



Public Solicitor's Office
Vanuatu

LAWYER HANDBOOK

2015

Public Solicitor's Office

VANUATU

LAWYER HANDBOOK

2015



Australian Government

Department of Foreign Affairs and Trade

**Australian
Aid** 

This publication is funded by the Australian Government through the Strem Rod Blong Jastis Program. All copyright belongs to the Office of the Public Solicitor 2015.

Disclaimer: The views expressed in this publication are those of the author and do not necessarily reflect the views of the Office of the Public Solicitor, the Government of Vanuatu, Government of Australia or the Australian Aid program.

This publication is not intended to convey legal advice and no liability will be accepted for any reliance on its contents.

Contents

Introduction	1
Chapter 1 – Who we are and what we do.....	3
Who the PSO represents	3
Cases we do not do	4
Annual report.....	4
Structure.....	4
Chapter 2 – File management.....	5
Application form.....	5
Means and merit test.....	5
Advice only matters.....	6
Providing realistic advice	6
The retainer – obligations of clients and PSO lawyer.....	6
Storage of files	7
How to organise a file.....	7
File notes.....	7
Correspondence	8
Closing files	8
“Salmon” folder.....	8
CMS – Case Management System	8
FILE MANAGEMENT CHECKLIST	10
Chapter 3 – Professional responsibility	11
Professional obligations when approaching ethical problems	11
Identifying an ethical issue	12
Rules of conduct	12
Special duties of a defence lawyer in criminal matters.....	13
Chapter 4 – Conflicts of interest.....	15
Conflicts in criminal law matters.....	15
Criminal cases.....	16
Conflict of interest and the lawyer client relationship.....	16
Amendments to the Public Solicitor Act	16
Resolving a conflict of interest	17
Chapter 5 – Limitation periods	18
Employment cases	19
Election cases	19

Extension of time.....	19
What to do if the claim is out of time	20
File management and limitation periods.....	20
The need for legislative reform.....	21
Limitation in criminal proceedings.....	21
Chapter 6 – Advocacy and etiquette.....	22
Written submissions and other court documents	22
Practice directions.....	22
Appearing in court.....	22
Chapter 7 – Oaths and sworn statements.....	24
Chapter 8 – Court tours.....	25
Legislation	26
Case law.....	26
Jenshels’ Annotated Civil Procedure Rules.....	27
Halsbury’s.....	27
Bullen and Leake’s Precedents of Pleadings	27
Archbold – Criminal Procedure and Practice	27
Ross on Crime	27
Other texts.....	27
Chapter 10 – Divorce, maintenance, custody and property.....	29
Divorce	29
Responding to a petition	31
Foreign marriage.....	31
Nullity.....	31
Maintenance – spousal.....	32
Maintenance – child.....	32
Maintenance – without a petition for divorce.....	33
Custody and access.....	33
Damages for adultery.....	34
Division of property.....	34
De facto relationships and division of property.....	35
SAMPLE PETITION FOR DIVORCE FORM C	36
SAMPLE DECLARATION FORM D.....	39
REPLY TO PETITION	40
SWORN STATEMENT IN SUPPORT OF REPLY TO PETITION	42
Chapter 11 – Adoption.....	43
International adoptions	43
BLANK ADOPTION FORM.....	44
Chapter 12 – Domestic violence and restraining orders	49
Referrals to Vanuatu Women’s Centre	49

Family Protection Orders.....	50
How to apply for a Family Protection Order	50
Grounds for making a Family Protection Order	51
Conditions of Temporary Protection Order or Family Protection Order	52
Temporary custody/access of children.....	52
Urgent protection orders	52
Procedure	52
Variation and revocation of Temporary Protection Order or Family Protection Order	53
Failure to comply with Temporary Protection Order or Family Protection Order	53
Domestic Violence Protection Orders	53
Civil Law Restraining Orders	54
Criminal charges and bail – an alternative model for protecting victims	55
Summary.....	56
FAMILY PROTECTION ORDER FLOW CHART.....	57
Chapter 13 – The lawyer client relationship – criminal cases	59
Managing client expectations	59
Taking instructions	60
Explaining the criminal trial process	60
Guilty plea	61
Reversing a guilty plea	62
Getting written instructions on the plea.....	62
Pleading not guilty after the client has admitted the offence to you.....	62
Disclosing the criminal record of your client	63
If the complainant does not attend the trial.....	64
Withdrawing from a case.....	64
Contact with complainants and prosecution witnesses.....	65
Discussions with judicial officers.....	65
INSTRUCTIONS TO PLEAD GUILTY	66
INSTRUCTIONS TO PLEAD NOT GUILTY AFTER ADMITTING GUILT TO INSTRUCTED LAWYER..	67
INSTRUCTIONS TO PLEAD NOT GUILTY TO VERY STRONG PROSECUTION CASE	68
Chapter 14 – Advising clients at the police station	69
At the police station.....	69
Voir dire on a record of interview.....	72
Chapter 15 – Juveniles	73
Principles and procedure.....	73
2013 Memorandum of Agreement.....	74
Relevant legislation and case law	74
Chapter 16 – Bail and arrest.....	76
Arrest	76
How long the police can hold a person before interview.....	77

