at the time the offence was committed: *s128, 129 Evidence Act*.

The logical consequence of this near duplication of provisions is that a spouse may be called, but may refuse to answer questions on the grounds of privilege, in:

- proceedings for bigamy; and
- proceedings under *ss116-134 Criminal Offences Act*.

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 choice whether to give evidence is that of the spouse and the spouse retains the right of refusal; and

- if the spouse waives the right of refusal, he or she becomes an ordinary witness and in some cases, an application may be made to treat the spouse as a hostile witness; 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.

Children

The general rule is that every witness in any criminal matter shall be examined upon oath. However, if, in your opinion, a young child as a witness, does not understand the nature of an oath, you may take their evidence without oath, provided that you are of the opinion that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth: *s116 Evidence Act*.

This provision provides for the possibility that children can be competent witnesses in a criminal trial, even in cases where they might not understand the implications of swearing an oath.

The evidence of any unsworn child must be recorded by the clerk in the same manner as the evidence of any other witness: *s116 Evidence Act*.

Regardless of whether a child shall be called to give sworn or unsworn evidence (i.e. is competent) it is at your discretion and will depend upon the circumstances of the case and upon the child who is being asked to give evidence.

<u>False Evidence</u>

If any child wilfully gives false evidence, he or she is liable upon conviction to imprisonment for any term not exceeding 2 years, and in the case of male children liable to be whipped in accordance with the applicable laws: *s116 Evidence Act*.

<u>Corroboration</u>

Recognising the danger that may attach to the evidence of children, it is the law that no person shall be convicted of a criminal offence solely on the unsworn evidence of any child unless corroborated by some other material evidence implicating the accused: *s116 Evidence Act.*

For further guidance on how to deal with child witnesses see Management of Proceedings chapter.

E7.2 Examination of Witnesses

General Powers of the Court

Subject to the prohibition against compelling a witness to answer any question to which he or she is legally entitled to refuse, you may ask any question in any form at any time of any witness, provided that you with your leave, any party may cross-examine the witness on the answer: *s162 Evidence Act*.

You may compel any person present in Court, whether a party to the proceedings or not, to give evidence and produce any document then and there in his or her actual possession, in the same manner and subject to the same rules as if he or she had come to Court by way of summons: *s163 Evidence Act*.

You may find a witness guilty of contempt and imprison him or her for not less than one hour and not more than one month, whenever a witness:

- refuses to be sworn or affirmed;
- refuses to give evidence when ordered; or
- wilfully pretends to misunderstand the questions put to him or her: *s70 Magistrates' Courts Act*.

Any such sentence must be passed on the spot after due warning has been given to the witness.

For more information on compelling witnesses to appear and give evidence see chapter on Pre-Trial Matters.

Examination-in-Chief

The object of examining a witness by the party calling him or her is to gain evidence from the witness that supports the party's case. This is called examination-in-chief.

Examination-in-chief must be conducted in accordance with rules of general application such as those relating to hearsay, opinion and the character of the accused.

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

- the rule requiring the prosecution to call all their evidence before the close of their case;
- leading questions; and
- refreshing memory.

Cross-Examination

The object of cross-examination is:

- to gain evidence from the witness that supports the cross-examining party's version of the facts in issue;
- to weaken or cast doubt upon the accuracy of the evidence given by the witness in examination-in-chief; and
- in appropriate circumstances, to draw questions as to the credibility of the witness.

A witness may be cross-examined as to previous statements made by the witness in writing or reduced into writing, without such writing being shown to the witness. If, however, the cross-examination on the writing is intended to contradict the witness, then the witness' attention must be drawn to those parts which are being used to contradict him or her: *s143 Evidence Act*.

You may require any such writing to be produced for your inspection and you may then make any use of it for the trial as you think fit: *s143 Evidence Act*.

Credibility

A witness may also be asked any questions which tend:

- to test his or her accuracy, veracity or credibility;
- to shake the witness' credit by injuring his or her character: *s145 Evidence Act*.

When credibility questions are being asked during cross-examination, you may prohibit any questions which appear vexatious or scandalous and not relevant to any matter and you are under a duty to forbid any question which appears to have been asked only for the purpose of insult or annoyance: *s145 Evidence Act*.

Re-Examination

Where a witness has been cross-examined, and is then again examined by the party who called him or her, it is called a re-examination.

Rules of Examination

Witnesses are first examined-in-chief, then if the adverse party wishes cross-examined, then if the party calling them wishes, re-examined: *s139 Evidence Act*.

The examination and cross-examination must related to facts which, in your opinion, are relevant to the facts in issue but the cross-examination need not be confined only to the facts raised in the examination-in-chief: *s140 Evidence Act*.

The re-examination shall be confined to the explanation of matters referred to in cross-examination. If, with your permission, new matter is introduced in the re-examination, the adverse party may further cross-examine upon the matter: *s141 Evidence Act*.

E7.3 Leading Questions

A leading question is one which either:

- suggests to the witness the answer which should be given; or
- puts facts which are in dispute to the witness in such a way as to make for "Yes" or "No" answers: *s150 Evidence Act*.

Examination-in-Chief and re-Examination

Leading questions must not be asked in an examination-in-chief or in a re-examination without your permission: *s151(1) Evidence Act*. The exception is that you must permit leading questions:

- on introductory matters;
- undisputed matters; or
- matters which have in your opinion already been sufficiently proved: *s151(2) Evidence Act*.

Cross-Examination

Leading questions may be asked in cross-examination, but such questions must not assume that facts have been proved or that particular answers have been given, if such is not the case: *s152 Evidence Act*.

In some instances you may prohibit leading questions in cross-examination if the witness being cross-examined shows a strong interest or bias in favour of the cross-examining party: *s153 Evidence Act*.

E7.4 Refreshing Memory

In the course of giving his or her evidence, a witness may refer to a document in order to refresh his or her memory. The basic rules are:

- a witness may refresh their memory from notes;
- the notes must have been made by the witness or under their supervision;
- the notes must have been made at the time of the incident or almost immediately after the incident occurred. Notes made after a day or two could not usually be used;
- the witness should not normally read from the notes, but should use them only to refresh their memory. However, if the notes are lengthy and complex, then the only sensible and practicable course is to allow the witness to actually read them; and

- if the accused or legal representative wishes to see the notes, there is a right to inspect them: See *ss154, 158 Evidence Act*.

Whenever a witness wishes to refresh his or her memory, he or she may, with your permission refer to a copy of the document, if you are satisfied that there is a sufficient reason for non-production of the original: *s155 Evidence Act.*

A witness may also refer to facts mentioned in any document, although he or she has no specific recollection of the facts themselves, if the witness is sure the facts are correctly recorded in the document: *s157 Evidence Act*. For example, a book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he may have forgotten the particular transactions entered.

An expert witness may refresh his or her memory by reference to professional treatises: *s156 Evidence Act*.

E7.5 Perjury

Accused

If it is established that the accused lied (i.e. told a deliberate lie as opposed to making a genuine error), this is relevant to his or her credibility as a witness. It does not necessarily mean, however, that the accused is guilty of the offence charged. Experience demonstrates that lies are told for a variety of reasons, and not necessarily for the avoidance of guilt.

Witness

As with an accused, where a witness is shown to have lied, this is highly relevant to that witness' credibility.

If you believe the witness is lying you should also warn them that it is an offence under *ss63, 64 Criminal Offences Act*.

"Where there is evidence of an out-of-Court statement by a witness, other than the accused person, which is inconsistent with the evidence given by the witness at the trial, a two-part direction must be given. First, the assessors must be directed that the fact of the inconsistency is relevant to the witness' credibility; second, they must be directed that the out-of-Court statement is not evidence on which they can make a finding of fact…" *Amina Koya v State* FCA Crim App No. AAU 0011/96.

E7.6 Corroboration

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

- the offences of treason and sedition;
- the offence of perjury;
- in cases where an accused would be convicted upon the unsworn evidence of a child under *s116 Evidence Act*; and
- in cases where an accused would be convicted upon the testimony of an accomplice: *ss123-125 Evidence Act*.

In all other cases, no particular number of witnesses are required to prove any fact: *s126 Evidence Act*. See *R v Mohulamo* Criminal Case #Cr.607 of 1998.

Sexual Offences

> "There is no requirement in the law of Tonga that the evidence of the complainant in a sexual case must be corroborated. Though corroboration of the evidence of the complainant is not essential in law, it is the practice to warn the jury against the danger of acting on his or her uncorroborated evidence, particularly where the issue is consent or no consent": See *Teisina v Rex* Crim App No. 3/99.

In all criminal proceedings for rape or other sexual offences, in order to corroborate the testimony of the complainant, evidence that the complainant at or shortly after the crime was committed voluntarily made a statement relating to its commission may be given. Such a statement shall not be considered as constituting additional or independent evidence of the crime but only as showing that the complainant's conduct is consistent with his or her evidence at the trial: *s11 Evidence Act*.

Section 11 does not make evidence of early complaint corroborative but such evidence shows consistency which adds to the weight of the complainant's evidence.

It is advisable to make it clear on the record or in your judgment that you are aware of the danger of convicting on the uncorroborated evidence of the complainant alone, but are nevertheless satisfied beyond reasonable doubt that the accused was guilty of the offence charged.

When dealing with an uncorroborated witness it is important to watch the witness as well as recording details of facts. You may want to:

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

E7.7 Hostile Witnesses

The general rule is that a party is not entitled to cross-examine or impeach the credit of his or her own witness by asking questions or introducing evidence concerning such matters as the witness's bad character or previous convictions, except by your permission when you believe the witness to be hostile: *s147(1) Evidence Act*.

A hostile witness is one who, from the manner in which he or she gives evidence, shows that he or she does not want to tell the truth to the Court: *s147(2) Evidence Act*.

In the case where the witness appears to be hostile, the general rules are:

- the party calling the witness may, by leave of the Magistrate, prove a previous inconsistent statement of the witness;
- the party calling the witness may cross-examine him or her by asking leading questions.

It is important to remember that the discretion of the Magistrate is absolute with respect to declaring a witness as hostile. The following guidelines are suggested:

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

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

- evidence of persons who testify that they from their knowledge of the witness believe him or her to be unworthy of credit;
- proof that the witness has been bribed or has received any other corrupt inducement to give evidence; or
- proof of former statements inconsistent with any part of his or her present evidence: *s148 Evidence Act*.

E7.8 The Warning to a Witness against Self Incrimination

Save as provided in *ss121(e),129 Evidence Act*, a witness must not be compelled to answer any question which would tend to expose the witness or his or her spouse to a criminal charge or penalty of forfeiture: *s137 Evidence Act*. See also *cl.14 Constitution*.

You will need to be constantly vigilant about self-incriminatory statements by a witness. If a question is asked of a witness, the answer to which could be self-incriminatory, you should:

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

The warning against self-incrimination does not apply to a question asked of an accused, where the question relates to the offence being considered by the Court. See *R v Coote* (1873) LR 4PC 599.

E7.9 Identification Evidence by Witnesses

The visual identification of the accused by witnesses needs to be treated with caution. Honest and genuine witnesses frequently made mistakes regarding the identity of the accused.

The fundamental principal of identification evidence is that the weight to be assigned to such evidence is determined by the circumstances under which the identification was made.

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 did the witness have the accused under observation?
- At what distance?
- In what light?
- Was the observation impeded in any way, as, for example, by passing traffic or a press of people?
- Had the witness ever seen the accused before?
- How often?
- If only occasionally, had they any special reason for remembering the accused?
- How long elapsed before the original observation and the subsequent identification to the Police?
- Was there any material discrepancy between the description of the accused given to the Police by the witness when first seen by them and his or her actual appearance?

E7.10 Visiting the Scene

You may view and investigate any subject matter and for this purpose you are entitled to access any land or other property for the inspection: *s164 Evidence Act*.

E8 Rules of Evidence

E8.1 Introduction

Rules of evidence have been established by both the common law and by statute. Rules relating to evidence can be found in the *Magistrates' Courts Act*, the *Criminal Offences Act* and the *Evidence Act*.

The rules of evidence are many and complicated. For this reason, it is possible to provide only a brief overview of some of the important rules of evidence that will arise in defended criminal proceedings in the Magistrates' Court.

Relevancy

Evidence should always be confined to those facts which go to prove or disprove the facts in issue in a trial. It is your duty to ensure that irrelevant facts are excluded.

To ensure this occurs, you may ask any party proposing to give evidence of any fact in what manner the alleged fact, if proved would, be relevant to the issues before you. You must admit the evidence if you think that the fact, if proved, would be relevant to the issue and not otherwise: *s14 Evidence Act*.

If any fact is not admissible unless another fact has first been proved you may, in your discretion, either permit evidence of the second fact to be given before the first fact is proved or you may require that evidence of the first fact be given before you allow admission of the second fact: *s15 Evidence Act*.

Foreign Evidence

Evidence from foreign material may often be admitted in criminal proceedings or related civil proceedings. For the rules see the *Foreign Evidence Act*.

E8.2 Burden and Standard of Proof

Standard of Proof

The standard of proof refers to the level of certainty that must be proved to establish a particular fact. In criminal trials, the standard for establishing guilt of an accused is proof beyond a reasonable doubt. For some facts in criminal trials and in determining civil trials facts need only be proved on the less rigorous standard of a balance of probabilities.

Burden of Proof

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

Legal Burden

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

- If the legal burden is borne by the prosecution, the standard of proof required is 'beyond reasonable doubt'.
- If the legal burden is borne by the accused, the standard of proof required is 'on the balance of probabilities'.
- The term 'balance of probabilities' means that the person deciding a case must find that it is more probable than not that a contested fact exists.
- For criminal trials, the general rule is that the prosecution bears the legal burden of proving all the elements in the offence necessary to establish guilt: *ss104-108 Evidence Act*.

There are several exceptions to the general rule.

Special Defences

If the accused raises a special defence, such as insanity or alibi, then the burden of proof transfers to the accused and he or must bear the burden of proving it, usually on the balance of probabilities. Special requirements of notice are placed on the accused before such evidence may be admitted: See *ss106, 108 Evidence Act*.

Statutory Exceptions

The burden shifts where a statute expressly, or by its construction, casts on the accused the burden of proving a particular issue or issues: *s106 Evidence Act*.

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

Other Facts

If the admissibility of a second fact requires proof of a first fact to be established, then the burden of proving the first fact lies on the party wishing to give evidence of the second fact: *s107 Evidence Act*.

For example, if A wishes to prove the contents of a document which is alleged to have been lost, then A must first prove that the document has been lost.

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 in relation to all the elements in the offence necessary to establish the guilt of the accused.

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. An accused may discharge his or her evidential burden with regard to some common law or statutory defence but the legal burden of proving the case still rests on the prosecution.

For example, the burden of proving that the accused does not come within any exception or exemption contained in the Act under which the accused is charged, lies with the prosecution: *s108(1) Evidence Act*.

E8.3 General Rules as to Admissibility

Generally, in any proceeding, evidence may be given of the existence or non-existence of:

- any fact in issue;
- any facts so closely connected to any fact in issue as to form part of the same transaction, whether at the same time and place or not;
- any facts which are the cause or effect of any fact in issue or which afforded an opportunity for its occurrence;
- any facts which explain the circumstances under which any fact in issue occurred or which help to fix the time or place of its occurrence;
- any facts which show a motive or preparation for any fact in issue;
- any fact tending to identify any person or thing whose identity is a fact in issue; and
- (in civil cases) any fact which may assist in assessing damages: *s3 Evidence Act*.

Due to the complexity of the law of evidence, a number of specific rules also exist dealing with particular forms of evidence. These are:

- presumptions;
- admissions and confessions;
- character evidence;
- hearsay evidence; and
- opinion evidence.

E8.4 Evidence of Mens Rea

It is always upon the prosecution to prove the requisite state of mind of the accused for criminal conviction.

Evidence of Similar Acts to Prove Intention

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

For example, if A is accused of knowingly passing counterfeit coins, the fact that A had other counterfeit coins in his possession and that he had previously or subsequently passed counterfeit coins are admissible to show his knowledge: *s7 Evidence Act*.

Evidence of State of Mind

Evidence showing the existence of any state of mind, state of body or bodily feeling may be given whenever the existence of such state is in issue or relevant to proceedings, provided that the evidence is strictly confined to showing the state of mind or body existed in regard only to the matter in question and not generally: *s10 Evidence Act*.

For these purposes, state of mind includes ***but is not limited to***:

- intention;
- knowledge;
- good faith;
- negligence;
- ill-will or goodwill towards any person: *s10 Evidence Act*.

For example, on a charge of dishonestly misappropriating property which A had found, the question arises whether A believed that the real owner could not be found, the fact that public notice of the loss of the property had been given is admissible to show that A did not in good faith believe the owner could not be found.

Possession of Stolen Goods

In cases of possession of stolen goods, evidence may be given that the accused was found with stolen goods within the preceding 12 months for the purpose of proving that the accused knew the goods to be stolen: *s9 Evidence Act*.

For any accused found in the possession of stolen goods, evidence of previous convictions for offences involving fraud and dishonesty are admissible to show the accused's knowledge that such goods are stolen: *s8 Evidence Act*.

E8.5 Presumptions

Certain facts may be proved through the operation of a presumption. Presumptions speed up the conduct of a trial by acknowledging well-known or sometimes hard to prove facts. Some presumptions are conclusive and cannot be challenged while other presumptions are rebuttable by contrary evidence.

Judicial Notice

Judicial notice is a particular brand of presumption, which allows the Court to accept as established, certain well-known facts. These matters then need not be proved: *s35 Evidence Act*.

The subjects of which the Court may take judicial notice are:

- any laws or rules whether previously, currently or in the future in force in Tonga;
- the course of proceedings of the Legislature;
- the accession and the sign manual of the current Sovereign;
- the Seals of the Superior Courts of any Commonwealth territory, the Seal of the Privy Council; and Seals of all Courts in Tonga, the Seals of all Notaries Public in any Commonwealth territory, and all seals authorized by law in Tonga;
- the names, titles, functions and signatures of persons currently filling any public office in Tonga, if their appointment is noted in the Gazette;
- any Commonwealth territory;
- the commencement, continuance and termination of hostilities between any State and any other State or body of persons;
- the names of the members of the Courts of Tonga and of their subordinate officers and clerks, and of all lawyers authorized to appear and act before the Courts of Tonga;
- the rule of the road on land or at sea; and

- all other matters which the Court is directed by any Statute to take notice of: *s36 Evidence Act*.

On all these above noted subjects and on all matters of public history, literature, science or art, you may refer to appropriate books or documents of reference: *s37(1) Evidence Act*.

If a party asks for judicial notice of any matter, you may refuse to take judicial notice until that party produces a book or document as you consider necessary to establish the fact: *s37(2) Evidence Act*.

General Presumptions

A number of general presumptions also exist. The ones that are most applicable to criminal proceedings are:

- the presumption of innocence in the absence of evidence to the contrary: *s46 Evidence Act*;
- the conclusive presumption that a boy under 13 years of age is incapable of committing rape: *s45 Evidence Act*;
- the presumption that, where a person is found to be in possession of recently stolen property, he or she stole it or received the property knowing it to be stolen unless he or she can give some satisfactory explanation of the manner in which possession was attained: *s40 Evidence Act*;
- the rebuttable presumption that any act done in any official or judicial capacity fulfilled all necessary conditions to be a valid act: *s39 Evidence Act*;

Documentary Presumptions

A number of presumptions exist with regard to documents produced in Court which expedite the process of proving the genuineness of their contents or validity as to form. These presumptions are contained in *ss47-59 Evidence Act*. Those documentary presumptions most pertinent to criminal law follow.

