

# Niue High Court Bench Book

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# **PJEP BENCHBOOK PROJECT 2003/2004**

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# 1:

## THE LEGAL CONTEXT

This part generally describes the legal context in which you work. It:

- explains the Constitutional and Court structure in Niue;
- describes the different types of law that you apply.



# 1 The Constitutional Framework of Niue

## 1.1 Niue's *Constitution*

Niue's *Constitution* came into force on October 19, 1974 and is found in the *Niue Constitution Act 1974*.

The *Constitution* details the basic elements of Niue's system of government by defining:

- the roles, responsibilities and powers of the Executive, Parliament and the Judiciary;
- the organization and structure of the legal system;
- the requirements of citizenship and details related to finance, land and leadership.

The *Constitution* gives effect to the doctrine of the Separation of Powers.

### **The Doctrine of the Separation of Powers**

This doctrine states that there should be three distinct and separate branches of government:

1. the Executive: administrator and policy maker;
2. the Parliament (Legislature): law maker;
3. the Judiciary: interpreter of law.

Each branch of government checks the roles and functions of the other branches. This checking maintains the balance of power between the three branches and does not allow the Executive to assume too much power.

The **independence of the Judiciary** is an important element of the doctrine of Separation of Powers and is vital for maintaining the balance of power.

### **Independence of the Judiciary**

Although Parliament makes laws and the Executive allocate funds, premises, supporting staff and services for the Judiciary, the Judiciary must be independent and free from all political or other influence in carrying out its duties and in making decisions.

The independence of the Judiciary is protected by:

- the *Constitution*;
- the process of appointment and removal of judicial officers, and their conditions of appointment; and
- immunity from civil actions.

## 1.2 The Branches of Government in Niue

### Head of State

The executive authority of Niue is vested in Her Majesty the Queen in right of New Zealand, and the Governor-General of New Zealand is accordingly the representative of Her Majesty the Queen in relation to Niue: *Art. 1 Constitution*.

### The Executive

The role of the Executive is to formulate and implement government policy.

In Niue, the Executive effectively runs and controls the affairs of the country.

The Executive and Parliament are distinct even though they have many people and positions in common.

The Executive in Niue comprises:

- the Premier; and
- the Cabinet of Ministers.

### Premier

The Premier is a member of the Niue Assembly.

He or she is elected by a majority of the members of the Assembly who are present and voting at the first meeting of the Niue Assembly after a general election.

### Cabinet

The Niue Cabinet is headed by the Premier and consists of three other ministers who are:

- from the Niue Assembly;
- nominated by the Premier with their consent; and
- appointed by the Speaker of the Assembly.

There are four members in total.

Cabinet is collectively responsible to the Assembly for the performance of the executive authority of government.

The Premier allocates which Minister will look after each government department. This includes the Minister that looks after the Justice Department and the Judiciary.

### **The Legislature (The Assembly)**

The Niue Assembly is established under *Article 16* of the *Constitution*.

The Assembly:

- has 14 members elected from village constituencies;
- has 6 members elected by persons from a common electoral role;
- is presided over by a Speaker, who is elected by Parliament;
- is dissolved every three years unless it has been dissolved earlier.

The Assembly:

- has the power to “make laws for the peace, order and good government of Niue, subject to the *Constitution*”;
- introduces and passes Bills in accordance with the *Constitution* and with the Standing Orders of the Assembly.

Bills become law only if:

- they have been debated in the Assembly and formally approved on three readings of the bill, in which 10 members of the Assembly have been present; and
- the speaker has endorsed, signed and sealed the bill after he or she is satisfied that the bill has been passed in accordance with the *Constitution* and Standing Orders of the Assembly; and
- the clerk of the Niue Assembly has countersigned the certificate on the copy of the bill in the presence of the Speaker of the Assembly:
  - ⇒ The Assembly must have a report by the Public Service Commission prior to passing a Bill which affects the Public Service Commission: *Article 32 Constitution*.
  - ⇒ Bills that affect financial measures in place in Niue cannot be passed except with the recommendation and consent of the premier: *Article 30 Constitution*.
  - ⇒ A Commission of Inquiry must be set up before the Assembly can consider bills which affect Niue Land: *Article 33 Constitution*.

The laws which are passed by the Niue Assembly are the laws which the Courts apply and interpret when dealing with the charges, complaints and disputes that are brought before them.

Note that the *Constitution* gives immunity to members of the Assembly when they are acting in their official capacity. No civil or criminal proceedings can be instituted against a member of Niue Assembly for:

- exercising their powers in conducting the business of government; or
- words spoken in the Assembly or included in a report or paper to the Assembly: *Article 24(2 & 3) Constitution*.

## **The Judiciary**

The Judiciary is the third branch of government in Niue. It:

- is an independent body which is responsible for interpreting and applying the laws made by the Niue Assembly;
- develops and interprets case law; and
- solves disputes of fact and law between individuals, and between individuals and the State.

The Judiciary comprises:

- the High Court;
- the Court of Appeal; and
- the Sovereign in Council (the Privy Council in England).

## **Local Government**

### Village Councils

The Village Councils provide governance at a local level.

Village Councils are elected under the *Village Councils Ordinance 1967* and *s. 50 Niue Act 1966*.

According to *s. 51* of the *Niue Act 1966*, Village Councils have the power to make bylaws. The bylaws, under the *Village Councils Ordinance 1967*, can relate to such things as village planning, housing, and control of animals.

Note that many of the matters that could be dealt with through village bylaws have now been legislated by the national government.



## 2 The Niue Court System

### 2.1 General Characteristics of the Niue Court System

Three Courts have jurisdiction in Niue:

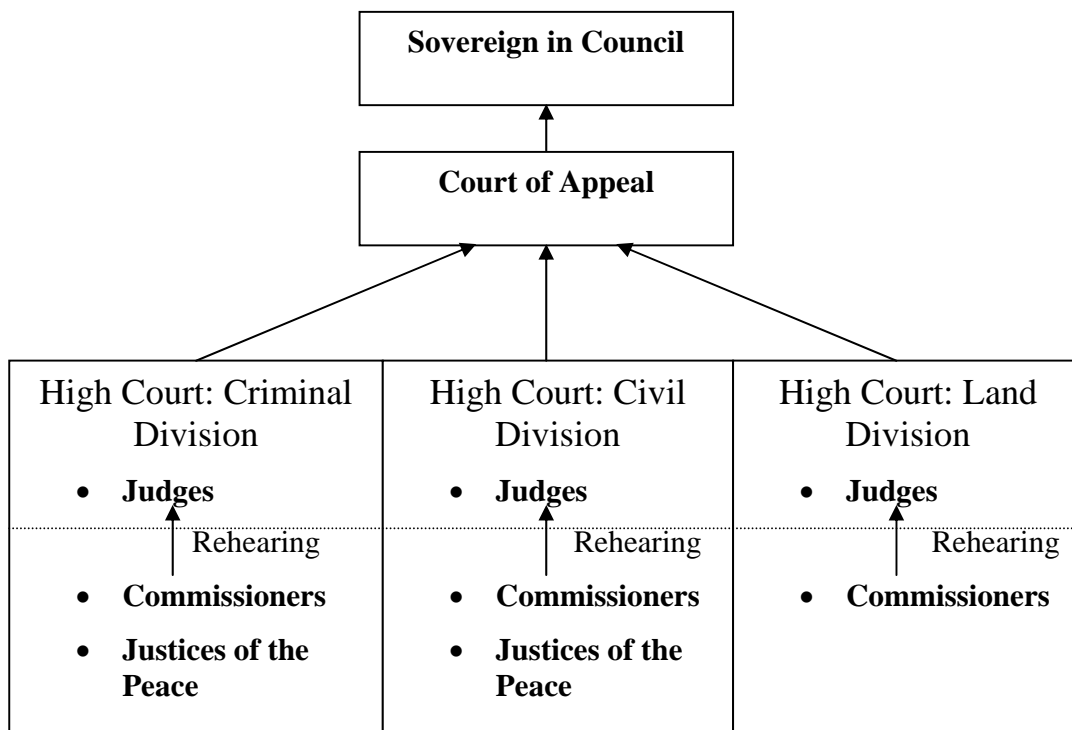
- the High Court;
- the Court of Appeal; and
- the Sovereign in Council.

The Court system is hierarchical:

- This hierarchy is essential to the Doctrine of Precedent (see Part II The Law).
- The hierarchy provides an appeal system, which allows decisions to be checked by more senior Courts. This helps prevent inconsistency within the Courts and provides a check and balance system for the fair administration of justice.

### 2.2 The Structure of the Niue Court System

Figure 1 The Structure of Niue Courts



## 2.3 A Brief Description of the Courts

### The Sovereign in Council (Privy Council)

Appeals from a decision of the Court of Appeal may be made by an aggrieved party to Her Majesty in Council. Her Majesty in Council may hear such an appeal at Her discretion, as she thinks fit: *Article 55(2) Constitution*.

The Sovereign in Council is the Queen of the United Kingdom, acting by and with the advice of the Judicial Committee of the Privy Council.

### The Court of Appeal

The Court of Appeal of Niue is a superior Court of record and was created in the 1992 amendments to the *Constitution Act*.

*Articles 55A and 55B* of the *Constitution* set out the grounds for, and manner of, appeal to the Court of Appeal.

#### Jurisdiction

The Court of Appeal may hear appeals from the High Court in both civil and criminal matters, subject to the provisions of the *Constitution: Article 55A(1) Constitution Amendment Act (No. 1) 1992*.

The Court of Appeal may hear appeals:

- where the High Court has granted leave because the question involved is one of general or public importance, or because of the magnitude of interest affected or for any other reason;
- as of right, if the High Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of the *Constitution*; and
- when they grant special leave to appeal in cases where the judgment of the High Court is declared to be final under any Act.

#### Civil Jurisdiction

The Court of Appeal has jurisdiction to automatically hear civil appeals, as of right, when a matter in dispute on appeal amounts to not less than such value as prescribed by Act.

#### Criminal Jurisdiction

A person convicted of a criminal offence before the High Court may, as of right, appeal their sentence to the Court of Appeal from any conviction by the High Court where the appellant has been sentenced to death, imprisonment for life, or to a fine or imprisonment that is not fixed by law.

## **The High Court**

The High Court of Niue is a Court of record and has original jurisdiction to hear all criminal, civil and land matters as is necessary to administer the law in force in Niue.

The High Court is divided in to **three divisions**:

- Criminal Division;
- Civil Division; and
- Land Division.

Each division of the High Court has the jurisdiction to hear and determine proceedings that, by virtue of any enactment, are to be heard and determined by that division or that, in certain circumstances are determined by the Chief Justice.

In addition to three divisions, there are also **three types of Judicial Officers** that sit in the High Court. These are:

- Judges;
- Commissioners; and
- Justices of the Peace.

Each of these Judicial Officers have different jurisdiction, as set out in Statute.

See Part 3 Introduction to the High Court, for a description of the jurisdiction.

## 3 The Law

### 3.1 Sources of Law in Niue

The laws of Niue are found in:

- the *Constitution*;
- legislation, including Acts and Regulations;
- case law decided by the Courts (known as common law).

### 3.2 The *Constitution*

The *Constitution* is found in the first and second schedules of the *Constitution Act 1974* and came into force on October 19, 1974. The first schedule contains the Niuean version and the second schedule contains the English version.

*Section 4(1) Constitution Act 1974* states that the *Constitution* is the **supreme law** of Niue. Any Statute or Regulation which is inconsistent with the *Constitution* is invalid, by virtue of *Article 28(4) Constitution*. Therefore, all other laws are to be interpreted and applied subject to the *Constitution* and, as far as practicable, in such a way as to conform with the *Constitution*.

It is Judges who interpret or decide the meaning of certain provisions in the *Constitution*, so the *Constitution* is affected by developments in the common law.

The *Constitution* and the *Constitution Act 1974* can only be amended by the Niue Assembly in accordance with the following requirements:

- on the 2 final readings of a bill to amend the *Constitution*, the bill receives affirmative votes of not less than two-thirds of the Assembly; and
- the vote of the final reading takes place at least 13 weeks after the reading that preceded it; and
- it has been submitted to a poll by persons who are entitled to vote for an Assembly in a general election and passes by:
  - ≡ two-thirds of the votes validly cast, if the bill amends or extends *ss. 2 to 9 Constitution Act 1974* or *Articles 1 to 60 Constitution*; or
  - ≡ a majority of votes validly cast for other cases; and
- the speaker is satisfied that the Bill has been passed in accordance with the *Constitution* and the Standing Orders of the Assembly and has endorsed, signed and sealed a copy of the bill; and
- the Clerk of the Niue Assembly has, in the presence of the speaker, countersigned the certified copy of the bill.

### 3.3 Legislation

Legislation is law that is passed or authorised by the Legislature (the Assembly). Legislation in Niue consists of:

- Statutes;
- Subordinate legislation, such as Regulations and Rules.

If legislation is inconsistent with the *Constitution*, it can be declared void.

Legislation is interpreted by Judges and may be affected by developments in the common law.

#### Statutes

The Statutes that apply in Niue are:

- Acts of the New Zealand Parliament, extended to Niue before 1974, that have not been repealed by the Assembly since 1974; and
- Acts of New Zealand Parliament, since 1974, that have been expressly requested and consented to by the Niue Assembly; and
- Act of the Niue Assembly since 1974.

The *Niue Act 1966* is the principal statute which applies in Niue. It sets out provisions regarding:

- the legislative and executive functions of government;
- the operation of the High Court;
- criminal offences;
- criminal procedure;
- law of evidence; and
- criminal responsibility.

The *Niue Act 1966* has been amended several times to reflect the changing needs of the law.

There are approximately 30 New Zealand Statutes that are in force in Niue by virtue of the express extension set out in the *Niue Act 1966*. *Article 36* of the *Constitution* requires that any application of a New Zealand Act to Niue after 1974 needs to be requested and consented to by resolution of the Niue Assembly.

Statutes made by the Niue Assembly, since 1974, become law in Niue when a majority of the members of the Assembly vote in favour of the bill. The bill must be endorsed and signed by the Speaker and the Clerk of the Niue Assembly.

Legislation can be found in the *Consolidated Laws of Niue 1990* and in the Statutes themselves.

## Subordinate Legislation

The power to make subordinate legislation is granted to Cabinet, who makes Rules and Regulations. Rules and Regulations of Cabinet shall have effect when they have been signed by the Premier or the Clerk of Cabinet: *Article 13 Constitution*.

## Understanding and Interpreting Legislation

It is your job, as a Commissioner or Justice of the Peace, to apply and interpret legislation.

Generally, Statutes contain a section at the start which defines the meaning of certain words and phrases. In the *Niue Act*, definitions for words are found at the beginning of each Part within the Act. If the word or phrase is not defined, then it may be given its natural and ordinary meaning.

When interpreting a word or phrase, consider:

- definitions in the Act (if any);
- a legal dictionary;
- how it has been used in the particular Act and section (i.e. the context it has been used in);
- what purpose Parliament had in passing the law.

When an Act says the Court “**may**” do something, that means the power may be exercised or not, at your discretion.

When an Act says you “**shall**” do something, this means you must. You have no choice.

You must always be aware of various amendments that have been made to the legislation. When an amendment comes into force, it will change particular sections in particular Acts. However, it may also affect the operation of other legislation.

This is especially important in Niue, where a number of amendments have been made to one piece of legislation without changes made to other legislation which is affected by the changes.

## 3.4 Common Law

Common law is the law that is made and developed by Courts. It is also called case law.

*Sections 672 and 673 Niue Act 1966* specifically provides that English common law and equity shall apply in Niue as it existed in 1840, if it is not inconsistent with the Act or the circumstances of Niue.

High Court Judges and the Court of Appeal and Privy Council can make and develop case law:

- where no legislation exists to deal with matters in that case; or
- by interpreting existing legislation.

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

### **Doctrine of Precedent**

Commissioners and Justices **must** follow decisions of High Court Judges and the Court of Appeal and Privy Council, unless the material facts in the case are different. This means cases of similar type should be decided in the same way, giving certainty to the law.

It is through this process of making decisions based on previous decisions that the body of common law has been built up.

When there is no relevant Niuean decision, then New Zealand or English cases may be considered.

## **3.5 Customary Law**

Custom is not a direct source of law in Niue with regards to civil and criminal matters, although the *Constitution* and *Niue Act 1966* does place some emphasis on customary values and practices. It should be noted that if custom is inconsistent with the written law it will not apply.

## 2:

# JUDICIAL CONDUCT

This part sets out what being a Commissioner or Justice of the Peace in the High Court requires, and describes expected behaviour in and out of Court. It:

- sets out your judicial oath and describes the well-established ethical principles applying to all judicial officers;
- gives guidance on managing proceedings;
- outlines the roles of Chair and panel members.





# 1 Ethical Principles

As a Commissioner or Justice of the Peace of the High Court, you have sworn the following oath on appointment:

“I swear by Almighty God that I will well and truly serve Her Majesty as the Head of State of Niue, Her heirs and successors, in accordance with the Constitution and the law, in the office of (Commissioner or Justice of the Peace); and I will do right to all manner of people, without fear or favour, affection or ill will. So help me God.”

The judicial role is a public one and your conduct will be under public scrutiny. The respect and confidence of the public in the justice system requires that Commissioners and Justices of the Peace respect and comply with the law, and conduct themselves in a manner which will not bring themselves or their office into disrepute.

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

## 1.1 “Well and Truly Serve”

### Diligence

You should be diligent in the performance of your judicial duties.

This means you should:

- devote your professional activity to your judicial duties, which include not only presiding and sitting in Court and making decisions, but other judicial tasks essential to the Court’s operation;
- bring to each case a high level of competence and be sufficiently informed to provide adequate reasons for each decision;
- take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for your role;
- not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in colleagues.

Decisions should be delivered as quickly as circumstances permit. Always try to do this immediately. This means you must:

- be familiar with common offences, jurisdiction and procedure; and
- prepare before sitting in Court.

## 1.2 “In Accordance with the *Constitution* and the Law”

### Lawfulness

You should act within the authority of the law.

This means you should **not**:

- take into account irrelevant considerations when making your decisions - the exercise of judicial discretion should only be influenced by legally relevant considerations;
- abdicate your discretionary powers to another person – it is for **you** to decide.

## 1.3 “Do Right”

### Integrity

You should strive to conduct yourself with integrity so as to sustain and enhance public confidence in the Judiciary.

This means you should:

- make every effort to ensure that your conduct is above reproach in the view of reasonable, fair minded and informed persons; and
- encourage and support your judicial colleagues to observe this high standard.

## 1.4 “All Manner of People”

### Equality

You should conduct yourself and proceedings before you so as to ensure equality according to the law.

This means you should:

- carry out your duties with appropriate consideration for all persons (for example, parties, witnesses, Court personnel and judicial colleagues) without discrimination;
- strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background;
- avoid membership in any organisation that you know currently practices any form of discrimination that contravenes the law;
- in the course of proceedings before you, disassociate yourself from and disapprove of clearly irrelevant comments or conduct by Court staff, counsel, or any other person subject to your direction. Improper conduct can include sexist, racist, or discriminatory language or actions which are prohibited by law.

## **1.5 “Without Fear or Favour, Affection or Ill Will”**

### **Judicial Independence**

An independent Judiciary is indispensable to impartial justice under the law. You should therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

This means you must:

- exercise your judicial functions independently and free of irrelevant influence;
- firmly reject any attempt to influence your decisions in any matter before the Court outside the proper process of the Court;
- encourage and uphold arrangements and safeguards to maintain and enhance the independence of the Judiciary;
- exhibit and promote high standards of judicial conduct so as to reinforce public confidence, which is the cornerstone of judicial independence.

### **Impartiality**

You must be, and should appear to be, impartial with respect to your decisions and decision making.