Talk to the client about bail	77
Police can grant bail.....	78
Court bail – talk with the prosecutor about bail.....	78
Factors relevant to bail.....	78
Bail conditions	79
Applying for bail in the Magistrates’ Court.....	79
Applying for bail in the Supreme Court	80
Appeal bail.....	81
Breach of bail.....	81
Cases on bail.....	81
BAIL INSTRUCTION FORM	83
SAMPLE BAIL APPLICATION	85
SAMPLE SWORN STATEMENT SHORT VERSION	87
SAMPLE SWORN STATEMENT LONG VERSION	88
Chapter 17 – Negotiation of charges.....	90
Possible reasons in support of your proposal.....	91
SAMPLE LETTER SEEKING NEGOTIATION OF CHARGES.....	92
SAMPLE LETTER REQUESTING WITHDRAWAL OF CHARGES	93
Chapter 18 – Preliminary enquiries.....	94
Relevant PI cases	96
Chapter 19 – Pleas of mitigation – sentencing submissions	98
Full instructions required before entry of plea.....	98
Appearing in court	98
Guideline case – the three stage approach to sentencing.....	100
Reconciliation and compensation	101
PLEAS OF MITIGATION: PSO CHECKLIST	102
SAMPLE SENTENCING SUBMISSIONS	103
SAMPLE CHARACTER REFERENCE LAYOUT	107
Chapter 20 – Warrants.....	108
What to do if a client approaches you at the office and they have a warrant outstanding.....	108
What to do when a client has been arrested on a warrant.....	108
Chapter 21 – Supreme Court plea days.....	110
Lawyer allocation	110
Negotiation of charges	110
Before the plea day	110
On the plea day	110
Entering a plea	111
Chapter 22 – Criminal trials.....	112
The role of a defence lawyer	112
The charge	112

Representative counts	113
Alternative counts.....	113
Client communication.....	115
The brief of evidence	115
The record of interview	116
Additional material and particulars	116
What are your client's instructions?	117
Is there a defence?	117
Identify the issues	117
Preparing the defence case.....	118
Speaking with the prosecutor before the trial	118
At trial.....	119
Interpreter	119
Voir dire.....	119
The start of the trial - entry of plea.....	119
Statement of presumption	119
Exclusion of witnesses.....	119
Opening address	120
Examination in chief.....	120
Cross-examination.....	121
Re-examination.....	122
Agreed facts.....	122
Prosecution duty to call all relevant witnesses	122
No case submission.....	123
The defence case.....	123
Should the defendant give evidence?.....	124
Counsel should not speak to a witness who is under cross-examination.....	125
Closing address.....	125
Beyond reasonable doubt.....	125
Judgment and verdict—the judicial reasoning process.....	126
Appeal.....	126
Chapter 23 – Voir dires and confessions.....	127
Oppression	127
Unfairness.....	128
The Judges' Rules.....	128
Can police hold a suspect in custody for interview?	128
How to challenge the admissibility of a confession—the voir dire	130
THE JUDGES' RULES 1912–1918	134
Chapter 24 – Mental health	135
Identifying that your client may have a mental health problem	135