Proper Signing and Sealing of Documents

It is presumed, until the contrary is shown, that any document purporting to be a document which by any Act at the time in force would be admissible if signed, stamped, sealed or otherwise authenticated in accordance with the *Evidence Act*, that:

- the signature, stamp, seal or other authentication of the document is genuine; and
- the person signing, stamping, sealing or otherwise authenticating it had at the relevant time the official or other position purported: *s47 Evidence Act*.

Truth of Documents of Record

It is presumed, until the contrary is shown, that any document purporting to be either a record or memorandum of evidence given by a witness in judicial proceedings or a statement or confession

by any prisoner or accused person taken in accordance with the law and purporting to be signed by any Judge, Magistrate or clerk that:

- the document is genuine;
- any statements as to the circumstances under which it was taken purporting to be made by the person signing it are true; and
- the evidence, statement or confession was duly taken: *s48 Evidence Act*.

Genuineness of Documents
It is presumed, until the contrary is shown, the genuineness:

- of every notice purporting to be a Government notice in any document purporting to be the official newspaper or official Gazette;
- of every document purporting to be a newspaper or journal;
- of every document purporting to be a document directed by law to be kept by any person if the document is kept substantially in the form required by law;
- of the contents of every document executed or authenticated either by a Tongan or foreign Notary Public: *ss50(a)(c)(d)(e) Evidence Act*.

Genuineness of Government Publications
It is presumed, until the contrary is shown, the genuineness of:

- every book purporting to be printed or published under the authority of the Government or of the Legislature of any country and to contain the laws of such country; and
- of every book purporting to contain reports of decisions of the Courts of that country: *s51 Evidence Act*.

Powers of Attorney
It is presumed, until the contrary is shown, that every document purporting to be a power of attorney and to have been executed and authenticated by a Notary Public or any Court, Judge or Magistrate in any Commonwealth territory or by a High Commissioner (Consul or Vice-Consul) or other representative of a Commonwealth territory was so executed and authenticated: *s51 Evidence Act*.

E8.6 Admissions and Confessions

Admissions
An admission is either an oral or documentary statement relating to any fact in issue which tends to the prejudice of the person making it or to the prejudice of some other person responsible for that person's statements: *s16 Evidence Act*.

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

- by the party him or herself;

- by any person, who in your opinion, is expressly or impliedly authorized by the party to make such admissions on his or her behalf;
- by any person whom the party has expressly referred for information regarding the matter in dispute: *s17(1)(a)(b)(f) Evidence Act*.

So long as the admission was made during the period of shared interest or privity then evidence may also be given of any admission made:

- by any person who, for the purposes of the case, is regarded as having identical interests as the party;
- by any person jointly interested with the party in the subject matter of the proceedings (except admissions by co-defendants are not receivable against each other);
- by any person who with reference to the subject matter of the proceedings is privy in blood, privy in law, or privy in estate: *s17(1)(c)(d)(e), 17(2) Evidence Act*.

Although admissions by related parties may sometimes be allowed as evidence, no evidence shall be given of any admission by a party suing or sued as a trustee, guardian, agent or in any other representative capacity unless the admission was made when the party was held that capacity: *s17(3) Evidence Act*.

To protect an accused, no evidence may be given of any admission made under illegal compulsion: *s19 Evidence Act*.

Confessions

A confession is a particular type of admission in which a person accused of an offence states or suggests that he or she committed the offence: *s20 Evidence Act*.

Evidence of a confession may have drastic implications on the party making it, so for this reason, a body of law has developed to prevent confessions obtained through unlawful or improper means.

Evidence from a confession is not permitted where it appears the confession was caused by any inducement, threat or promise from the prosecutor or other person having authority over the accused and sufficient for the accused to suppose on reasonable grounds that by making it, he or she would gain any advantage or avoid any evil: *s21 Evidence Act*.

The exception to this is where any fact discovered as the result of the confession, evidence may be given of the fact and so much of the confession as strictly relates to the fact: *s21 Evidence Act*.

For example, if A is coerced into making a confession about stealing B's watch and in the confession A states where he hid the watch, then if the watch is found in such place, the portion of the confession relating only to the hiding is admissible. If the watch is not found in the place where A claims to have hid it, then none of the confession is admissible.

With the exception of confessions made to a Police officer while in custody and in answer to questions put to the accused by the Police officer, which you may refuse to admit, admissibility of a confession cannot be objected to on the grounds that it was made:

- under a promise of secrecy;
- in consequence of a deception practiced on the accused person for the purpose of obtaining such confession;
- when the person making it was drunk;
- in answer to questions which the person making the confession need not have answered; or
- without any warning having been given to the person making it that he or she was not bound to make such a confession and that evidence of it might be given against him or her: *s22 Evidence Act*.

One may not object to the admissibility in evidence of a confession merely because it was made under examination as a witness in a judicial proceeding unless, having refused to answer a question, the person was then improperly compelled to answer. Evidence of the answer may not be given: *s23 Evidence Act*.

For a review of the possible complications that may arise in admitting a confession see *R v Kitekei'aho* [1990] TOSC 5; [1990] TLR 201. *Kitekei'aho* established the following three principles:

- that a confession was not signed by an accused does not in itself prevent it being used as evidence;
- merely because a Policewoman was not present during the questioning of a female accused does not of itself render it unfair; and
- the fact that the accused was frightened or hoped that a confession would lead to lighter sentences does not in itself render the confession unfair.

E8.7 Character Evidence

Character evidence is unique in that it can only be brought into issue if the accused causes it. This is so, because evidence of bad character may not be given unless evidence has been given by the accused of his or her good character, or from examination-in chief questions which ask to show good character: *s31 Evidence Act*.

Once character becomes an issue, the evidence is confined to general reputation only and not to particular acts of good or bad conduct: *s34 Evidence Act*.

Previous Convictions

For the purposes of the Magistrates' Court, character evidence will most likely arise when an accused is being tried for:

- larceny or for any other offence declared punishable as larceny;
- obtaining goods by false pretences;
- receiving property knowing it to have been stolen; or
- any other offence involving fraud.

In any of these situations, if an accused calls witnesses to show that he or she bears a good character or asks questions with that intent, the prosecution may give evidence of any previous convictions: *s32(b) Evidence Act*.

A previous conviction may be proved by the production of a certificate signed by a clerk of the Court in which the conviction was made and containing the substance and effect of the charge and conviction: *s95 Evidence Act*.

Possession of Stolen Goods

For any accused found in the possession of stolen goods, evidence of previous convictions for offences involving fraud and dishonesty are admissible to show the accused's knowledge that such goods are stolen. The evidence of the previous convictions may then be tendered in a proceeding even **before** evidence of the possession of stolen goods is tendered, so long as the accused is given 3 days notice before the previous convictions are tendered: *s8 Evidence Act*.

Previous Convictions of Witnesses

Subject to *s121(f) Evidence Act*, a witness may also be questioned as to whether he or she has been convicted of any offence and if the witness either denies the fact or refuses to answer, the opposite party may prove the conviction: *s144 Evidence Act*.

Sexual Offence Cases

Specific rules regarding character evidence in rape and indecent assault cases also exist: See *s11 Evidence Act*.

At trial for rape and indecent assault cases, without your leave, no evidence and no question in cross-examination may be adduced or asked by or on behalf of a defendant about any sexual experience of a complainant with a person other than that defendant: *s33(1) Evidence Act*.

You must give leave to adduce such evidence only if you are satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked: *s33(2) Evidence Act*.

Although *s33 Evidence Act* uses the word "Judge", it must also apply to proceedings in Magistrates' Court.

E8.8 Hearsay Evidence

Hearsay evidence is any statement that is made by a person other than the person giving oral evidence and is tendered to prove the truth of some fact that has been asserted. Such evidence is generally not admissible.

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

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 as hearsay evidence. For example, it is not hearsay if the statement is tendered only to prove that it was in fact made not to prove the truth of its contents.

You must ensure that the witness who gives the evidence has direct personal knowledge of the evidence contained in the statement if prosecution relies on the evidence as being the truth of what is contained in the statement.

Exceptions to the Hearsay rule

The *Evidence Act* provides a number of situations where hearsay evidence is admissible. The exceptions most applicable to criminal proceedings are:

- where the statement forms part of the fact or transaction which is being investigated by the Court:
  - for example a criminal defamation case;
- where the death of any person is the subject of a criminal charge and a statement as to the circumstances relating to his or her death was made by the person while in the actual expectation of death and without hope of recovery:
  - for example, B is tried for A's murder. A on his deathbed says, "I am going to die, it was B who stabbed me."

- where the statement was made in the presence of and in the hearing of the person against whom the evidence is tendered and where the person had an opportunity of replying to such statement;
- where the statement is an admission or confession made by or to the prejudice of the party against whom it is sought to be proved, subject to *ss17-23 Evidence Act*:
- where the knowledge, intention, motive or state of mind or body of any person is a fact in issue and the statement proves or disproves the knowledge, motive or state of mind or body:
  - for example, where a fact in issue is whether A was acting in good faith when he found some property, then evidence that public notice of the loss had been given in the town where A was is admissible to show that A was not acting in good faith;
- where the statement refers to a fact in issue or a fact relevant to a fact in issue and is contained in any official book, register or record and was made by a public servant in discharge of official duty or by any other person in performance of a legal duty of the country in which the book, register or record is kept:
  - for example, records of liquor sales to members which every registered club is required to keep;
- where the statement was made in the ordinary course of business by a person since dead and is an account or record of some act done by that person which the deceased was required to do and to record:
  - for example, to prove that A delivered goods to B, an entry of the delivery made by the drayman (since deceased) whose duty was to deliver and record the delivery;
- where the existence of any relationship by blood or marriage is a fact in issue and the statement made by the person since dead relates to the existence of such relationship, provided that you are satisfied that the deceased was him or herself related by blood or marriage to the parties and that the statement was made prior to the dispute arising:
  - for example, if the question is whether B and C are cousins of A, a declaration by A's widow (deceased) that B and C were his cousins or that A had told her they were his cousins;
- where, in a criminal trial before the Supreme Court and jury, the statement consists of a deposition taken before a Magistrate and *ss44, 45 Magistrates' Courts Act* have been complied with: *s89(a)(b)(c)(d)(e)(f)(g)(j)(m) Evidence Act*.

A final but more complex exception exists under *s89 Evidence Act*. Where direct oral evidence of a fact would be admissible, any statement contained in a document which tends to establish that fact shall, on production of the document, be admissible if:

- the document is, or forms, a record made in any trade or business or finance or money operation by persons who have or may reasonably have personal knowledge of the matters dealt with in the information they supply; and
- the person who supplied the information recorded in the statement is dead, overseas, or unfit because of physical or mental conditions to attend as a witness or cannot be

identified or found or cannot be reasonably expected (having regard to the time lapse and the circumstances) to have any recollection of the matters dealt with in the information: *s89(n)(i)(ii) Evidence Act*.

When deciding whether to admit such a statement, you may draw any reasonable inference from the document in which the statement is contained, and in deciding on whether a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a registered medical practitioner or Medical Officer under the *Public Health Act*: *s89(n)(A) Evidence Act*.

When deciding how much weight (if any) to attach to such a statement, you must give regard to all the circumstances from which any inference can reasonably be drawn as to the truth of the statement, in particular whether the person who supplied the information in the statement did so at the same time as the facts occurred and to whether the person making or keeping the record had any reason to misrepresent the facts: *s89(n)(B) Evidence Act*.

Several other exceptions to the hearsay rule exist under *s89 Evidence Act*, and you may have to refer to these from time to time when dealing with possible hearsay evidence.

E8.9 Expert Opinion Evidence

Normally, a casual witness must confine his or her testimony to matters of fact within his or her own knowledge. Sometimes it will be necessary to form an opinion about some matter outside the expertise of the Court, and in such cases expert opinion evidence may be necessary.

Expert opinion evidence may be necessary on matters of:

- identity or genuineness of handwriting;
- points of foreign law;
- medicine or science;
- manufacture; or
- any other subject requiring special knowledge or skill: *s24(1) Evidence Act*.

Qualifications of Experts

When expert knowledge is required, the evidence may be given by any person who, in your opinion, is possessed of special knowledge or skill in the subject under consideration: *s24(1) Evidence Act*.

Written Statement of Expert

Whenever expert opinion evidence is given, you may admit a statement containing:

- his or her qualifications and experience;
- such facts as are within his or her knowledge;

- such facts as have been communicated to him or her by others and identifying the source of those facts;
- his or her opinion; and
- his or her signature: *s24(2) Evidence Act*.

Upon admitting the statement, it shall serve as evidence of all of the contents, except for those facts communicated to the expert by other sources: *s24(2) Evidence Act.*

Before admitting the statement, you must ensure that a copy of the statement has been served on the accused with sufficient time to allow him or her to give notice that he or she requires the expert to attend for cross-examination: *s24(2) Evidence Act*.

If the accused does give notice and is convicted, he or she may be ordered to pay the costs of attendance of the expert: *s24(2) Evidence Act.*

Procedure

An expert may refer to books or writing in support of his or her opinion, and you may consider such books and writing in conjunction with the expert's evidence: *s25 Evidence Act*.

Handwriting

Whenever you must form an opinion as to the person who wrote or signed any document, any witness acquainted with the handwriting of the person alleged to written or signed may give evidence on whether in his or her opinion, it was or was not made by the person in question: *s26(1) Evidence Act*.

A witness is deemed to be acquainted with the handwriting of another, whenever he or she has:

- seen the person in question write;
- received documents purporting to be written by the person in question in reply or by direction of the witness and addressed to the witness; or
- in the ordinary course of business, documents purported to contain the handwriting of the person in question have habitually come under the witness' notice: *s26(2) Evidence Act.*

E8.10 Evidence of Reputation

General Custom

It may sometimes be necessary to establish the existence of any general custom or right. In such cases, evidence may be given of general reputation with reference to such custom or right among those likely to know of its existence: *s27(1) Evidence Act*.

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

The term “general custom or right” includes any custom or right common to any considerable class of persons: *s27(2) Evidence Act*.

If the existence of a custom or right arises, evidence may be given of:

- any transaction by which the right or custom was created, modified, recognised, asserted or denied or was inconsistent with its existence;
- particular instances in which the right or custom was claimed, recognised, asserted or in which its exercise was disputed, asserted or departed from: *s5 Evidence Act*.

Relationship

When you have to form an opinion as to the relationship of one person to another, evidence may be given of general reputation regarding such relationship among those likely to know of its existence, with the exception that such evidence is not admissible for the purpose of proving a marriage in prosecutions for bigamy: *s28 Evidence Act*.

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

F:

CRIMINAL RESPONSIBILITY

F1 Introduction

The *Criminal Offences Act* is the chief statute with respect to crimes in Tonga. It sets out:

- those acts and omissions regarded as criminal offences;
- the parties which may be held criminally responsible for those acts or omissions; and
- rules regarding criminal responsibility.

Part III of the *Criminal Offences Act* sets out the exemptions to criminal responsibility. It also lays out the grounds for criminal responsibility for causing criminal acts of involuntary agents. Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

Generally, an accused's case will be that:

- 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 (e.g. "lawful excuse"); or
- that he or she was not criminally responsible according to the provisions in *Part III* of the *Criminal Offences Act*.

In criminal proceedings, the burden of proving that the accused does not come within any exception or exemption contained in the Act under which he or she was charged lies with the prosecution: *s108(1) Evidence Act*. An exception to this rule is when an accused wishes to raise a special defence such as insanity or alibi. The accused then must, on a balance of probabilities, prove that defence.

In order to call such evidence, the accused should give written notice of such defence to the prosecution within 7 days of committal for trial. This notice must contain (in the case of an alibi) details of the place in which the accused states he or she was at the time and the names and addresses of witnesses the accused intends to call. If the accused does not furnish the prosecution with this notice, the evidence is admissible only with your leave: *s108(2) Evidence Act*.

The rules in *Part III* can be divided into two categories:

1. Those rules that relate to a denial of the required mens rea of the offence or a denial that the accused was acting voluntarily, such as:

- insanity;
- intoxication; and
- immature age.

2. Those rules that relate to circumstances which justify, in law, the conduct of the accused such as:

- compulsion.

Outside *Part III*, other rules exist which also deal with criminal responsibility, both within and outside the *Criminal Offences Act*. These are such things as:

- honest claim of colour of right;
- intention;
- automatism;
- accident;
- mistake; and
- defence of person or property.

F2 Mens Rea

At its most basic, the concept of mens rea refers to the mental state that attaches to other elements of an offence to establish criminal liability. The defining of a mental state required for any particular crime, however, is not easy as the general classifications of mens rea appear, often these classifications are not well defined and overlap with one another.

According to one author, mens rea should not be equated merely with physical control of one's body, volition, knowledge of the relevant circumstances or foresight of the consequences, although each may have bearing on the proving of a particular mental state. (Findlay, Mark *Criminal Law of the South Pacific*, at 50). Nor is mens rea to be equated with motive, for motive deals with an individual's reasons for doing an act. To confuse these concepts distracts from the narrow focus on the mental elements of the offence itself, with which mens rea is concerned.

There are three broadly accepted categories of mens rea, although, as already mentioned, these categories overlap.

F2.1 Presumptions

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 dispensed with in writing; and
- individuals intend the natural consequences of their actions.

Mens Rea as an Essential Element of Every Offence

That mens rea is an element of every offence was made clear in the English case of *Sherras v. De Rutzen* (1985) 1QB 918. Even if words associated with mens rea, such as "knowingly" are not used in an offence section, it is still presumed that some mental element accompanied the act to make it criminal. It is only when the specific language of an Act creates an absolute offence (i.e one without mens rea) that this presumption does not operate and the simple committing of the actus reus will attract criminal liability. Most of the offences you will deal with, will require a mens rea (mental element) them.

Individuals Intend the Natural Consequences of their Actions

There is a presumption that individuals intend the natural consequences of their actions: See *R v Lemon* [1979] 1 All ER 898. However it is the burden of the prosecution to prove every element of an offence through direct or circumstantial evidence. See the section on Common Offences for examples of the elements of some offences.

Statutory Provisions

Often it can be very difficult to prove whether an accused committed an act intentionally or not. To overcome this, certain evidential provisions exist.

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

For example, if A is accused of knowingly passing counterfeit coins, the fact that A had other counterfeit coins in his possession and that he had previously or subsequently passed counterfeit coins are admissible to show his knowledge: *s7 Evidence Act*.

F2.2 Intention

In addition to mental states such as "fraudulently" and "knowingly" that an offence section may explicitly require, two other mental states interpreted as necessary to establish criminal liability in certain offences are intention and recklessness.

Intention is the highest form of criminal mental state, although what actually constitutes intention is the subject of much legal debate.

See *Onedera v R* [1991] TOCA Crim App No. 11/1991 (31 May, 1991). *Onedera* discusses the mens rea of wilfulness (requiring knowledge of certain facts) versus negligence in a charge of causing grievous bodily harm.

F2.3 Recklessness

After intention, recklessness is the other main form of mens rea used to establish criminal liability. This form of mens rea is about the acts of people who do not intend to cause harm but who consciously take unjustifiable risks which lead to the prohibited consequences.

Depending on the type of recklessness, either a subjective test of what the accused actually knew about the risk or an objective test based on what the reasonable person would have known about the risk may be used.