This means you should:

- strive to ensure that your conduct, both in and out of Court, maintains and enhances confidence in your impartiality and that of the Judiciary;
- not allow your decisions to be affected by:
  - ≡ bias or prejudice;
  - ≡ personal or business relationships; or
  - ≡ personal or financial interests;
- as much as reasonably possible, conduct your personal and business affairs so as to minimise the occasions on which it will be necessary to be disqualified from hearing cases;
- review all commercial, social and political groups you are a member of, or have an interest in, and ask yourself, “could this involvement compromise my position as Commissioner or Justice of the Peace?”

You must not only be impartial, but you must be seen to be impartial. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair-minded and informed person.

This principle touches several different areas of your conduct.

a) Judicial demeanour

While acting decisively, maintaining firm control of the process and ensuring cases are dealt with quickly, you should treat everyone before the Court with appropriate Courtesy.

b) 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 reflect adversely on your impartiality or interfere with the performance of your judicial duties.
- Do not solicit funds (except from judicial colleagues or for appropriate purposes) or lend the prestige of the judicial office to such solicitations.
- Avoid involvement in causes and organisations that are likely to be engaged in litigation.
- Do not give legal or investment advice.

c) 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 issues that could come before the Courts.

All partisan political activity must cease upon appointment. You should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that you are engaged in political activity.

You should refrain from:

- membership in political parties and political fundraising;
- attendance at political fundraising events;
- contributing to political parties or campaigns;
- 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;
- signing petitions to influence a political decision.

Members of your family have every right to be politically active. Sometimes this may adversely affect the public perception of your impartiality. In any case before the Court where there could reasonably be such a perception, you should not sit.

d) Conflict of interest

You must disqualify yourself in any case in which you believe that you will be unable to judge impartially.

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

You should not preside over a case where the accused or witness:

- is a near relative;
- is a close friend;
- is an employer or employee; or
- has a close business relationship with you.

Do not preside over a case where you may have or appear to have preconceived or pronounced views relating to:

- issues;
- witnesses; or
- parties.

Given that Niue is small, you should also be careful not to let personal or local knowledge affect your judgment.

Disqualifying yourself from a case is **not** appropriate if:

- the matter giving rise to a possibility of conflict is insignificant or a reasonable and fair-minded person would not be able to make an argument in favour of disqualification;
- no other Commissioners or Justices of the Peace are available to deal with the case; or
- because of urgent circumstances, failure to act could lead to a miscarriage of justice.

## 2 Conduct in Court

### 2.1 Preparing for a Case

Ensure you have studied and understood the files you will be dealing with.

Make sure you have the relevant legislation at hand.

#### **Criminal**

Make sure you know what elements of the offence must be proved.

#### **Civil**

Study the file, affidavits, etc.

Identify the issues in dispute and the relief sought.

### 2.2 The Principle that “Affected Parties have the Right to be Heard”

It is a well established principle, evolved from common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before a decision is made.

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 heard. This extends to allowing the person sufficient notice to prepare their submissions, to collect evidence to support their submissions and to rebut or contradict the other party’s submissions.

Note that a person may be heard but the view they have expressed does not have to prevail. You are entitled to reject it for what might be a good reason. The relevance and weight of the information is to be determined by you.

There are three aspects to the principle:

#### **1. Prior notice**

- You should be satisfied that adequate notice has been given, 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.

- For criminal matters, you will need proof of service of the warrant or summons. For civil and family matters, you will need proof of service of the writ with particulars of the claim.
- 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 a new and relevant issue.
- It always requires you to ensure you have all the relevant facts and materials before deciding.

## **3. Relevant material disclosed to parties**

- Generally, all relevant material should be disclosed to the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you propose to take into account.

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

## **2.3 Courtroom Conduct**

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

- Be Courteous and patient.
- Be dignified.
- Be humble - if a mistake is made you should apologise - there is no place on the Bench for arrogance.
- Continually remind yourself that a party is not simply a name on a piece of paper:
  - The parties are looking to the Court to see justice is administered objectively, fairly, diligently, impartially, and with unquestionable integrity.
- Never make fun of a party or witness:
  - A matter which may seem minor to you, may be very important to a party or witness.



- Show appropriate concern for distressed parties and witnesses.
- Never state an opinion from the Bench that criticises features of the law:
  - ⇒ Your duty is to uphold and administer the law, not to criticise it.
- Never say anything or display conduct that would indicate you have already made your decision before all parties are heard.
- Do not discuss the case or any aspect of it outside of the panel. This includes other Magistrates who are not sitting on the case.

## **2.4 Maintaining the Dignity of the Court**

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

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

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

- decisiveness and firmness;
- dealing promptly with interruptions or rudeness;
- clearing the Court or adjourning if necessary.

## **2.5 Communication in Court**

### **Speaking**

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

## **Listening Actively**

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

## **Questioning**

### Criminal

- 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 them, but to listen and determine.
- Generally, you should not ask questions or speak while the prosecution or defence are presenting their case, examining or cross-examining witnesses.
- You may ask questions at the conclusion of cross-examination, but only to 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.

### Civil

- You may ask questions. If parties are unrepresented, you might do this to indicate what is needed to satisfy you and clarify what they are saying.
- Be careful to be neutral when asking questions. Your questions must not show bias to either side.
- Avoid interrupting during submissions. If possible, wait until the party has finished their submissions.

## **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 or parties understand:

- the charge faced (criminal) or matters in issue (civil); and
- the procedures of the Court.

### Criminal

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

- the nature of the charge;
- the procedure and formalities of the Court;
- the legal implications of the allegations.

At any stage in the proceedings, you may take the time to satisfy yourself that the defendant knows:

- why he or she is appearing in Court;
- what his or her rights are;
- what the Court is doing;
- why the Court is following that course.

### Civil

You may need to be more attentive to an unrepresented party's needs. Take care to explain:

- the nature of the hearing and what will occur;
- what is expected when the party comes to speak; and
- to an applicant that they have to tell you what they want and why.

### **Dealing with language problems**

Ideally, an interpreter should be obtained and sworn in when there is a language problem. Often, however, one is not available. In this case:

- explain the nature of the charge or issues as slowly, clearly and simply as possible;
- 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.

### **3 Working as a Panel**

Commissioners and Justices of the Peace in Niue often sit as a panel, so it is important for those on the panel to agree to a process for handling Court hearings and out of Court deliberations.

Since views from the Bench should be seen to be as one, the accepted practice is for the panel who is sitting together to decide who will be the Chair of the panel.

#### **The Chair**

The role of the Chair is to manage the proceedings. From the perspective of the public and those in the Court, he or she is in charge of the Courtroom. This involves:

- handling all procedures;
- issuing all summonses, warrants, orders, convictions and recognisances;
- recording the evidence if the Court Clerk is not present;
- announcing all decisions of the Court;
- asking questions from the Bench to witnesses;
- ensuring all before the Court understand what is going on and are treated with respect;
- structuring and guiding any panel discussions out of Court, ensuring the discussions are purposeful and relevant and all members of the Bench have the opportunity to be heard.

The Chair should know the members' strengths and weaknesses and make the most of their strengths and expertise whenever possible. He or she should ask the opinions of each member, listen to them and treat each contribution as important.

The Chair may ask other members to undertake specific tasks, for example:

- note taking;
- referring to legislation and this benchbook;
- ensuring observation of the rules of evidence.

#### **Other members**

The role of the other members involves:

- listening attentively;
- appropriately drawing the Chair's attention to particular matters of significance or procedure;
- undertaking tasks as required by the Chair; and
- working in partnership with the Chair and other Bench members to decide the case.

## **3:**

# **INTRODUCTION TO THE HIGH COURT**

This part generally describes the High Court. It sets out:

- the composition of the Court;
- rules of appointment and removal of Commissioners and Justices;
- governing legislation of the Court; and
- the jurisdiction of the Court.



# 1 Introduction

The High Court is the Court where most people come into contact with the judicial system. The Court is divided into three divisions:

- Civil Division;
- Criminal Division; and
- Land Division.

Each of the divisions of the High Court hear and determine:

- proceedings that are, under or by virtue of any enactment, to be heard and determined by that division; and
- such other proceedings that may be determined by the Chief Justice, either generally, in any particular proceedings or classes of proceedings: *s. 38(1) Constitution 1974*.

Most criminal offences start in the High Court presided over by Commissioners and Justices. However, a number of serious offences go straight to the Chief Justice or to a Judge of the High Court.

The *Constitution and Rules of the High Court 1916* confer both criminal and civil jurisdiction on Commissioners and Justices.

## Language of the Court

All documents filed in or issued from the Court may be either in the English language or the language of Niue: *Rule 104 RHC by virtue of s. 735(3) Niue Act*.

## 2 Governing Legislation

The *Constitution* establishes the High Court, and the *Niue Act 1966* and *Rules of the High Court 1916* govern the High Court.

Other relevant legislation includes:

- *Niue Transport Act 1965*;
- *Arms Act 1975*;
- *Race Relations Ordinance 1972*;
- *Misuse of Drugs Act 1975*; and
- *Acts Interpretation Act 1924*.



## 3 Composition of the Court

The High Court comprises Judges, Commissioners and Justices of the Peace.

### 3.1 Judges

The High Court has 1 or more Judges, each of whom is appointed under the provisions of the *Constitution*.

If only one Judge is appointed, he or she shall be the Chief Justice of Niue. If more than one Judge is appointed, then one will be chosen to be Chief Justice: *Article 39(2) Constitution*.

#### **Appointment: Article 42 Constitution**

The Chief Justice shall be appointed by the Governor-General, acting on the advice of Cabinet tendered by the Premier of Niue.

Other Judges shall be appointed by the Governor-General, acting on the advice of Cabinet tendered by the Chief Justice and the Minister of Justice.

#### **Jurisdiction**

Each Judge of the High Court, or any 2 or more Judges, may at any time in Niue or beyond Niue exercise all powers of the High Court unless the *Constitution* or other law provides otherwise: *s. 37 Constitution*.

A Judge of the High Court may exercise any of the jurisdiction and powers for any division of the High Court.

#### **Tenure of Office**

Except in the case of temporary Judges appointed by Cabinet for one year under *Article 41 Constitution*, no person who has attained the age of 68 years shall be appointed or continue to hold the office as the Chief Justice or other Judge of the High Court: *Article 43 Constitution*.

#### **Removal: Article 45 Constitution**

A Chief Justice or other Judge of the High Court cannot be removed from office except by the Governor-General, acting on the advice of Cabinet tendered by the Premier and given in accordance with a recommendation contained in a resolution of the Niue Assembly.

The only ground upon which the Chief Justice or Judge can be removed from office is:

- inability to discharge the functions of his or her office due to infirmity of mind, body or any other cause; or
- misbehaviour.

### **3.2 Commissioners**

#### **Appointment: *Article 46 Constitution***

Commissioners of the High Court may be appointed by Cabinet and hold office for as long as specified in the warrant of appointment.

The office of Commissioner may, with the approval of the Public Service Commission, be held concurrently with any other office in the Niue Public Service or any other position or employment.

However, a Commissioner who is a member of the Niue Public Service shall not be in control of the Niue Public Service Commission, in the exercise of his or her functions.

No person who is a Member of the Niue Assembly shall be appointed to or continue to hold office as a Commissioner.

#### Temporary Commissioners

The Cabinet may appoint any person of any age, who is qualified, to hold office of a Commissioner for a period as specified in his or her warrant of appointment, as long as it does not exceed one year: *Article 47 Constitution*.

#### **General Jurisdiction: *Article 48 Constitution***

See paragraph 4 Jurisdiction, below.

#### **Tenure of Office**

No person who has reached the age of 68 years shall be appointed to or continue to hold office as a Commissioner: *Article 46(2) Constitution*.

However, nothing done by a Commissioner in the performance of his or her functions shall be deemed invalid by reason only that:

- he or she has reached the age of retirement; or
- his or her term of office has expired: *Article 46(2) Constitution*.

A Commissioner may resign in writing to the Premier.

**Removal: Article 50 Constitution**

A Commissioner shall not be removed from office except by Cabinet, acting in accordance with a recommendation of the Chief Justice.

The only ground upon which a Commissioner can be removed from office is:

- inability to discharge the functions of his or her office due to infirmity of mind, body or any other cause; or
- misbehaviour.

**3.3 Justices of the Peace (Justices)****Appointment: Article 51(1) Constitution**

The Cabinet may appoint Justices of the Peace for Niue who hold office for a term set out in their warrant of appointment.

**General Jurisdiction: Article 51(2) Constitution**

See paragraph 4 Jurisdiction, below.

**Removal: Article 51(4) Constitution**

A Justice of the Peace shall not be removed from office except by Cabinet acting in accordance with a recommendation of the Chief Justice.

**3.4 Other Officers of the Court**

Other officers of the Court include:

- Registrar;
- Deputy Registrar; and
- Administrative Officers.

**Registrar**

The Registrar of the High Court is appointed by the Public Service Commissioner according to *Part XXXI Niue Act 1966*.

The Registrar:

- keeps the records of the High Court in proper books and containing the minutes of all criminal and civil proceedings: *s. 65 Niue Act*; and

- performs administrative duties with respect to the Court that the Chief Justice shall direct: *s. 62(2) Niue Act.*

### **Deputy Registrar**

A Deputy Registrar of the High Court may also be appointed by the Public Service Commission according to *Part XXXI Niue Act 1966.*

The Deputy Registrar possesses, exercises and perform the same powers and functions and duties as the Registrar, subject to the control of the Registrar. Every reference to the Registrar of the High Court, so far as possible, applies to the Deputy Registrar: *s. 62(3) Niue Act.*

### **Administrative Officers**

Under the provisions of *Part XXXI Niue Act 1966*, there shall be appointed such sheriffs, bailiffs, clerks, interpreters, or other administrative officers as may be necessary for the High Court: *s. 63 Niue Act.*

## 4 Jurisdiction of Commissioners and Justices

### 4.1 Jurisdiction Defined

“Jurisdiction” is the power and authority to hear or determine a particular matter.

Courts may only act within their jurisdiction, as defined by law.

If a Court hears a case or makes a decision that it has no authority or power to make, then it acts outside its jurisdiction. Consequently, the decision and any orders it makes are not lawful and therefore invalid.

It is very important that the Court be satisfied that it has authority to hear the matter before it proceeds.

The Courts in Niue derive their jurisdiction or authority from the following Statutes:

The Sovereign in Council	<i>Constitution Act 1974</i>
The Court of Appeal	<i>Constitution Act 1974, Niue Act 1966</i>
The High Court	<i>Constitution Act 1974, Niue Act 1966, Rules of the High Court 1916</i>

### Criminal Jurisdiction

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

There are different categories of crime, and the category of crime determines which Court has jurisdiction to hear and determine the matter.

Criminal prosecutions are generally brought by the State, as represented by the Public Prosecutor, against a person who is alleged to have committed an offence.

*Part V* of the *Niue Act 1966* sets out those acts or omissions that are crimes in Niue.

Other legislation also establishes criminal offences. For example:

- the *Niue Transport Act*;
- the *Misuse of Drugs Act*;
- the *Arms Act 1975*.

## **Civil Jurisdiction**

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

The amount claimed in a civil matter is what determines which level of Court may hear the matter.

## **4.2 General Jurisdiction**

A Commissioner possesses and may exercise such functions of a Judge of the High Court, whether judicial or administrative, as may be prescribed by Act, except those vested exclusively by the Chief Justice: *Article 48 Constitution*.

All references in any enactment to a Judge of the High Court shall be read as applying to applying to a Commissioner **within** the limits of the jurisdiction given to him or her: *Article 48 Constitution*.

Any two Justices of the Peace, acting together, possess and exercise any of the functions that are conferred by law on Commissioners of the High Court. Therefore, *Article 48 Constitution*, which refers to jurisdiction of Commissioners, shall also be read as referring to the jurisdiction of two Justices sitting together, except where the Justice is a member of the Niue Assembly or is 68 or older: *Article 51 Constitution*.

Although the *Constitution* and the *Rules of the High Court 1916* (as amended) provide for 1 Commissioner **or** 2 Justices to sit alone to hear criminal and civil matters, it has been the practice in Niue that most of the criminal and civil matters are heard by one Commissioner and two Justices sitting together.

## **4.3 Criminal Jurisdiction**

### **One Commissioner**

The main enactment which sets out the specific jurisdiction of Commissioners is the *Rules of the High Court 1916 (RHC)*.

One Commissioner has the jurisdiction to hear any criminal matter:

- for which the offence is punishable by fine only: *r. 83(a) RHC 1916*;
- for any offence set out in *Schedule 6 RHC: r. 83(d)*;
- under *s. 39 Niue Transport Act 1965 No. 30*; and
- for any other offence contained in any enactment, ordinance, regulation or bylaw for which the maximum term of imprisonment does not exceed 3 years: *Rule 2(2) RHC*.

### **Two Justices of the Peace**

The main enactment which sets out the specific jurisdiction of Justices is the *Rules of the High Court 1916 (RHC)*.

Two Justices of the Peace have the jurisdiction to hear any criminal matter:

- for which the offence is punishable by fine only: *r. 83(a) RHC 1916*;
- for any offence set out in *Schedule 6 RHC: r. 83(d)*; and
- under *s. 39 Niue Transport Act 1965 No. 30*; and
- for any other offence contained in any enactment, ordinance, regulation or bylaw for which the maximum term of imprisonment does not exceed 3 years: *Rule 2(2) RHC under 1975 Amendment*.

### **One Commissioner and Two Justices Sitting Together**

One Commissioner and two Justices of the Peace sitting together have the jurisdiction mentioned above, as well as jurisdiction to enter a conviction and impose sentence in criminal proceedings for charges where:

- the charge is punishable for a term of imprisonment not exceeding 10 years;
- the charge is other than those set out in *Rules 83(c) & (d) RHC*; and
- the defendant has entered a guilty plea.

The sentence imposed will not have any effect unless and until it has been confirmed or varied by the Chief Justice in accordance with *Rule 84B RHC: Rule 84A RHC*.

## **4.4 Sentencing Jurisdiction**

### **Commissioner**

Regardless of the maximum fine or term of imprisonment provided by law for an offence, a Commissioner has the power to impose only:

- a fine up to \$200; or
- a term of imprisonment up to one year: *Rule 84A RHC*.

### **Two Justices Sitting Together**

Regardless of the maximum fine or term of imprisonment provided by law for an offence, two Justices have the power to impose only:

- a fine up to \$200; or
- a term of imprisonment up to one year: *Article 51 Constitution & Rule 84A RHC*.

### A Commissioner and Two Justices

Additionally, a Commissioner and two Justices sitting together may sentence up to 10 years imprisonment if the defendant has entered a guilty plea. The sentence will be confirmed or varied by the Chief Justice in accordance with *Rule 84B RHC: Rule 84A RHC*.

The following tables show the offences under the *Niue Act* and the *Niue Transport Act*. They do not, however, provide a complete list of all criminal matters which may come before you under other Acts. You must always check whether you have jurisdiction to hear a criminal matter.

### 4.5 Table of Criminal Jurisdiction Under the *Niue Act 1966*

This table lists the name and section of major offences set out in the *Niue Act*, and provides the maximum sentence that may be imposed and which Court has jurisdiction to hear the offence and pass sentence.

Use this table as a quick reference guide to determine if you have jurisdiction to hear a particular offence.