The relevance of a mental illness or mental condition	135
Mental health and sentencing	137
What to do if your client threatens self-harm or suicide.....	138
Your mental health.....	138
FITNESS TO PLEAD FLOW CHART.....	140
INSANITY FLOW CHART.....	141
SAMPLE SECTION 91 APPLICATION.....	142
AUTHORITY TO RELEASE MEDICAL INFORMATION	147
Chapter 25 – Working in the civil jurisdiction.....	149
The Island Courts.....	149
The Magistrates’ Court	149
The Supreme Court.....	150
The Court of Appeal	150
Rules of procedure in the Supreme Court and Magistrates’ Court.....	150
Rules of procedure in the Court of Appeal.....	151
Chapter 26 – Civil claims against the Government	152
SAMPLE SECTION 6 NOTICE	153
Chapter 27 – Stages of a civil case.....	154
Taking instructions: What is the client’s claim and what are the elements of that claim?	154
What is the evidence and where will it come from?.....	154
Sending the first letter to the other side	155
Settlement negotiations.....	155
If no settlement	155
Start the proceedings.....	156
Pleading the claim—statement of the case	156
Notice of acting as a lawyer.....	157
Urgency	157
Discovery.....	157
Subpoena of documents.....	158
Ending a proceeding early	158
Summary and default judgment—make sure the other party is aware of the court date	160
Mediation.....	160
Evidence	161
Trial.....	162
Judgment and enforcement.....	162
Basic steps in contested Supreme Court litigation.....	162
SAMPLE LETTER BEFORE ACTION	164
MAGISTRATES’ COURT PROCEEDING FLOW CHART	165
SUPREME COURT UNDEFENDED PROCEEDING FLOW CHART	166
SUPREME COURT	166
SUPREME COURT DEFENDED PROCEEDING FLOW CHART	167

Chapter 28 – Drafting the claim	168
Address	168
The statement of the case.....	168
What are the relevant facts?.....	169
Precedents	169
Damages	170
Amending the statement of the case	170
The defence.....	171
The counterclaim	173
Counterclaim against additional party—Third Party Notice	173
The reply.....	174
Summary.....	174
SUPREME COURT CLAIM	176
Chapter 29 – Debt recovery	179
Default judgment for damages claims	180
Chapter 30 – Personal injury	181
Summary of steps	181
Special damages.....	181
General damages.....	182
Motor vehicle claims	182
Uninsured vehicles.....	183
Slip and fall cases	183
Work related cases.....	184
Assault claims.....	185
TABLE OF PERSONAL INJURY CASES	186
Chapter 31 – Motor vehicle insurance policies	187
Who caused the accident?.....	187
Types of motor vehicle insurance.....	187
Compulsory third party insurance only	187
Comprehensive insurance.....	188
Claims	188
If the vehicle at fault had no insurance	188
The “excess”	188
If the driver at fault was drunk or not licensed to drive.....	189
The insurance company can sue the driver at fault.....	189
Chapter 32 – Fatal accidents	190
Pecuniary loss	190
Funeral expenses.....	192
Loss of expectation of life	193
Pleading a fatal accidents claim.....	194

TABLE OF RECENT FATAL ACCIDENT CASES	195
Chapter 33 – Employment	196
PSO and the Department of Labour.....	196
Employment Act.....	196
Limitation period	196
Employee or independent contractor?	196
Termination of employment	197
Constructive dismissal	197
Is there a written contract?.....	197
Termination of employment – what to claim?	198
Other employment issues.....	203
Checklist – basic entitlements on termination	206
Chapter 34 – Breach of contract	210
Chapter 35 – Costs.....	212
Advising the client about costs	212
Standard basis for costs	212
Taxation	213
Indemnity costs.....	213
When can indemnity costs be ordered?	214
Cases involving indemnity costs	214
Wasted costs	215
Taking into account offers to settle.....	216
Calderbank letters	216
Costs in public interest cases	217
Extra charges	218
Costs in the Magistrates’ Court	218
Costs in criminal cases.....	218
Chapter 36 – Probate	219
Seven basic points.....	219
Administration of the estate.....	220
Division of the estate	221
Other cases.....	222
Chapter 37 – Land leases	225
Indefeasibility	225
The register is not proof of custom ownership	225
Cautions	226
Mistake or fraud.....	226
SAMPLE LAND LEASE CLAIM	228
Chapter 38 – Appeals	232

Reasonable prospects of success.....	232
Time limits for appeals	232
Appeals from the Magistrates’ Court to the Supreme Court	232
Criminal appeals from Supreme Court to the Court of Appeal	233
Lodging a criminal appeal	233
Bail pending appeal	234
The power to increase a sentence on appeal	235
Civil appeals from Supreme Court to Court of Appeal	235
Appeal book.....	236
Written submissions.....	236
SAMPLE APPEAL SUBMISSION INTRODUCTION	237
Appearing at the appeal	238
Appeal Court advocacy.....	238
SAMPLE NOTICE OF APPEAL.....	240
SAMPLE BAIL APPLICATION PENDING APPEAL.....	241

Introduction

This is an updated version of a manual for lawyers first written in 1998 by Garry Blake.