F2.4 Negligence

Negligence is the failure of the accused to foresee a consequence that a reasonable person would have foreseen and avoided. This could be seen as a less blameworthy mental state than recklessness because recklessness requires an accused to willingly take an action which will expose him or herself to the likely consequences of that risk. Negligence on the other hand, can often be seen as the absence of a mental state, similar to carelessness.

F2.5 Strict and Absolute Liability

Offences of strict and absolute liability are those from which the elements of mens rea have been eliminated. For both these types of offences, the crime is complete upon the doing of the prohibited act. The difference between these two forms of liability is that a defence of honest and reasonable mistake may be raised for strict liability offences, while no defence exists for absolute liability offences.

F3 Specific Exemptions from *Part III Criminal Offences Act*

F3.1 Criminal Liability of Children

Nothing done by a child under the age of seven years is deemed to be an offence: *s16(1) Criminal Offences Act*.

Nothing done by a child above seven years of age and under 12 years of age is deemed to be an offence, unless in the opinion of the Court or jury, the child had attained sufficient maturity of understanding to be aware of the nature and consequences of his or her conduct in regard to the act in question: *s16(2) Criminal Offences Act*.

This is illustrated in the *Criminal Offences Act*. A child aged 8 years ought only to be convicted of an offence if the Magistrate or jury think that the child was aware he was committing an offence.

Evidence of Age

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

F3.2 Person Suffering from Mental Disease

Due to the requirements of mens rea, those who are unable to appreciate the quality or nature of their acts due to mental disease should not be held criminally liable for those acts.

No person is responsible for an act or omission that would otherwise be an offence, if at the time of the act or omission, the person was suffering from a mental disease that either:

- deprived him or her of the capacity to understand the physical nature and quality of the act or omission; or
- deprived him or her of the capacity to understand that the act or omission was wrong: *s17(1)(a)(b) Criminal Offences Act.*

If the person suffering from the mental disease is affected by delusions on some matters but such delusions do not render him or her irresponsible under either of the above two categories, then that person is criminally responsible to the same extent as if the facts with respect to such delusions were real.

Procedure where Accused Appears to be Insane

Arraignment

If the accused appears to be insane on arraignment in the Supreme Court, a jury may be sworn to see whether the accused is sane, insane and unfit to stand trial. If a person is found insane, this does not prevent the accused from later being tried for the offence if he or she subsequently becomes of sound mind: *s18 Criminal Offences Act*.

At Trial

If, at trial in the Supreme Court, the jury finds that the accused appears to have been insane at the time of the act or omission, the jury must return a special verdict that the accused is not guilty because he or she was insane at the time of the act or omission: *s19 Criminal Offences Act.*

Custody
If found insane, either on arraignment or at trial, the Court must order the accused to be retained in safe custody. The Judge must then report the finding of insanity to the Prime Minister who must refer the matter to the Privy Council who decide the place and mode of detention of the accused.

F3.3 Intoxication

Intoxication (usually known as drunkeness) only serves as a defence where, due to intoxication, the accused did not know the act or omission was wrong or did not know what he or she was doing, and:

- the state of intoxication was caused without the accused's 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 or omission: *s21(2) Criminal Offences Act*.

Except as outlined above, intoxication shall not constitute a defence to any charge: *s21(1) Criminal Offences Act*.

Intoxication also includes states produced by narcotics or drugs: *s21(5) Criminal Offences Act*.

Procedure
If the intoxication of the accused was brought on without his consent by the malicious or negligent acts of another, then the accused shall be discharged: *s21(3) Criminal Offences Act*.

If the intoxication was such as to cause insanity, then the *Criminal Offence Act* provisions for insanity apply: *s21(3) Criminal Offences Act*.

Intoxication must also be taken into account when determining whether the accused had formed any intention, in the absence of which he or she would not be guilty of the offence: *s21(4) Criminal Offences Act*.

F3.4 Compulsion

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

A married woman who commits an offence in the presence of her husband shall not be presumed to have committed it under his compulsion: *s22 Criminal Offences Act*.

F3.5 Involuntary Agents

A person is deemed to have caused an event if he or she intentionally or negligently causes an involuntary agent to cause that event: *s23 Criminal Offences Act*. For example, if the accused induces a child of 6 years to steal a thing, the accused is guilty of theft.

Involuntary agents include any animal, or other thing, or any person who is exempt from criminal responsibility due to infancy, insanity or otherwise exempt under *Part III* of the *Criminal Offences Act*.

F4 General Exemptions to Criminal Responsibility

In addition to the specific exemptions to criminal responsibility under *Part III*, other general exemptions apply to specific offences.

F4.1 Bona-fide Claim of Right

For property offences, there must normally be an intention to act dishonestly or defraud another. For example, the offence of theft requires the dishonest taking of anything by the accused without colour of right. Thus, if the accused held an honest belief that the property was his or her own, the accused is not guitly of the offence.

F4.2 Involuntary Acts / Accidents

If an act or omission occurs independently of the exercise of the free will of the accused, then he or she will not be criminally responsible. For example, if a person is pushed into another, they will not be guilty of the offence of assault. To avoid criminal responsibility, the accused must not have intended the event to happen.

F4.3 Mistake of Fact

This defence is a denial of the mens rea of the offence. It normally occurs when a person holds an honest but mistaken belief that a particular element of the offence is lacking. For example, if A shoots B dead, believing B to be a scarecrow then A may be guilty of other offences but will not be guilty of murder which requires the intention to kill a person.

The traditional requirement that mistakes have to be reasonable was refuted in a case heard by the House of Lords in *Director of Public Prosecutions v Morgan* [1976] AC 182.

Since *Morgan* (supra), it has been held that :

- the prosecution has the burden of proving the unlawfulness of the accused's action;
- if the accused has been labouring under a mistake as to the facts, he or she must be judged according to his or her mistaken view of the facts; and
- if the accused was or may have been mistaken as to the facts, it is immaterial that on an objective view the mistake was unreasonable: *R v Williams (G.)* [1984] CrimLR. 163, CA.

F4.4 Defence of Person or Property

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

Any action taken in defence of person or property must be reasonable considering all the circumstances.

F5 Parties

According to the law, different people may be held responsible for an offence, as parties.

In Tonga, parties to offences include:

- principal offenders;
- abettors;
- conspirators; and
- those who compound crimes;
- those who harbour criminals.

F5.1 Principal Offenders

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

In order to be a principal offender, the accused must have committed the actus reus of the offence and had the mens rea for the offence.

Joint Enterprise

There may be more than one principal offender where two or more accused form a "joint enterprise". In such cases, each accused may be criminally responsible for the acts of the others even if one party has no involvement in the act itself. For example, the English case of *Anderson and Morris* [1966] 2 QB 110 acknowledges that,

> "Where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise [and] this includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise [and]... this includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise."

In order to trigger this, the parties must share a common purpose and make it clear by their actions that this was their common intention, as gauged from their conduct: cited with approval in *R v Fakatava* [2001] TOSC 13; CR 90–93 00.

F5.2 Abettors

Any person who directly or indirectly, commands, incites, encourages or procures the commission of an offence by any other person or who knowingly does any act for the purpose of facilitating the commission of an offence is an abettor: *s8 Criminal Offences Act*.

According to *R v Makahununiu* [2001] TOSC 25; CR 195 00 (6th July, 2001) an abettor is one who;

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

A person may be an abettor despite the fact that the offence is committed in a manner different than the manner which was counselled: *s11 Criminal Offences Act*. For example, if A incites B to murder C by shooting him, A will still be an abettor if B commits C's murder by poisoning.

As well, an abettor is deemed to be a party to any offence committed as a result of his or her counselling, inciting or procuring. Thus if A counsels, incites or procures B to commit an offence, then A will be deemed to be a party to every offence which B commits in consequence of such counselling, inciting or procuring and which A knew or ought to have known would be likely to be committed in consequence of such counselling, inciting or procuring: *s12 Criminal Offences Act*.

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

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 AllER 267.

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 and that act or omission would have constituted an offence on his or her part is guilty of the offence of the same kind.

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; *National Coal Board v Gamble* (1958) 3 All ER 203.

See *Bharat Dwaj Duve v The State* Criminal Appeal No HAA0049 of 2001S High Court of Fiji, which discusses how to deal with non-principal offenders procuring an offence:

> "it is advisable in the interests of fairness for the prosecution to particularise the real case against the accused in the Particulars of Offence".

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
  - this applies if the participation of the counsellor is confined to advice and encouragement;
- withdrawal should be communicated in a way that will serve unequivocal notice to the one being counselled that help is being withdrawn; and
- 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: See *R v Becerra and Cooper* (1975) 62 Cr App R 212.

Procedure

In terms of jurisdiction, an abettor is punishable either in the Supreme Court or Magistrates' Court as if he or she had actually committed the offence: *s9 Criminal Offences Act*.

An abettor may be tried before, after or with a person abetted and despite the fact the person abetted is dead or not amenable to justice: *s10 Criminal Offences Act*.

Punishment

Where the offence is actually committed in pursuance or during abetment, an abettor is liable to the same punishment as if the abettor had, him or herself, actually committed the offence: *s8(a) Criminal Offences Act*.

Where the offence is not actually committed, an abettor may only be liable to a maximum of one half the length of imprisonment or one half the maximum fine which a person actually committing that offence might be sentenced, with the exception of abetting murder for which the maximum sentence is life imprisonment: *s8(b) Criminal Offences Act*.

F5.3 Conspirators

Conspiracy requires 2 or more people to act together with a common purpose in order to commit or abet an offence, with or without any previous concert or deliberation: *s15(1) Criminal Offences Act*.

If guilty of conspiracy to commit or abet an offence, each conspirator will be liable to be punished if the offence is committed or if the offence is not committed, be liable as an abettor: *s15(2) Criminal Offences Act*.

F5.4 Compounding

A person may compound a crime by either:

- offering or agreeing to not prosecute, or give evidence against a person in consideration of money, other valuable thing or some advantage for him or herself or another person; or
- accepting or agreeing to accept any reward upon pretence or on account of restoring to any person or helping any person to recover anything which has been stolen or dishonestly appropriated by any crime under *Part X* of the *Criminal Offences Act* on the understanding that no prosecution shall be proceed with: *s14(a)(b) Criminal Offences Act*.

The maximum penalty for this type of compounding is 2 years: *s14 Criminal Offences Act*.

A person may also compound a crime by causing any wasteful employment of the Police by knowingly making a false report saying an offence has been committed, or to give false concern

for the safety of persons or property, or showing that he or she has information material to any Police inquiry: *s14(2) Criminal Offences Act*.

The maximum penalty for this type of compounding is 6 months imprisonment or $500.

F5.5 Harbouring

Any person who, knows or has reason to believe that another has:

- committed an offence; or
- been charged by a prosecuting authority with an offence; or
- been issued with a summons by any Court in respect of any offence; or
- been remanded for or is awaiting trial in any Court in respect of any offence; or
- been convicted of any offence; **and**

without lawful authority or reasonable excuse, does any act with intent to impede the apprehension, prosecution or the execution of the sentence is guilty of an offence: *s13 Criminal Offences Act*.

Occasionally in the case law individual parties who help others evade justice are referred to as "accessories after the fact".

The maximum penalty for harbouring is 3 years imprisonment: *s13 Criminal Offences Act*.

F6 Attempts

The basis of criminal responsibility is the punishment of blameworthy behaviour coupled with a blameworthy state of mind. To let a person off merely because they were unable to complete a full offence would hinder this function of the criminal law, thus the punishment of 'attempt' has evolved to fill this role.

F6.1 Definition of Attempt

An attempt to commit an offence is an act done or omitted with the intent to commit that offence, forming part of a series of acts or omissions which such series would have constituted the full offence had they not been interrupted by the voluntary determination of the offender or by some other cause: *s4(1) Criminal Offences Act*.

An attempt requires:

- some actual act or omission that forms part of the full offence;
- intent to commit that offence;
- interruption of the offence either voluntarily by the offender or not.

Impossibility

In some cases, it would be impossible for the offender to commit the full offence, according to his or her intent. Mere impossibility alone is not enough to acquit the offender: *s4(2) Criminal Offences Act*.

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

F6.2 Relationship to Full Offence

Full Offence Charged / Attempt Proved

In some cases, the full offence may be charged but at trial the evidence may only be enough to establish the attempt. In such cases, the offender may be convicted of the attempt. However, if convicted of the attempt, the offender may not be later tried again for the full offence: *s6 Criminal Offences Act*.

Attempt Charged / Full Offence Proved

If an accused is charged with an attempt to commit an offence, but in Court the evidence establishes the commission of the full offence, the offender must not be discharged but may only be convicted of the attempt. Upon conviction, the offender may not later be tried again for the full offence: *s7 Criminal Offences Act*.

F6.3 Punishment

For some offences the punishment for a conviction of an attempt is specifically set out in the offence section. For example, procuring defilement of females and attempted rape specifically require maximum sentences.

If not expressly specified, the sentencing for offenders who are found guilty of 'attempt' are liable:

- to imprisonment for a period not exceeding one-half of the maximum sentence to which a person actually committing the offence would be liable;
- to a fine not exceeding one-half the maximum fine to which a person actually committing the offence would be liable: *s5 Criminal Offences Act*.

G:

MANAGEMENT OF PROCEEDINGS

G1 General Organisation for Court

Before going to Court, you should make sure with your clerk that:

- he or she has prepared the case list for the day;
- if there is a need to have an interpreter, the necessary arrangements have been made;
- the Police have an orderly present;
- if there are matters to be heard in chambers, these should not proceed beyond 9:30 am.

Start Court on time and finish at the expected time. This is not only for your benefit but also for legal representatives, the prosecutors and Court staff.

G2 Order of Calling Cases

The following is a recommended suggestion in the order of calling cases:

- Call through defended hearing cases to find out which are ready to proceed.
- Stand down cases according to estimated time for hearing.
- Call cases where the accuseds are in custody, to free up Police and prison officers.
- Call adjourned cases and those that had accuseds previously remanded.
- Deal with cases so that legal representatives can appear consecutively.
- Deal with sentencing matters and judgments near the end of the list.
- Deal with the balance of the list, usually consisting of guilty pleas.

G3 Adjournments

The power to grant an adjournment is provided for under *s7 Magistrates' Courts Act*.

For non-appearance of either the accused or the prosecution you may also adjourn the hearing: *s21(1) Magistrates' Courts Act*.

At any time before or during the hearing of the case you may, for reasonable cause, adjourn the hearing to a future time and place. This must be stated in the presence and hearing of the accused or legal representative and the prosecution: *s31(1) Magistrates' Courts Act*.

See J: Defended Hearings for a more in depth examination of adjournments.

G4 The Mentally Ill Accused

A mentally ill accused person cannot make a lawful plea.

G5 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.

Vulnerable witnesses, such as the very young, very old, and disabled, are entitled to special measures when they are giving evidence. Consider the use of screens. Allow people in wheelchairs to give evidence from the floor of the Court instead of the witness box. Ensure that a family member or friend can sit with a child or elderly victim while they are giving evidence.

G5.1 Consideration of Victims' Statements

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 the victim was drunk you cannot assume the victim deserved to be hurt by the offender, unless the victim's actions are clearly relevant to mitigate the offence and you are certain about the facts.

G5.2 Victims of Sexual Offences

Three factors that make sexual offence trials particularly distressing for victims are:

- the nature of the crime;
- the role of consent, with its focus on the credibility of the victim;
- the likelihood that the accused and victim knew each other before the alleged offence took place.

Dealing with Victims of Sexual Offences

In order to minimise the distress of victims of sexual offences, you should:

- conduct the trial and control the demeanour of those in the Courtroom in a manner that reflects the serious nature of the crime;
- ensure the safety of the victim in the Courtroom;
- ensure that Court staff understand the danger and trauma the victim may feel;
- consider allowing an advocate or support person sit with the victim during the trial;
- enforce motions that protect the victim during testifying, such as closing the Courtroom and providing a screen to block the victim's view of the defendant. This is especially important where the victim is a young person;
- know the evidentiary issues and rules that apply in sexual offence cases, such as corroboration, recent complaint and the inadmissibility of previous sexual history. This will enable you to rule on the admissibility of evidence and weigh its credibility; and
- consider the victim impact statement when sentencing.

G6 Child Witnesses

For the provisions on dealing with the evidence of children, see *s116 Evidence Act*.

In order to ensure that the child 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 should be allowed to sit with the child while the child gives evidence.

Where a child victim of a crime is giving evidence, it will be helpful to arrange for the child not to face 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.

G7 Unrepresented Accused

Both the complainant and the defendant are entitled to conduct their cases in person or by a licensed lawyer: *s20 Magistrates' Courts Act*.

Because of the expense of hiring lawyers to conduct proceedings, a significant number of litigants appear in the Magistrates' Court on their own behalf. Most have little or no idea of Court procedures and what is involved and rely on the system to assist to some extent.

If at all possible, all accuseds charged with an offence carrying imprisonment terms should be legally represented. If legal representation is not available or if the accused does not want it, then you are to ensure that he or she understands:

- the charge(s); and
- that if found guilty, 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.

See the additional considerations for accuseds who are not represented in J: Defended Hearings.

G8 The Accused

The accused is entitled to be present in Court during the whole of his or her trial. Although a party may be legally represented, they still must obey all summons and appear in Court.

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: *ss21, 31 Magistrates' Courts Act*.

G9 Contempt of Court

Occasionally, in order to bring uncooperative witnesses into line or to advance proceedings, it may be necessary to find a witness in contempt of Court. You shall find a witness in contempt when he or she:

- refuses to be sworn or affirmed;
- refuses to give evidence when ordered by you; or
- pretends to misunderstand the questions put to him or her: *s70 Magistrates' Courts Act*.

At your discretion, you may sentence someone who is guilty of contempt of Court, to be imprisoned for not less than 1 hour and not more than 1 month: *s70 Magistrates' Courts Act*.

Any sentence for contempt of Court must be passed by you on the spot after a warning has been given to the witness. The Court clerk should then immediately make out the warrant and hand it to the Police so that they can detain the person. Because it is designed to advance proceedings, no person can be prosecuted for contempt at another sitting of the Court.

Giving false evidence is a form of contempt and may additionally constitute the offence of perjury under *s63 Criminal Offences Act*.

For an examination into criminal contempt taking place by the media outside the Court, see *Namoa v Attorney General* Crim App No. 09 of 2000.

G10 Case Management

The American Bar Association expressed the following in relation to case-flow management:

> "From the commencement of litigation to its resolution, any elapsed time other from reasonably required for pleadings, discovery and Court events is unacceptable and should be eliminated".

On the question of who controls litigation and Judges' involvement the American Bar Association said:

> "To enable just and efficient resolution of cases, the Court, not the lawyers or litigants should control the pace of litigation. A strong judicial commitment is essential to reducing delay and once achieved, maintaining a current docket".

To make any case management system work requires judicial commitment.

Goals

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
- use efficiently the available judicial, legal and administrative resources.

The following quotes from the *1995 Report of the New Zealand Judiciary*, at page 14, provides a good description of case-flow management:

> "It is essentially a management process and does not influence decisions on the substantive issues involved in a case. Case-flow management acknowledges that time and resources are not unlimited, and that unnecessary waste of either should be avoided".
>
> "The principles of case-flow management are based on the managing of cases through the Court system to ensure they are dealt with promptly and economically and that the sequence of events and their timing are more predictable. The progress of cases through the Courts is closely supervised to ensure agreed time standards are met, and the early disposition of cases that are not likely to go to trial is encouraged".