<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Sedition	<i>s. 129</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83 and Sch. 6 RHC</i>
Murder	<i>s. 133-138</i>	Guilty or Not Guilty	Life Imprisonment	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Manslaughter	<i>s. 139</i>	Guilty or Not Guilty	14 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Duty to provide necessaries of life	<i>s. 142</i>	Guilty	7 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Duty to provide necessaries of life	<i>s. 142</i>	Not Guilty	7 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>



<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Duty of parent or guardian to provide necessities of life	<i>s. 143</i>	Guilty	7 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Duty of Parent or Guardian to provide Necessaries of life	<i>s. 143</i>	Not Guilty	7 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Attempted Murder	<i>s. 147</i>	Guilty or Not Guilty	14 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Conspiracy and inciting murder	<i>s. 148</i>	Guilty	10 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Conspiracy and inciting murder	<i>s. 148</i>	Not Guilty	10 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Counselling Suicide	<i>s. 149</i>	Guilty or Not Guilty	14 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Concealment of Birth	<i>s. 150</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of up to 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Grievous Bodily Harm	<i>s. 151</i>	Guilty	7 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Grievous Bodily Harm	<i>s. 151</i>	Not Guilty	7 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Actual Bodily Harm	<i>s. 152</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence up to 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Omissions resulting in Bodily Harm	<i>s. 153</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence up to 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Intentionally endangering persons on aerodromes	<i>s. 154</i>	Guilty or Not Guilty	14 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>

<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Wantonly endanger persons on/near aerodromes	<i>s. 155</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence up to 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Indecent Assault	<i>s. 156</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Indecent Assault	<i>s. 156</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Assault	<i>s. 157</i>	Guilty or Not Guilty	1 year	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Cruelty to a Child	<i>s. 157A</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Cruelty to a Child	<i>s. 157A</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Resisting Constable in execution of his/her duty	<i>s. 158</i>	Guilty or Not Guilty	6 months or \$40 fine	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 2(3) Amendment No. 5 RHC</i>
Abduction of girl under 15	<i>s. 159</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 2(3) Amendment No. 5 RHC</i>
Abduction of children	<i>s. 160</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Rape	<i>s. 162</i>	Guilty or Not Guilty	14 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Sexual Intercourse/ indecency with girl under 12	<i>s. 163</i>	Guilty	10 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Sexual Intercourse/ indecency with girl under 12	<i>s. 163</i>	Not Guilty	10 years	Judge	Judge Imposes Sentence	<i>Art. 38 Constitution</i>

<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Sexual Intercourse/ indecency with girl between 12 and 15	<i>s. 164</i>	Guilty or Not Guilty	3 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 2(3) Amendment No. 5 RHC</i>
Sexual Intercourse with woman of unsound mind, imbecile or idiot	<i>s. 165</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 2(3) Amendment No. 5 RHC</i>
Procuring Miscarriage of woman or girl	<i>s. 166</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Woman or girl procuring her own miscarriage	<i>s. 167</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Supplying means of miscarriage	<i>s. 168</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Bigamy	<i>s. 169</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Bigamy	<i>s. 169</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Buggery	<i>s. 170</i>	Guilty	10 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Buggery	<i>s. 170</i>	Not Guilty	10 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Attempted Buggery and indecent assaults on males	<i>s. 171</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Attempted Buggery and indecent assaults on males	<i>s. 171</i>	Not Guilty	5 years	Judge	Judge imposes Sentence	<i>Art. 38 Constitution</i>

<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Incest	<i>s. 172</i>	Guilty	7years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Incest	<i>s. 172</i>	Not Guilty	7 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Indecent Acts	<i>s. 173</i>	Guilty or Not Guilty	6 months	1 Commissioner or 2 Justices	Commissioner or 2 Justices impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Indecent Documents	<i>s. 174</i>	Guilty or Not Guilty	6 months	1 Commissioner or 2 Justices	Commissioner or 2 Justices impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Brothels	<i>s. 175</i>	Guilty or Not Guilty	6 months	1 Commissioner or 2 Justices	Commissioner or 2 Justices impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Gaming Houses	<i>s. 176</i>	Guilty or Not Guilty	6 months	1 Commissioner or 2 Justices	Commissioner or 2 Justices impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Riot	<i>s. 177</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Forcible Entry	<i>s. 178</i>	Guilty or Not Guilty	6 months	1 Commissioner or 2 Justices	Commissioner or 2 Justices impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Affrays	<i>s. 179</i>	Guilty or Not Guilty	1 year	1 Commissioner or 2 Justices	Commissioner or 2 Justices impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Judicial Corruption in judicial capacity	<i>s. 180A(1)</i>	Guilty or Not Guilty	14 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Judicial Corruption in official capacity	<i>s. 180A(2)</i>	Guilty	7 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Judicial Corruption in official capacity	<i>s. 180A(2)</i>	Not Guilty	7 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>

<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Bribery of Judicial Officer in Judicial Capacity	<i>s. 180B(1)</i>	Guilty	7 years	1 Commissioner and 2 Justices	Requires confirmation by Chief Justice	<i>Rule 84A RHC</i>
Bribery of Judicial Officer in Judicial Capacity	<i>s. 180B(1)</i>	Not Guilty	7 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Bribery of Judicial Officer in Official Capacity	<i>s. 180B(2)</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Bribery of Judicial Officer in Official Capacity	<i>s. 180B(2)</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Minister of Crown accepts bribe or is found corrupt	<i>s. 180C(1)</i>	Guilty or Not Guilty	14 years	Judge. Prosecutor requires leave of a judge to prosecute.	Judge imposes sentence	<i>Art. 38 Constitution</i>
Person gives corruptly gives bribe to any person to influence Minister of Crown	<i>s. 180C(2)</i>	Guilty	7 years	1 Commissioner and 2 Justices. Prosecutor requires leave of Commissioner to prosecute.	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Person gives corruptly gives bribe to any person to influence Minister of Crown	<i>s. 180C(2)</i>	Not Guilty	7 years	Judge. Prosecutor Requires leave of Judge to prosecute.	Judge imposes sentence	<i>Art. 38 Constitution</i>
Member of L. Assembly accepts bribe	<i>s. 180D(1)</i>	Guilty	7 years	1 Commissioner and 2 Justices. Prosecutor requires leave of Commissioner to prosecute.	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Member of L. Assembly accepts bribe	<i>s. 180D(1)</i>	Not Guilty	7 years	Judge. Prosecutor requires leave of judge to prosecute.	Judge imposes sentence	<i>Art. 38 Constitution</i>

<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Person offers bribe to member of L. Assembly	<i>s. 180D(2)</i>	Guilty or Not Guilty	3 years	1 Commissioner or 2 Justices. Prosecutor requires leave of Commissioner to prosecute.	Can only impose sentence of 1 year	<i>Rule 2(3) Amendment No. 5 RHC</i>
Law enforcement officer accepts bribe	<i>s. 180E(1)</i>	Guilty	7 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Law enforcement officer accepts bribe	<i>s. 180E(1)</i>	Not Guilty	7 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Person offers bribe to law enforcement officer	<i>s. 180E(2)</i>	Guilty or Not Guilty	3 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 2(3) Amendment No. 5 RHC</i>
Official accepts bribe	<i>s. 180F(1)</i>	Guilty	7 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Official Accepts Bribe	<i>s. 180F(1)</i>	Not Guilty	7 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Person bribes official to influence act or omission	<i>s. 180F(2)</i>	Guilty or Not Guilty	3 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 2(3) Amendment No. 5 RHC</i>
Corrupt use of information by official	<i>s. 180G</i>	Guilty	7 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Corrupt use of information by official	<i>s. 180G</i>	Not Guilty	7 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Perjury	<i>s. 181</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Perjury	<i>s. 181</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>

<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Fabricating evidence	<i>s. 182</i>	Guilty or Not Guilty	3 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Conspiracy to pervert justice	<i>s. 183</i>	Guilty or Not Guilty	3 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Breaking Prison	<i>s. 184</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Breaking Prison	<i>s. 184</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Escape	<i>s. 185</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Rescue	<i>s. 186</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Criminal Libel and Slander	<i>s. 187</i>	Guilty or Not Guilty	6 months	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 2(3) Amendment No. 5 RHC</i>
Theft	<i>s. 188 and s. 192(a)</i>	Guilty or Not Guilty	3 months	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Theft	<i>s. 188 and s. 192(b)</i>	Guilty or Not Guilty	1 year	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Theft	<i>s. 188 and s. 192(c)</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Theft	<i>s. 188 and s. 192(c)</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Stealing Documents	<i>s. 193(1)</i>	Guilty or Not Guilty	3 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 2(3) Amendment No. 5 RHC</i>
Stealing Documents (Testamentary instrument)	<i>s. 193(2)</i>	Guilty	10 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>

<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Stealing Documents (Testamentary instrument)	<i>s. 193(2)</i>	Not Guilty	10 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Receiving Stolen Goods	<i>s. 194; s. 188 and 192(a)</i>	Guilty or Not Guilty	3 months	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Receiving Stolen Goods	<i>s. 194; s. 188 and s. 192(b)</i>	Guilty or Not Guilty	1 year	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Receiving Stolen Goods	<i>s. 194; s. 188 and s. 192(c)</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Receiving Stolen Goods	<i>s. 194; s. 188 and s. 192(c)</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Robbery	<i>s. 195</i>	Guilty	10 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Robbery	<i>s. 195(1,2)</i>	Not Guilty	10 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Assault with intent to commit robbery	<i>s. 195(3)</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Assault with intent to commit robbery	<i>s. 195(3)</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Conversion or Attempted Conversion of Motorcars	<i>s. 196(1)</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Conversion or Attempted Conversion of Motorcars	<i>s. 196(1)</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Possession of instrument for conversion of motorcars	<i>s. 196(2)</i>	Guilty or Not Guilty	1 year	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 2(3) Amendment No. 5 RHC</i>



<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Breach of Trust	<i>s. 197</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Breach of Trust	<i>s. 197</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Menaces	<i>s. 198</i>	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Witcraft	<i>s. 199</i>	Guilty or Not Guilty	6 months	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Obtaining Credit by Fraud	<i>s. 200</i>	Guilty or Not Guilty	6 months	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Accusation of Criminal Offences	<i>s. 201</i>	Guilty or Not Guilty	5 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Conspiracy to defraud	<i>s. 202</i>	Guilty or Not Guilty	3 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Obtaining Execution of Valuable Securities by Fraud	<i>s. 203</i>	Guilty or Not Guilty	3 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Burglary	<i>s. 204</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Burglary	<i>s. 204</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Unlawful Entry of dwellinghouse with intent to commit criminal offence	<i>s. 205(1)</i>	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Unlawful Entry of dwellinghouse with intent to commit criminal offence	<i>s. 205(1)</i>	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>

<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Unlawful entry of dwellinghouse without intent to commit offence	s. 205(2)	Guilty or Not Guilty	3 months or \$20 fine	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 2(3) Amendment No. 5 RHC</i>
Unlawful entering building, ship or aircraft for criminal purpose	s. 205A	Guilty	4 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Unlawful entering building, ship or aircraft for criminal purpose	s. 205A	Not Guilty	4 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Threats to kill or do bodily harm	s. 206	Guilty or Not Guilty	5 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Forgery	s. 207	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Forgery	s. 207	Not Guilty	5 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Making counterfeit coin	s. 209	Guilty	7 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>
Making counterfeit coin	s. 209	Not Guilty	7 years	Judge	Judge imposes sentence	<i>Art. 38 Constitution</i>
Lightening Coin	s. 210	Guilty or Not Guilty	2 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 83(d) and Sch. 6 RHC</i>
Uttering Counterfeit Coin	s. 211	Guilty or Not Guilty	6 months	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 83(d) and Sch. 6 RHC</i>
Arson	s. 212	Guilty	5 years	1 Commissioner and 2 Justices	Can impose max sentence but requires confirmation of Chief Justice	<i>Rule 84A RHC</i>

<b>Offence</b>	<b>Section of NA</b>	<b>Plea</b>	<b>Maximum Penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Establishment of jurisdiction</b>
Arson	s. 212	Not Guilty	5 years	Judge	Judge imposes sentence	Art. 38 Constitution
Wilful Mischief to property	s. 213	Guilty or Not Guilty	3 years if damage over \$20 6 months for damage less than \$20	1 Commissioner or 2 Justices	Can only impose sentence of 1 year if over \$20 or impose full sentence for less than \$20	Rule 83(d) and Sch. 6 RHC
Provoking breach of peace	s. 214	Guilty or Not Guilty	\$10 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 or 83(c) RHC
Profane, indecent and obscene language	s. 215	Guilty or Not Guilty	3 months or \$40 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 or 83(c) RHC
Disorderly Conduct in Public Places	s. 216	Guilty or Not Guilty	\$10 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 or 83(c) RHC
Obstructing Public Place	s. 217	Guilty or Not Guilty	\$10 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 or 83(c) RHC
Drunkenness	s. 218	Guilty or Not Guilty	\$20 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 or 83(c) RHC
Animal Trespass	s. 219	Guilty or Not Guilty	\$10 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 or 83(c) RHC
Prostitution	s. 220	Guilty or Not Guilty	\$10 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 or 83(c) RHC
Laying Poison	s. 221	Guilty or Not Guilty	\$10 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 or 83(c) RHC
Polluting Water	s. 222	Guilty or Not Guilty	6 months or \$100 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 RHC
Sale of Unwholesome provisions	s. 223	Guilty or Not Guilty	1 month or \$40	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 RHC
Unsanitary Premises	s. 224	Guilty or Not Guilty	\$20 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 or 83(c) RHC
Wilful Trespass	s. 225	Guilty or Not Guilty	\$10 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 or 83(c) RHC
Cruelty to Animals	s. 226	Guilty or Not Guilty	1 month or \$20 fine	1 Commissioner or 2 Justices	Impose sentence	Rule 83(d) and Sch. 6 RHC

Offence	Section of NA	Plea	Maximum Penalty	Jurisdiction	Sentence	Establishment of jurisdiction
Falsely Trading as a Incorporated Company	s. 227	Guilty or Not Guilty	\$200 fine	1 Commissioner or 2 Justices	Impose sentence	<i>Rule 83(d) and Sch. 6 or 83(c) RHC</i>
Wrongful Communication/ retention/ copying of official information	s. 228A	Guilty or Not Guilty	3 years	1 Commissioner or 2 Justices	Can only impose sentence of 1 year	<i>Rule 2(3) Amendment No. 5 RHC</i>

#### 4.6 Table of Jurisdiction under the *Niue Transport Act 1965*

This table sets out the jurisdiction over traffic offences under the *Niue Transport Act 1965* and its subsequent amendments. The table includes the name and section of the offence under the *Niue Transport Act*, as well as the maximum penalty, the jurisdiction of the High Court, who imposes sentence and whether there is endorsement and disqualification. *Note that the shaded parts refer to a problem created by some amendments to the legislation. In 1996, s. 40(1) was repealed including the 1996 amendments and replaced with a whole new section. In the new section, there was no sentence specified. In this table, we have fallen back on the general penalties for traffic offences under s. 103 Niue Transport Act. However, this is considerably less than what was in the 1996 amendments, so it is possible that this was not the intention.*

Offence	Section of NTA	Max. penalty	Jurisdiction	Sentence	Disqualification	Endorsement
Use/permit use of vehicle without registration or license	s. 5(1)	\$100 fine	1 Commissioner or 2 Justices	May impose sentence	No	No
Use/permit use of vehicle without reg. plates	s. 5(1)	\$100 fine	1 Commissioner or 2 Justices	May impose sentence	No	No
Wilfully or negligently deface reg. plate	s. 5(1)	\$100 fine	1 Commissioner or 2 Justices	May impose sentence	No	No
Unlicensed person who drives motor vehicle	s. 19(1)	\$100 fine	1 Commissioner or 2 Justices	May impose sentence	No	No
Vehicles to keep left	s. 28	\$100 (s. 103 NTA)	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: s. 44(1)	Yes: s. 44(2)

<b>Offence</b>	<b>Section of NTA</b>	<b>Max. penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Disqualification</b>	<b>Endorsement</b>
Driver to give audible signal when overtaking	<i>s. 29</i>	\$100 ( <i>s. 103 NTA</i> )	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: <i>s. 44(1)</i>	Yes: <i>s. 44(2)</i>
Overtaking involving risk	<i>s. 30</i>	\$100 ( <i>s. 103 NTA</i> )	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: <i>s. 44(1)</i>	Yes: <i>s. 44(2)</i>
Right hand turn at intersection	<i>s. 31</i>	\$100 ( <i>s. 103 NTA</i> )	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: <i>s. 44(1)</i>	Yes: <i>s. 44(2)</i>
Driver to yield right of way to vehicle approaching right	<i>s. 32</i>	\$100 ( <i>s. 103 NTA</i> )	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: <i>s. 44(1)</i>	Yes: <i>s. 44(2)</i>
Unsafe vehicles	<i>s. 33</i>	\$100 ( <i>s. 103 NTA</i> )	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: <i>s. 44(1)</i>	Yes: <i>s. 44(2)</i>
Dangerous riding on vehicles	<i>s. 34</i>	\$100 ( <i>s. 103 NTA</i> )	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: <i>s. 44(1)</i>	Yes: <i>s. 44(2)</i>
Motor driver's visible signals	<i>s. 35</i>	\$100 ( <i>s. 103 NTA</i> )	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: <i>s. 44(1)</i>	Yes: <i>s. 44(2)</i>

<b>Offence</b>	<b>Section of NTA</b>	<b>Max. penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Disqualification</b>	<b>Endorsement</b>
Parking of motor vehicle	<i>s. 36</i>	\$100 ( <i>s. 103 NTA</i> )	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: <i>s. 44(1)</i>	Yes: <i>s. 44(2)</i>
Towing of motor vehicles and leading animals	<i>s. 37</i>	\$100 ( <i>s. 103 NTA</i> )	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: <i>s. 44(1)</i>	Yes: <i>s. 44(2)</i>
Number of persons on motor cycles	<i>s. 38</i>	\$100 ( <i>s. 103 NTA</i> )	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: <i>s. 44(1)</i>	Yes: <i>s. 44(2)</i>
Safety Helmets for motor-cyclists	<i>s. 38A</i>	\$100 ( <i>s. 103 NTA</i> )	1 Commissioner or 2 Justices	May impose sentence	May disqualify present or future drivers license: <i>s. 44(1)</i>	Yes: <i>s. 44(2)</i>
Causing death or bodily injury through reckless or negligent driving	<i>s. 39(a)</i>	Five years or \$1500 fine or both	1 Commissioner or 2 Justices: <i>Article 2(2) 1975 Amendment of RHC</i>	Can only impose sentence of 1 year or \$200 fine	Shall disqualify for 1 year (may disqualify for longer) unless special reasons for Court not to.	Yes: <i>s. 44(2)</i>
Causing death or bodily injury by driving while intoxicated	<i>s. 39(b)</i>	Five years or \$1500 fine or both	1 Commissioner or 2 Justices: <i>Article 2(2) 1975 Amendment of RHC</i>	Can only impose sentence of 1 year or \$200 fine	Shall disqualify for 1 year (may disqualify for longer) unless special reasons for Court not to.	Yes: <i>s. 44(2)</i>

<b>Offence</b>	<b>Section of NTA</b>	<b>Max. penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Disqualification</b>	<b>Endorsement</b>
Reckless or negligent driving in a public place	<i>s. 40(1) (a)</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A
Driving at a speed which is/might be dangerous to the public	<i>s. 40(1) (b)</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A
Driving a vehicle in a manner dangerous to the public or any person	<i>s. 40(1) (d)</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A
Driving under the influence of drink or drugs	<i>s. 40(2)</i>	6 months or \$1000 or both; sentence of community work	1 Commissioner or 2 Justices	Can impose 6 months sentence or fine up to \$200	Can disqualify for period as Court considers appropriate	Yes: <i>s. 44(2)</i>
Careless driving	<i>s. 40(3)</i>	\$500 fine	1 Commissioner or 2 Justices	Can impose \$200 fine	Can disqualify for period not exceeding 3 months	Yes: <i>s. 44(2)</i>
Failure to comply with direction of police when consider incapable of driving	<i>s. 41</i>	\$500 fine	1 Justice or 2 Commissioners	Can impose \$200 fine	Can disqualify for up to 3 months	Yes: <i>s. 44(2)</i>
Driver failing to comply with duty after accident where person is injured	<i>s. 42</i>	1 year or \$500 fine	1 Justice or 2 Commissioners	Can impose 1 year sentence or impose \$200 fine	Yes: can disqualify for up to 3 months	Yes: <i>s. 44(2)</i>
Driver failing to comply with duty after accident where no person injured	<i>s. 42(4)</i>	3 months or \$500 fine	1 Commissioner or 2 Justices	Can impose sentence or \$200 fine	No	N/A
Driving with disqualified license	<i>s. 45</i>	\$500	1 Commissioner or 2 Justices	Can impose up to \$200 fine	Yes: shall disqualify for 1 year or longer unless Court has special reasons related to the offence not to	Yes: <i>s. 44(2)</i>

<b>Offence</b>	<b>Section of NTA</b>	<b>Max. penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Disqualification</b>	<b>Endorsement</b>
Driving with excessive breath/ blood alcohol level	<i>s. 45A</i>	6 months or \$1000 or both or community work	1 Commissioner or 2 Justices	Can impose sentence and up to \$200 fine	Yes: may disqualify for period Court considers appropriate	Yes: <i>s. 44(2)</i>
Speeding	<i>s. 47(1)</i>	\$100 fine	1 Commissioner or 2 Justices	Impose fine	No	N/A
Failure to have proper equipment and brakes	<i>Part VII: ss. 49 to 68</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A
Warrant of vehicle fitness required	<i>s. 73</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A
Wilfully or negligently removes, defaces, damages traffic sign	<i>s. 80</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A
Public places to be kept free from obstructions	<i>Part X: ss. 81 to 83</i>	\$100 fine: under (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A
Rules relating to bicycles	<i>Part XI: ss. 84 to 94</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices <i>s. 103 NTA</i>	Impose fine	No	N/A
No liquor on public transport	<i>s. 95</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A
Speed limit for trucks carrying passengers	<i>s. 96</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A
Unlawful interference with vehicle	<i>s. 100</i>	\$500	1 Commissioner or 2 Justices	Impose fine up to \$200	No	N/A



<b>Offence</b>	<b>Section of NTA</b>	<b>Max. penalty</b>	<b>Jurisdiction</b>	<b>Sentence</b>	<b>Disqualification</b>	<b>Endorsement</b>
Failure to comply with directions given in relation to <i>NTA</i>	<i>s. 102 (a)</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A
Wilfully obstruct person doing duty under <i>NTA</i>	<i>s. 102(b)</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A
Knowingly makes false statement in any application under <i>NTA</i>	<i>s. 102(f)</i>	\$100 fine: under <i>s. 103 NTA</i> (general penalties)	1 Commissioner or 2 Justices	Impose fine	No	N/A

## **4.7 Civil Jurisdiction**

### **One Commissioner**

One Commissioner has the jurisdiction to hear and determine a civil action for which the recovery of debt, or damages, or chattels does not exceed NZ \$1500: *Rule 83(a),(b) RHC (Amendment Regulation 1991)*.