The purpose of this handbook is to provide Public Solicitor Office (PSO) lawyers, especially new graduates, with basic information about the law and legal procedure of Vanuatu. The handbook is a step-by-step guide to practical considerations that may arise while working as a PSO lawyer.

The advice in this handbook should be read as a starting point only, not as a complete answer to any difficult situation. If you are unsure of how to approach a specific situation, always seek advice from other lawyers, especially more experienced lawyers.

Laws and procedures change over time so information from any of the sources should be checked, particularly for legislative amendments and updated case law.

I am very grateful for the leadership and commitment of Mr Stephen Barlow, legal adviser to the Public Solicitor Office for being instrumental in leading and completing this very resourceful handbook. The support of all the PSO staff is also acknowledged. Without them this handbook would never have been produced. Much of the content of this handbook is the work of PSO lawyers. Pauline Kalwatman, Bryan Livo and Francis Tasso made helpful contributions. Thanks also to Edward Nalyal for his contribution to Chapter 16, and Ms Viran Molisa Trief, Solicitor General of Vanuatu for contributing to Chapter 15. Very useful comments were made by Senior Magistrate Beverleigh Kanas for the Family Law section.

Thank you to Garry Blake for allowing Stephen Barlow to update his work and for his enthusiastic support for the project.

The *Public Solicitor's Office of Solomon Islands Handbook* (in particular the hard work of co-author Edward Cade and adviser Robert Cavanagh) and the *Duty Lawyer Manual of the NSW Legal Aid Commission* are also acknowledged. Some parts of this handbook have been extracted from those publications.

The publication of this handbook has been funded by the Australian AID funded *Stretum Rod Blong Jastis* Vanuatu Law and Justice Program.

Jacob Kausiama
Public Solicitor
November 2014

PART 1

ESSENTIALS

Chapter 1 – Who we are and what we do

The **Office of the Public Solicitor** is a government public legal office established to provide certain legal services to the people of Vanuatu, in particular to ensure the legal services contained in the [Constitution](#) of the Republic of Vanuatu are discharged. The Public Solicitor’s Office (PSO) is governed according to the [Constitution](#) of the Republic of Vanuatu and the [Public Solicitor Act](#). The Public Solicitor holds office under the [Constitution](#) and he or she is independent.

Article 5 (2) of the [Constitution](#) states:

Protection of the law shall include the following:

- (a) Everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent court and be afforded a lawyer if it is a serious offence.

Article 56 of the [Constitution](#) states:

The function of the Public Solicitor is to provide legal assistance to needy persons.

Section 5(2) of the [Public Solicitor Act](#) provides that the term “**needy person**” is to be:

- (b) interpreted in relation to each particular case and, without limiting the generality of this expression, account shall be taken of the means of the person to meet the probable cost of obtaining alternative legal assistance, the availability of such assistance and the hardship which might result to the person if compelled to obtain legal assistance other than by the Public Solicitor.

Who the PSO represents

The primary function of lawyers is to provide legal advice and representation to accused persons in serious criminal cases. Other functions include attending circuit tours of the Supreme Court and Magistrates’ Court, providing advice and representation in civil cases, and conducting legal awareness and legal education activities throughout Vanuatu.

For civil cases, there is a means and merit test.

A person who is aggrieved by a refusal of legal assistance may apply to the Supreme Court for a direction. See section 5(3) of the [Public Solicitor Act](#).

Currently the PSO has regional offices in Santo (two lawyers), Tanna (one lawyer) and Malekula (one lawyer). Lawyers are deployed to circuit courts as required.

The mission statement of the PSO is:

To provide high quality professional legal services to the needy citizens of Vanuatu.

If a person does not qualify for legal representation, you may be able to assist them by providing legal advice, referring them to a private lawyer, or giving them a copy of one of PSO’s brochures.

Cases we do not do

The PSO does not provide assistance in the following types of cases:

- Defamation.
- Land cases where title to land is in dispute or unresolved.
- Chiefly title disputes.
- Cases involving election petitions, politicians or political disputes.

Annual report

Each year the PSO submits its annual report to the Ministry. The report is tabled in Parliament.