Principles

The principles of case-flow management are:

- 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 make sure ensure litigants and lawyers are aware of their obligations;
- the system should be orderly, reliable and predictable and ensure certainty;
- early settlement of disputes is a major aim; and
- procedures should be simple and easily understandable.

H:

PRELIMINARY INQUIRIES

H1 Introduction

Many criminal offences are triable only by the Chief Police Magistrate or the Supreme Court, but the Magistrates' Court still has a vital role to play in such cases during the preliminary inquiry.

Your role as a Magistrate is to inquire into the evidence and determine whether enough evidence exists to commit the accused to trial before the Chief Police Magistrate or the Supreme Court, as the case may be. Your role is **not** to conduct a trial.

H2 Jurisdiction of Magistrates

You may compel a person accused of a criminal offence to appear for the purposes of a preliminary inquiry, where:

- a person is accused of committing within your district an offence triable before the Supreme Court or Chief Police Magistrate; or
- a person accused of committing outside your district, an offence triable before the Supreme Court or Chief Police Magistrate is to be found or likely to be found in your district: *s32(a)(b) Magistrates' Courts Act*.

H2.1 Compelling Appearance

Compelling the appearance of the accused may be done by way of a summons or where proved on oath to your satisfaction that the accused is likely to abscond, a warrant of arrest: *s32 Magistrates' Courts Act*.

If a summons is issued for a preliminary inquiry, it must conform to all the requirements in terms of content, preparation, issue and service of a summons for trial in Magistrates Court as outlined in *s14-18 Magistrates' Courts Act*: *s33 Magistrates' Courts Act*.

H3 Proceedings at Preliminary Inquiry

Because the function of the preliminary inquiry is to examine the evidence and determine whether the accused should be committed for trial, the procedure is slightly different than the procedure used for a trial. The procedure has 6 distinct parts that must be observed.

1. You shall state to the accused the offence charged and explain that he or she is not required to plead or answer to the charge in the Magistrates' Court as the offence is only triable before the Supreme Court or the Chief Police Magistrate.

2. You shall order all witnesses to remain out of the hearing until called upon to give their evidence. You shall then proceed to hear the evidence of the witnesses for the prosecution.

3. The evidence of every witness for the prosecution must be given upon oath or affirmation as prescribed by *s72 Magistrates' Courts Act*. This evidence must be given in the presence of the accused and the accused or his or her representative shall be entitled to cross-examine each witness upon all relevant facts.

4. When the examination of all prosecution witnesses is complete, you must say the following words to the accused,

> "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to do so unless you so desire but whatever you say will be taken down by the clerk and may be given in evidence against you upon your trial."

Any statement from the accused must then be taken down and read over to him or her. This statement may be upon oath or not at the accused's option.

5. You shall then ask the accused if he or she wishes to call any witnesses. Any evidence then given by witnesses must be in the same manner as that of the prosecution witnesses. The Inspector of Police or other person prosecuting is entitled to cross-examine each witness upon all relevant facts.

6. After the accused has been heard and his or her witnesses have given their evidence, you must then decide, based upon the whole of the evidence, if a sufficient case has been made out to put the accused to trial before the Supreme Court or Chief Police Magistrate. If you decide that a sufficient case has not been made out, you must discharge the accused: *s34 Magistrates' Courts Act*.

H3.1 Discharge

If you discharge an accused upon a preliminary inquiry, you must send to the Attorney General a transcript of the record comprising the charge and all the evidence taken in the case: *s37 Magistrates' Courts Act*.

If the Attorney General is convinced by the evidence that the accused should not have been discharged, then the Attorney General may apply to the Chief Justice to issue a warrant for the arrest and committal of the accused for trial. If the Chief Justice is also convinced, then the case will proceed as if committal had been ordered: *s37 Magistrates' Courts Act*.

H3.2 Committal for Trial

If, after looking at the whole of the evidence in the preliminary inquiry, you think a sufficient case has been made out to put the accused on trial, you must commit the accused for trial in the next ensuing session of the Supreme Court or Chief Police Magistrate, as the case may be. If the proper Court is then sitting, you may commit the accused for trial: *s38 Magistrates' Courts Act*.

Election

In all indictable cases, before committing an accused to trial, you should ask the accused whether he or she wants to be tried by the Supreme Court and a jury or by a Judge of the Supreme Court alone. Commit the accused accordingly. This is subject to the possibility of a summary trial under *s35 Magistrates' Courts Act*: *s12 Magistrates' Courts Act*.

H3.3 Summary Trial

During the course of the preliminary inquiry, it may appear to you that the case can be successfully dealt with through summary trial in Magistrates' Court.

In order for a summary trial to occur, you must be satisfied that the punishment you have decided upon is appropriate, having regard to the representations made by the prosecutor in the presence of the accused or representations made by the accused and having regard to the nature and circumstances of the case: *s35(1) Magistrates' Courts Act*.

> *"The decision is only to be made when the magistrate has had regard to any representations made by the prosecutor or accused and to the nature and circumstances of the case. Having heard those, the only question for the Magistrate is whether, in view of what he has heard, he considers the punishment he has power to inflict will be adequate…[I]n order to assess that nature and circumstances of the case, it is necessary for the Magistrate to ascertain the general nature and scale of the evidence the prosecution will be seeking to present. Only on hearing that, can the decision be made": R v Veamatahau* Criminal Case #Cr.619 of 1999.

Before making the decision to proceed by summary trial, it may be necessary to gather information on the circumstances of the offence and look at guidance cases. For example in assault cases, you must gather information about the victim's injuries before ordering a summary trial. See *Hu'ahulu & another v Police* [1994] TOSC Crim App 5861 & 587/94 (19 August 1994).

If you are satisfied that the punishment you have power to inflict would be adequate, then you may conduct a trial in accordance with the provisions of *s24* of the *Magistrate Courts Act*: *s35(1) Magistrates' Courts Act*.

You must be very careful when deciding to proceed by summary trial as it will then bind your sentencing discretion. If, having allowed summary trial and heard the case, it is more serious

than you originally thought, you are not empowered to send it up for sentence on that basis. You may only commit the accused to the Supreme Court for sentencing if you receive information, unknown to you when you agreed to summary trial, relating to previous convictions or other matters concerning the accused's character: *R v King's Lynn JJ ex p Carter* (1969) 1 QB 488; *R v Hartlepool JJ ex p King* (1973) CrimLR 637: cited with approval in *Rex v Veamatahau* [1999] TOSC 31; CR 619 99.

In order for a summary trial to take place you must tell the accused beforehand that by his or her consent, he or she may be tried summarily instead of being tried by a Judge of the Supreme Court or by jury. You should also explain what is meant by being tried summarily so the accused understands the decision he or she is making: *s35(2) Magistrates' Courts Act*.

Whenever you decide to proceed by summary trial you should always give your reasons for doing so on record. See *Hu'ahulu & another v Police* [1994] TOSC Crim App 5861 & 587/94 (19 August 1994).

Higher Sentence Required

If the accused is convicted of the offence during the summary trial, but after obtaining information about the accused's **character**, you are of the opinion that greater punishment should be inflicted than you are empowered to give, you may commit the accused in custody to the Supreme Court for sentencing: *s35(3) Magistrates' Courts Act*.

H3.4 Remission to Magistrate

It may also occur from time to time, that a Judge of the Supreme Court will on application and with consent of the parties, remit a case to Magistrates' Court to be heard as a summary trial. In such cases, you must deal with the matter as a summary trial in accordance with the provisions of *s24 Magistrates' Courts Act*: *s36(1)(2) Magistrates' Courts Act*.

Despite having a case remitted to Magistrates' Court from the Supreme Court, you may, upon conviction, commit the person back to Supreme Court for sentencing if you are of the opinion that a greater punishment than you can give is required: *s36(3) Magistrates' Courts Act*.

H4 Evidence

The proper result of a preliminary inquiry depends very much on the quality of evidence tendered and for this reason it is essential that witnesses, testimony and exhibits be handled with care and according to law. See E: Evidence for further guidance.

H4.1 Committal Without Calling Witnesses

Upon the application of the prosecutor, and with the consent of the accused, you may commit the accused to trial in the Supreme Court without the calling of witnesses: *s42(1) Magistrates' Courts Act*.

Before allowing such a committal, a number of requirements of the prosecutor and of you, as a Magistrate, must be fulfilled.

Requirements for the Prosecution

In the application, the prosecutor must:

- give written notice of the application for committal to you and to the accused in Form 19 and Form 20 of the Schedule to the *Magistrates' Courts Act*; and
- lodge with you 2 sets of documents, each consisting of one copy of a summary of the statements of the prosecution witnesses, one copy of the list of proposed exhibits, and one copy of any proposed documentary exhibits: *s42(2)(a)(b) Magistrates' Courts Act*.

Requirements for the Magistrate

Upon the accused appearing in answer to the summons, you must:

- state to the accused the offence with which he or she is charged and explain that he or she is not required to plead or answer at this stage;
- state to the accused that by his or her consent, he or she will be committed to the Supreme Court for trial without the calling of witnesses, and if committed will be served with a summary of the statements of the prosecution witnesses;
- state to the accused that if he or she does not consent the prosecution will call their witnesses; and
- record the decision of the accused: *s42(3) Magistrates' Courts Act*.

If Accused Does Not Consent

If the accused does not consent to committal without the calling of witnesses, you must continue with the normal procedure for conducting a preliminary inquiry as set out in *s34(2)* to *s41 Magistrates' Courts Act*: *s42(4) Magistrates' Courts Act*.

If Accused Does Consent

If the accused does consent to committal without the calling of witnesses, you must:

- ensure that the accused receives in open Court a set of documents consisting of one summary of the statements of the prosecution witnesses, one copy of the list of exhibits, and one copy of the documentary exhibits;
- endorse on your copy that the accused has received his or her set of documents;
- commit the accused to the Supreme Court for trial in custody or on bail as appropriate; and
- forward the remaining set of documents along with a record of the proceedings in Form 21 of the Schedule of the *Magistrates' Courts Act* to the Registrar of the Supreme Court: *s42(5) Magistrates' Courts Act*.

H4.2 Evidence of Sick or Absent Witnesses

If it appears to you that a person able to give material evidence either for or against the accused is so ill as to be unable to attend Court or is about to leave the Kingdom for a period extending beyond the time when the accused would be tried, you may take the evidence of such person at the place where the person is lying ill or in the case of a person about to leave the Kingdom in open Court: *s44(1) Magistrates' Courts Act*.

Before taking this evidence, you must give the prosecutor and the accused reasonable notice in writing, specifying the time and place where the evidence will be given as in Form 16 of the Schedule to the *Magistrates' Courts Act*. The prosecution and accused must then have the opportunity to attend and cross-examine the person whose evidence is being taken: *s44(1) Magistrates' Courts Act*.

If the accused is in custody, you may order the custodian to convey the accused to the place and time where the evidence is being taken: *s44(2) Magistrates' Courts Act.*

Record of Evidence Taken

Any evidence taken from sick or absent witnesses must state the date and place where it was taken, the reason for taking it, and the names of those present when it was taken: *s45 Magistrates' Courts Act*.

In indictable cases, 2 transcribed copies of sick or absent witnesses must be included in the copies of the record of the preliminary inquiry forwarded to the Registrar of the Supreme Court or the Chief Police Magistrate and may be used as evidence at trial unless it is proved that the person who gave the evidence has returned to the Kingdom or has recovered from illness, so as to be able to present evidence in person: *s45 Magistrates' Courts Act*.

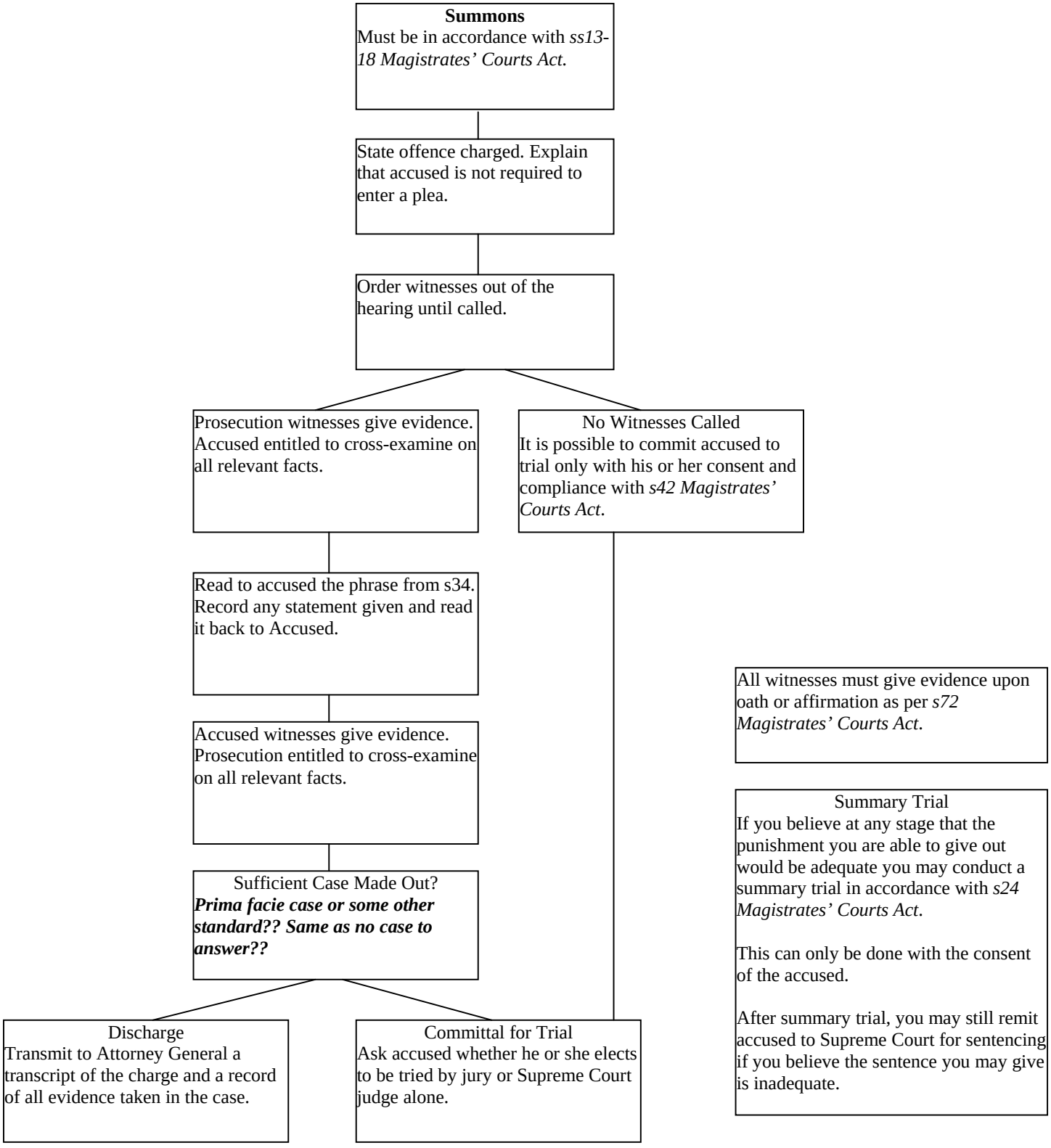
H4.3 Exhibits

All exhibits must be labelled at the preliminary inquiry with the name of the case and must be numbered consecutively in the order they are produced in Court: *s43(1) Magistrates' Courts Act*.

Exhibits other than documents shall be taken charge of by the Police and shall be produced by them at trial before the Supreme Court or Chief Police Magistrate: *s43(2) Magistrates' Courts Act*.

The accused is entitled to examine all exhibits produced by the prosecutor at all reasonable times between the preliminary inquiry and the trial: *s43(3) Magistrates' Courts Act*.

Procedure on Preliminary Inquiry



I:

PRE-TRIAL MATTERS

I1 The Criminal Process: Institution of Proceedings

Criminal proceedings in Magistrates' Courts are started by applying in person to the clerk for a summons. At the time of making the application, the person must clearly state the nature of the offence complained of and the time and place at which it was committed: *s13 Magistrates' Courts Act*. For the writing of the summons, "clerk" has been interpreted to include a member of the Police force.

A complainant may bring more than one charge against the same accused at the same time by taking out separate summons in respect of each charge. The Magistrate may deal with such summons either together or separately: *s15 Magistrates' Courts Act*.

I2 The Summons

I2.1 Content

If it appears that an offence triable by a Magistrate has been committed within the district, the clerk then makes out a summons. The summons must:

- state concisely the offence charged;
- state the time and place at which it was committed; and
- require the accused to appear in a specified time before the Magistrates' Court to answer the charge: *s14 Magistrates' Courts Act*.

Each summons must be for one offence only: *s15 Magistrates' Courts Act*. Before being issued for service, the summons must be read by you and you must sign your signature and seal it: *s16 Magistrates' Courts Act*.

In any district in which there is no resident Magistrate, the summons may be signed by the Government Representative for that district: *s16(1) Magistrates' Courts Act* as added by *s2 Magistrates' Courts (Amendment) Act 11 of 1997*.

I2.2 Service

Service of the summons shall be effected by a Bailiff constable or other officer of the Police either:

- by delivering it to the accused personally; or
- by leaving it or a copy with some adult inmate of the age of 16 years or upwards at his or her last place of abode: *s17 Magistrates' Courts Act*.

A Certificate of Service completed according to the *Bailiffs' Act 2000* shall be sufficient evidence of such documents: *s17(3) Magistrates' Courts Act* as added by *s2(ii) Magistrates' Courts Amendment Act 6 of 2000*.

If the summons is not served on the accused more than 24 hours before the time and date stated in the summons (if served within the district) or more than 14 days (if served outside the district) the case must not proceed without the express consent of the accused. This consent must be recorded in the record of proceedings: *s14 Magistrates' Courts Act*.

I3 Failure to Appear on Summons

I3.1 Arrest Warrants

As a Magistrate, you must issue a warrant for arrest if it appears on oath that the person accused of any criminal offence is likely to abscond. This must be done, even if a summons in respect of the same charge has been issued and the time for appearance stated in the summons has not yet expired: *s52(1) Magistrates' Courts Act*.

You may also issue a warrant for arrest when empowered by other provisions of the *Magistrates' Courts Act* or any other enactment: *s52(1) Magistrates' Courts Act*.

The warrant of arrest must:

- be in Form 4 of the Schedule to the *Magistrates' Courts Act*;
- be dated, signed and sealed by the Magistrate who issued it;
- be directed to each and all of the constables of the Kingdom; and
- briefly state the act complained of, the name or description of the person to be arrested and order that such person be apprehended and brought before the issuing Magistrate: *s52(2)(3) Magistrates' Courts Act*.

I4 Appearance of Witnesses

I4.1 Subpoenas

If, in a civil or criminal case, any party requires a witness to be summoned to give evidence, the party shall state the name and address of the witness to the clerk, who shall prepare a separate subpoena for each witness: *s 68(1) Magistrates' Courts Act*.

You must sign and seal every subpoena before issuing it: *s68(1) Magistrates' Courts Act*. In a civil case, a subpoena may require a witness either to give evidence or to produce documents: *s68(2) Magistrates' Courts Act*.

I4.2 Service

Service of subpoenas shall be effected and proved in the same way as a summons for an accused: *s68(1) Magistrates' Courts Act*.

I4.3 Failure to Appear on Subpoena

If a person summoned to attend or to produce any document in a civil or criminal case, fails or refuses to attend the hearing or trial, you may, upon proof on oath that the summons was properly served, issue a warrant for the arrest of the witness: *s69 Magistrates' Courts Act*.