### **Justices of the Peace**

Two Justices of the Peace have the jurisdiction to hear and determine a civil action for which the recovery of debt or damages, or chattels does not exceed NZ \$1500: *Rule 83(a),(b) RHC (Amendment Regulation 1991)*.

## 5 Transfer of Cases

In any proceeding commenced by a Commissioner, when he or she is exercising jurisdiction given under *Rule 2 of Amendment No. 5 1975 RHC*, a Commissioner may at any time before the defendants have been sentenced or otherwise dealt with:

- decline to deal further with the offence; and
- require that it shall be dealt with by a Judge of the High Court; and
- endorse on the Information a certificate stating such.

*Rule 2(1)-(3) of Amendment No. 5 1975 RHC* states that a Commissioner is given jurisdiction for:

- *s. 188*, in cases where *s. 192(a) and (b)* apply;
- *s. 193(1)*;
- *s. 39 Niue Transport Act 1965*; and
- any other offences contained in any enactment, ordinance, regulation or by law, for which the maximum term of imprisonment provided does not exceed three years.

If a defendant is being convicted or has pleaded guilty, the Commissioner shall remand him or her for sentence by a Judge and make an order accordingly under provision of the *Rules of the High Court*, if it is expedient and in the interest of justice to do so.

In any other case, the Judge will deal with the case in all respects as a rehearing.

# 4:

## EVIDENCE

This chapter discusses criminal evidence and the common law rules that apply to evidence. It outlines:

- types of evidence;
- rules relating to witness testimony;
- common law rules of evidence.



# 1 Introduction

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

The subject of evidence and the rules related to it are a complex area of law. This chapter provides a brief introduction to the subject of evidence and outlines some of the rules of evidence that you may encounter in a criminal trial. It should not replace in-depth study of the rules of evidence and their application in criminal trials in the High Court.

In order to properly apply the rules of evidence in a criminal trial, it is important to understand how evidence is classified.

## **2 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).

### **2.1 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.

### **2.2 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.

### 3 Documentary Evidence

This is information that is contained in written documents. These documents may 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. Often, documentary evidence will only be admissible under an exception to the hearsay rule.

It is best if the documents produced at the trial are the originals. If the original cannot be produced, then copies may be ruled admissible depending on the circumstances.

#### Secondary evidence

Secondary evidence refers to evidence that is not original. It may not be given as much weight as original evidence, but under *s. 289(2) Niue Act* you may refuse to receive any evidence which you consider unsatisfactory because it is secondary evidence.

Examples of secondary evidence include:

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



## 4 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 person's 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.

## 5 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 other 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.

## 6 Oral Evidence

Oral testimony consists of statements or representations of fact. These statements may be ‘in Court’ statements or ‘out of Court’ statements.

In Court statements are defined as those made by a witness who is giving testimony. If a witness wants to mention in his or her testimony a statement 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, pursuant to the hearsay rule.

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

The value of oral evidence is that you can observe:

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

You must ensure that at every stage of the proceedings, you take down in writing oral evidence given before the Court or that which you deem material.

## 7 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 and the accused;
2. examination of witnesses;
3. leading questions;
4. refreshing memory;
5. lies;
6. corroboration;
7. warnings to witnesses against self incrimination; and
8. identification evidence by witnesses.

### 7.1 Competence and Compellability of Witnesses

A witness is **competent** if he or she may be lawfully called to testify. In Niue, all witnesses are declared competent unless subject to one of the provisions of *Part VII Niue Act: s. 290 Niue Act 1966*.

**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 certain just exceptions.

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

#### The accused

In Niue, the accused is considered a competent witness, except where the contrary is expressly provided for in enactment, **but** that he or she is not a compellable witness: *s. 292(1) Niue Act 1966*.

This means that an accused cannot be called by the prosecution to give evidence against himself or herself.

#### Spouses

The spouse of the accused shall be a competent and compellable witness for the defence: *s. 292(2)(a) Niue Act 1966*.

The spouse of an accused shall be a competent witness for the prosecution but will not be compellable except when the offence the accused is charged with is an offence spouse or against a child of the accused: *s. 292(2)(b) Niue Act 1966*.

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**

Every witness in any criminal matter shall be examined upon oath. However, the Court may take the evidence of any person under the age of 12 without oath. The *Niue Act 1966* does require that a witness under the age of 12 makes the following, or a similar, declaration which will have the same force and effect as an oath:

“I promise to speak the truth, the whole truth and nothing but the truth

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.

## **7.2 Examination of Witnesses**

### **General**

In any proceedings, the Registrar of the High Court may summon any person to give evidence or to produce any documents to the Court: *s. 73 Niue Act 1966*.

A person shall be guilty of contempt of the High Court where he or she, without sufficient cause:

- neglects or fails to appear after receiving summons to appear or produce any document;
- refuses to be sworn;
- having being sworn, refuses to give evidence;
- refuses to produce any document; or
- having been sworn, neglects or fails give further evidence as directed by the Court: *s. 74 Niue Act 1966*.

Justices may make an order for the examination on oath of any witness or person:

- before any officer of the Court or any other person; and
- at any place in or out of Niue: *s. 75(1) Niue Act 1966*.

You may also order any deposition taken under *s. 75 Niue Act 1966* to be filed in the Court and empower any party to the proceedings to give the deposition in evidence: *s. 75(1) Niue Act 1966*.

### **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.

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.

In cross-examination, you may limit the manner and the extent of cross-examination of witnesses as to credit: *s. 293 Niue Act 1966*.

You shall refuse to permit cross-examination which is needlessly offensive or injurious to a witness, having regard to:

- the nature and gravity of the imputations made against him or her;
- the importance of his or her evidence: and
- the effect of those imputations upon his or her credibility: *s. 293 Niue Act 1966*.

### **7.3 Leading Questions**

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

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

Leading questions may be allowed in the following circumstances:

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

### **7.4 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 counsel wishes to see the notes, there is a right to inspect them.

### **7.5 Lies**

If it is established that the accused lied (i.e. told a deliberate falsehood 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. Experience demonstrates that lies are told for a variety of reasons, and not necessarily for the avoidance of guilt.

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

## 7.6 Corroboration

Where corroboration is required as a matter of practice, as in the prosecution of sexual offence cases, you must look for it in the prosecution evidence. If at the end of the hearing, you find that the complainant's evidence does not have support from another witness but you were nevertheless convinced that the complainant was telling the truth, you may still convict the accused.

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

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

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

## 7.7 The Warning to a Witness against Self Incrimination

Nothing in the *Part VII Niue Act 1966*, which sets out provisions related to evidence, shall take away from or affect the privilege of any witness to refuse to answer questions which may tend to criminate him or her: *s. 294 Niue Act 1966*.

Therefore, 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.



## 7.8 Identification Evidence by Witnesses

The visual identification of the accused by witnesses needs to be treated with caution. Honest and genuine witnesses have 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?

## **8 Rules of Evidence**

### **8.1 Introduction**

Rules of evidence have been established by both the common law and by statute.

The rules of evidence are many and complicated. A brief overview of some of the important rules of evidence that will arise in defended criminal proceedings in the High Court follow.

### **8.2 Burden and Standard 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.

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

#### Insanity

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

#### Express statutory exceptions

Where a statute may expressly cast on the accused the burden of proving a particular issue or issues.

#### Implied statutory exceptions

Where a statute, on its true construction, may place the legal burden of proof on the accused.

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.

### **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. However, in relation to some common law and statutory defences, once the accused discharges his or her evidential burden, then the legal burden of disproving the defence will be on the prosecution.

## **8.3 Judicial Notice**

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

You shall take judicial notice of:

- all Acts of the Niue Assembly or Parliament of New Zealand; and
- Orders in Council; and
- regulations; and
- Proclamations; and
- laws in force in Niue, including Niuean custom so far as it has the force of law under the *Niue Act 1966*; and
- Seals and signatures set out in *s. 297 Niue Act 1966: ss. 296 & 297 Niue Act 1966*.

## **8.4 Admissibility of Evidence**

Subject to provisions in the *Niue Act*, you have the discretion to admit, receive and act on such evidence as you think fit, whether that evidence is or is not admissible or sufficient at common law: *s. 289 Niue Act 1966*.

Despite this discretion, at any time during the course of the proceedings, there may be questions or objections as to the admissibility of evidence.

If there are questions or objections to the admissibility of evidence, the parties will be called upon to make submissions to the Court.

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

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

If you allow such submissions, it is up to you to rule on whether the evidence should be admitted or excluded, according to rules set out in the *Niue Act 1966* or at your discretion under *s. 289(1) Niue Act 1966*. You may want to consider the common law rules regarding admissibility of evidence as they may help you in your discretion.

### **Relevance**

You may refuse to receive any evidence, whether it is admissible or not at common law, which you consider irrelevant or needless: *s. 289(2) Niue Act 1966*.

### **Weight**

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

### **Discretion to exclude at common law**

Every person charged with a criminal offence has the right to a fair trial before a Court of law. In order to ensure that the accused receives a fair hearing, you have discretion under the common law to exclude otherwise admissible prosecution evidence if, in your opinion, it is gravely prejudicial to the accused.

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

## 8.5 Best Evidence Rule

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

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

## 8.6 Hearsay Rule

Evidence given by a person who did not see or hear the original matter is called hearsay evidence.

An example of hearsay evidence would be a witness telling the Court what his friend told him about what she saw the accused do. The witness did not see the accused do anything. It was his friend who saw it, and who should give evidence.

The general rule is that an assertion that is made by a person other than the one giving oral evidence in a proceeding is inadmissible as evidence to prove the truth of some fact that has been asserted.

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

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

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 All ER 447 at 449.

Although the rule against hearsay evidence is fundamental, it is qualified by common law.

## **Exceptions to the hearsay rule**

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

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

## **8.7 Opinion Evidence**

The rule on opinion evidence is that witnesses may only give evidence of facts they personally observed and not evidence of their opinion. A statement of opinion is only an inference drawn from the facts.

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

There are two exceptions to the rule on opinion evidence.

- experts;
- non-experts or lay persons.

### **Experts**

Expert witnesses are allowed to give opinion evidence if:

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

In order to give opinion evidence, an expert witness must relate to the Court his or her background, qualifications and experience, to establish their credentials to speak as an expert in a specific field. Having done that, as a general rule they should be allowed to give their opinion on all relevant matters within their competency.

Expert opinion should only be admitted where the Court has been shown that an issue of fact requires the application of knowledge, experience and understanding that is beyond that of ordinary persons.

Some examples of expert opinion evidence include:

- a registered medical practitioner giving an opinion about the health of a patient;
- a registered architect giving an opinion about the structure of a building; and

- a qualified motor mechanic giving an opinion about the condition of a motor vehicle.

### **Non-experts**

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

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

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

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

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

## **8.8 Character Evidence**

### **Admissibility of evidence of bad character**

As a general rule, it is not open to the prosecution to introduce evidence of the bad character of the accused in any form.

Therefore, the previous convictions of the accused may not form part of the case against him or her, nor may his previous misconduct, his disposition towards wrong doing or immorality, or his or bad reputation in the community in which he or she lives.

The only way that evidence of bad character of the accused can be introduced is by exceptions to the rule. Some of the exceptions to this rule at common law are:

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

**Admissibility of evidence of good character**

An accused may introduce evidence to show that he or she is of good character. By doing so, however, they put their character in issue and the prosecutor may cross-examine witnesses or, in some cases, the accused about their character and about any previous convictions.

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



## 5:

# CRIMINAL RESPONSIBILITY

This chapter discusses the principles and rules as to criminal responsibility. It sets out:

- general principles relating to criminal law;
- defences that can be raised which excuse criminal responsibility;
- parties to offences.



# 1 Introduction

In Niue, every offence is created by a Statute, Regulation or a by-law.

The *Niue Act 1966* is the main Statute that sets out those acts or omissions which should be regarded as a criminal offence in Niue, and the rules related to the criminal law in Niue.

This chapter will discuss the:

- important principles of the criminal law which govern the conviction of criminal offences in Niue;
- defences that can be raised which excuse an accused from criminal responsibility; and
- parties which should be held criminally responsible for those acts or omissions;

## 2 Principles of Criminal Law

### 2.1 Innocent Until Proved Guilty

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

### 2.2 Burden and Standard of Proof

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

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

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

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

### 2.2 Beyond Reasonable Doubt

This means you are sure the accused is guilty of the charge, based on the evidence that has been presented by the prosecution, and there is no doubt in your mind.

If you are uncertain in any way, you must find the accused not guilty and **not** ask for further information from either party after they have made submissions: see April 2, 1998 letter from the Chief Justice.

If you have doubts, this means that the prosecution has not proven the charge “beyond reasonable doubt.”

## 2.4 What Must be Proved

All offences involve the:

- actus reus; and
- mens rea.

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

This is the physical conduct or action, or an omission:

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

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

An offence may consist of one act or omission or a series of acts or omissions. The failure by the prosecution to prove the act(s) or omission(s), and any accompanying conditions or circumstances means there can be no conviction.

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

Most offences require the prosecution to prove the accused had a particular state of mind in addition to the act and its consequences. This is called the *mens rea*.

This could be:

- intention: the accused means to do something, or desires a certain result;
- recklessness: the accused foresees the possible or probable consequences of his actions and although does not intend the consequences, takes the risk;
- knowledge: knowing the essential circumstances which constitute the offence;
- belief: mistaken conception of the essential circumstances of the offence; or
- negligence: the failure of the accused to foresee a consequence that a reasonable person would have foreseen and avoided.

### 3 Criminal Responsibility

Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

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

- the prosecution has not proved all the elements beyond reasonable doubt; or
- he or she has a specific defence, specified in the actual offence (e.g. “lawful excuse”); or
- he or she was not criminally responsible, relying on one of the defences either in Statute, or at common law under *s. 238 Niue Act 1966*.

*Section 238 Niue Act 1966* sets out that all the rules and principles of the common law which render any circumstance a justification or excuse for an act or omission, or a defence to any charge, shall remain in force with respect to the *Niue Act* or any other enactment unless inconsistent with such enactments.

In the case of a defence, the accused must point to some evidence to support such a defence. Then, it is the **prosecution** that bears the burden of proving that such evidence should be excluded and that the accused **was** criminally responsible for his or her act(s) or omission(s).

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

Defences can be divided into two categories:

1. Those rules that relate to a denial of the *mens rea* of the offence or to a denial that the accused was acting voluntarily:
  - Intention;
  - Accident;
  - Mistake;
  - Intoxication; and
  - Immature age.
2. Those rules that relate to excuses or circumstances which justify, in law, the conduct of the accused:
  - Compulsion; and
  - Defence of person or property.

## 4 Rules Relating to the *Mens Rea* of an Offence and to Involuntary Acts

### 4.1 Negligence, Involuntary Acts and Accidents

Subject to the express provisions of any enactment relating to negligent acts and omissions, a person is generally not criminally responsible for an act or omission which occurs independently of the exercise of his or her will or for an event which occurs by accident.

#### **Negligent Acts or Omissions**

Criminal negligence is where the accused's act or omission, which constitutes the offence, fails to comply with the standards of the **reasonable** person. This is a different standard of fault than most criminal offences, which require proof of the accused's state of mind.

Therefore, a person can be found criminally negligent for something, even if it is an accident, if a reasonable person would have been aware of the risks of that conduct in the same situation.

#### **Involuntary Acts**

Most criminal offences require that the accused's acts or omissions be 'willed' or 'voluntary'.

#### Involuntary Acts

An accused will not be criminally responsible for acts or omissions that are involuntary, not only because there is a lack of the required *mens rea* for the offence but also because involuntary movements cannot constitute the necessary *actus reus* of any offence.

An example of an involuntary act would be if Tagata Goagoa was thrown out of a shop window by his enemies and landed on a car window. Tagata Goagoa would not be criminally responsible for the damage to the car because it was not Tagata Goagoa's voluntary act that led to the damage of the car.

#### **Accidents**

A person is generally not criminally responsible for an event that occurs by accident.

The event must not be intended by the accused. An event is an accidental outcome of the willed act, which then leads to a result. The event must not have been able to be easily foreseen by the accused under the circumstances.

You must ask:

- Would such an event have been easily foreseen by an ordinary person in the same circumstances?

The prosecution bears the burden of proving that the act or omission was not an accident, beyond a reasonable doubt. However, when the defence of accident is raised by the accused, he or she must point to some evidence in support of the defence.

## 4.2 Mistake of Fact

For the defence of mistake of fact to succeed:

- the accused must have been under an honest, but mistaken, belief as to the existence of any state of things; and
- the offence must have been committed while holding the honest but mistaken, belief.

Whether the accused was under an honest, but mistaken, belief is a **subjective** test, that is, from the evidence presented, did the accused **actually** have a genuine and honest belief as to the state of things, even though he or she was mistaken in that belief?

The common law rules for honest but mistaken belief are:

- 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, that the mistake was unreasonable: *R v Williams (G.)* [1984] CrimLR. 163, CA.

## 4.3 Intoxication

Intoxication itself is not a defence to a crime. Rather, the common law rule is that voluntary intoxication by drink or drugs may only give rise to a defence to crimes of specific intent.