Structure

All staff work under the supervision and direction of the Public Solicitor. Administrative staff report to the Office Manager.

A diagram of the office structure appears in the annual report.

Chapter 2 – File management

A file must be created for each new matter. Plain manila folders are used for civil files. Orange manila folders are used for criminal files.

A client may have more than one file. For example, a client who is facing different sets of criminal charges will have a separate file for each set, because a different file may be needed for each trial. In criminal cases with several co-accused, a separate file should be opened for each accused person. For civil and criminal appeals, there will be one file for the original case (if PSO appeared), and a separate file for the appeal matter.

Application form

At the first client appointment, help the client to complete the “Application for Legal Assistance Form”. If assistance is approved, attach the form to the file.

When you complete the application form, ensure you record **contact details** for the client, including a phone number and, if possible, a second back-up phone number.

This is also an opportunity to identify and record important dates for Limitation Periods. Remember the three- year time limit in personal injury cases.

Means and merit test

You must apply a means test and merit test for each new civil matter.

The **means test** relates to whether a client could afford a private lawyer for the matter. The PSO is required to act for needy persons. Section 5(2) of the [Public Solicitor Act](#) defines “**needy person**”.

Assess the circumstances of the case and decide if the client qualifies as a needy person. Each case needs to be decided on its own circumstances, taking into account income and assets, the cost of alternative representation, and the hardship which might result if legal assistance is refused by PSO.

If you refuse assistance to a person, advise them that they have a right to apply to the Supreme Court for a direction about the issue of representation. See section 5(3) of the [Public Solicitor Act](#).

In [Office of the Public Solicitor v Kalsakau \[2005\] VUCA 13](#), the Court of Appeal looked at the monthly income, expenses, assets and debts of the applicant. The court held that the applicant had sufficient monthly earning above expenses (over VT50,000 excess of income over expenses per month), as well as equity in his house, to pay for a private lawyer.

If in doubt about administering the means test, seek assistance from the Public Solicitor.

In terms of the **merit test** – does the case have reasonable prospects of success? Is there a cause of action? PSO resources are limited, and should be directed to cases where a successful outcome is more

likely. Taking on hopeless cases reduces the time and resources available for meritorious cases.

Advice only matters

In some situations, after you provide legal advice at the first appointment, there may be no further action required with that client. Tick the box on the application form marked “Advice Only”. There is no need to open a file.

Providing realistic advice

Clients often approach the PSO with non-legal problems. Their problem may be financial, or involve human relationship issues, which cannot be solved by the law. Other clients may have a legal problem but their case has no merit. The legal problem may be years old or there may be no identifiable cause of action.

In these situations, it is important that you properly manage the expectations of the client. The PSO can only help clients who have legal problems. The PSO cannot take on cases that have no merit.

Clients want to be told that we will fix their problems and help them, but that is not your role. Your duty is to provide honest and realistic advice, even if that will disappoint the client.

Failure to give realistic advice creates problems for you and the client. It gives the client false hope, and may expose them to future costs orders if their case is unsuccessful. It also results in you and other PSO staff being overworked. Spending time on a hopeless case reduces time which should be used on a worthy case.

If in doubt about how to approach a particular case or client, seek advice from senior lawyers.

The retainer – obligations of clients and PSO lawyer

Explain to your client the nature of the agreement to provide legal assistance. Both the client and the lawyer have obligations. Outline the following:

- The client should sign the retainer agreement on the “Application for Legal Assistance Form”.
- The client is required to pay a standard contribution fee of VT1,125 for civil cases. There is no fee for criminal cases.
- The client is required to pay any court filing fees.
- In civil cases, if the client loses in court, the client may have to pay the legal fees of the other party. Standard costs against a losing party are ordered at the rate of VT10,000 per hour.
- The client is required to regularly keep in contact with the PSO, and advise the PSO of any matters that may be important to their case, including change of phone number and

- changes to their financial situation.
- If the client does not contact the PSO for a period of six months, the PSO can close the file without notifying the client.
- The client is required to provide truthful instructions to the lawyer.
- The client does not have a right to choose which PSO lawyer works on their case.
- The lawyer is required to keep instructions and personal information confidential.
- The lawyer is required to act in the best interests of the client.
- The lawyer is required to comply with the professional rules and ethics relating to working as a lawyer.

Storage of files

Files should be stored alphabetically in filing cabinets located in the room of each lawyer. Files should not be placed on the floor.