Upon the arrest of a non-attending witness, he or she shall be brought before a Magistrate who shall inquire into why the witness did not attend, and unless it appears that his or her non-attendance was due to uncontrollable circumstances, the Magistrate may order imprisonment without hard labour for up to 8 days or a fine not exceeding $2: *s69 Magistrates' Courts Act.*

J:

DEFENDED HEARINGS

J1 Preparation for Hearing

J1.1 Sittings of Court

Magistrates' Courts sit regularly at Nuku'alofa (Tongatapu), Lifuka (Ha'Apai), Neiafu (Vava'u).

For Magistrates' Courts at 'Eua and in the outer islands of the Ha'apai group, Angaha (Niuafo'ou) and Hihifo (Niuatoputapu), sittings shall be held at such times and places as scheduled by the Chief Police Magistrate.

Additional sittings of the Magistrates' Courts or the varying of time and place may be done under the rules of the *Magistrates' Courts Act*: *s6(3) Magistrates' Courts Act*.

J1.2 Daily Case List

Prior to the beginning of Court each day, the clerk shall prepare a list of all the criminal cases to be tried that day. The list must state the name of each accused, the offence with which he or she is charged and the name of the prosecutor: *s19 Magistrates' Courts Act*. The cases shall be called for hearing from the daily list: *s17 Magistrates' Courts Act* as amended by *Magistrates' Courts Amendment Act 24 of 1990*.

J2 Summary Trial Procedure

In the interests of justice and consistency, it is vital that the conduct of a trial follows the procedures as outlined in the *Magistrates' Courts Act*.

The diagram on the next page shows the summary trial procedure.

Summary Trial Procedure

Proceedings begun by summons as per *ss13-18 Magistrates' Courts Act* or on remission from Supreme Court.
State to the accused the charge and ask for his or her plea.

Guilty plea

Sentence
Make such order as the justice of the case requires.

Not guilty plea

Order witnesses from both sides out of the Court until called on to give their evidence.

Prosecution case

The complainant may address the Court at the commencement of his or her case.
Hear the evidence of the complainant and his or her witnesses.
The defendant is entitled to cross-examine on all relevant facts.

Defence case

The defendant may either address the Court either at the commencement or conclusion of his or her case.
Hear the evidence of the defendant and his or her witnesses.
The complainant is entitled to cross-examine on all relevant facts.
Hear evidence tendered by the complainant in reply to the evidence given by the defendant.
The complainant may address the Court at the conclusion of the case if the defendant has tendered any evidence.

The evidence of every witness shall be on oath or affirmation as per *s71 Magistrates' Courts Act*
The defendant is not compellable but may make an unsworn statement if he or she so chooses.

The trial may be conducted either by the party concerned or through a licensed lawyer.

Judgment

Guilty – Sentence
Not Guilty - Acquit

J2.1 Open Court

To ensure the transparency of justice, it is a long standing principle of the common law that hearings be conducted in open Court, wherever possible. This principle is set down in *s86 Magistrates' Courts Act*. Exceptions to this rule apply in certain instances and it may sometimes be advisable to order individuals out of the Court.

Exceptions

You may order all women and children to be excluded from the Court when inquiring into charges of:

- rape;
- adultery or other immorality; or
- the use of profane or indecent language: *s86 Magistrates' Courts Act.*

In the case of accuseds who appear to be under 16 years of age who are not charged jointly with any person who appears to be above 16 years of age, you may order that any and all persons be excluded from the Court: *s86 Magistrates' Courts Act*.

J2.2 Legal Representation

Both the accused and the complainant are entitled to conduct their cases in person or through a law practitioner: *s4 Magistrates' Courts (Amendment) Act 1990*.

J2.3 Procedure Where Both Parties Appear

If, when the case is called, both the complainant and the accused appear, you shall proceed to hear and determine the complaint: *s24(1) Magistrates' Courts Act*.

1. At the outset, you must state to the accused the offence charged in the summons and ask whether he or she is guilty or not guilty: *s24(2) Magistrates' Courts Act*.

2. If the accused pleads guilty at this stage, you shall make such order against him or her as the justice of the case requires: *s24(3) Magistrates' Courts Act*.

3. If the accused pleads not guilty, you must order the witnesses from both sides to remain out of the hearing until called on to give their evidence: *s24(4) Magistrates' Courts Act*.

4. You shall then hear the evidence of the complainant and his or her witnesses and then hear the evidence of the accused and his or her witnesses and any evidence tendered by the complainant in reply to that evidence of the accused: *s24(5) Magistrates' Courts Act.*
5. The evidence of every witness must be given on oath or affirmation as prescribed in *s71 Magistrates' Courts Act*, with the exception of the accused who, while not compellable to

give evidence, may choose to make an unsworn statement or give evidence on oath: *s24(6) Magistrates' Courts Act*.

6. Both the complainant and the accused or their respective lawyers have the right to cross-examine the opposing side and each of their witnesses upon all relevant facts: *s24(7) Magistrates' Courts Act*.

7. The complainant or his or her legal representative is entitled to address the Court at the commencement of their case. The accused or his or her representative is entitled to address the Court either at the beginning or conclusion of their case. If any evidence has been given by the accused or witnesses, you may allow the complainant or his or her representative address the Court a second time at the conclusion of the case.

8. At the conclusion of the case, you may either at that time or at a later adjourned sitting, give your decision by either dismissing the complaint or convicting the accused and making an appropriate order against him or her: *s24(9)Magistrates' Courts Act*.

9. In every case, it is very important that the clerk take and keep a record in shorthand of the complaint, the evidence and the order made: *s24(10) Magistrates' Courts Act*.

Remission from Supreme Court

Under certain circumstances, a Judge of the Supreme Court may remit a case to Magistrates' Court, and the procedure outlined above for summary trials must be followed in such cases: *s36(1) Magistrates' Courts Act*.

J2.4 Procedure on Non-Appearance of Accused

If the accused does not appear before the Court on the date specified in the summons, you may:

- adjourn the hearing to a later date;
- after proof of service of the summons, hear and determine the case in the absence of the accused; or
- after proof of service of the summons, issue a warrant for the arrest of the accused and adjourn the hearing: *s21(1)(a)(b)(c) Magistrates' Courts Act*.

If the accused is subsequently arrested under a warrant issued for non-appearance, he or she must be brought before a Magistrate, who may either admit the accused to bail or order him or her to be remanded in custody until the next sitting of Court: *s21(2) Magistrates' Courts Act*.

At the next sitting of the Court, you must proceed with the hearing of the case, unless it is impossible to complete the hearing of the case, in which case you may adjourn the hearing to the subsequent sitting and admit the accused to bail or order him or her to be remanded in custody until the next Court sitting: *s21(3) Magistrates' Courts Act*.

J2.5 Procedure on Non-Appearance of Complainant

If, when the case is called, the accused is brought before the Court on a warrant of arrest and you are satisfied that the complainant had due notice of the time and place of the hearing and does not appear, you may dismiss or adjourn the hearing to a future day: *s22 Magistrates' Courts Act*.

J2.6 Procedure on Non-Appearance of Both Parties

If, when the case is called, neither the complainant nor the accused appear, you may dismiss or adjourn the case as you think fit: *s23 Magistrates' Courts Act*.

J3 Unrepresented Accused

Whenever an accused is unrepresented, special care must be taken to ensure that the rights of the accused are respected and that justice is done. It is not your responsibility to conduct the case for the accused, only to see that the trial is fair.

Whenever an accused is unrepresented, the following should be done:

- Confirm the accused's plea and ensure it is recorded;
- Provide an interpreter if necessary;
- Provide the accused with a brief explanation of:
  - the procedure to be followed;
  - the right to cross-examine prosecution witnesses;
  - the right to give and call evidence; and
  - the obligation to put his or her case to any witness;
- If you ask any questions of a witness after re-examination has concluded, ask both the prosecutor and the accused if they have any further questions raised by the witness' testimony.

> "In all cases the duty of the magistrate is to ensure that an unrepresented person charged with a criminal offence, understands both the charge and the proceedings and also that, if

he has a defence, he has an opportunity to present it…Once he is satisfied the accused understands the charge he faces and that he has admitted it, the magistrate should proceed to hear the facts and mitigation…"

Cocker v Police Department Criminal Appeal Case #Cr.App.1251 of 1998.

J4 No Case to Answer

Whether the accused is represented or not, the accused may make a submission at the end of the prosecution's case that there is no case to answer. If such a submission is made, you should give the prosecution the opportunity to reply.

When a submission of "No Case to Answer" is made, your sole function is to consider whether there is sufficient evidence which, if believed, would entitle the Court to convict. Matters such as credibility of witnesses or reliability of evidence are immaterial at this stage. You must focus solely on the question of sufficiency: See *Practice Note 01/92* (16 January, 1992). If a prima facie case is made out at this stage, you must commit the accused to trial.

If you dismiss the case at this stage, great care should be taken when compiling the Record of Proceedings to ensure that all the evidence led is recorded and the reasons why you considered it insufficient. You should not comment on reliability or credibility: See *Practice Note 01/92* (16 January, 1992).

J5 Witnesses

J5.1 Evidence to be on Oath or Affirmation

Evidence is to be given on oath. However, where any witness objects to being sworn in due to conscientious motives, he or she is entitled to make a solemn affirmation: *s71 Magistrates' Courts Act*.

The penalties for lying under solemn affirmation are the same as are provided against persons guilty of perjury: *s71 Magistrates' Courts Act*.

J5.2 Form of Oath or Affirmation

Oath

In the case of an oath, the person taking the oath shall stand and hold the Bible (or in the case of a Jew the Old Testament) in his or her uplifted right hand and shall repeat after you the following:

> "I swear by Almighty God that I will speak the truth in the evidence that I shall give before the Court."

The person taking the oath shall then kiss the Bible (or Old Testament) by touching it with his or her lips, forehead or nose: *s72 Magistrates' Courts Act*.

Affirmation

In the case or an affirmation, the person making the affirmation shall repeat after you the following:

> "I solemnly and truly affirm that I will speak the truth in the evidence that I shall give before the Court."

If a witness refuses to be sworn, he or she may be cited for contempt of Court. See G: Management of Proceedings for further guidance on contempt.

J6 Evidential Matters

Refer to E: Evidence for dealing with evidence in a defended hearing.

J7 Pleas

***At the outset of the hearing you must tell the accused of the offence he or she is charged in the summons and you must ask the accused whether he or she is guilty or not guilty:* s24(2) Magistrates' Courts Act.**

The accused may, with leave of the Court, change a not guilty plea to guilty at any time. The accused may also, with leave of the Court, change a guilty plea to not guilty at any time, but this must be before sentencing.

Where an unrepresented accused wishes to take legal advice before making a plea, adjourn the matter to a fixed date where the accused must make his or her plea.

J7.1 Fitness to Plead

Before taking a plea, you should have regard to *Part III Criminal Offences Act*, in particular *ss16, 17*. For example, if the accused is not of the age for criminal responsibility then there is no need for him or her to make a plea.

J7.2 Not Guilty Plea

If an accused pleads not guilty, follow the procedure for trial as outlined in *s24 Magistrates' Courts Act*.

If the plea of not guilty occurs at first appearance, the Police will normally request an adjournment until a date so that they may call their witnesses. Before fixing the date:

- inform the accused of his or her right to legal counsel (if unrepresented);
- advise the accused to prepare for hearing the case;
- set a date for the accused to appear again either for hearing or for counsel to appear.

J7.3 Guilty Plea

If an accused pleads guilty, ask the Police to give a brief of the evidence and you may then convict the accused and sentence him or her accordingly.

When an accused pleads guilty, you must be aware that, if the accused comments or disputes some facts in the Police brief, that it may indicate a possible defence. If this occurs, enter a plea of not guilty and proceed as a defended trial.

If anything comes up in the statements to the Court by the prosecution or the accused that might suggest a defence, the Magistrate should stop the proceedings and find out what is being asserted. Often a short inquiry will make it plain that the plea is properly entered but in any case where it is not, the Magistrate must enter a plea of not guilty and try it as a contested case: See *Cocker v Police Department* Criminal Appeal Case #Cr.App.1251 of 1998.

Traffic Act Offences

In come cases an accused may plead guilty to an offence under the *Traffic Act* without appearing in Court.

In order for this to occur, the offence:

- must be under the Traffic Act;
- is not triable in the Supreme Court; and
- does not carry a sentence of imprisonment: *s20A(1) Magistrates' Courts Act* as added by *s5 Magistrates' Courts Amendment Act 24 of 1990*.

For the requirements and procedure to follow in such cases, see *s20A Magistrates Courts Act* as added by *s5 Magistrates' Courts Amendment Act*.

J8 Withdrawal of Complaint

Sometimes, the **Police** will make a request to withdraw a complaint. This often occurs when parties have reconciled and compensation has been paid for minor offences. It is good policy to inquire into the reason for the withdrawal to ensure that justice has been done in the case.

Occasionally, withdrawal will be sought in cases of assault or other violent crime. You must be very careful in these situations that the withdrawal is not being sought because the complainant is being coerced or threatened in some manner. In such cases, you should consider refusing the application for withdrawal. If you do refuse the application, you should nevertheless take the reasons given in support of the withdrawal into account as mitigating factors.

K:

BAIL

K1 Introduction

Terminology

The *Bail Act* consistently uses some terminology throughout which you should be aware of.

Specifically, its references to "Police officer" mean a Police officer with the rank of sergeant or above or an officer in charge of a Police station.

References to "surrender to custody" mean an accused surrendering him or herself into the custody of the Court or Police officer, as required, at the time and place appointed.

K2 Right To Bail

There is a general presumption of the right to bail for every person who:

- is arrested for or charged with a criminal offence;
- has been convicted of a criminal offence; and
  - who has appealed against sentence or conviction; or
  - whose case has been adjourned for the purpose of obtaining sentencing information: *s3(1) Bail Act* as amended by *s2 Bail Amendment Act 14 of 1991*.

The exception to this presumption is that a person charged with murder or treason may only be granted bail by the Supreme Court or Court of Appeal: *s3(2) Bail Act*.

K3 Offences Punishable by Imprisonment

A person arrested or charged with an offence punishable by imprisonment must be granted bail unless you (or a Police officer, in the case of a person arrested) is satisfied that:

- there are substantial grounds for believing that, if released on bail with or without conditions, the accused will:
  - fail to surrender to custody;
  - commit an offence while on bail; or
  - interfere with witnesses or otherwise obstruct the course of justice, in relation to him or herself or another;

- the accused should be kept in custody for his or her own welfare;
- the case has been adjourned for inquiries which would be impractical to make unless the accused is kept in custody;
- the accused is already in custody for another sentence of a Court; or
- the accused has already been released on bail and has been arrested for absconding or breaking the conditions of bail: *s4(1) Bail Act*.

In making the decision as to whether you grant bail for a person charged with an offence punishable by imprisonment, you or the Police officer must have regard to all the relevant circumstances, particularly:

- the nature or seriousness of the offence (and the probable method of dealing with the accused);
- the character, associations and community ties of the accused;
- the accused's record in fulfilment of obligations under previous grants of bail; and
- the strength of the evidence regarding the accused having committed the crime: *s4(2) Bail Act*.

> "If a Magistrate is not given by the Police a sound reason why the Magistrate should deprive the suspect of his liberty, and the Magistrate authorises the Police to detain him, then the Magistrate may be liable in damages under *s92* of the *Magistrates' Courts Act cap 11*. Under the *Bail Act 1990* and its amendments, the Magistrate must decline an application for custody unless he is satisfied of certain things that are stated there. Under *clauses 1, 9* etc of the *Constitution*, the suspect is entitled to his liberty unless sound reason is shown to keep him in custody. The Magistrate is the protector of that liberty": See *R v 'Ahokovi* Criminal Case #Cr.1522 of 1998.

K3.1 Bail While on Adjournment for Sentencing

Where an accused has been convicted of an offence punishable by imprisonment and the case is adjourned in order to gather information relevant to sentencing, the accused must be granted bail if you are satisfied that:

- it is unlikely the accused will be sentenced to imprisonment;
- it would be impracticable to obtain the further information if he or she is kept in custody;
- there are substantial grounds for believing that, if released on bail, whether subject to conditions or not, he or she will surrender to custody without committing any offence whilst on bail: *s4A(1) Bail Act* as added by *s3 Bail Amendment Act 14 of 1991*.

You must not grant bail where:

- the person is already in custody under a sentence of a Court;
- the person has in relation to the offence been arrested under *s9 Bail Act*; or
- it is considered best to keep the person in custody for his or her own protection or welfare: *s4A(2) Bail Act* as added by *s3 Bail Amendment Act 14 of 1991*.

When making this decision, you must have regard to all the relevant circumstances and particularly to:

- the nature of the offence and the probable sentence for it;
- the character, associations and community ties of the person; and
- the person's record in surrendering to custody at the trial and on other occasions: *s4A(3) Bail Act* as added by *s3 Bail Amendment Act 14 of 1991*.

K3.2 Bail on Appeal

Once the appellant has given notice and paid the appeal fee, bail may be allowed or refused at your discretion. The appellant may appeal, by way of petition, any refusal of bail to the Supreme Court within 14 days of your refusal: *s75(3) Magistrates' Courts Act*.

A person who has been convicted of and sentenced to imprisonment for a criminal offence and who has appealed or applied for leave to appeal against sentence or conviction must be granted bail if you are satisfied that:

- there is a reasonable prospect of the appeal succeeding;
- the appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served; and
- there are substantial grounds for believing that, if released on bail (with or without conditions) the person will surrender to custody without committing any offence while on bail: *s4B (1) Bail Act* as added by *s3 Bail Amendment Act 14 of 1991*.

In making the decision on whether to grant bail to an appellant you must have regard to all the relevant circumstances and particularly to:

- the nature of the offence and length of sentence;
- the grounds of appeal;
- the character, associations and community ties of the person; and
- the appellant's record in surrendering to custody at trial and on other occasions: *s4B(2) Bail Act* as added by *s3 Bail Amendment Act 14 of 1991*.

Recognizance

If you allow bail, you must require the appellant to enter into a recognizance in Form 17 of the Schedule to the *Magistrates' Courts Act* within 14 days from the date of your decision being appealed. The recognizance must require the appellant to appear and prosecute his or her appeal before the Supreme Court and to pay any costs and abide by any orders of the Supreme Court: *s76 Magistrates' Courts Act*.

As part of the recognizance, you may or may not require a surety or sureties: *s76 Magistrates' Courts Act*.

Once the recognizance has been entered into, the execution of your decision must be stayed until the appeal has been disposed of, and if the appellant is in custody, you must liberate him or her: *s76 Magistrates' Courts Act*.

K4 Offences Not Punishable by Imprisonment

A person arrested or charged with any offence not punishable by imprisonment must be granted bail unless you (or a Police officer in the case of a person arrested) is satisfied that:

- the accused has previously been granted bail and has failed to surrender to custody and that if released on bail (with or without conditions) is likely to fail to surrender to custody again;
- the accused should be kept in custody for his or her own welfare;
- the accused is already in custody under a Court sentence: *s4(3) Bail Act*.

K5 Procedure

K5.1 Magistrates' Procedure

Where you grant or withhold bail or impose or vary the conditions of bail you must make a written record of the decision and the reasons for it. A copy of the record must be given to the accused as soon as practicable, but no longer than 24 hours after it was made: *s7(1)(a)(b) Bail Act*.

Where you grant bail, the recognizance must be in *Form 1* of the *Schedule*: *s11(1) Bail Act*.