Specific intent offences are those in which a particular state of mind, or mens rea, is a required element of the offence.

For a defence of intoxication to succeed then, it would have to be shown by the evidence that the accused did not have the necessary state of mind required for that offence, because of his or her state of voluntary intoxication.

All offences, other than those of specific intent, can be regarded as crimes of basic intent and the accused should not be allowed to show that he or she lacked the mens rea due to voluntary intoxication.



#### **4.4 Immature Age: ss. 237A & 238A Niue Act 1966**

No person shall be convicted of an offence by reason of any act or omission when under the age of 10 years: *s. 237A(1) Niue Act*.

No person shall be convicted of an offence by reason of any act or omission when of the age of 10 but under the age of 14 **unless** he or she knew that it was wrong or that it was contrary to the law: *s. 238A(1) Niue Act*.

It should be noted however that there should be no presumption of law that any person is incapable of intercourse because of his age for the purposes of *Part V: Criminal Offences: s. 161 Niue Act 1966*.

#### **Evidence of age**

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

#### **Capacity to know and understand for children between 10 and 14 years**

From *R v Sheldon* [1996] 2 CrAppR 50.

It is for the prosecution to prove, beyond reasonable doubt, that when committing the offence, the child knew that his or her act was seriously wrong. This is distinct from an act of mere naughtiness or childish mischief.

Clear evidence as to the child’s capacity is required, not just evidence as to the offence itself.

The surrounding circumstances are relevant and what the accused child said or did both before and after the act may go towards proving guilty knowledge. However, sometimes this behaviour may be consistent with naughtiness or mischief rather than wrongdoing.

Proof that the accused was a normal child for his or her age will not necessarily prove that he or she knew his action was seriously wrong.

Capacity or understanding may be proven by:

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

## 5 Rules Relating to Excuses or Special Circumstances

### 5.1 Compulsion (or Duress)

A person may have an excuse for an offence based on compulsion, also called duress.

#### Compulsion by Threats

Compulsion by threat is when an accused commits an act or omission in order to **comply** with the demands of the person threatening him or her.

#### Type of Threat

- There must be threats of death or grievous bodily harm.
- Serious psychological injury is not enough of a threat: *R v Baker and Wilkins* [1997] Crim LR, 497.
- Threats of death or grievous bodily harm made to third parties, especially close relatives, may be enough of a threat to give a defence: *R v Ortiz* (1986) 83 Cr App R 173.

#### Reasonableness

- The fact that the accused believed that a threat of death or grievous bodily harm would be carried out is **not** sufficient. It is whether a person of reasonable firmness sharing the characteristics of the accused would not have given way to the threats.

#### The test for compulsion by threats

1. Was the accused driven to act as he or she did because he or she had a reasonable belief, because of what the other party did or said, that if he or she did not act, the other party would kill or cause grievous bodily harm to him or her?
2. If the accused had such reasonable belief, has the prosecution proved that a person of reasonable firmness, sharing the characteristics of the accused, would **not** have responded the same as the accused if that person reasonably believed what was said or done by the other party to the offence?

#### Compulsion by Circumstances

Compulsion by circumstances is when an accused does an act or omission in order to **escape** from the threats of the other person.

This defence is available only if, from an objective standpoint, the accused was acting reasonably and proportionately in order to **avoid** a threat of death or grievous bodily harm.

## 5.2 Defence of Person or Property

A person may use such force as is reasonable in the circumstances for the purposes of:

- self-defence;
- defence of another; or
- defence of property.

### Principles

- A person may use such force as is reasonable in the circumstances as he or she honestly believes them to be in the defence of him or herself or another: *Beckford v The Queen* [1988] AC 130.
- What force is necessary is a matter of fact to be decided on a consideration of all the surrounding factors.
- The state of mind of the accused should also be taken into account. This is a subjective test: *R v Whyte* (1987) 85 CrAppR 283.
- Force may include killing the aggressor, but there must a reasonable necessity for the killing or at least an honest belief based on reasonable grounds that there is such a necessity.
- It would only be in the most extreme circumstances of clear and very serious danger that a Court would hold that a person was entitled to kill simply to defend his or her property, as there are many other effective remedies available.
- The onus is on the prosecution to prove that the accused did **not** act in self-defence or in defence of property, once the issue has been raised by the accused and evidence has been presented: *Billard v R* (1957) 42 CrAppR 1; *R v Moon* [1969] 1 WLR 1705.

## 6 Parties to Offences

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

In Niue, parties to offences include:

- principal offenders and accessories, under *s. 233 Niue Act*;
- joint offenders who are in prosecution of a common purpose, under *s. 234 Niue Act*;
- those who incite another party to an offence, under *s. 232 Niue Act*;
- accessories after the fact, under *s. 236 Niue Act*;
- conspirators, under *s. 228 Niue Act*.

### 6.1 Principal Offenders

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

*Section 233(a) Niue Act* states that everyone is a party to and guilty of an offence who actually commits the offence.

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

In cases where there is only one person who is involved in the offence, he or she will be the principal offender.

For Example:

If a person punches another on the face causing injury, that person would be considered the principal offender for the offence of assault.

### 6.2 Accessories

An accessory is a person who aids, abets, or counsels or procures the commission of an offence. Although an accessory is not a principal offender, they are charged and can be convicted of the actual offence as if they had been the principal offender.

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

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

- aiding, abetting, counselling and procuring;
- the offence.

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

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

### **Aiding and Abetting**

Every person is a party to and guilty of an offence who does or omits any act for **the purpose of aiding** another person to commit the offence: *s. 233(b) Niue Act*.

Every person is a party to and guilty of an offence who **abets** any person in the commission of the offence: *s. 233(c) Niue Act*.

The terms to aid and abet generally mean to give assistance and encouragement at the time of the offence.

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

### **Elements for Aiding or Abetting:**

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

### **Counselling or Procuring**

Every person is a party to and guilty of an offence who counsels or procures any person to commit the offence: *s. 233(d) Niue Act*.

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

You should note that every person who counsels and procures another person to be a party to an offence is:

- a party to that offence, even if the offence was committed in a way that was different from what was counselled; or
- a party to every offence which the other commits as a consequence of the counselling and procuring and which the person counselling or procuring knew was likely to be committed as a consequence of the counselling or procuring: *s. 235(1) & (2) Niue Act*.

### Counselling

The normal meaning of 'counsel' is to 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.

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 All ER 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.

### **The Elements of 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.

### **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 their has been a change of mind
  - ⇒ this applies if the participation of 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;
- 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.

### 6.3 Prosecution of a Common Purpose

If two or more persons form a common intention to carry out an **unlawful** purpose with one another and, to assist each other in that purpose, each of them is party to every offence committed by one of them if it was known to be a probable consequence of carrying out that common purpose: *s. 234 Niue Act*.

*Section 234 Niue Act* would **not** apply in circumstances where the offenders form a common intention to commit an offence and, in fact, do nothing further than commit the offence as planned. In this case, one would be a principal offender and one would be an accessory because both are equally culpable for the offence that was proposed and committed.

*Section 234 Niue Act* applies when, during the commission of the intended, original offence, an additional offence is carried out.

#### Example:

Steven and Robert decide to commit a robbery. Steven is inside the store taking the money while Robert is holding the door and making sure no one comes into the bank. Steven will be liable for the offence of robbery as the principal offender under *s. 233(a) Niue Act*, while Robert will be liable for the offence of robbery as a secondary party under *s. 233(b) Niue Act*.

However, if during the course of the robbery, Steven shoots and kills the shopkeeper, Steven will be liable as the principal offender for killing the shopkeeper.

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

If Robert knew or ought to have known that killing the shopkeeper was a probable consequence of carrying out the common purpose of robbing the shop, he will be liable for the killing as a secondary party under *s. 233(b) Niue Act*. Both Robert and Steven will be jointly charged with murder under *s. 233 Niue Act* and the relevant provisions for murder.

#### **Elements for Prosecution of a Common Purpose:**

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



## 6.4 Accessories After the Fact

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

- has knowledge that a person is a party to an offence; **and**
- receives, comforts, or assists another, or tampers with or knowingly suppresses evidence against him or her, so that he or she is able to avoid arrest or conviction, or escape after arrest: *s. 236 NA*.

Any person who becomes an accessory after the fact to any offence punishable by imprisonment, unless an express provision is made by the *Niue Act* or some other enactment for the punishment of an accessory after the fact, is liable to imprisonment:

- for 7 years if the punishment for the offence is for life; or
- for 5 years if the punishment for the offence is for 10 or more years; or
- in any other case, to no more than half the punishment he or she would have been had been liable to if they had been the principal offender: *s. 237 NA*.

A married person does **not** become an accessory after the fact for the offence of the spouse if they:

- receive, comfort or assist the spouse, or suppress or tamper with evidence, in order to enable the spouse to avoid arrest or conviction or escape after arrest; or
- receive, comfort or assist the spouse and any other person who has been a party to the offence, or suppress or tamper with evidence, in order to enable the spouse and any other party to the offence to avoid arrest or conviction, or escape after arrest: *s. 236(2) NA*.

### Elements for Accessories after the Fact:

- The party to the offence was guilty of a offence punishable by imprisonment; and
- The accused knew that he or she was a party to an offence; and
- The accused received or assisted or comforted the party to the offence, or tampered with or suppressed evidence; and
- The accused received or assisted the party to the offence, or tampered with or suppressed evidenced, in order to enable the him or her to avoid arrest or conviction or escape after arrest.

### Points to Note

- The principal offender received or assisted must have been guilty of an offence.
- The assistance must be given to the offender personally.

- The assistance must be given in order to prevent or hinder him or her from being apprehended or being punished.
  - ⇒ Assistance given indirectly or for motives other than hindering arrest of the principal offender, such as avoiding arrest him or herself or to make money for him or herself, would not make the person guilty as an accessory after the fact: *Sykes v Director of Public Prosecutions* (1961) 45 CrAppR 230.
- The Court must be satisfied that the accused knew that an offence had been committed by the principal offender.
- Proof that an offence has been committed is sufficient to prove a person guilty of being an accessory after the fact, even if there has not yet been a conviction of the principal offender: *R v Anthony* (1965) 49 CrAppR.

## 6.5 Conspiracy

Every person who conspires with any other person to commit an offence which is punishable by imprisonment is liable to imprisonment for a term not exceeding half the longest term to which the person committing the offence would be sentenced: s. 228 *Niue Act*.

### Elements of Conspiracy:

#### Actus Reus

- Agreement is the essential element of conspiracy. It is the actus reus of conspiracy. There is no conspiracy if negotiations fail to result in a firm agreement between the parties: *R v Walker* [1962] Crim LR 458.
  - ⇒ The offence of conspiracy is committed at the moment of agreement: *R v Simmonds & Others* (1967) 51 CrAppR 316.
  - ⇒ An intention between two parties is not enough for a charge. What is required is an agreement between two or more to do an unlawful act by unlawful means: *R v West, Northcott, Weitzman & White* (1948) 32 CrAppR 152.
- At least **two** persons must agree for there to be a conspiracy. However, a single accused may be charged and convicted of conspiracy even if the identities of his or her other fellow conspirators remains unknown.

#### Mens Rea

- Conspiracy requires two or more people to commit an unlawful act with the intention of carrying it out. It is the intention to **carry out the crime** that constitutes the necessary mens rea for conspiracy: *Yip Chieu-Chung v The Queen* [1995] 1 AC 111.
- Knowledge of the facts is only material, in so far as such knowledge throws light onto what was agreed to by the parties: *Churchill v Walton* [1967] 2 AC 224.
- Knowledge of the relevant law that makes the proposed conduct illegal need not be proved: *R v Broad* [1997] Crim LR 666.

## **6:**

# **CRIMINAL PROCEEDINGS**

This chapter deals with criminal proceedings. It sets out:

- how a case gets to Court;
- how to take a plea; and
- steps in a trial.

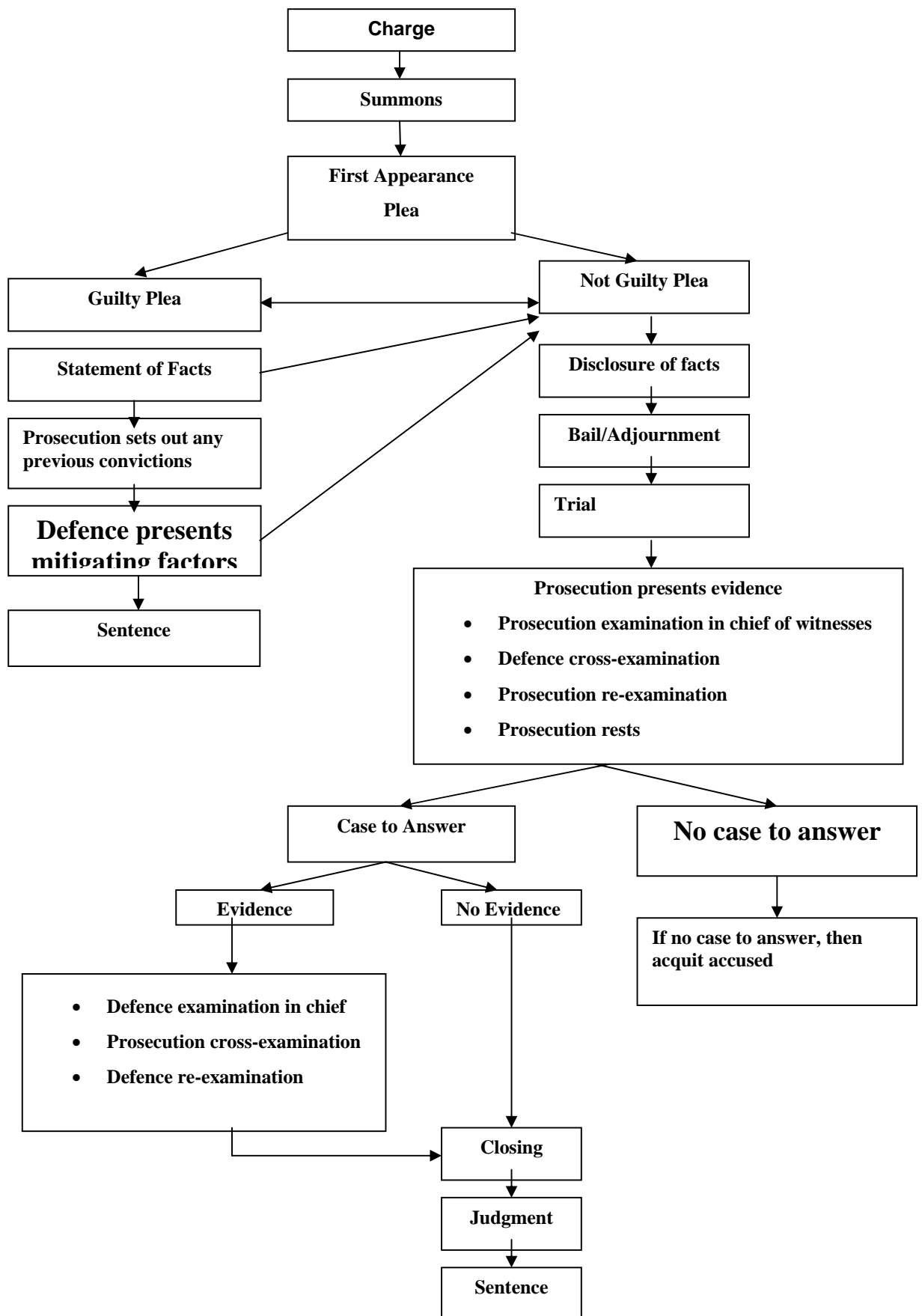


# 1 Criminal Procedure in the High Court

Procedures establish how an offender is brought to Court and how the case is dealt with in Court.

For the High Court, procedures are found in the *Rules of the High Court 1916* and *Niue Act 1966*.

The diagram on the following page shows the process of typical criminal proceedings in the High Court.



## 2 How a Case Gets to Court

Criminal proceedings (known as a prosecution) are normally filed by the police on behalf of the Crown against a person alleged to have committed an offence.

Criminal proceedings are commenced by the laying of an Information (*Sch. 4, Form 1 RHC*) by the police, followed by issue of a summons (*Sch. 4, Form 2 RHC*) or a warrant of arrest (*Sch. 4, Form 5 RHC*).

### 2.1 The Information

Before a criminal case proceeds to Court, an Information in writing must be laid by the police: *s. 253 Niue Act*.

An Information must be sworn on oath before the Registrar, and a Justice or Commissioner must sign and date it.

The Information should give the name of the person who is accused of the offence, details of what the police allege that the accused has done, and the law the police allege that the accused has breached.

Prior to signing the Information, you should check the Statute referred to in the Information to ensure that the offence(s) charged with exists in Statute law as no person shall be proceeded against for any criminal offence at common law: *s. 239 Niue Act*.

Remember that these are allegations which have to be proved or admitted and the accused is innocent until proven guilty.

### 2.2 The Summons

A summons is a formal notice requiring a person to appear before the Court on the date and time stated in the summons.

The summons is issued by any Commissioner, Justice or Registrar in the prescribed form:

- *Form 2, Sch. 4 RHC* for the accused; and
- *Form 3, Sch. 4 RHC* for a witness: *Rules 88 & 89 RHC*.

The Registrar should arrange for the police to serve the summons on the accused in person.

Summons can be served in two ways:

- personal service; or
- leaving the summons with a member of the family who is 18 years of age and living at the person's residence.

Proof of service should be endorsed on the Court copy of the summons. It should show:

- fact of service;
- time of service; and
- mode of service.

Where the accused is off island, the charge and summons should be prepared and sent to where the accused is living.

### **2.3 Warrant for Arrest**

A warrant for arrest may be issued to enforce attendance where:

- a summons has been disobeyed; or
- a serious offence is alleged.

You will use *Form 5* in *Sch. 4 RHC: Rule 91 RHC*.

No person shall be arrested without a warrant except according to the provisions in *s. 250 Niue Act*. A police constable, or any person assisting him or her, may arrest without a warrant any person who is:

- attempting to or believed to have been disturbing the public peace; or
- suspected of committing an offence against *s. 214* or *s. 216 Niue Act*; or
- suspected of committing treason under the *NZ Crimes Act 1961*; or
- any other offence punishable by imprisonment: *s. 250 Niue Act*.

If a person is arrested, either with or without warrant on a charge of any offence, they must be brought before the High Court as soon as possible: *s. 251A(5) Niue Act*.



### 3 First Appearance

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

- the integrity of the Information (if not already considered);
- non appearance, therefore summons and warrants;
- plea, including fitness to plead;
- bail;
- adjournments.

It is your duty to explain the proceedings to the accused, **prior** to setting out the charge.

#### 3.1 Non-Appearance by the Accused

Where an accused does not appear in Court, you should:

- establish that he or she has been served with the summons with sufficient time to comply;
- if the summons has not been served, adjourn the matter to allow service.

In some cases, if service has been proved, you may issue an arrest warrant (Form 5). However, before issuing an arrest warrant for non-appearance, you should consider:

- What effort has the prosecution made to serve the accused?
- Is the failure to serve the accused a result of false Information by the accused?
- Does the offence with which the accused is charged carry a term of imprisonment?
- How long after the alleged offence was the summons issued?

#### 3.2 Dispensing with Attendance of Accused

Note that any person may be tried in his or her absence if he or she:

- is being prosecuted for an offence punishable by fine only; and
- has been summoned to appear before the High Court; and
- fails to appear in accordance with the summons: *s. 257 Niue Act*.

If a hearing is conducted in the absence of the accused, you must ensure that the prosecutor provides evidence which prove the elements of the offence. This is called a **formal proof**. Once the evidence has been presented, you must decide whether that evidence proves beyond reasonable doubt the guilt of the accused.