In addition to the physical file, the contents of each file are scanned onto the Case Management System.

How to organise a file

Write the name of the client on the side of the file.

Write the limitation date in thick marker pen on the front cover of the file.

All documents inside the file should be hole-punched and attached by the clip. If the file contains a document that should not be punched, such as photographs or original documents such as a birth certificate, use a plastic sleeve or place the documents in an envelope then hole-punch and placed on the file pin.

A good test of a whether a file is in order is to turn the file upside down and see if any loose paper comes out. If any papers fall out, the file is not in good order.

All papers inserted into a file should be placed in reverse chronological order so that the history of the case can be quickly and accurately determined.

The file should contain:

- copies of all documents created for the case including sworn statements, submissions, medical reports, criminal charges, preliminary enquiry (PI) bundle, pre-sentence report.
- all letters and other correspondence.

File notes

All activities relating to the file should be recorded and be placed on the file. Use the blue EVENT form to record court appearances, phone calls, conferences and other events. Record:

- all phone calls made and received (including date, time, names of parties).
- all conferences with the client and witnesses (including date, time, names of those present).
- all court appearances, including the name of the Judge or Magistrate, opposing counsel, date, whether the client was present, orders and next court date.

Regularly advise the client of progress on the file (or lack of progress) and keep a record of the advice on the file, using a blue form to record this advice.

Correspondence

The Public Solicitor should sign all outgoing letters. Attach all incoming and outgoing correspondence to the file.

Closing files

Complete the “close file form” when a file is ready to be closed.

It is important to close files that are no longer active. Check all your files every six months and close files that are no longer active. You may need to write to the client to advise that the file is being closed.

In criminal matters, once the court case is finished, and no appeal lodged, close the file.

“Salmon” folder

Accessing the “salmon” shared folder is an essential skill of a PSO lawyer. The public folder contains submissions, precedents, forms, reports sentencing tables and other helpful materials.

CMS – Case Management System

The Case Management System is a confidential electronic database where records of all files are held by the PSO and where you can search for clients and access their file.

The database is only accessible by PSO staff. It includes:

- the client’s name and personal details.
- the allocated legal practitioner.
- court dates.
- scanned copies of all important documents on the file.

- case notes.

It takes time to become familiar with CMS. Seek assistance from the Paralegal Officer or other lawyers if you have difficulties with CMS.

FILE MANAGEMENT CHECKLIST

1. When you decide to grant assistance for a client, open a file. If you start a file, keep that file until it is closed or transferred to another lawyer.
2. Record personal details (phone number or other contact method if possible). Record the next court date. Check and record any limitation date.
3. Keep a hard copy of all letters, correspondence and file notes on the file in chronological order.
4. Use the blue form to record details and outcomes of court appearances and conferences and phone calls.
5. Enter court dates on the file cover and in your personal diary.
6. Take your diary to court and be aware of your unavailable dates.
7. Print important emails and keep them on the file.
8. Record the results of each court appearance using the blue form.
9. Update CMS after each court appearance.
10. For criminal clients with multiple charges, open a separate file for each separate set of charges (each “Information” has a separate file).
11. For criminal matters with more than one accused, open a separate file for each co-accused.
12. Keep your desk tidy. If you have finished with a file, file it in the cabinet rather than leaving it on your desk. It is easier to track files and keep in control if your desk is tidy.
13. All court commitments should be entered in your personal diary and cross-checked with the front desk diary and the CMS court listings.
14. Attendance: Start time is 7.30am. Start on time so you can prepare for court.

Chapter 3 – Professional responsibility

This chapter addresses some of the professional responsibility issues that sometimes arise for PSO lawyers and suggests principles to consider.¹

There are many different approaches to identifying and resolving ethical issues. If you are unsure as to whether you have an ethical issue, assume you have one.

There is often no single correct answer to an ethical problem. If you are unsure how to resolve an ethical issue, choose the more ethical option.

Professional obligations when approaching ethical problems

When approaching ethical problems, be aware of your professional obligations. Refer to the [Legal Practitioners Act – Rules of Etiquette and Conduct of Legal Practitioners Order 2011](#).

The [Legal Profession Act 2005](#) has been passed by Parliament but it is not yet in force, so you are not bound by this legislation.