Where you withhold bail you must inform the accused that he or she may apply to the Supreme Court to be granted bail: *s7(2) Bail Act*.

K5.2 Police Procedure

Where a Police officer withholds bail, the person arrested shall be brought before a Court as soon as is practicable and in any event within 24 hours of withholding bail: *s6(2) Bail Act*.

Where a Police officer grants or withholds bail the Police officer must make a written record of the decision and the reasons for it. A copy of the record must be given to the accused as soon as practicable, but no longer than 24 hours after it was made: *s7(1)(b) Bail Act*.

Where a Police officer grants bail, the recognizance must be in *Form 2* of the *Schedule*: *s11(2) Bail Act*.

Accused Already Out on Bail

A Police officer may arrest a person released on bail, without warrant:

- if the arresting officer has reasonable grounds to believe that the person is not likely to surrender to custody;
- if the arresting officer has reasonable grounds to believe that the person is likely to break or has broken any of the bail conditions;
- if a surety of the accused notifies a Police officer in writing that the accused is not likely to surrender to custody and for that reason the surety wishes to be relieved of his or her obligations as a surety: *s9(2) Bail Act*.

A person arrested on the above grounds must be brought as soon as practicable before you, and within 24 hours (excluding Saturdays, Sundays and holidays) of his or her arrest. You may then remand the accused in custody or grant him or her bail subject to the same or different conditions as originally imposed: *s9(3) Bail Act*.

K5.3 Sureties

For the purposes of considering the suitability of a surety, among other things you may have regard to the surety's:

- financial resources;
- character and previous convictions;
- proximity (as to kinship, residence or otherwise) to the accused: *s10(2) Bail Act*.

Where you grant bail on the basis of a surety, but no suitable surety can be found, you must fix the amount for which the surety will be bound for the purpose of enabling the surety to enter into later: *s10(3) Bail Act*.

A surety may enter into a recognizance before:

- a Police officer of the rank of inspector or above or who is in charge of a Police station;
- a Magistrate; or
- a Registrar of the Supreme Court: *s10(4) Bail Act*.

Where one of the above parties declines to take a surety's recognizance because he or she is not satisfied of the surety's suitability, the surety may apply to the Court which fixed the amount of the recognizance to take his or her recognizance: *s10(5) Bail Act*.

K6 Requirements and Conditions of Bail

Any person to whom you grant bail must surrender to custody: *s5(i) Bail Act*.

Additionally, in order to secure the accused's surrender **before** you release the accused on bail, you may require that the accused:

- give a surety him or herself or on his or her behalf; and/or
- provide a surety or sureties: *s5(ii) Bail Act*.

You may require an accused who has been granted bail to comply with requirements necessary to ensure that the accused:

- surrenders to custody;
- does not commit an offence while on bail;
- does not interfere with witnesses or otherwise obstruct justice in relation to him or herself or to another;
- makes him or herself available for the purpose of enquiries or reports to be used in assisting the Court in dealing with the accused: *s5(iii) Bail Act*.

You may also order an accused not to leave Tonga before trial and order that he or she surrender their passport and travel documents to the Court to ensure compliance: *s5(iv) Bail Act*.

Where you have granted bail, you or a higher Court may vary the conditions of bail or impose conditions in respect of bail which has been granted unconditionally, upon application by the accused, the prosecutor or a Police officer: *s6(1) Bail Act*.

K7 Breach of Bail

You may issue a warrant for arrest if an accused who has been released on bail:

- fails to surrender to custody; or
- absences him or herself from the Court without leave of the Court at any time after he or she has surrendered to custody: *s9(1) Bail Act*.

It is an offence for an accused who has been released on bail to not, without reasonable cause, to surrender to custody. Conviction carries a penalty of a maximum $1000 fine and/or 1 year imprisonment: *s8(1) Bail Act*.

It is up to the accused to prove that he or she had reasonable cause for his or her failure to surrender to custody: *s8(2) Bail Act*.

If an accused who has been released on bail, fails without reasonable cause, to surrender to custody, you may:

- order that the whole or part of the accused's security be forfeited to the Crown; and/or
- order that unless reasonable cause be shown, that the whole or part of the security given by a surety be forfeited to the Crown: *s10(7) Bail Act*.

You may reverse a decision of forfeiture of security to the Crown if you are satisfied on an application made by or on behalf of the accused or any surety that the accused did have reasonable cause for his or her failure to surrender to custody: *s10(9) Bail Act*.

L:

JUDGMENT

L1 Decision Making

Decison making is one of the most important aspects of your position. Although help as to meaning of the law can be sought from textbooks and legal representatives, the decision cannot be made by anyone other than the Magistrate or Magistrates hearing the case.

L1.1 Principles Governing Decision Making

There are three principles which collectively translate into the general duty to act fairly:

- You must act lawfully;
- Affected parties have a right to be heard;
- You must be free from bias.

The principles are intended to ensure:

- the fair, unbiased and equal treatment of all people;
- the exercise of any discretion only on reasoned and justified grounds.

Adhering to these principles does not guarantee that the Court has made a good decision. It does mean, however, that the Court is likely to have followed a process that is designed to introduce many of the relevant and critical factors, and exclude prejudice and irrelevant material and considerations.

You Must Act Lawfully

This principle is concerned with what the governing legislation or rules require.

There are several aspects to the principle of lawfulness:

- You must act within the authority of the law;
- You must take into account all the relevant considerations and must not take into account irrelevant considerations;
- You must not give away your discretionary power. Only the members of the panel can make the decision.

Ask yourself:

- "Do I have jurisdiction to hear and determine the matter?"
- "What are the considerations I must take into account?"
    - Look to the appropriate legislation to work out what you must be satisfied of.

- Each element of the offence will point to the relevant considerations. Factors unrelated to those elements will be irrelevant.

- "Have I taken into account anything irrelevant?"

Affected Parties Have a Right to be Heard

Both the prosecution and defence must have a full and fair opportunity to be heard before the decision is made.

The purpose of this principle is to ensure that the Court considers all relevant information before making its decision.

Throughout the hearing process, ask yourself:

- "Am I giving each party a fair opportunity to state his or her case?"

You Must be Free from Bias

You should not allow your decision to be affected by bias, prejudice or irrelevant considerations.

You must not have an interest in the matter from which it might be said you are biased.

- It is not necessary to show actual bias, the appearance of bias is sufficient.
- Bias might be inferred where there is a relationship to a party or witness, a strong personal attitude that will affect your decision, or a financial interest in the matter.

Ask yourself:

- "Is there any factor present which could amount to bias, or the perception of bias, if I hear this matter?"

Consequences of a Breach of the Principles

If these principles are not adhered to, your decision may be reviewed on appeal.

There are other consequences of breaching the principles. These include:

- a person being unlawfully punished or a guilty person getting off without punishment;

L2 A Structured Approach to Defended Criminal Cases

Decision making is a process of applying particular facts to the relevant law. You must adopt a judicial approach, which will prevent you from reaching conclusions before all the evidence and arguments have been placed before you. The way to do this is to employ a structured approach.

There are three tasks:

1. To be clear what the defendant is charged with and all the essential elements of the offence/s:

For the defendant to be found guilty, **every element** of the offence must be proven beyond reasonable doubt. It is vital that you are clear about the elements that must be proved.

2. To determine what the facts of the case are - what happened, what did not happen:

The defendant is presumed to be innocent and the prosecution must prove that he or she is guilty. This is done by reference to the evidence produced.

This involves assessment of the credibility of witnesses and the reliability of their evidence.

3. To make your decision:

This is done by applying the law to the facts. You must make the decision. Under no circumstances should you ask anyone else to decide the matter.

L3 Note Taking

A recommended suggestion is to note each element of the charge on a separate sheet of paper. As the evidence is given, note it as it relates to each of these elements. This method can provide a helpful framework for your decision.

L4 Delivering your Judgment

Under the law you are required to issue a judgment but it does not have to be written although it can be. You must deliver your judgment in every trial in open Court, either immediately at the conclusion of the trial or at some adjourned sitting: *s24(9) Magistrates' Courts Act*.

If you reserve your decision to a later date, you must notify the parties when your judgment will be delivered. The accused person should be present when you deliver your judgment.

Your judgment should contain the following:

- the offence of which, and section of the *Criminal Offences Act* or other Act under which, the accused person is charged;
- the point or points for determination (the issues);
- the decision on each of those points; and
- the reasons for the decision.

In the case of an acquittal, you must direct that the accused person be set at liberty.

In the case of a conviction, include the sentence either at the same time or at a later date, as appropriate.

Note, however, that if the accused pleads guilty, your judgment need only contain the finding and sentence or other final order. You do not need to explain your reasons for finding the accused guilty in these circumstances.

L4.1 Judgment Format

The format on the following page is a useful format for making and delivering your decision. This must be applied to each charge.

It is a good idea to have the 'losing' party in mind when giving your reasons – make sure you address all their evidence and submissions thoroughly.

Criminal Judgment Format

Introduction

What the case is about?

What is alleged by the prosecution in the summary of facts?

The law

What must be proved beyond reasonable doubt?

The elements of the offence?.

The facts not in dispute

The facts that are accepted by the defence.

The elements that those accepted facts prove.

The facts in dispute

The facts that are disputed by the defence. These are usually the issues (points for determination) in the case.

Your finding of the facts, with reasons. Which evidence you prefer and why.
(Questions of credibility and reliability must be dealt with here.)

Apply the law to the facts

Make your findings on the facts.

Do the facts prove all the essential elements?

Deliver your judgment

This will be conviction or acquittal.

Structure your judgment before delivering it.

Make sure you give adequate reasons and that the parties understand.

Orders:
Pronounce any orders as to costs, return of exhibits, etc.

M:

SENTENCING

M1 Introduction

At the end of a trial, after you have heard and considered all the relevant evidence, you must sentence the offender to an appropriate sentence without delay.

The accused (or his or her representative) should be allowed to ask the Court to take his or her comments into consideration before it passes sentence (known as a plea in mitigation).

You must explain the sentence and your reasons for it so that the accused understands what he or she needs to do.

A person charged and found guilty of an offence has the right not to be sentenced to a more severe punishment than was applicable when the offence was committed: *Cl. 20 Constitution*. See *Rex v Fakauho* [2000] TOSC 12; CR 420 99 and *Edwards v Kingdom of Tonga* [1994] TOCA App No. 907/93.

M2 Jurisdiction

Magistrates

A Magistrate may sentence:

- a maximum of 3 years imprisonment;
- any fine up to a maximum of $1000;
- any sentence or order authorised by law: see *s2 Magistrates' Courts (Amendment) Act 1990.*

The Chief Police Magistrate is permitted to sentence up to $1500: *s2(c) Magistrates' Courts (Amendment) Act 1990*.

Supreme Court

Any offence for which the maximum punishment is **greater** than $1500 or 3 years imprisonment is heard in the Supreme Court.

M3 Sentencing Principles

There are four basic sentencing principles to be considered by the Court. These are:

- Deterrence;
- Prevention;
- Rehabilitation; and/or
- Retribution.

Deterrence

The punishment is designed to deter the offender from breaking the law again and act as a warning to others not to do the same

Prevention

The sentence is to prevent the offender from further opportunity to offend during the period of punishment.

Rehabilitation

The penalty is selected so as to aid an offender to reform and not offend again.

Retribution

The punishment is for wrong-doing imposed on behalf of the community, to mark its disapproval of the offence committed.

M4 Sentencing Discretion

While limits of sentence are imposed upon the Court by legislation, the level of sentence in each case is a matter for you to decide. The level of sentence in a particular case must be just and correct in principle and requires the application of judicial discretion.

The judicial act of sentencing needs you to balance:

- the gravity of the offence;
- the needs of the society; and
- an expedient and just disposal of the case.

One of the most common criticisms of the Court is that sentences are inconsistent. Failure to achieve consistency leads to individual injustice and may bring the Court into disrepute.

A means of ensuring consistency in the actual sentence given is to seek a consistent approach to sentencing in all cases.

Although, there is no set or fixed formula in applying the principles, you may have to consider and assess the following factors when selecting the most appropriate penalty or sentence:

- the purpose of the legislation;
- the circumstances of the offence;
- the personal circumstances of the offender; and
- the welfare of the community.

On sentencing, either the accused or his or her representative may make submissions.

M5 A Structured Approach to Sentencing

You must develop a systematic method of working through each sentence. Please note the Sentencing Checklist at M6 and Sentencing Format at M8 which you can use.

M5.1 The Tariff

The first step in sentencing is to identify the tariff for the offence.

The tariff is the range within which sentences have been imposed for that offence. The statutory maximum sentence is usually specified in the *Penal Code* or the relevant legislation.

You may be assisted in finding the suitable tariff by referring to:

- guideline judgments from superior Courts;
- sentences from other Magistrates' Courts for the same offence;
- sentences for similar offences from overseas jurisdictions.

M5.2 The Starting Point

Once the tariff has been identified, choose a starting point. The starting point is decided according to the seriousness of the actual offence committed.

M5.3 Aggravating and Mitigating Factors

There are a number of factors which will influence you when deciding what sentence to pass.

Some factors will cause you to deal with the offender more harshly – these are called aggravating factors. Some factors will cause you to deal with the offender more lightly – these are called mitigating factors. You need to take all the factors into account when passing sentence.

Aggravating factors include:

- the use of violence;
- persistent offending;
- damage to property;
- age and vulnerability of victim;
- value of property stolen;
- premeditated acts;
- danger to the public; and
- prevalence.

Mitigating factors include:

- guilty plea (but note that the Court cannot penalise an offender for exercising his or her right not to plead guilty);
- genuine remorse;
- reparation;
- reconciliation;
- young offender;
- first offender;
- provocation; and
- no harm or minimal harm to person or property.

There are also a number of factors that float between these two categories, depending on the circumstances.

In these cases, you need to evaluate the weight to be given to each of them in terms of the appropriate sentence to be considered by the Court. These include the following:

- previous good character;
- victim acquiescence;
- political instability; and

- responsible position.

M5.4 Scaling to the Appropriate Sentence

Scaling means increasing the sentence to reflect aggravating circumstances, and decreasing it to reflect mitigating circumstances. This involves using your own judgement. You may use your own knowledge and experience of affairs in deciding how to scale the punishment.

Any discounts you give for certain factors are at your discretion, but must be reasonable and justifiable. You may consider reasonable reductions for the following:

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

M5.5 Totality Principle

This is the final analysis stage of sentencing. When you impose a sentence, you must review the case as a whole to ensure that the overall effect is just.

The totality principle requires you to look at the overall sentence and ask yourself whether the total sentence reflects the totality of the offending. Some considerations include:

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

Having considered all the relevant mitigating and aggravating factors of the offending and the offender, and after determining the overall sentencing principles that you wish to apply, you will then arrive at what can be considered the proper sentence for both the offence and the offender.

It is good practice to give reasons for all decisions, and this is particularly important if the sentence you arrive at is substantially more or less than the normal sentence.

M6 Sentencing Checklist

Sentencing is one of the most difficult areas of judicial discretion, so it is important to develop a systematic method of working. The following checklist provides a working guide and is not exhaustive:

Ensure that you have the fullest information:

- full summary of facts;
- latest record of previous convictions;
- any special reports if applicable (welfare/medical/psychiatrist).

Do not sentence on important disputed facts:

- if the dispute is over material issues, arrange a hearing of facts for sentencing purposes;
- if the offender declines to have such a hearing, record this before proceeding further.

Analyse the information relating to the offence:

- the nature of the charge including the maximum penalty;
- the gravity of the particular facts of the case;
- aggravating factors;
- mitigating factors.

Consider the views of the victims and any public concerns as a reflection of the final decision taken:

- "Courts should take public opinion into account but not pander to it because it may be wrong or sentimental": See *R v Sergeant* (1975) Crim LR 173;
- traditional apologies: See *Ta'ani v Police* [1994] TOSC Crim App 585 & 728/94 (16 August, 1994);
- full recovery of complainant/ compensation paid.

Account for any specific provisions relevant to the offender (i.e is the offender a juvenile, elderly, or handicapped person).

Account for principles or guidelines issued by superior Courts:

- guideline judgments (See *Mafi & Latu v R* TOCA Crim App No. 6/1991);
- circular memoranda issued by the Chief Justice.

Determine which sentencing principle(s) apply:

- deterrence/prevention/rehabilitation/retribution/other.

Account for any mitigating or aggravating factors in respect of the offender and the offending.

Consider the totality of sentence imposed.

Deliver the sentence, with reasons:

- using the Sentencing Format below at M8 will ensure adequate justification for the sentence.

M7 Consideration of Other Offences

When deciding the sentence to be imposed, you may, with the consent of the offender and the prosecution, take into consideration any other **untried** offence of a like character which the accused admits in writing to have committed:

M8 Sentencing Format

It is suggested that you use the format on the following page when delivering sentence:

Sentencing Format

The charge

The facts of the particular offending:

- If there was a defended hearing, refer to the evidence.
- If there was a guilty plea, refer to the prosecution summary of facts.

The defence submissions or comments on the facts of the offending

Comment on the offence, if relevant:

- The seriousness of the particular type of offending.
- Whether it is a prevalent offence.
- Its impact upon the victim.

Note any statutory indications as to the type of penalty to be imposed

Identify the tariff and pick the starting point

The personal circumstances of the offender

Note any prior offending if relevant

- How many offences?
- How serious?
- When committed?
- Of the same kind?
- Is there a current suspended sentence?

The offender's response to sentences in the past

Defence submission and any evidence called by the defence

The contents of any reports submitted to the Court

Your views summarising the mitigating and aggravating features

Scale, then consider the totality of the sentence

Pronounce sentence

M9 Types of Sentences

The *Criminal Offences Act* provides for the six following punishments:

- payment of compensation;
- community service order;
- fine;
- whipping;
- imprisonment; and
- death: *s24 Criminal Offences Act* as amended by *s2 Criminal Offences Amendment Act 1990*.

M9.1 Payment of Compensation

You may order an offender to make compensation not exceeding $500 to any person who was injured or suffered loss by the offence: *s25(2) Criminal Offences Act*.

The order of compensation may be either as a substitute or in addition to any other punishment you give: *s25(3) Criminal Offences Act*.

If the offender is found in default, he or she is liable to a maximum 12 months imprisonment: *s25(3) Criminal Offences Act*.

Money Taken from Prisoner

If a person is convicted of a criminal offence, then any money that was found upon him or her at the time of arrest may be applied to any compensation you direct to be paid: *s194 Criminal Offences Act*.

M9.2 Community Service Orders

Where an offender is convicted of an offence punishable by imprisonment, you may make a community service order requiring the offender to perform unpaid work for the community: *s3 adding s25(a)(1) Criminal Offences (Amendment) Act 1990*.

You may only make a community service order if you are satisfied that proper arrangements will be made for supervision of the order by a suitable person: *s3 adding s25(a)(3) Criminal Offences (Amendment) Act 1990*.

Content of the Order

The order must specify:

- the number of hours to be worked (minimum 40 / maximum 120); and
- the nature and location of the work: *s3 adding s25(a)(2)(i) Criminal Offences (Amendment) Act 1990.*

The work ordered must normally be completed within a maximum of 1 year from the date of the order: *s3 adding ss 25(a)(2)(ii) Criminal Offences (Amendment) Act 1990*.

If, on application by summons of the offender or supervisor, you are satisfied that by reason of circumstances which have arisen since the order was made that it would be just, you may revoke, vary, or extend the period for completing the work hours: *s3 adding s25(a)(8) Criminal Offences (Amendment) Act 1990*.