## **4 Putting the Charge to the Accused**

### **4.1 Identifying the Accused**

When an accused person is brought before you, you must first ascertain who he or she is. Ask for his or her:

- full name;
- address;
- occupation; and
- age.

This is very important. More than one person may share the same name.

### **4.2 The Prosecution**

In Niue, the Chief of Police generally acts as the prosecutor.

This can cause difficulties, as they are two separate roles:

- The duty of police as prosecutor is to present and argue the case for the prosecution.
- When a police officer is giving evidence as a witness, they are in no different position from anyone else coming before the Court. Their evidence is judged by the same standards as evidence from other sources – it is no more or less credible.

In any case before the Court, the duty of the person prosecuting (the police) is to the Court. They must not mislead or deceive the Court. They must:

- assist the Court to arrive at a conclusion which is in accordance with truth and justice; and
- place the case impartially before the Court, including all relevant facts.

If a charge has been filed after 6 months has passed since the offence took place, the case should be withdrawn by the police.

### **4.3 Defence Counsel**

A defence advisor also has a duty to the Court. They must not mislead or deceive the Court, but remember that their interests are those of the accused, and they are under no duty to be impartial.

#### **4.4 Explaining the Charge to the Accused**

In Niue, the accused rarely, if ever, has access to legal advice. Therefore, it is very important that the accused understands the charge against him or her, and is able to respond to the allegation made.

You must clearly explain the nature of the offence to the accused. This involves explaining the elements.

Unless the accused clearly understands the nature of the offence with which he or she is charged, he or she will not be able to work out if he or she has a defence. This will affect his or her ability to enter a plea.

##### **Check for understanding**

Check whether the accused understands the charge. When you are sure he or she understands the full nature of the offence charged, then ask how he or she pleads to the charge. Never take for granted that the accused person might have understood your explanation without his or her confirmation.

It is important that you clearly record what an unrepresented accused has been told by the police and by any advisors, and his or her responses.

## 5 Plea

### 5.1 Pleas Generally

An accused can either plead 'guilty' or 'not guilty' to a charge.

A plea may be changed from Guilty to Not Guilty, and vice versa, at any time up until sentence has been imposed.

### 5.2 Fitness to Plead

You will need to be conscious in particular cases of whether the accused is fit to plead. An accused is under a disability if he or she cannot plead and understand the nature of proceedings.

In these situations, it would be better to ascertain the nature of the problem first than to allow proceedings to continue. Relevant reports may have to be ordered, if necessary, and the matter may have to be adjourned to another date.

A finding of disability can result in:

- the accused's detention in a hospital or psychiatric facility; or
- the accused's immediate release.

### 5.3 Guilty Plea

Ask the accused whether the charge is true or not. If the accused says it is true:

- ask him or her to sit down;
- ask the prosecution to read a brief summary of the facts;
- tell the accused to listen very carefully to this. Explain that he or she will be asked at the end whether the facts are true; and
- after the prosecution has read the facts, ask the accused whether the facts are true or not.

If the accused admits the truth of the facts, this will suffice as a plea of **guilty**. You then:

- record his or her admission as nearly as possible in the words used by him or her;
- convict him or her; and
- pass sentence or make an order against him or her (either immediately or at a later date).

If the accused admits the truth of the charge, but makes some remarks or comments, listen carefully because sometimes those remarks or comments indicate a possible defence. You need to be particularly alert to this.

If the accused disputes any of the facts read out by the prosecution, consider whether the disputed facts are relevant to the elements of the offence. Note that a plea of guilty is a plea to the **elements** of the charge, not necessarily acceptance of the police summary of facts. If the facts in dispute are not relevant to the elements, enter a plea of **guilty**.

If the disputed facts are relevant to any of the elements, or where any remarks or comments made by the accused may amount to a defence, you must enter a plea of **not guilty** for the accused.

#### Example

On a charge of drunk and disorderly, one of the elements is the behaviour must be in a public place. If the accused admits to being drunk and disorderly, but it was in his friend's backyard, that is relevant and you should enter a plea of not guilty for the accused. It is then up to the prosecution to prove he was in a public place.

## **5.4 Guilty Plea by Letter**

In certain offences, a letter admitting the offence can be accepted by the Court, and the Court may excuse the attendance of the accused. This letter has to be signed and dated.

The letter will be read out to the Court and the plea entered. The Prosecutor will proceed to read out the facts, and any other relevant information.

The Court will sentence the accused in their absence and the Clerk will write to the accused to advise him or her of the decision made.

This should be done only where the offence is minor.

The person should be in attendance where the sentence is:

- an order disqualifying from driving; or
- imprisonment.

The case should be adjourned and the accused summoned for that purpose.

## **5.5 Entering Conviction**

The accused's admission of the truth of the charge should be recorded as nearly as possible in the words used by him or her.

You should never sentence a person without convicting him or her first.

You may:

- sentence immediately;
- stand down the matter to consider the appropriate sentence; or
- adjourn the matter to allow for relevant reports to be compiled, and remand the accused.

If you are adjourning, consider bail/remand.

## **5.6 Not Guilty Plea**

If the accused pleads not guilty, or the Court enters such a plea on behalf of the accused, the case should be adjourned for hearing. This enables and ensures:

- witnesses are called by both parties; and
- disclosure of police papers to the defence (on request).

### **Immediate hearing**

If all parties are ready to proceed with a defended hearing (including witnesses), proceed to hear the matter immediately or adjourn the case to later in the day to hear it. See next section on “Defended Hearings”.

### **Hearing at a later date**

You should fix a suitable hearing date so that the parties have ample time to summon and get their witnesses to Court.

### **Remands / bail after plea**

If a plea of not guilty is entered you may:

- remand the accused and obtain an estimate of hearing time; or
- release the accused on bail on such condition or conditions that he or she attends trial at the date and time scheduled; and
- record all of the above.

If bail is granted, the terms, if any, should be noted carefully on the Evidence Sheet. Reasons must be given for refusing bail (see Chapter 7 Management of Proceedings.)

## 6 Trial

Prior to the defended hearing, all witnesses should be asked to attend Court. This is done by issuing a summons asking them to attend at a certain time and place (*Sch. 4, Form 1 RHC*): *s. 73 Niue Act*.

If a witness has been summoned and fails to appear without sufficient cause, he or she shall be guilty of contempt: *s. 74 Niue Act*.

Before the hearing begins, it is usual to confirm the plea. In some cases where legal advice has been given, the plea may change to guilty. If this happens:

- send any witnesses away, as there is no further need for their attendance; and
- continue as for a guilty plea (see 5.3 above).

### 6.1 The Un-represented Accused

Generally, an accused will appear without a lawyer. Most have little idea what is involved in a defended hearing.

You should begin by explaining:

- the elements of the charge that the prosecution must prove;
- how the case will proceed;
- their right to cross-examine witnesses and call their own witnesses, who will be cross-examined by the prosecution;
- that they may give evidence, but do not have to, and if they do, they may be cross-examined by the prosecution; and
- that there may be a possible defence at common law.

### 6.2 Prosecution Case

The police prosecutor will present the case on behalf of the Crown. This means he or she will have prepared the case.

#### Opening Address

The prosecutor may make an opening address, which outlines the evidence to be given by prosecution witnesses. For most minor cases, however, the prosecution will begin by bringing forth his or her first witness.

## **Prosecution Witnesses**

The prosecutor calls the prosecution witnesses individually to give evidence.

If there is more than one witness, you should order all other witnesses under examination to go and remain outside the Court until required to give evidence. If this order is disobeyed, the witness shall be guilty of contempt of the High Court (see Chapter 8 Management of Proceedings).

The witness will give his or her evidence on oath or affirmation.

The prosecutor may also present any real or documentary evidence during this time.

## **Exhibits**

### Production

Though it is the Registrar's function to mark and record the exhibits, you may have to intervene to ensure that each exhibit (especially with a set of photos) is:

- distinctively marked; and
- recorded in your notes in the Evidence Sheet in a manner that leaves no doubt what the exhibit mark refers to.

Generally, prosecution exhibits are numbered 1, 2, 3, etc. and defence exhibits are letters A, B, C, etc. An exhibit produced by a prosecution witness in cross-examination is a defence exhibit.

### Marking of exhibits by witness

Often parties pass exhibits, such as plans and photos, to witnesses quite indiscriminately and invite them to mark some point, e.g. the impact point in a collision.

If such a situation occurs, care must be exercised to ensure clarity.

Ensure that the witness marks all photos (or plans, or maps) with, ideally, a differently coloured pen and your notes should clearly describe it.

If, however, by marking a plan or photograph, it is possible that a later witness may be influenced by such marking, it may be preferable to have a copy of the exhibit marked and produced as a separate exhibit with the original being kept in an unmarked state.

## **Note-taking**

You should take notes of the evidence presented, to assist in making your decision. One way to do this is:

- to note each element on a separate piece of paper; and
- 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, as well as ensuring every element has been proved.

### **Cross-examination**

Once the prosecution have finished with each witness, the accused can ask questions. This is called cross-examination.

The purpose of cross-examination is to test the credibility or reliability of the witness and to try and bring forth other facts which may assist the accused.

The accused should be encouraged to ask question of the witness on topics which he or she does not agree. The failure of a defendant to question the evidence of a witness in cross-examination can affect the result of the accused.

### **Re-examination**

The prosecution can re-examine that witness if they feel it necessary to do so.

Re-examination **must** be confined to matters that arose in cross-examination and no new matters should be introduced, unless you give leave to do so.

At the end of re-examination, you may ask questions to clarify any matter.

When the prosecution have called their final witness, that concludes their case.

## **6.3 No Case to Answer**

Once the prosecution case is closed, you need to be satisfied that:

- the facts support the charge;
- there is evidence of all the elements of the offence charged in relation to the accused; and
- the evidence adduced by the prosecution is credible and reliable after cross-examination.

If not, then the case should be dismissed and the accused acquitted.

Make a note on the Court record that there was no case to answer and the accused is acquitted.

If you are satisfied that the prosecution has presented evidence to prove all the elements of the offence charged in relation to the accused, then the accused or their advisor will present the case for the defence.

## **6.4 The Defence**

The defence does not have to prove anything.

The accused may give evidence and call witnesses to support his or her case.

An accused is not obliged to give evidence if he or she does not want to do so. If you rule there is a case to answer, you should ask the accused:

- Do you wish to give evidence or call witnesses to give evidence?

If the accused chooses to call witnesses or present evidence, it should be done in the same manner as the prosecution's case.

Once each of the accused's witness gives testimony, they may be asked questions by the prosecutor and re-examination may take place.

You may ask any questions on the evidence that has been heard or to deal with issues that you feel need to be asked from the evidence that has been heard.

Once the accused has presented all his or her witnesses and cross-examination has taken place, the defence case is then closed.

## **6.5 Conclusion of Case**

The defence may summarise the facts and explain why the case has not been proved. This may include reference to the law.

The prosecution will respond, explaining how the case has been proved and the law that applies.

In both cases, they will explain how the evidence supports their case.

## 7:

# MANAGEMENT OF PROCEEDINGS

This chapter provides advice on how to manage proceedings. It includes advice and rules regarding:

- organising the Court;
- Evidence Sheets;
- adjournments, bail and remand in custody;
- dealing with victims, child witnesses, mentally ill accused;
- rehearing criminal proceedings; and
- case management.



# 1 General Organisation for Court

Before you go to Court:

- make sure that the Registrar is present and ready for Court to commence;
- if there is a need to have an interpreter, then ensure that the person is duly sworn and his or her role is explained before the proceedings start;
- ensure that you have a police orderly for your Court and that he or she is briefed about the order of proceedings.

When in Court:

- start Court on time and rise at the expected time. This is not only for your benefit but also for the accused, the prosecutors and Court staff.

## **2 The Evidence Sheet**

### **2.1 General**

There will be an Evidence Sheet for each file against the accused.

The file will have the reference number of the case after the name of the accused.

You must check that the information contained in the charge sheet is duly sworn and that the dates of the offence and appearance are correct.

### **2.2 Endorsing the Evidence Sheet**

Remember that those who follow you need to know what you have done. You should endorse each Evidence Sheet with:

- evidence presented;
- the action you have taken in Court, with reasons;
- the correct date;
- your signature, at the conclusion of the proceedings.

Do all of the above in Court if that is possible.

Neatness, precision and full information are essential.

Standard information in the Evidence Sheet includes:

- name of the accused;
- plea;
- name of counsel;
- all remands or adjournments;
- any bail and bail conditions;
- any amendment to the charge, fresh plea, etc.;
- consent to amendment by the accused;
- witness numbers and hearing times;
- the final disposal of the case, whether it be conviction, dismissal of the charge, withdrawal of the charge by the prosecution, or acquittal;
- the sentence and details.

### **3 Order of Calling Cases**

The following is a suggestion in the order of calling cases.

- Call through cases to find out which are ready to proceed and stand down cases according to estimated time for hearing.
- Next, call cases where the accused are in custody, to free up police or prison officers.
- Call adjourned cases and those where the accused was previously remanded.
- Deal with sentencing matters and judgments near the end of the list.
- Finally deal with the balance of the list.

## **4 Disclosure**

The accused is entitled to know the evidence against him or her before they enter a plea to the charge.

Early disclosure of the police evidence is essential for the proper working of the case-flow management in criminal proceedings.



## 5 Adjourments

The rules of natural justice dictate that an adjournment may be granted in any case where an application is brought, and the Court is satisfied that inadequate notice has been given to the accused or inadequate time has been given to enable a party to prepare a defence or answer the proceedings.

Every adjournment must be made for a specific time and date. It should never be for a lengthy period unless it is to enable a party to obtain some specific evidence or carry out some direction of the Court. It cannot be left open for the Court or the Registrar to set at a later date.

When a hearing is adjourned, and the accused is liable on conviction to a sentence of imprisonment or has been arrested, you may:

- allow the accused to go at large; or
- remand him or her custody; or
- release him or her on bail.

### **Adjournment for Lack of Jurisdiction**

You may be called to adjourn a hearing if you have no jurisdiction to hear a particular case. The case will be adjourned in order for a Judge of the High Court to hear the case.

In this case, there is usually no dispute about granting an adjournment.

### **Parties Asking for Adjournment**

You may be asked for an adjournment by either the prosecution or the accused, if they are unable to proceed with the case. In this case, one party may dispute a request for an adjournment.

The party seeking an adjournment should show “good cause” before an application for adjournment is considered. Good cause includes, but is not limited to, the **reasonably** excusable absence of a party or witness. However, adjournment **should** not be allowed due to a lack of preparation by one of the parties.

Unnecessary adjournments should be **avoided** as they waste the time and resources of the Court and other people in the case, and in some cases lead to a long delay in the case, which amounts to a denial of the principle that the accused should be tried within a reasonable time. However, an accused must be given a reasonable opportunity to prepare a defence and if no adjournment would mean that the accused would not have a fair trial, then grant the adjournment.

There is a right of appeal **only** from a decision **refusing** adjournment.

## **6 Allowing Accused at Large**

This order allows the accused to go free from the Courtroom and remain without restriction until the date of the adjourned hearing.

In making this order, you should consider:

- the seriousness of the offence;
- whether the accused is a first time or repeat offender;
- whether the accused is a reliable person; and
- the circumstances of the case.

## 7 Remand and Bail

When any prosecution has been commenced in the High Court, the Court may from time to time either:

- remand the accused in custody; or
- admit him or her to bail, with or without sureties: *s. 257 Niue Act*.

### 7.1 Remand in Custody

A remand in custody places an accused under the control of the Court ensures his or her attendance at the hearing and removes the accused from the community in the case of serious offence.

Any person that is in lawful custody may be detained in any prison in Niue or temporarily, in any other suitable place of security if it is impractical to put them in prison: *s. 27 Niue Act*.

In the interests of justice, long remands in custody should be avoided as much as possible. If a long remand in custody is requested, it may be preferable to remand the accused to appear as soon as possible before a Judge or the Chief Justice and let him or her decide.

#### Child in Custody

The High Court may, on application of any person, make such order it thinks fit as to custody of any minor by any parent or guardian of that minor: *s. 69(1) Niue Act*.

You must ensure that any order you make under this section is in the best interests of the minor: *s. 69(3) Niue Act*.

Before you order a minor into custody for the purpose of criminal proceedings, the minor must be at least 10 years old, as anyone younger cannot be held not criminally responsible for an offence: see Chapter 5 Criminal Responsibility.

A remand of a minor in the care of a parent or guardian places the burden on the parent or guardian to care for the minor and ensure the minor attends Court when required.

## 7.2 Bail

When deciding whether to grant bail or not, you should consider the offence. There are three categories of offences:

1. Offences where a Judge, Commissioner or Justice must refuse bail:

- This includes serious offences such as murder, where life imprisonment is the punishment.

2. Offences where an accused has a right to bail:

- This includes offences with a maximum sentence of a fine only, or under 2 years imprisonment, unless there are aggravating circumstances.

3. Offences or circumstances where an accused may be bailed only at the discretion of the Court:

- This includes offences punishable by imprisonment where the accused has previous convictions.

Other relevant considerations include:

- age of the accused;
- likelihood that the accused will commit further offences while released on bail;
- reason to believe that the accused will attempt to defeat the ends of justice by tampering with evidence or intimidating witnesses while out on bail; and
- danger to other persons in the community.

### Application for Bail

If the accused does not ask for bail, then you should ask if he or she is seeking bail. You should explain what is meant by bail.

You should also ask whether the police have any objection to granting bail. The police will either:

- offer no objection and agree to bail; or
- not oppose bail but request certain conditions; or
- oppose bail.

If the police oppose bail, then the prosecutor should make submissions as to why bail should not be granted. You may hear evidence regarding disputed facts upon which granting bail may depend.

### **Rules as to Bail**

When any person is admitted to or released on bail under the Niue Act, or any other enactment, he or she shall pay bond to the Crown as required, with or without sureties: *s. 282(1) Niue Act*.

The amount of bond shall, from time to time, be prescribed by the Chief Justice of the High Court and shall be taken by and before a Judge of the High Court or the Registrar of the High Court: *ss. 282(2) & (3) Niue Act*.

A bond needs to be signed by the person released on bail, and also by his or her sureties, if there are any. The signature shall be attested to by the Judge or Registrar of the High Court: *s. 282(4) Niue Act*.

Where a person released on bail fails to perform any condition of his or her bond, the Registrar shall fix a time and place where the High Court may consider the failure. The Registrar must ensure that the person on bail, and his or her sureties, are informed not less than 7 days prior to such a hearing: *s. 282(7) Niue Act*.

The person released on bail, who fails to meet the conditions of the bail order or fails to appear may be:

- arrested and brought before the Court; and
- remanded in custody: *s. 282(8) Niue Act*.

## 8 The Mentally Ill Accused

The procedure in cases where the accused is of unsound mind or otherwise incapacitated is provided for under *Part XXVI Niue Act*.

If at any time after a formal charge has been presented, you have reason to believe that the accused may be of unsound mind so as to be incapable of understanding the proceedings against him or her, you may adjourn the case and make an order for a medical report or to make other enquiries as you deem necessary: *s. 602 Niue Act*.

Upon receipt of such medical evidence, if you are of the opinion that the accused is of unsound mind so that he or she is incapable of understanding the nature of the proceedings, you may order the person to be detained in prison or place of security until the pleasure of the Ministers of Cabinet: *s. 616 Niue Act*.

Where the accused raises the defence of insanity at trial and the evidence before the Court supports such contention, make a special finding to the effect that the accused was not guilty by reason of insanity: *s. 620 Niue Act*.

## 9 Victims

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

In particular, you should restrain defence counsel or accuseds from humiliating victims of a crime in Court.

For vulnerable witnesses, such as the very young, very old, or disabled, you should consider special measures for giving evidence. Consider the use of screens, allowing people in wheelchairs to give evidence from the floor of the Court instead of the witness box, and ensuring that a family member or friend can sit with a child victim or elderly victim while giving evidence.