A lawyer client relationship is fiduciary in nature. The four elements of the fiduciary duty are:

- The duty of loyalty to the client.
- The duty of confidentiality.
- The duty to disclose to the client all information within your knowledge that is relevant in order to act in the client's best interests.
- The duty not to put your own or anyone else's interests before those of the client.

There are some generally accepted unwritten rules of professional conduct. These include:

- A legal practitioner must not mislead the court.
- A legal practitioner must act for his or her client without fear or favour. This may involve acting for a client in a controversial or unpopular case.
- Do not lend money to a client.
- Do not have a sexual or intimate relationship with a client.
- As a PSO lawyer, do not seek or accept money from a client. You are not entitled to conduct a private practice.

¹ Parts of this Chapter have been extracted from the NSW Legal Aid Commission Duty Lawyer Manual

Identifying an ethical issue

Identifying an ethical problem can be difficult. As a PSO lawyer, be aware of situations that cause a conflict of interest, or have the potential to bring about a conflict of interest. If something about your client, or the instructions you have received from your client causes you discomfort, address it and find a solution.

You will be guided in answering ethical problems by:

- giving considered thought to the particular matter
- conscientiously seeking advice from more experienced lawyers
- making decisions according to the duties that you owe. This in particular refers to the balancing of the duties that you owe to the court and to your client. Your overwhelming duty will always be to the court first and to your client second. Remember, under no circumstances should you mislead the court. However you have no positive duty to disclose matters against your client's interests to the court.

Rules of conduct

These are contained in the [Legal Practitioners Act – Rules of Etiquette and Conduct of Legal Practitioners Order 2011](#)

Important rules include:

- A lawyer is obliged to uphold the rule of law and to facilitate the administration of justice [Rule 5(1)].
- The overriding duty of a lawyer is as an officer of the court [Rule 5(2)].
- The relationship between lawyer and client is one of confidence and trust that must never be abused [Rule 32(1)].
- The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client [Rule 32(2)].
- Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. These instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them [Rule 76].
- In general, a lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer in that matter. Exceptions include urgent situations where it is not possible to contact the lawyer, and service of legal documents [Rule

61].

- A lawyer cannot act in a case if he or she will be required to give sworn evidence about any contentious issue in the case [Rule 78(2)].
- A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exists [Rule 80(2)].
- A lawyer must not adduce evidence knowing it to be false [Rule 82(1)].
- A lawyer must not communicate with a witness during the course of cross-examination or re-examination of that witness, except where good reason exists and with the consent of either the judge or the lawyers for all other parties (or, where a party is unrepresented, the consent of that party) [Rule 83(1)].

Special duties of a defence lawyer in criminal matters

Rule 87 states:

1. A defence lawyer must protect his or her client so far as is possible from being convicted (except upon admissible evidence sufficient to support a conviction for the offence with which the client is charged) and in doing so must:
 - (a) put the prosecution to proof in obtaining a conviction regardless of any personal belief or opinion of the lawyer as to his or her client's guilt or innocence; and
 - (b) put before the court any proper defence in accordance with his or her client's instructions, but must not mislead the court in any way.
2. When taking instructions from a client, including instructions on a plea and whether or not to give evidence, a defence lawyer must ensure that his or her client is fully informed on all relevant implications of his or her decision and the defence lawyer must then act in accordance with the client's instructions.
3. If at any time before or during a defended trial a client makes a clear confession of guilt to his or her defence lawyer, the lawyer may continue to act only if the plea is changed to guilty or the lawyer:
 - (a) does not put forward a case inconsistent with the confession; and
 - (b) continues to put the prosecution to proof and, if appropriate, asserts that the prosecution evidence is inadequate to justify a verdict of guilty; and
 - (c) does not raise any matter that suggests the client has an affirmative defence such as an alibi, but may proceed with a defence based on a special case such as insanity, if such a course appears in the lawyer's professional opinion to be available.

4. If:
 - (a) a defence lawyer is told by his or her client that he or she did not commit the offence; or
 - (b) if a defence lawyer believes that on the facts there should be an acquittal, but for particular reasons the client wishes to plead guilty, the defence lawyer may continue to represent the client, but only after warning the client of the consequences and advising the client that the lawyer can act after the entry of the plea only on the basis that the offence has been admitted, and put forward factors in mitigation.
5. A defence lawyer must not attribute to another person the offence with which his or her client is charged unless it is necessary for the conduct of the defence to do so and the allegation is justified by facts or circumstances arising out of the evidence in the case or reasonable inferences drawn from them.
6. A defence lawyer must not disclose a client's previous convictions without the client's authority.