Offenders subject to community service orders must:

- report to the supervisor at such reasonable times as that officer may direct; and
- carry out the required number of hours of work at such times as the supervisor directs: *s3 adding s25(a)(4) Criminal Offences (Amendment) Act 1990*.

The directions of the supervisor must, as much as is practical, avoid:

- conflict with the offender's religious beliefs; and
- interference with the offender's normal attendance at work, church or any educational establishment: *s3 adding s25(a)(5) Criminal Offences (Amendment) Act 1990*.

Non-Compliance with Order

If an offender fails to comply with the terms of the community service order the supervisor may issue a summons requesting that the order be revoked: *s3 adding s25(a)(6)(i) Criminal Offences (Amendment) Act 1990*.

If you are satisfied that the offender has failed, without reasonable excuse to comply with the terms of the order, you may:

- impose a fine not exceeding $100 and direct that the order continue in force; or
- revoke the order and deal with the offender in any other manner appropriate to the original offence: *s3 adding s25(a)(6)(ii) Criminal Offences (Amendment) Act 1990*.

<u>Conviction on another offence</u>

If an offender who is subject to a community service order commits an offence punishable by imprisonment, you may, once the offender hs been convicted for the second offence, revoke the community sentence order and deal with the offender in any other manner appropriate to the original offence: *s25(a)(7) Criminal Offences Act* as added by *s3 Criminal Offences Amendment Act 1990*.

Examples of when community service orders are appropriate include when:

- imprisoning an offender would unduly harm his or her family;
- an offender's skills are needed in the community;
- a young offender's future would be severely disrupted by imprisonment.

M9.3 Fines

You may order a fine up to a maximum of $1000: *s2 Magistrates' Courts (Amendment) Act 1990*.

In any case where an offender is convicted of an offence punishable by imprisonment, you may sentence the offender to pay a fine instead: *s30 Criminal Offences Act*.

Imprisonment on Default

Whenever you impose a fine, as part of the sentence, you must direct that, if the offender does not pay the fine, he or she may be imprisoned for not more than one year unless the fine is paid sooner: *s26(1) Criminal Offences Act*.

Imprisonment for failure to pay the fine shall commence at the end of any term of imprisonment given for the offence itself: *s26(2) Criminal Offences Act*.

Whenever an offender is imprisoned for non-payment of a fine, the sentence should be treated as beginning on the date he or she entered prison and not from the date of conviction: *s28 Criminal Offences Act*.

The period of imprisonment for non-payment of a fine is within your discretion, subject to the following maximums:

- an amount up to $20, = a maximum of 7 days imprisonment;
- between $21 and $50, = a maximum of 14 days imprisonment;
- between $51 and $100, = a maximum of 3 months imprisonment;
- between $101 and $200, = a maximum of 6 months imprisonment;
- between $201 and $300, = a maximum of 12 months imprisonment;
- over $300, = a maximum of 2 years: *s28 Magistrates' Courts Act*.

Payment

You may allow an offender a maximum of 3 months time to pay any fine: *s27 Criminal Offences Act*.

If an offender is imprisoned for non-payment of a fine, he or she must be discharged from the prison once payment of the sum specified in the warrant of commitment is made to the keeper of the prison, so long as the offender is not in custody for another matter: *s29(1) Criminal Offences Act*.

If an offender is imprisoned for non-payment of a fine and pays only part of the sum specified in the warrant of commitment, the offender must be discharged from prison as soon as he or she has completed the proportion of the sentence equal to the unpaid sum, so long as the offender is not in custody for another matter: *s29(2) Criminal Offences Act*.

Distress Warrants

Where any money to be paid under an order is unpaid after 14 days, excluding Sundays, from the date of the order, then unless the Act under which the order was issued provides for imprisonment, you may issue a warrant of distress under *ss53-54 Magistrates' Courts Act* to levy the sum: *s27 Magistrates' Courts Act*.

M9.4 Whipping

Adult Offenders

Sentence of whipping may be passed on a male offender only when the law expressly provides that the offence is one punishable by whipping: *s31(2) Criminal Offences Act*.

Females may not be sentenced to whipping: *s31(1) Criminal Offences Act*.

You may sentence a male offender to be whipped once or twice, with a minimum of 14 days between the whippings. You must specify the number of strokes to be inflicted on each occasion: *s31(3) Criminal Offences Act*.

For an offender above 16 years, you may sentence him to a maximum total of 26 strokes: *s31(3) Criminal Offences Act*.

Manner of Inflicting

Before a sentence of whipping is carried out, the offender must be examined by a doctor or a Government medical assistant who must certify that the offender has no physical or mental impairment which renders him unfit for such a punishment: *s31(6) Criminal Offences Act*.

For offenders above 16 years of age, whipping must be inflicted on the breech with a cat approved by Cabinet: *s31(5) Criminal Offences Act*.
Every sentence of whipping must be carried out in the presence of a Magistrate by the chief gaoler or gaoler for the district within the prison precinct: *s31(4) Criminal Offences Act*.

Offences

You may inflict a sentence of whipping for the following offences:

- upon an offender under 16 years of age for the offence of indecent assault;
- upon an offender above 16 years of age for the offence of cruelty to children and young persons *s115(1)-(4) Criminal Offences Act*.

Most other offences for which whipping is permitted are indictable offences triable by the Supreme Court.

Punishment of Child by Whipping

For male offenders who are above the age of 7 years and below the age of 15 years, instead of inflicting any other punishment within your jurisdiction, you may order the offender to be whipped by a constable or sergeant of Police: *s30(1) Magistrates' Courts Act*.

The offender may have his parent or guardian present at the whipping if he so chooses: *s30(1) Magistrates' Courts Act*.

For an offender under 16 years, you may sentence him to be whipped once or twice, with a maximum total of 20 strokes. There must not be more than 10 strokes inflicted at any one whipping. There must be at least 14 days between whippings: *s31(3) Criminal Offences Act* and *s30(2) Magistrates' Courts Act*.

For offenders under 16 years of age, whipping must be inflicted on the breech with a light rod or cane composed of tamarind or other twigs: *s31(5) Criminal Offences Act* and *s30(2) Magistrates' Courts Act*.

Whipping is normally carried out on a child when it is a serious offence which you believe deserves punishment but imprisonment might be too harsh.

M9.5 Imprisonment

Any offender or other person committed to prison shall be subject to hard labour unless the sentence or warrant expresses the contrary: *s32 Criminal Offences Act*.

Suspended Sentences

When imposing a sentence of imprisonment, you may suspend the whole or part of the sentence for up to 3 years: *s24(3)(a) Criminal Offences Act*.

All suspended sentences must be conditional on the offender not being convicted of an offence during the period of suspension. If the offender is convicted of such an offence and that offence is punishable by imprisonment, he or she must serve the term of the suspended sentence in addition to any sentence for the other offence: *s24(3)(b)(c) Criminal Offences Act as amended by s2 Criminal Offences (Amendment) Act 2000*.

In the *Mo'unga* case, the Court of Appeal adopted as appropriate to Tonga the approach suggested *R v Petersen* [1994] 2 NZLR 533, namely, that suspension of sentence may be appropriate in the following situations:

> "(i) Where the offender is young, has a previous good record, or has had a long period free of criminal activity.
> (ii) Where the offender is likely to take the opportunity offered by the sentence to rehabilitate himself or herself.
> (iii) Where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, the presence of provocation, or coercion by a co-offender.
> (iv) Where there has been co-operation with authorities." cited with approval *in Tukuafu v Police* [2001] TOSC 27 Crim App No. 016 01.

For a discussion of the factors to take into account when determining whether a suspended sentence would be appropriate, see *Rex v Motulalo* Crim App No. 02 of 2000.

When sentencing a first offender who has committed an offence solely against property, the Court should consider a sentence other than imprisonment. In particular, when a young offender is convicted of any offence, the Court should strive to avoid imprisonment, although exceptions to these general provisions exist: See *'Eukaliti v Police* [1994] Crim App No. 510/94. See also *Sailosi v R* TOCA Crim App No. 4/1991 and *Lausi'i and Tauki'uvea v R* TOCA Crim App No. 3/1991.

See *Mafi & Latu v R* TOCA Crim App No. 6/1991 for the proposition that imprisonment should not be the first choice, particularly when full compensation has been paid.

In special circumstances you may release the offender from serving the suspended sentence after another conviction and you may extend the original period of suspension for a maximum of 1 year: *s24(e) Criminal Offences Act* as added by *s2 Criminal Offences Amendment Act 2000*.

For example, when an accused has made significant progress in reforming his or her life it may constitute special circumstances, as when a child returns to school.

When ordering a suspended sentence you may also impose other conditions, such as a requirement that the offender be under the supervision of a probation officer or other responsible member of the community: *s2 adding s24(3)(d) Criminal Offences (Amendment) Act 1999*.

If a breach of the conditions contained in the suspended sentence order occurs, upon application the Court may revoke the recission of the suspended sentence: *s2 adding s24(3)(d) Criminal Offences (Amendment) Act 1999*.

M9.6 Death

Sentences of death are only for indictable offences triable by the Supreme Court.

M9.7 Probation

While not strictly a form of punishment under the *Criminal Offences Act*, probation may be used in certain instances.

Where you are of the opinion that it would be inappropriate to inflict any punishment, or only a nominal punishment would be appropriate, you may make an order for the discharge of the offender, conditionally on his or her entering into a recognizance: *s198 Criminal Offences Act*.

You may form the opinion that probation would be appropriate based on:

- the character, antecedents, age, health or mental condition of the person charged;
- the trivial nature of the offence; or
- the extenuating circumstances under which the offence was committed: *s198 Criminal Offences Act*.

"It has been stated many times that probation is not a soft option and neither is it a penalty for the Court to make when it can think of no other. It is certainly not the penalty to pass just because the offence is not serious. If that was the Magistrate's view, he should have ordered a small fine or discharged the accused." *Dhayananadan v Police* [1999] TOSC 15; CR APP 030 99.

Recognizance / Probation Order

The recognizance (probation order) must require that the offender be of good behaviour and that he or she must appear for sentence when called at any time specified in the order, up to a maximum of 3 years: *s198 Criminal Offences Act*.

In a probation order, you may order:

- the offender be under the supervision of a person named in the order for the duration of the recognizance;
- the offender's place of residence;
- the offender abstain from alcohol; and
- other conditions to secure supervision: *s199 Criminal Offences Act*.

When making a probation order, you must furnish the offender a notice in writing, stating in simple terms the conditions he or she is required to observe: *s200 Criminal Offences Act*.

M9.8 Liability of Guardian for Costs

You may order that the parent or guardian of any child offender, who is proved or appears to be above 7 years of age and below 15 years of age, pay costs or costs and compensation to the complainant: *s29 Magistrates' Courts Act*.

In such cases, the parent or guardian shall have the opportunity to be heard and provide evidence in his or her defence before you order any payment: *s29 Magistrates' Courts Act*. If such costs or costs and compensation are not paid by the parent or guardian within 14 days from the date of the order, you may issue a warrant of distress: *s29 Magistrates' Courts Act*.

N:

APPEALS

N1 Right of Appeal

Any party has the right to appeal to the Supreme Court a decision, sentence or order of a Magistrate made in a civil case or criminal case tried summarily in Magistrates' Court: *s74 Magistrates' Courts Act*.

Any party to any appeal to the Supreme Court has a further right of appeal on a point of law to the Court of Appeal if it has the permission ("leave") of the Supreme Court or Court of Appeal: *s74(2) Magistrates' Courts Act* as added by *s8 Magistrates' Courts Amendment Act 24 of 1990*.

N2 Commencement of an Appeal

To begin an appeal an appellant must, within 10 days after you have given your decision, provide to you and the other party written notice of his or her intention to appeal the decision and state the general grounds of the appeal. At this time, the appellant must also pay the prescribed fee to the clerk: *ss75(1)(2) Magistrates Court Act*.

N3 Procedure

Once an appeal against your decision has begun, you still have a role to play before the case is dealt with by the Supreme Court.

N3.1 Bail

Once the appellant has given notice and paid the appeal fee, bail may be allowed or refused at your discretion. The appellant may appeal, by way of petition, any refusal of bail to the Supreme Court within 14 days of your refusal: *s75(3) Magistrates' Courts Act*.

A person who has been convicted of and sentenced to imprisonment for a criminal offence and who has appealed or applied for leave to appeal against sentence or conviction must be granted bail if you are satisfied that:

- there is a reasonable prospect of the appeal succeeding;
- the appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served; and

- there are substantial grounds for believing that, if released on bail (with or without conditions) the person will surrender to custody without committing any offence while on bail: *s4B (1) Bail Act* as added by *s3 Bail Amendment Act 14 of 1991*.

In making the decision on whether to grant bail to an appellant you must have regard to all the relevant circumstances and particularly to:

- the nature of the offence and length of sentence;
- the grounds of appeal;
- the character, antecedents, associations and community ties of the person; and
- the appellant's record in surrendering to custody at trial and on other occasions: *s4B(2) Bail Act* as added by *s3 Bail Amendment Act 14 of 1991*.

Recognizance

If you allow bail, you must require the appellant to enter into a recognizance in Form 17 of the Schedule to the *Magistrates' Courts Act* within 14 days from the date of your decision being appealed. This recognizance must require the appellant to appear and prosecute his or her appeal before the Supreme Court and to pay any costs and abide by any orders of the Supreme Court: *s76 Magistrates' Courts Act*.

As part of the recognizance, you may or may not require a surety or sureties: *s76 Magistrates' Courts Act*.

Once the recognizance has been entered into, the execution of your decision must stay until the appeal has been disposed of, and if the appellant is in custody, you must liberate him or her: *s76 Magistrates' Courts Act*.

N3.2 Documents

Upon the appellant fulfilling the required obligations, the clerk must forward to the Registrar of the Supreme Court the following:

- the appellant's notice of appeal;
- the recognizance entered into by the appellant; and
- a correct transcript of all proceedings in the case in Magistrates' Court: *s77 Magistrates' Courts Act*.

N4 Appeal at Supreme Court

Once the appeal reaches the Supreme Court, the Registrar of the Supreme Court gives to the parties of the date fixed for the hearing of the appeal: *s78 Magistrates' Courts Act*.

N4.1 Conduct of Appeal

Evidence

The decision given by the Supreme Court on appeal shall be on the written evidence given in the lower Court which must be forwarded to the Registrar of the Supreme Court by the clerk. The Supreme Court may, in its discretion, examine any or all of the witnesses from the original hearing and, on good cause being shown by either party, may admit new evidence: *s79 Magistrates' Courts Act*.

Appeals Decided on Merits

The decision of the Supreme Court must be on the merits of the case only, not because of a defect in any of the proceedings: *s81 Magistrates' Courts Act.*

The improper admission or rejection of evidence at the firt trial is not of itself, grounds for a new trial or reversal of any decision, if it appears to the appellate Court that independently of the evidence objected to or rejected, there was sufficient evidence to justify the decision already made: *s165 Evidence Act*.

Judgment

At appeal, the Supreme Court may:

- affirm, reverse or amend your decision;
- remit the case with their opinion thereon to you; or
- may make any other order (including as to costs) as it thinks just, exercising any power that the Magistrates' Court could have exercised: *s80(1) Magistrates' Courts Act.*

If the appellant is acquitted in a criminal appeal, the Supreme Court must order the appeal fee to be refunded to the appellant: *s80(2) Magistrates' Courts Act*.

Upon the decision of the Supreme Court, the Registrar must transmit to you a certificate in Form 18 of the Schedule to the *Magistrates' Courts Act*. This certificate authorises the carrying out of the decision and allows for the issuance of any warrant of distress or commitment which may be required: *s83(1) Magistrates' Courts Act*.

O:

OFFENCES

O1 Introduction

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

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
- a maximum sentence you may pass if the accused is found guilty.

O1.1 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.

O1.2 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 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.

O1.3 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.

O1.4 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 of the particular offence. Imprisonment should be used only for the most serious breaches and where an alternative sentence is not appropriate.

O1.5 Sample Offence Planning Sheet

On the next page is a sample of an offence planning sheet you may wish to practise with.

Offence

Section

Description

Elements

Commentary

Maximum Sentence

Common Assault

Section

s112 Criminal Offences Act (Cap. 18)

Description

Any person is guilty of an offence, who wilfully and without lawful justification:

- strikes at or actually hits another person with his or her hand or with anything held in the hand;
- seizes or tears the clothes of another person;
- pushes, kicks, or butts another person;
- spits or throws liquid or any substance on or at another person; or
- sets a dog on another person;
- applies or attempts to apply force to another person directly or indirectly;
- threatens by any act or gesture to apply force to another person,

if the person making the threat has or causes the other to believe on reasonable grounds that he or she has the present ability to effect his or her purpose.

Elements

Every element (i.e. numbers 1-6 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused wilfully struck at or actually hit another person with his or her hand or with some object held in the hand;

or

4. The accused seized or tore the clothes or another person;

or

4.The accused punched, kicked or butted another person;

or

4. The accused spat or threw liquid or any other substance on or at another person;

or

4. The accused set a dog on another person;

or

4. The accused applied or attempted to apply force to another person, directly or indirectly;

or

4. The accused threatened (by any act or gesture) to apply force to another person:

5. The accused caused the person to whom the threat or strike, force, seizure, punch , kick, spit, liquid or dog was aimed at, to believe on reasonable grounds that he or she had the present ability to effect his or her purpose.

6. The accused had no lawful justification for his or her act.

Commentary

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.

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.

Wilfully

"Willfully" is an in important element of this offence. The prosecution will need to prove the accused did his or her actions 'wilfully' and not by mistake or accident.

Without lawful justification

The prosecution will need to provide evidence that the accused did not have any lawful reason for his or her actions.

Defences

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

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

Maximum Sentence

$500 fine or in default of payment, one year imprisonment.

Theft

Section

s143, 145 Criminal Offences Act (Cap. 18)

Description

Theft is the dishonest taking without any colour of right of anything capable of being stolen with intent either:

- to deprive the owner permanently of such thing; or
- to deprive any other person permanently of any lawful interest possessed by him or her in such thing,

with the intention of converting such thing to the use of any other person without the consent of the owner or person possessing the property.

Elements

Every element (i.e. numbers 1-8 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused took anything capable of being stolen;

5. The accused did this without the consent of the owner;

6. The accused did this with the intent to either:
   - permanently deprive the owner of the thing; or
   - permanently deprive any other person of their lawful interest in the thing;

7. The accused did this dishonestly and without colour of right;

8. The accused did this with the intention of converting the thing to the use of any other person without the consent of the possessor of the property.

Commentary

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.

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.

Things capable of being stolen

Section *144* defines those things which are capable of being stolen.

The things capable of being stolen are:

- every animate thing which is the property of any person;
- any inanimate thing if it is moveable or capable of being made moveable and has been made moveable even though it has been made moveable only to steal it.

Taking

Theft requires the moving of the property by the accused. If the accused did not move the property in the slightest degree, then the offence does not amount to theft, although it may be attempted theft.

Colour of right

If the property which the accused is charged with stealing was taken by the accused by mistake or in the honest belief that he or she had a right to it the accused cannot be convicted of theft.

Permanently deprive

If the accused had the intention of returning the thing taken to the owner, he or she cannot be convicted of theft.

The prosecution must show that the accused intended at the time of he or she took the thing of keeping the thing or using it as his or her own. It is the accused intention that is important.