### 9.1 Checklist

1. Identify the victim/s.
2. At all times treat the victim/s with Courtesy and compassion.
3. At all times respect the victim/s privacy and dignity.
4. If the victim and offender both want a meeting, encourage that to occur.
5. Take into account the victim's views on a bail application.
6. Before sentencing, consider:
  - the impact on the victim;
  - giving the victim the opportunity to speak to the Court;
  - receiving a victim impact report.

### 9.2 Judicial Language and Comment

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

Be careful about “blaming” the victim, unless the victim's actions are clearly relevant to mitigate the offence and you are certain about the facts.

### **9.3 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; and
- the likelihood that the accused and victim knew each other before the alleged offence took place.

#### **Nature of the crime**

The crime experienced by sexual offence victims is more than an assault. Due to the sexual nature of the acts and the physical invasion of the person, victims often experience feelings that are not present in other types of crimes.

The trial process adds to the difficulty that sexual offence victims experience because:

- they must face the accused in open Court;
- they are usually required to recount the offence against them in explicit detail in order to establish the elements of the offence; and
- they may be subject to cross-examination by the accused if there is no defence counsel, which can be a very traumatic experience.

#### **Focus on the victim's credibility**

The role of consent makes adult sexual offence trials different from most other criminal proceedings. Behaviour that is ordinarily legal (engaging in sexual activity with another adult) becomes illegal in the absence of consent.

When the alleged offence occurs in private, which is often the case, often the trial comes down to the word of the victim against the word of the accused. Therefore, the trial often turns on whether the victim is a credible witness.

Due to the fact that the credibility of the victim is at issue, it is necessary for the defence to use cross-examination of the victim to try and discredit them. This may further victimise the victim. Overseas research shows that some victims find this to be like a second sexual offence.

#### **Relationship between the victim and accused**

Unlike some other types of crimes, it is often the case that the victim and accused knew each other before the offence occurred. This can increase the distress and difficulty experienced by the victim because they have been betrayed by someone they trusted, and because there may be on-going contact between the accused and the victim due to family obligations or relationships.



## **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 understands the danger and trauma the victim may feel;
- consider allowing an advocate of the victim to sit with them during the trial to offer support;
- enforce motions that protect the victim during testifying, such as closing the Courtroom and providing a screen to block the victims' view of the accused. This is especially important where the victim is a child or juvenile;
- 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 allowing a victim impact statement in sentencing.

## 10 Child Witnesses

Child witnesses may be intimidated by the Courtroom, as they may not understand the proceedings and be fearful of giving evidence in front of other people. It is therefore important to consider the following when dealing with child witnesses:

- In cases of indecency, the Courtroom should be closed.
- A screen should be used to screen the child witness from the accused. The prosecution can be ordered to provide a screen. If a screen is not available, you can ask the child to face you and not to look anywhere else during evidence in chief and cross-examination.

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.

Under the *Convention of the Rights of the Child*, the judiciary is must give primary consideration to the interests of children.

## 11 Unrepresented Accused

Because of the lack of legally qualified personnel in Niue, most accuseds appear in the High Court on their own behalf, or are represented by an untrained advocate. Many accuseds have little or no idea of Court procedures and rely on the system to assist them to some extent.

When legal representation is not available, you are to ensure that the accused understands the following:

- the charge(s); and
- that if they are 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 of the Court;
- the litigant's 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.

## 12 Disruption and Misbehaviour

Persons who do not behave in Court will usually respond to polite but firm requests to stop. Failure to respond to your request should be followed by a warning and then you may want to consider contempt of Court charges.

You have power to impose a charge of contempt for offences relating to judicial proceedings: *s. 104 Niue Act*. Offences under this provision include where a person:

- disobeys any judgment or order of the Court, other than defaulting in the payment of a fine or compensation;
- uses any abusive, insulting, offensive or threatening words or behaviour in the presence or hearing of the Court;
- assaults, resists, obstructs a constable or officer of the Court in serving any process in the Court (or incites another to);
- uses words or behaviour to obstruct the proper and orderly administration of justice in the Court;
- does anything in the *Niue Act* or any other enactment which is declared to be contempt of Court; or
- aids, abets, counsels, procures or incites any other person to commit contempt of Court: *s. 101 Niue Act*.

Where the above offences are committed in view of the Court, you may order that the accused be detained in custody and brought before the Court: *s. 104 Niue Act*.

The penalty for contempt of the High Court is imprisonment for a term not exceeding 6 months or a fine not exceeding \$100: *s. 102 Niue Act*.

You should only use contempt of Court in very serious cases. Some guidelines are:

- unless the action or conduct is deliberate or intentional, no contempt has been committed;
- sometimes it may be more prudent not to hear an involuntary remark;
- in many situations, a calm but firm attitude by the panel will prevent behaviour developing where an order of contempt is needed.

## 13 Rehearing of Criminal Proceedings

Where on the hearing of any information of which the accused has been convicted, the High Court may grant a re-hearing of the information. They may hear either the whole matter or the sentence: *s. 87(1) Niue Act*.

When a re-hearing has been granted, the conviction and/or sentence shall cease to effect: *s. 87(2) Niue Act*.

There are times when a Judge will ask you to conduct a re-hearing. On such a re-hearing you shall have the same powers and follow the same procedures as if it were the original hearing.

If a re-hearing is granted but it will not be held immediately, and the accused is serving a term of imprisonment, you may remand the accused in custody until the date of rehearing. This power is subject to *s. 257 of the Niue Act: s. 87(3) Niue Act*.

## 14 Case Management

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

“From the commencement of litigation to its resolution, any elapsed time, other than time reasonably required for pleadings, discovery or Court events, is unacceptable and should be eliminated”.

On the question of who controls litigation, it says:

“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 maintaining a current docket”.

Judicial commitment is required to make any case management system.

### Goals

The goals of case management are to:

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

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 ensure litigants, the prosecution, and counsel are aware of their obligations;
- The system should be orderly, reliable and predictable and ensure certainty;
- Early settlement of disputes is a major aim;
- Procedures should be as simple and easily comprehensible as possible.

## **Standards**

It will be the Niue judiciary, in consultation with the Registrar of the High Court, the Attorney-General and the Chief of Police or Police Prosecutor, who needs to set the standard it wishes to apply to disposition of criminal cases. Experience has shown that without the support of one these other parties, the judicial objective to efficiently manage its cases cannot be achieved.

## **8:**

# **JUDGMENT**

This chapter provides advice on decision-making and judgment writing. It addresses:

- ways to make effective decisions;
- a structured approach to decision making and delivery.





# 1 Decision Making

The decision is to be made by the Commissioner and/or 2 Justices.

Although help as to meaning of the law can be sought from textbooks and legal counsel, the decision cannot be made by anyone other than the Commissioners and/or Justices hearing the case.

## 1.1 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 it 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;
- expense, hardship and emotional turmoil;
- a loss of faith in the system of justice.

## **2 Deliberations**

If sitting in a panel, at the end of the formal hearing the panel discusses the evidence produced by parties and makes their decision. It is good practice to retire to discuss the matter and reach a decision. The Clerk may only assist you if there is a point of law that you wish to be clarified.

This is the last important opportunity for the members of the Court to ensure absolute adherence to the underlying judicial principles of conducting a fair hearing, and ultimately to arrive at a just and lawful decision.

The Chair will lead discussions.

You must work in partnership and with understanding and open minds. No one should overpower or force his/her opinion on others.

### 3 A Structured Approach to Making a Decision

Decision making is a process of applying particular facts to the relevant law.

You must not reach a conclusion before all the evidence and arguments have been heard. The way to do this is to employ a structured approach.

There are three tasks involved:

**1. To be clear with what the Court is being asked to do.**

In criminal cases, this is what the accused is charged with and all the essential elements of the offence. For the accused to be found guilty, every element of the offence must be proved beyond reasonable doubt.

**2. To determine what the facts of the case are – what happened; what did not happen.**

In criminal cases, the accused is presumed to be innocent and the prosecution must prove that he or she is guilty. This is done by producing evidence.

To determine the facts, you will need to assess the credibility of the witnesses and the reliability of their evidence.

Credibility: “Is the evidence believable?” “Can it be believed?” “Is the witness being honest?”

Reliability: “Should I believe the witness?” “Is the evidence accurate?” “Could the witness be mistaken?” “How good is their memory of what happened?”

When considering oral evidence, take into account not only what has been said but also how it has been said. How you assess the demeanour of a witness can be a valuable aid in judging his or her credibility and reliability.

You may accept parts of the evidence of a witness and reject other parts.

A witness may be cross-examined for the sake of disproving their credibility.

Note that in a criminal case, if you accept the prosecution evidence, you must also reject the defence evidence on that matter. If there is a reasonable possibility that the defence evidence is true, and it relates to an essential element, there is reasonable doubt and the accused must be found not guilty.

**3. To make your decision, according to the law.**

This is done by applying the facts to the law.

## **4 Delivering a Decision**

Follow the format on the following page when making and delivering your decision. Remember that it is important to:

- consider all the evidence given and either accept it or reject it; and
- give reasons.

## ***Criminal Decision Format***

Follow this format when making and delivering your decisions.

### **Introduction**

What the case is about.

### **Summary of what is alleged**

What is alleged by the prosecution.

### **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**

Your finding of the facts, with reasons. Which evidence you prefer and why?

### **Apply the facts to the law**

Apply the facts as you have found them to the elements of the offence. Do the facts prove all the essential elements?

You may convict the accused if you are satisfied beyond reasonable doubt that the prosecution has proved the essential elements of the offence.

If there is a reasonable doubt, your verdict must be not guilty.

### **Deliver your decision**

Structure your decision before delivering it. Make sure you give adequate reasons and that the parties understand. Record your decision and reasons on the Court record.

### **Orders**

# 9:

## SENTENCING

This chapter outlines:

- your sentencing jurisdiction;
- principles of sentencing;
- a structured approach to sentencing;
- types of sentences;
- a sentencing checklist.





# 1 Introduction

After a guilty plea, or a finding of guilt, you pass sentence. The sentence explains the penalty that the Court will give, and its reasons.

The accused will be able to ask the Court to take his or her comments into consideration before it passes sentence (known as a plea in mitigation).

Once that has been done, you can pass sentence on the offender. You must explain the sentence and your reasons for it, so that the accused understands what he or she needs to do.

## 2 Jurisdiction

### Commissioner Sitting Alone

A Commissioner has jurisdiction to pass sentence up to:

- a maximum of one year imprisonment; or
- a fine not exceeding \$200: *Rule 84A RHC 1916*.

### Two Justices Sitting Together

Two Justices sitting together have the same jurisdiction to pass sentence as one Commissioner sitting alone according to *Article 51(2) Constitution 1974*. This is up to:

- a maximum one year imprisonment; or
- a fine not exceeding \$200: *Rule 84A RHC 1916*.

### One Commissioner and Two Justices Sitting Together

One Commissioner and 2 Justices have the jurisdiction to pass sentence up to 10 years provided that:

- the criminal offence is other than those specified in *Rules 83(c) & (d) RHC*; and
- the accused has entered a guilty plea.

The sentence will have no effect **unless** and **until** it has been either confirmed, varied, or a rehearing ordered by the Chief Justices within one month of receipt of the copy of the sentence: *Rule 84A & Rule 84B RHC 1916*.

Once the Chief Justice reviews the sentence, he or she shall report his or her decision in writing. A certified copy of the report will be sent back to the original Court that determined the case, which will:

- execute the confirmed or varied sentence; or
- grant a rehearing if so ordered: *Rule 84(2) RHC*.

### **3 Sentencing Principles**

It is the Court's task to represent the community by deciding on and imposing a sentence for criminal behaviour. There are a number of reasons for passing a sentence. These are called the principles of sentencing. They are:

- Punishment – the sentence is to punish the offender for their criminal behaviour;
- Deterrent – the sentence is to deter other people from doing the same thing;
- Prevention – the sentence is to prevent the offender from doing the same thing again;
- Restoration – the sentence serves to restore or repair the damage done to others;
- Rehabilitation – the sentence is to rehabilitate the offender.

When deciding which sentence to pass, you will have one or more of these reasons in mind. Ask yourself, which of the sentencing principles apply in this case?

## 4 Sentencing Discretion

While the maximum sentence you may impose as Commissioners and Justices is set out by legislation, you have the discretion to decide **up to** the maximum limit you are allowed to impose. The level of sentence in a particular case must be just and correct in principle and requires the proper application of judicial discretion.

The judicial act of sentencing needs you to balance:

- the gravity of the offence; and
- the needs of the society; and
- an expedient and just disposal of the case.

### 4.1 Factors Influencing Sentence

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 to plead not 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;
- family ties;
- custom ties;
- political instability; and
- responsible position.

## **4.2 Previous Convictions**

The prosecution will show the Court any previous criminal convictions that the accused has. This guides you in setting the sentence by helping you to assess the previous character and the likelihood of the offender re-offending.

You must ensure that the list of convictions is shown to the offender.

- If the offender accepts these are correct, then you can proceed to consider them.
- If the offender disputes these, the prosecution will need to obtain evidence to support the conviction/s. It is the duty of the prosecution – a Court can only pass sentence on the strength of the evidence produced. It cannot rely on information that has not been proved by evidence or accepted by the offender.

In assessing previous convictions, you have to be aware of the result and effect of a previous sentence. If, for example, a person is before you having been convicted of being drunk and disorderly, and has a similar offence from 1986, the earlier offence will not be taken into consideration as it has been so many years since then.

If that person is convicted of a similar offence later in the year, then the Court may deal with him more harshly.

### 4.3 Plea of Mitigation

Before sentence is given, ask the offender if he or she has anything to say on their own behalf. This is known as a **plea in mitigation**. Either the offender or, where legal representation is available, a lawyer can do this.

### 4.4 Further Information and Reports

Decide whether any further information or reports are necessary. These will give further background and are useful in assessing the sentence to be given.

### 4.5 Consistency

One of the most common criticisms of the Court is that sentences are inconsistent. Failure to achieve consistency leads to individual injustice.

It is most important that you are consistent when sentencing. You must:

- treat similar cases in the same way;
- treat serious cases more seriously than less serious cases; and
- treat minor cases less seriously than serious cases.

A means of ensuring consistency is to seek continuity in the **approach** to sentencing, both as an individual and with other judicial officers presiding over the matter with you.

## **5 A Structured Approach to Sentencing**

You must develop a systematic method of working through each sentence. Make sure you have as much information as possible. If a Welfare Report is necessary, ask the Welfare Officer or Community Officer.

The format on the following page is a useful guide for you to work through.



## ***Sentencing Format***

### **Introduction**

What the offender has been convicted of.

### **The relevant facts**

If there was a defended hearing, refer to the evidence called.

If there was a plea of guilty, refer to the Summary of Facts.

### **The law**

#### **Statute:**

Maximum sentence and any mandatory requirements, such as mandatory disqualification.

#### **Common law:**

What do the higher Courts say?

### **Mitigating and aggravating features**

Make sure you address any arguments that the accused or their lawyer has put forward.

#### **Relating to the offence:**

Aggravating factors, e.g. danger to the public, premeditated attack, major impact on the victim.

Mitigating factors, e.g. no harm to person or property, minor offence.

#### **Relating to the offender:**

Aggravating factors, e.g. personal information; previous convictions; lack of remorse.

Mitigating factors, e.g. personal information; age; good character; remorse shown; customary steps taken to restore the damage.

### **Relevant factors from reports/written statements**

Village elders or clergy may give written statements and these, and any agency reports, should be considered, including medical reports, reports from supervisors if previously on probation/community service.

### **Pronounce sentence**

Make sure you explain the sentence so the offender understands. Using the headings in this checklist is a good way of covering your reasons. Record your sentence on the Court record.

### **Advise rights of appeal**

When someone has been found guilty and sentenced following trial, or has pleaded guilty and is sentenced, explain their rights of appeal.

## 6 Types of Sentences

### 6.1 Imprisonment

You must not impose more than the maximum term provided for in the Statute which creates the offence and not more than the maximum you are empowered to pass.

Ideally, imprisonment should only be considered when no other sentence is appropriate. However, given the limited sentencing options that exist, perhaps it is best to be guided by the following questions:

- Is it necessary to impose a custodial sentence?
- Is there a viable sentencing alternative available?

An offender liable to imprisonment maybe sentenced to pay a fine not exceeding \$200 in addition to or instead of imprisonment: *s. 240 Niue Act 1966*.

The Court may direct that the sentences of an offender shall take effect one after the other (**consecutively**) or together (**concurrently**) when:

- the offender is sentenced for more than one offence at the same time; or
- the offender has been sentenced for an offence when he or she has already been sentenced for any other offence and has not yet completed that sentence: *s. 246 Niue Act 1966*.

Generally, if the offences arise from the same actions or set of circumstances, you would direct the sentences to be served concurrently.

### 6.2 Fines

As a penalty, fines are sometimes regarded as:

- a sufficient or convenient punishment for less serious offences; or
- an appropriate penalty for offences that are criminal more in form than in nature.

However, a suitable fine can also be a substantial punishment either for a truly criminal offence or any other serious offence.

An enactment usually prescribes the maximum fine that may be imposed, but you must keep in mind the maximum fine you may impose for any criminal proceeding is \$200: *s. 84A RHC 1916*.

Every fine that is imposed by the High Court shall be a judgment debt due by the offender to the Crown.

Payment of the fine shall be enforceable and recoverable by writ of sale or any other civil process in the same manner as if the debt had been recovered in civil proceedings at the suit of the Crown: *s. 241(1) Niue Act 1966*.

A person may be committed to prison on a warrant when he or she is sentenced to a fine and defaults on the payment of that fine. You must use *Form 10* in the *Fourth Schedule to RHC: s. 96 RHC 1916*. The term of imprisonment you may direct for default on payment of fine shall only be for a period for which you have jurisdiction to impose. See 6.1 above.

The Court should take into account the offender's ability to pay a fine. It has been suggested as a general rule that fines should be capable of being paid by the offender within one year.

### **6.3 Conditional/Unconditional Discharge: *s. 281(1) Niue Act***

In any criminal trial you may convict and discharge the accused without sentence, either conditionally or unconditionally, if the charge is proved but:

- the case is so trifling in nature; or
- the offence was committed under such circumstances that no punishment should be imposed.

If a person is convicted and conditionally discharged, and they breach the conditions, he or she shall be guilty of , and punishable in the same manner as, the offence they were previously convicted for.

### **6.4 Discharge without Conviction: *s. 281(3) Niue Act***

Where any person is accused of an offence, the High Court may in its discretion, discharge the accused without convicting him **unless** a minimum penalty is expressly provided for in the enactment relating to the offence.

If you discharge a person without conviction under *s. 281(3)*, being satisfied that the charge is proved against the accused, you may make an order for:

- payment of costs;
- payment of damages;
- payment of compensation; or
- restitution of any property.

However, you must ensure that any of the above orders **can be** made, according to enactment, for the particular offence the accused is charged with. For example, if you discharged an accused without conviction for the offence of burglary, you could not order restitution of property of since the *Niue Act 1966* does not provide for this as a punishment for burglary.

A discharge under this section of the *Niue Act* shall be deemed an acquittal, and so the order cannot be referred to at a later date as part of a list of previous convictions.

## **6.5 Order to Come up For Sentence: s. 280 Niue Act**

Upon convicting the accused, you have the power to:

- order that the sentence not be imposed at the time of conviction but that the accused appear for sentence in the future **if** called upon to do so; and
- impose any conditions you think fit: *s. 280(1) Niue Act*.

In making an order under *s. 280*, you must take into consideration all circumstances of the case, including the nature of the offence and the character of the offender.

### **Calling up for sentence**

An offender for whom an order is made under *s. 280* may be called upon to appear for sentence within:

- any period specified by the Court in the order, as long as it does not exceed three years from the date of conviction; or
- a period not exceeding one year, if the Court has not specified the period in the order: *s. 280(3)*.