If the accused later sells or gives the property away, he or she has used

Ownership
Whether the owner is named or not, ownership of the property must be proved by the prosecution as an essential element of the offence.

Consent
The prosecution must also prove that the owner did not consent to the thing being stolen.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence i.e. colour of right (see above)..

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

Maximum Sentence

If the value of the property stolen does not exceed $500, the maximum period of imprisonment is 2 years: *s145 Criminal Offences Act.*

Upon conviction for theft, in addition to any other punishment, you may order any male person to be whipped in accordance with *s31 Criminal Offences Act*.

Taking Things According to Tongan Custom

Section

s147 Criminal Offences Act (Cap. 18)

Description

Every Tongan is guilty of an offence who, following the former Tongan custom, takes from one of his or her relatives anything capable of being stolen without the permission of its owner and with intent to deprive the owner permanently deprive of such thing.

Elements

Every element (i.e. numbers 1-8 below) 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 is alleged to have taken place;
3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused is a Tongan;
5. The accused took anything capable of being stolen from one of his or her relatives;
6. The accused was following the former Tongan custom;
7. The accused did this without the permission of the owner;
8. The accused did this with the intent to permanently deprive the owner of the thing.

Commentary

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.

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.

Ownership

The prosecution must prove that the owner of the goods which were taken, were owned by a relative of the accused.

Consent

The prosecution must also prove that the owner did not consent to the thing beng stolen.

Permanently deprive

If the accused had the intention of returning the thing taken to the owner, he or she cannot be convicted of theft.

The prosecution must show that the accused intended at the time of he or she took the thing of keeping the thing or using it as his or her own. It is the accused intention that is important.

If the accused later sells or gives it away, he or she has used it as his or her own.

Colour of right

If the property which the accused is charged with stealing was taken by the accused by mistake or in the honest belief that he or she had a right to it the accused cannot be convicted of theft.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence such as colour of right, see below.

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

Maximum Sentence

The punishments under *s147* are the same as those for theft.

If the value of the property stolen does not exceed $500, the maximum period of imprisonment is 2 years: *s145 Criminal Offences Act.*

Upon conviction for theft, in addition to any other punishment, you may order any male person to be whipped in accordance with *s31 Criminal Offences Act*.

Receiving

Section

s148(1) Criminal Offences Act (Cap. 18)

Description

Any person is guilty of an offence who receives any property knowing or believing it to be stolen or obtained in any way under circumstances which amount to a criminal offence.

Elements

Every element (i.e. numbers 1-5 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused received any property;

5. The accused knew or believed the property to be stolen or obtained in any way which amounted to a criminal offence.

Commentary

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.

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.

Relation to principal offender
An accused may be convicted of the offence of receiving property whether or not the principal offender has been convicted or is not otherwise amenable to justice: *s148(3) Criminal Offences Act*.

Receiving
For the purposes of all laws relating to receivers or receiving, a person shall be treated as receiving property if he dishonestly undertakes or assists in its retention, removal, disposal or realisation, or if he or she arranges to do so: *s148(5) Criminal Offences Act*.

Intention
The prosecution will need to provide evidence that the accused knew or believed the property had been stolen or obtained in any way which amounted to a criminal offence.

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

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

Maximum Sentence

The punishment for receiving is the same as the punishment for theft.

If the value of the property stolen does not exceed $500, the maximum period of imprisonment is 2 years: *s145 Criminal Offences Act.*

Upon conviction for theft, in addition to any other punishment, you may order any male person to be whipped in accordance with *s31 Criminal Offences Act*.

Trespass

Section

s188 Criminal Offences Act

Description

Any person is guilty of an offence who, without lawful excuse, enters upon the tax allotment, plantation, garden or other land belonging to or in possession of another person.

The prosecution of this offence must be initiated by the owner or occupier against whom the trespass was committed.

Elements

Every element (i.e. numbers 1-6 below) 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 is alleged to have taken place;
3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused trespassed upon a tax allotment, plantation, garden or other land;
5. The land belonged to or was in the possession of another person;
6. The accused had no lawful excuse for entering the land.

Commentary

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.

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.

Trespass
A trespasser is anyone who enters onto the property of another without being on lawful business.

Owner or occupier
The person who complains to the Police and/or requests to have charges laid against the accused for trespass on the property must either own the property or being in legal possession of it.

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

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

Maximum Sentence

For simple trespass the maximum fine is $50, half of which must be paid to the owner or occupier of the land where the trespass occurred and the other half must be paid to the Government.

If the trespass caused damage to crops, the offender may be ordered to pay a maximum of $200 compensation in addition to any fine. The compensation shall be paid to the owner or occupier of the land, or in the case of the Government, to the Treasury: *s148(2) Criminal Offences Act.*

If the offender does not pay the fine, compensation and cost of summons within the time specified at the time of conviction, you may commit the offender to prison for a maximum of 4 months, unless the amount be paid sooner: *s148(2) Criminal Offences Act*.

Defamation

Section

ss2,5 Defamation Act (Cap. 33)

Description

Any person is guilty of defamation who speaks, writes, prints, or otherwise puts into visible form any matter:

- damaging to the reputation of another; or
- causing another to be exposed to hatred, contempt or ridicule or causing him or her to be shunned.

Repetition by any person of defamatory matter concerning another also constitutes defamation of character.

All criminal proceedings for *s5 Defamation Act* shall be by way of summons and preliminary inquiry before a Magistrate at the instance of the Attorney General: *s8 Defamation Act*.

Elements

Every element (i.e. numbers 1-4/5 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused spoke, wrote, printed or otherwise put into a visible form any matter;

5. The matter was damaging to the reputation of another;

or

4. The accused spoke, wrote, printed or otherwise put into a visible form any matter;

5. The matter caused another to be exposed to hatred, contempt,

ridicule or caused the victim to be shunned.

or

4. The accused repeated defamatory matter concerning another person.

Commentary

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.

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.

Truth of matter

In criminal proceedings for defamation, proving the truth of the matter does not entitle the accused to be acquitted unless it is also proved that the publication of the matters was done for the public benefit: *s7 Defamation Act*.

Absolutely privileged statements

No criminal or civil proceedings for defamation of character may be maintained in respect of any matter stated:

- in any petition to the King or Legislative Assembly;
- in the course of any proceedings in the Legislative Assembly;
- in the course of judicial proceedings before any Court in Tonga;
- in any communication made as part of official duties by any official of the Government to the Privy Council, Cabinet or another Government official: *s9 Defamation Act*.

Partially privileged statements

No criminal or civil proceeding for defamation of character may be maintained in respect of any communication so long as the communication was made bona fide:

- by a person in discharge of a legal, moral or social duty;
- in reference to a matter in which the person making and the person receiving the communication have an interest; and
- the person making the communication was not actuated by anger, ill-will or other improper motive.

Publication in periodicals

No criminal or civil proceedings for defamation may be maintained in respect of publications made contemporaneously and without malice in any periodical published at intervals not exceeding one month of:

- fair and accurate reports of:
  - proceedings in the Legislative Assembly;
  - public proceedings heard in any Court having judicial authority;
  - proceedings of a public meeting:
- fair comments upon facts truly stated and in reference to matters of public interest: *s12 Defamation Act*.

This defence may not be used:

- to authorise the publication of any blasphemous or indecent matter;
- if it is proved that the defendant has been requested to insert in the periodical a reasonable letter or statement of contradiction or explanation and has refused or neglected to do so: *s12 Defamation Act*.

Procedure on alleged privileged statements

Whether or not a statement is privileged either partially or absolutely is to be decided by you at trial: *s11(1) Defamation Act*.

If you decide the statement is absolutely privileged, you must enter judgment for the defendant: *s11(2) Defamation Act*.

If you decide the statement is partially privileged, then unless there is evidence that the defendant was actuated by anger, ill-will or other improper motive, you must enter a verdict for the defendant: *s11(3) Defamation Act*.

Defences

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

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

Maximum

The maximum punishment for defamation of any person who is not

Sentence	a member of the Royal Family or an otherwise enumerated dignitary, is a fine not exceeding $100 and in default of payment, imprisonment for a term not exceeding 6 months.

Drunkenness

Section

s3(j)(k) Order in Public Places Act (Cap. 37)

Description

Any person is guilty of an offence, who:

- is found drunk in any public place; or
- in any public place is drunk and incapable, or
- is drunk and behaves in a disorderly manner in a public place.

Elements

Every element (i.e. numbers 1-4 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused was found drunk in a public place;

or

4. The accused was drunk and incapable in a public place;

or

4. The accused was drunk and behaved in a disorderly manner in the public place.

Commentary

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.

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.

Public place
"Public place" means any public way and any building, place or vessel to which for the time being the public are entitled or permitted to have access either without 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 meeting or assembly or as an open Court: *s2 Order in Public Places Act.*

The prosecution must prove by evidence that it was a public place that the accused was in when drunk. Often a description of the place may be sufficient because you may know it. Otherwise it needs to be proved hat the place was public in nature.

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

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

Maximum Sentence

$100 fine and in default of payment 4 months imprisonment

Grievous Bodily Harm

Section

s106 Criminal Offences Act

Description

Any person is guilty of an offence who wilfully and without lawful justification causes grievous harm to any person in any manner or by any means.

Elements

Every element (i.e. numbers 1-6 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused caused grievous harm to a person in any manner or by any means;

5. The accused did this wilfully;

6. The accused did this without lawful justification.

Commentary

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.

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.

Grievous harm
Grievous harm means:

- any harm endangering life;
- the destruction or permanent disabling of any external or internal organ, member or sense;
- any severe wound;
- any grave permanent disfigurement; or

the transmitting to another person by any means of human immunodeficiency virus (HIV): *s106(2) Criminal Offences Act*.

Degree of harm
It is vital that you have evidence to establish the degree of harm caused. This is usually medical evidence from a doctor. You may then decide whether it reaches the level required for this offence.

If the degree of harm does not reach the required level for this offence, consider lesser and included offences, under *ss107, 112 Criminal Offences Act*.

Wilfully
The prosecution will need to show that the accused caused the grievous harm wilfully and not by mistake or accident.

Lawful justification
Because this is an element of the offence, the prosecution will need to prove the accused did not have lawful justification for his or her actions.

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

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

Maximum Sentence

10 years imprisonment.

Bodily Harm

Section

s107 Criminal Offences Act

Description

Any person is guilty of an offence who wilfully and without lawful justification causes harm to any person in any manner or by any means whatsoever.

Elements

Every element (i.e. numbers 1-5 below) 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 is alleged to have taken place;
3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused caused harm to a person in any manner or by any means;
5. The accused did this wilfully;
6. The accused did this without lawful justification.

Commentary

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.

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.

Harm
Harm for this offence means:

- any injury which seriously or permanently injures health or is likely so to injure health;
- any injury involving serious damage to any external or internal organ, member or sense, short of permanent disablement;
- any wound which is not severe; or
- any permanent disfigurement which is not of a serious nature: *s107(2) Criminal Offences Act*.

Degree of harm
It is vital that you have evidence to establish the degree of harm caused. This is usually medical evidence from a doctor. You may then decide whether it reaches the level required for this offence.

If the degree of harm does not reach the required level for this offence, consider lesser and included offences under *s112 Criminal Offences Act*.

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

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

Maximum Sentence

5 years imprisonment.

Assault Obstruction under s113(a)

Section

s113(a) Criminal Offences Act

Description

Any person is guilty of an offence who assaults any person with intent to commit an offence, or to resist or prevent the lawful apprehension or detention of him or herself or of any other person, or to rescue any person from lawful custody.

Elements

Every element (i.e. numbers 1-5 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused used physical force on another person;

5. The accused intended to commit an offence;

or

4. The accused used physical force on another person;

5. The accused resisted or prevented the lawful apprehension of himself, herself or any other person for an alleged offence.

or

4. The accused used physical force on another person;

5. The accused attempted to rescue another from lawful custody.

Commentary

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.

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.

Intent

It is important to remember that the assault must be done with the intent to commit an offence, or to resist any persons apprehension or detention, or to rescue any person from lawful custody. The prosecution will need to prove the accused intended at least one of the three intentions described.

It is the intention of the accused that is important - you may have to infer this from the circumstances.

Defences

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

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

Maximum Sentence

$500 fine and 1 year imprisonment.

Assault Obstruction under s113(b)

Section

s113(b) Criminal Offences Act.

Description

Any person is guilty of an offence who assaults, obstructs or resists any Police officer acting in the execution of his or her duty or any person in aid of that officer.

Elements

Every element (i.e. numbers 1-4 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused assaulted, obstructed or resisted any Police officer acting in execution of his or her duty;

or

4. The accused assaulted, obstructed or resisted any person aiding the officer.

Commentary

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.

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.

Defences

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

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

Maximum Sentence

Maximum $500 fine and 1 year imprisonment.

Assault Obstruction under s113(c)

Section

s113(c) Criminal Offences Act

Description

Any person is guilty of an offence who assaults, obstructs or resists any person acting in the lawful execution of any process against any property or with intent to rescue any movable property taken under that process or under any lawful distress.

Elements

Every element (i.e. numbers 1-4 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused assaulted, obstructed or resisted any person acting in the lawful execution of any process against any property;

or

4. The accused assaulted, obstructed or resisted any person with the intent to rescue any movable property taken under a lawful process or under any lawful distress.

Commentary

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.

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.

Defences

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

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

Maximum Sentence

$500 fine, 1 years imprisonment, or both

Housebreaking

Section

s173 Criminal Offences Act

Description

A person is guilty of an offence who:

- enters any building or part of a building as a trespasser and with intent to commit any crime; ***or***
- having entered any building or part of a building as a trespasser, he or she committed or attempted to commit any crime in the building or that part of it.

Elements

Every element (i.e. numbers 1-5 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused entered any building or part of a building;

5. The accused entered with an intent to commit any crime;

or

4. The accused entered any building or part of a building;

5. The accused committed or attempted to commit any crime in the building or part of it.

Commentary

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.

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.

Building

Building includes also an inhabited vehicle or vessel and applies to any vehicle or vessel at times when the inhabitant is or is not physically present: *s173(2) Criminal Offences Act*.

Enters

"Enters" means the putting of any part of the body of the accused or any part of any instrument used by him or her inside the building: *s173(3) Criminal Offences Act*.

Defences

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

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

Maximum Sentence

10 years imprisonment.

Robbery

Section

s154 Criminal Offences Act

Description

Every person is guilty of an offence who takes anything capable of being stolen through violence or threats of injury to the owner or person in lawful possession of the thing taken or to the property of the person so as to put him or her in fear and thereby overcome his or her opposition to the taking.

Elements

Every element (i.e. numbers 1-5 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused took anything capable of being stolen;

5. The accused used violence or threats of injury to the owner or person in lawful possession of the thing taken, so as to put him or her in fear and thereby overcome his or her opposition to the taking.;

or

4. The accused took anything capable of being stolen;

5. The accused used violence or threats of injury to any property of the owner or person in lawful possession so as to put him or her in fear and thereby overcome his or her opposition to the taking.

Commentary

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.

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.

Anything capable of being stolen

See the definition of "things capable of being stolen" in *s144 Criminal Offences Act*.

Violence or threat of injury

There must be actual violence or threat of injury. This violence may be to the owner, the person in lawful possession of the property or to the actual property of the person concerned.

The violence must put the owner or person in lawful possession in actual fear such as to overcome his or her opposition to the taking of the property.

Defences

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

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

Maximum Sentence

10 years imprisonment.

Embezzlement

Section

s158 Criminal Offences Act

Description

Any person is guilty of an offence who, employed as or acting in the capacity of a clerk or servant, fraudulently converts to his or her own use or benefit or the use or benefit of another any money, valuable security or property or any part thereof which was delivered to or received by him or her on behalf of his or her master or employer.

This section does not apply to persons in the public service.

Elements

Every element (i.e. numbers 1-7 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused was employed or acting in the capacity of a clerk or servant;

5. The accused converted to his or own use or benefit or to the use or benefit of any other person any money, valuable security or property or part thereof;

6. The money or property in question was delivered to or received by the accused on behalf of his or her employer;

7. The accused did this fraudulently.

Commentary

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.

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.

Valuable security

"Valuable security" means any document which entitles or is evidence of the title of any person to any thing or proprietary right of any kind. For the *Criminal Offences Act*, a valuable security is deemed to be of the same value as the title to the thing or proprietary right of which it is evidence: *s2 Criminal Offences Act*.

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 *Denning*[1962] NSWLR 175.

Defences

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

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

Maximum Sentence

7 years imprisonment.

Because this offence involves a breach of trust, unless exceptional mitigating factors are present, conviction should always result in a term of imprisonment.

Falsification of Accounts

Section *s159 Criminal Offences Act*

Description Every person is guilty of an offence who, while employed as or acting in the capacity of a clerk, officer or servant, in the service of the Government or not, wilfully and with intent to defraud:

- destroys, alters or falsifies any book, valuable security, account or document which belongs to his or her employer;
- makes or concurs in making any false entry in any such book or document; ***or***
- omits or alters or concurs in omitting or altering any material particular in any such book or document.

Elements **Every element (i.e. numbers 1-7 below) 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 is alleged to have taken place;
3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused was employed as or acting in the capacity of a clerk, officer or servant, in the service of Government or a private employer;
5. The accused destroyed, altered or falsified any book, valuable security, account or document belonging to his or her employer;
6. The accused did this wilfully;

7. The accused did this with intent to defraud.

or

4. The accused was employed as or acting in the capacity of a clerk, officer or servant, in the service of Government or a private employer;

5. The accused made or concurred in making any false entry in any such book or document;

6. The accused did this wilfully;

7. The accused did this with intent to defraud.

or

4. The accused was employed as or acting in the capacity of a clerk, officer or servant, in the service of Government or a private employer;

5. The accused omitted or altered or concurred in omitting or altering any material particular in any such book or document;

6. The accused did this wilfully;

7. The accused did this with intent to defraud.

Commentary

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.

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.

Evidence

Proving this offence will almost always require production of the document in question. For exceptions to this rule, see the evidence chapter.

Mens rea

There are two mental elements required in this offence.

For example, if an accused altered a document based on wrong information given to him, he may do so wilfully but without the intention to defraud.

Intention to defraud.

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 *Denning*[1962] NSWLR 175.

Defences

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

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

Maximum Sentence

7 years imprisonment.

Fraudulent Conversion of Property

Section

s162 Criminal Offences Act.

Description

Any person is guilty of an offence, who:

- having had delivered to him or her anything capable of being stolen on loan or on hire or in order that he or she may do work upon such thing; or
- being entrusted with anything capable of being stolen in order that he or she retain the property in safe custody or apply, pay or deliver for any purpose or to any person the property or part thereof; or
- having received for or on account of any other person anything capable of being stolen,

fraudulently converts to his or her use or own benefit or to the use or benefit of any other person the property or part or proceeds thereof.

Elements

Every element (i.e. numbers 1-6 below) 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 is alleged to have taken place;

3. There must be a place where the offence was alleged to have been committed;

Specific

4. The accused had delivered to him or her, anything capable of being stolen on loan or on hire or in order to do work upon the thing;

or

4. The accused was entrusted with anything capable of being stolen in order that he or she retain in safe custody, apply, pay or deliver the property or part or proceeds thereof;

or

4. The accused received for or on account of any other person anything capable of being stolen;

5. The accused converted the property or part or proceeds thereof to his or her own use or benefit or to the use or benefit of another;

6. The accused did this fraudulently.

Commentary

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.

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.

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 *Denning*[1962] NSWLR 175.

Defences

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

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

Maximum Sentence

7 years imprisonment.