Where a person is brought up for sentence under *s. 280* and you have inquired into the circumstances of the case and the conduct of the offender, you may sentence him or her for that offence or otherwise deal with them: *s. 280(4)*.

### **Conditions**

One condition that you may impose under *s. 280* is that the offender be subject to supervision by a person nominated by the Premier, for such a period of time as the Court thinks fit, as long as it does not exceed:

- 3 years from the date of conviction, if the period has been specified by the Court; or
- 1 year from the date of conviction, if the period of supervision is not specified by the Court: *s.280(1) & (3)*.

### **Ability to make other orders**

The making of an order under *s. 280* does not limit or affect your power to make any order for the payment of costs, damages, compensation or for restitution of property:

- as long as the provisions of the applicable enactment are followed; and
- notwithstanding that the offender is **not** sentenced on conviction: *s. 280(2)*.

## **6.6 Disqualification from Driving**

Persons convicted of offences against *Part IV*, *Part V* and *Part VI* of the *Transport Act* may, along with other penalties, be:

- disqualified from driving if they hold a license; or
- disqualified from obtaining a licence if they do not have one at the time of the offence: *s. 44 NTA*.

Also, persons convicted of offences under *Part VA* of the *Niue Transport Act* can be disqualified from holding or obtaining a drivers license: *s. 45H Part VA NTA (1997 Amendment)*.

The length of disqualification under these parts of the *Niue Transport Act* will either be:

- set out in the section dealing with the offence; or
- at your discretion.

Although no specific rules set out how you should apply your discretion to disqualify licences, some important things to consider are:

- the facts of the offence;
- the effects of the disqualification on the offender and his/her family;
- the seriousness of the offence; and
- questions of road safety.

The Chief Justice of Niue, in practice notices issued May 1998 and March 1999, has also given you direction in regards to license disqualification. The Chief Justice indicates that you should consider:

- Does the length of disqualification reflects the seriousness of the offence?
- Does the length of disqualification act as a deterrent to others in the community?

With these considerations in mind, the Chief Justice states in the May 1998 practice notice that: “disqualification of licenses for ‘driving under the influence of drink or drugs’ or ‘driving with excessive breath-alcohol’ should be between 6 to 12 months.”

The Chief Justice has also suggested that limited licenses should rarely be granted for offences under *s. 40(2)* or *s. Part VA Niue Transport Act*. You should take into account the practice directions issued by the Chief Justice in relation to the disqualification of licenses and granting limited licenses, as they will ensure that justice is properly administered in Niue and a consistency in sentencing.

## 6.7 Compensation for Loss of Property

You may order an accused, upon conviction for any offence, to pay to any person a sum of money as compensation for any loss or damage to property suffered through or by means of the offence: *s. 287(1) Niue Act 1966*.

On arrest, if any money was taken from an offender, you may order the whole or part of that money to be paid as compensation for the loss of property: *s. 287(2) Niue Act 1966*.

An order for payment under this section may be enforced in the same way as a fine.

It **must** be noted that sentencing a person to pay compensation under *s. 287* **only** applies when there has been damage to **property** suffered through or by the means of the offence. The Chief Justice, in a practice notice dated April 1998, stated that you cannot order compensation paid to a victim if there is no damage to property, as this would be lawmaking which is beyond your power.

## 10:

# COMMON OFFENCES

This part is a quick reference guide to some of the common offences you will encounter. It:

- outlines the elements of the offence;
- provides guidance on evidential matters and other material issues;
- details the maximum sentence you may impose.

It is **not** a replacement for the legislation. You must always go to the legislation and make your own decision.





## Common Assault

---

**Section** *s157 Niue Act 1966*

---

**Description** Every person who commits an assault on any person is guilty of an offence.

---

**Elements** General

- The person named in the charge is the same person who is appearing in Court;
- There is a date or period of time when the offence charged is alleged to have taken place;
- There must be a place where the offence was alleged to have been committed.

Specific

- The accused used physical force on another person;
  - There was no legal excuse for the force being used.
- 

**Commentary**

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the accused who used physical force.

Definition of assault

An assault is any act by which a person intentionally causes another person to apprehend immediate unlawful violence. The context is very important:

- What was the situation?
- Where did the alleged assault occur?

The intention of the accused is immaterial: *s9(2) Penal Code*.

If the person assaulted is injured, then a more serious assault charge might be more appropriate.

Legal excuse

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

If the defence provides a reason for the assault, what is it, and does it have any merit?

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).

---

**Sentence**

1 year imprisonment: *s. 157 Niue Act*

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## Dangerous Driving

---

**Section** *s40(1)(b) Niue Transport Act 1965*

---

**Description** Every person commits an offence who drives a motor vehicle at a speed or in a manner which, having regard to all the circumstances of the case, is or might be dangerous to the public.

---

**Elements** General

- The person named in the charge is the same person who is appearing in Court;
- There is a date or period of time when the offence charged is alleged to have taken place;
- There must be a place where the offence was alleged to have been committed.

Specific

- The accused drove a motor vehicle;
  - The driving was at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case.
- 

**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the accused was driving dangerously.

Drives

s. 3 NTA states that “driver includes the rider of a motor cycle or power cycle or pedal bicycle; and drive has a corresponding meaning.”

### Motor Vehicle

Motor vehicle is defined in s. 3 NTA as “a vehicle that is drawn or propelled by mechanical power and includes a trailer or tractor but does not include a vehicle normally propelled by mechanical power while it is being temporarily towed without the use of its own power.”

### Dangerous

Danger generally refers to the danger of injury to a person or serious damage to property. Any danger to any person, if it is obvious to a careful and competent driver, will be sufficient for dangerous driving.

As yourself:

- Does the way the accused drove fall far below what would be expected of a competent and careful driver and would it be obvious to a competent and careful driver that driving in that way would be dangerous?

### Circumstances of the Case

May include the nature, condition and use of the road, and the amount of traffic actually on the road or reasonably expected to be on the road.

### Defences

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

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

---

## **Sentence**

In 1996, s. 40(1) was repealed including the 1996 amendments and replaced with a whole new section. In the new section, there was no sentence specified. The general penalty for traffic offences *under s. 103 Niue Traffic Act* gives you the ability to impose a fine only. However, this is considerably less than what was in the 1996 amendments, so it is possible that this was not the intention.

---

## Careless Driving

---

**Section** *s40(3) Niue Transport Act 1965*

---

**Description** Every person commits an offence who drives a motor vehicle in any public place carelessly or without reasonable consideration for other persons using that public place.

---

**Elements** General

- The person named in the charge is the same person who is appearing in Court;
- There is a date or period of time when the offence charged is alleged to have taken place;
- There must be a place where the offence was alleged to have been committed.

Specific

- The accused drove a motor vehicle;
  - The driving was:
    - without the care and attention expected of a reasonably competent driver; or
    - was inconsiderate to others.
- 

**Commentary**

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the accused who drove the vehicle carelessly.

Drives

*s. 3 NTA* states that “driver includes the rider of a motor cycle or power cycle or pedal bicycle; and drive has a corresponding meaning.”

### Motor Vehicle

Motor vehicle is defined in s. 3 NTA as “a vehicle that is drawn or propelled by mechanical power and includes a trailer or tractor but does not include a vehicle normally propelled by mechanical power while it is being temporarily towed without the use of its own power.”

### Place

The careless driving must have been in a public place.

Public place is defined in s. 3 NTA as “every road, street, footway, thoroughfare, or piece of public resort or any place to which the public have access whether as of right or not.”

### Nature of the driving

The prosecution must prove that the nature of the driving or riding was well below the standard others expect.

It will usually only be careless or inconsiderate if there is some consequence, such as an accident, or someone is really put at risk of harm or put to inconvenience.

If inconsiderate driving or riding is alleged, the prosecution must prove that other road users were inconvenienced

Ask, “was the driving or riding well below an acceptable standard?”

### Defences

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

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

---

## **Sentence**

\$500 fine (you may only sentence up to a \$200 fine under *Rule 84A RHC*) and you may disqualify him or her from holding or obtaining a driver’s licence for a period not exceeding 3 months.

---

# Reckless or Negligent Driving

---

**Section** *s40(1) Niue Transport Act 1965*

---

**Description** Every person commits an offence who recklessly or negligently drives a motor vehicle in any public place.

---

## Elements

### General

- The person named in the charge is the same person who is appearing in Court;
- There is a date or period of time when the offence charged is alleged to have taken place;
- There must be a place where the offence was alleged to have been committed.

### Specific

- The accused drove a motor vehicle;
  - The driving was:
    - reckless; or
    - negligent;
  - the driving was in a public place.
- 

## Commentary

### Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

### Identification

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

The prosecution must provide evidence to prove that it was the accused who drove the vehicle recklessly or negligently.

### Drives

*s. 3 NTA* states that “driver includes the rider of a motor cycle or power cycle or pedal bicycle; and drive has a corresponding meaning.”

### Motor Vehicle

Motor vehicle is defined in *s. 3 NTA* as “a vehicle that is drawn or propelled by mechanical power and includes a trailer or tractor but does not include a vehicle normally propelled by mechanical power while it is being temporarily towed without the use of its own power.”

### Place

The driving must have been in a public place.

Public place is defined in *s. 3 NTA* as “every road, street, footway, thoroughfare, or piece of public resort or any place to which the public have access whether as of right or not.”

### Nature of the driving

The prosecution must prove that the nature of the driving or riding was well below the standard others expect and was either reckless or negligent.

- Reckless driving is when a person is aware of that there is a risk in their driving in a certain manner and it is, in the circumstances known to him or her, unreasonable to take that risk.
- Negligent driving is when a person drives below the standard of how a reasonable person would drive.

### 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).

---

## **Sentence**

In 1996, *s. 40(1)* was repealed including the 1996 amendments and replaced with a whole new section. In the new section, there was no sentence specified. The general penalty for traffic offences *under s. 103 Niue Traffic Act* gives you the ability to impose a fine only. However, this is considerably less than what was in the 1996 amendments, so it is possible that this was not the intention.

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## Driving Under the Influence of Drink or Drugs

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**Section** *s40(2)(a) & (b) Niue Traffic Act (as amended in 1997)*

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**Description** (a) A person who, when driving or attempting to drive a motor vehicle on a road or other public place, is unfit to drive through drink or drugs, shall be guilty of an offence.  
(b) Without prejudice to (a) above, a person who, when in charge of a motor vehicle which is on the road or other public place is unfit to drive through drink or drugs, shall be guilty of an offence.

---

**Elements** General

- The person named in the charge is the same person who is appearing in Court;
- There is a date or period of time when the offence charged is alleged to have taken place;
- There must be a place where the offence was alleged to have been committed.

Specific

- The accused drove, attempted to drive, or was in charge of a motor vehicle;
  - The driver had consumed drink or drug;
  - As a result of the drink or drugs, the driver was not able to drive to a standard expected of a reasonably competent sober driver.
- 

**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the accused who drove or attempted to drive or was in charge of a motor vehicle while under the influence.

#### Place

The driving or attempt to drive must have been in a public place.

Public place is defined in *s. 3 NTA* as “every road, street, footway, thoroughfare, or piece of public resort or any place to which the public have access whether as of right or not.”

#### Attempt to drive

See the definition of “attempt” in *s229 Niue Act*. Usually an attempt to drive involves any action taken in preparation for driving. Sitting in the driver’s seat with the key in the ignition may be sufficient

#### Drink or drug

The prosecution must prove that the driver had consumed drink or drug.

Drug is defined in *s. 3 NTA* as any intoxicant other than alcohol.

A police officer, in the course of an investigation into whether a person has committed an offence under *s. 40(2)*, may require that person to:

- provide a specimen of breath for analysis by an approved device;
- provide a specimen of blood for laboratory analysis:  
*s. 45C(1) NTA*.

Failure to provide a specimen when required to do so and without a reasonable excuse shall be guilty of an offence: *s. 45C(4) NTO*.

Evidence of the proportion of alcohol or any drug in a specimen of breath or blood provided by the accused shall, in all cases, be taken into account **unless** the accused proves that he consumed alcohol after he had ceased to drive, attempted to drive, or was in charge of a motor vehicle but before he provided the specimen: *s. 45E NTA*.

#### Driver’s ability impaired

The prosecution must prove more than the fact that the driver was affected by drink or drug. They must show that the driver’s ability was impaired as a result.

Impaired means driving in such a manner that the driver's control of the vehicle is affected by the alcohol consumed. This may be evidenced by swerving the vehicle, driving very fast or other reasons. The police will need evidence to establish this.

#### Defences

Even if the prosecution has proved the elements of the offence beyond reasonable doubt, the accused may still have a defence at common law.

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

---

#### **Sentence**

6 months imprisonment or \$1000 fine (you may only impose a \$200 fine as per *Rule 84 RHC*), or both.

You may order the accused to be disqualified from holding or obtaining a driver's licence for period you consider appropriate and impose a sentence of Community work.

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# Burglary

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**Section** *s204(1) Niue Act 1966*

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**Description** Every person is guilty of burglary who, by day or by night;

(a) breaks and enters any building or ship with intent to commit a crime therein; or

(b) breaks out of any building or ship either after:

- committing a crime therein; or
- having entered with intent to commit a crime therein.

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## Elements

### General

- The person named in the charge is the same person who is appearing in Court;
- There is a date or period of time when the offence charged is alleged to have taken place;
- There must be a place where the offence was alleged to have been committed.

### Specific

(a):

- The accused broke and entered into a building or ship; and
- The accused did this with the intention of committing any crime in that building or ship.

(b):

- The accused broke out of the building or ship, having either:
    - entered the building or ship with the intention of committing any crime in there; or
    - committed a crime in there.
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**Commentary** 1 Commissioner and 2 Justices only have jurisdiction to hear this offence if the accused pleads guilty.

### Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

### Identification

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

The prosecution must provide evidence to prove that it was the accused who broke and entered or broke out.

### To Break

In relation to any building or ship, break means to:

- break any part, internal or external of the building or ship; or
- open by any means whatsoever any door, window or other thing intended to cover openings to a building or ship or to give passage from one part of it to another: *s. 204(2) Niue Act 1966*.

### Building

Means any building, erection, or structure of any description, whether permanent or temporary. It may include a tent or caravan, enclosed yard or any closed cave or tunnel: *s. 204(2) Niue Act 1966*.

### Intent to commit a crime

*s204(a)*: As intention is an express element of the offence, the prosecution must prove beyond reasonable doubt that the accused intended to commit a crime once they had broke and entered into the building or ship.

If the prosecution is not able to prove this intention, the accused cannot be found guilty of burglary.

The prosecution does not have to prove that the accused actually committed a crime.

*204(b)*: The prosecution has to prove that the accused either intended to commit a crime in the building or ship they are breaking out of or that they did in fact commit a crime.

If the prosecution **cannot** prove that the accused intended to commit a crime while they were in the ship or building or that they in fact did commit a crime, the accused cannot be found guilty of burglary.

The prosecution does not have to prove that the accused actually committed a crime unless that is the ground on which the charge is based.

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**Sentence**

5 years imprisonment.

If the person pleads guilty, you may sentence them up to five years with the condition that the Chief Justice reviews the decision and sentence.

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## Causing Actual Bodily Harm

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**Section** *s152 Niue Act 1966*

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**Description** Every person commits an offence who wilfully and without lawful justification causes actual bodily harm to any person.

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**Elements** General

- The person named in the charge is the same person who is appearing in Court;
- There is a date or period of time when the offence charged is alleged to have taken place;
- There must be a place where the offence was alleged to have been committed.

Specific

- The accused injured another person;
  - The accused did this wilfully;
  - There was no legal excuse.
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**Commentary** Burden and standard of proof

The prosecution must prove **all** the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the accused who caused the actual bodily harm.

Actual Bodily Harm

There must be actual bodily harm, i.e. a real injury.

### Wilfully

The prosecution needs to prove the mens rea of the offence, which was that the accused **deliberately** and **voluntarily** caused the bodily harm.

### Without Lawful Justification

Since this is an element of the offence, the prosecution must prove beyond reasonable doubt that the accused had no legal excuse for causing the actual bodily harm.

If the defence provides a reason, what is it and does it have any merit?

### Defences

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

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

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## **Sentence**

The maximum penalty is imprisonment for 2 years. You may only impose a sentence of up to 1 year imprisonment. You can also give the accused a fine not exceeding \$200 instead of or in addition to imprisonment under *s. 240 Niue Act 1966*.

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## Possession of Arms or Ammunition

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**Section** *s10(1) Arms Act 1975*

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**Description** No person shall carry or be in possession of any firearm, ammunition, explosive or dangerous weapon except for some lawful, proper or sufficient purpose.

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**Elements** General

- The person named in the charge is the same person who is appearing in Court;
- There is a date or period of time when the offence charged is alleged to have taken place;
- There must be a place where the offence was alleged to have been committed.

Specific

- It was the accused who was in the possession of a firearm, ammunition, explosive or dangerous weapon.
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**Commentary** Burden and standard of proof  
The prosecution must prove the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

It is important to note that the prosecution does **not** have to prove that there was no lawful, proper or sufficient purpose. *Section 10(1) AA* states:

- the burden of proving “lawful, proper or sufficient purpose” shall lie with the defendant.

If the prosecution proves the elements above, then it is up to the accused to show he or she had lawful, proper or sufficient purpose on the balance of probabilities to succeed in a defence on this ground.

Identification

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

The prosecution must provide evidence to prove that it was the accused who was in the possession of the firearm, explosive or dangerous weapon.

#### Firearm

Includes:

- any weapon from which a missile can be discharged by the force of an explosion or by the force of compressed gas or compressed air;
- a weapon which for the time being is not able to discharge a missile but which could by replacement of any part of the firearm or correction of a defect;
- any weapon which is, for the time being, dismantled.

It does not include any firearm of the type commonly known as humane killers, or bolt or stud guns.

#### Explosive

Includes any article of which an explosive forms a part and which is capable of a destructive effect by way of an explosion.

#### Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence at common law or that he or she had a lawful, proper or sufficient purpose in possessing or carrying the firearm, explosive or dangerous weapon.

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

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### **Sentence**

Imprisonment not exceeding three months or a fine not exceeding \$200 or both.

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# In Charge of a Firearm While Drunk or Drugged

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**Section** *s10(2) Arms Act 1975*

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**Description** No person, while under the influence of drink or drugs to such an extent as to be incapable of having proper control of the firearm, shall be in charge of any firearm.

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**Elements** General

- The person named in the charge is the same person who is appearing in Court;
- There is a date or period of time when the offence charged is alleged to have taken place;
- There must be a place where the offence was alleged to have been committed.

Specific

- The accused was in charge of the firearm.
  - At the time the defendant was in charge of the firearm, he or she was under the influence of drink or drugs.
  - The extent to which the accused was under the influence of drink or drugs caused him or her to be incapable of having proper control of the firearm.
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**Commentary** Burden and standard of proof  
The prosecution must prove the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the accused who was in the possession of the firearm, explosive or dangerous weapon while under the influence.

### Firearm

Includes:

- any weapon from which a missile can be discharged by the force of an explosion or by the force of compressed gas or compressed air;
- a weapon which for the time being is not able to discharge a missile but which could by replacement of any part of the firearm or correction of a defect;
- any weapon which is, for the time being, dismantled.

It does not include any firearm of the type commonly known as humane killers, or bolt or stud guns.

### Under the influence of drink or drugs

The prosecution will have to provide evidence that the accused was under the influence of drink or drugs.

The Arms Act does not provide what this evidence must be, but could consider eyewitness statements and breath and blood samples as collected by the police.

### Incapable of proper control of the firearm

The prosecution will also have to prove that the influence of the drink or drugs was to the extent that it made the accused incapable of having proper control of the firearm.

You need to ask:

- Was the accused's control of the firearm that of a reasonably competent and sober person.

### Defences

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

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

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## **Sentence**

Imprisonment not exceeding three months or a fine not exceeding \$200 or both.

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