Chapter 4 – Conflicts of interest

Currently the PSO does not act in matters where there is an existing conflict of interest.

In **civil cases** the conflicted party is referred to the USP Community Legal Centre (for advice only) or to the private profession.

In criminal matters, the first option is to refer the conflicted client to the private profession. The conflicted party must either pay for representation or hope that a private lawyer will provide *pro bono* representation. As a last resort, and subject to the consent of the other accused, the PSO may still act on the basis that an “information barrier” is used in the PSO.

Conflicts in criminal law matters

You have a conflict of interest when you are serving or attempting to serve two or more interests that are not compatible. There are several possible types of conflict of interest in a criminal case:

1. Conflict between co-accused in criminal cases. This is a client vs client conflict.

For example, one co-accused provides instructions, which are disputed by another co-accused. Often this involves a dispute as to who committed the offence, or a dispute about who played what particular role in the commission of the offence.

2. Conflict with a current or former client.

This might arise if a current or former PSO client is a witness for the prosecution. You may be in a position where you are required to cross-examine that witness. You may have unique access to their previous instructions and other personal information held on the PSO file.

There may be some difference in approach between acting against a current client, and acting against a former client who was assisted by different lawyers previously.

3. Conflict between the accused and a staff member of the PSO. This is a client lawyer conflict.

This might arise if a staff member, or a close relative of a staff member, is an accused person or a prosecution witness.

SAMPLE CONFLICT OF INTEREST SITUATION

On a court tour with only one lawyer attending, PSO is approached to act for James and Alex who have both been charged with unlawful entry. The lawyer gets written authorities from James and Alex to act for the other co-defendant and starts to take instructions.

James instructs that it was Alex's idea to break in to the house and that he only acted as a lookout while Alex went inside.

Alex instructs that it was James' idea to break into the house, and that James threatened to injure Alex's little sister if Alex did not help. Alex says he only acted as lookout while James went into the house.

In this situation, the lawyer would have a conflict of interest because the instructions from James would be contrary to the interests of Alex. We cannot ask James about the alleged threats he made to Alex because this would breach our duty of confidentiality to Alex.

Criminal cases

The difficulty arising from co-accused in criminal cases is the duty of confidentiality to one client conflicts with the duty to disclose all relevant information to the other client. You have a duty to keep the first accused's instructions secret, but you also have a duty to give all relevant information, including those secret instructions, to your other client.

Most striking is the risk that you will have to cross-examine your own client in a criminal trial, which is not possible. Another example is submitting something about your client which they do not agree with.

In a plea in mitigation, you may not be able to blame a co-accused for their greater role in the offending if you represent more than one accused.

Conflict of interest and the lawyer client relationship

To act when you have a conflict of interest involves breaching your fiduciary duty to your client or former client.

Another reason why a lawyer should not act where there is a conflict of interest is the old adage that justice must not only be done but be seen to be done. Consider the public perception of the profession and the damage that might be done to that important perception if a lawyer acts while having a conflict of interest.

Amendments to the Public Solicitor Act

The 2012 amendments have not yet been gazetted and therefore have not commenced.

The amended section 6A of the [Public Solicitor Act](#) states:

Conflict of interest

1. The Public Solicitor must refer a legal matter in which he or she has a conflict of interest to a private legal practitioner.
2. Any legal matter referred to a private legal practitioner will be dealt with on a pro bono basis.

Resolving a conflict of interest

At the heart of the work of PSO is a commitment to “access to justice” and to help “needy persons”, especially those facing serious criminal charges. Refusing to act for a conflicted client may result in that person being unrepresented at trial.

Article 5 (2) of the [Constitution](#) states:

Protection of the law shall include the following:

- (a) **Everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent court and be afforded a lawyer if it is a serious offence.**

Given this provision, you may need to consider taking a practical approach to a conflict situation in a serious criminal case. Options include referring the client to another lawyer at the PSO, or one of the PSO regional office lawyers. If you do this, you would need to make sure there is an information barrier to protect confidential information on your file. This is sometimes called a “Chinese wall”.

If you deny representation to a person because there is a conflict of interest, advise the person that they can apply to the Supreme Court for a direction about the issue of representation. See section 5(3) of the [Public Solicitor Act](#).

Seek guidance from the Public Solicitor in any conflict case.

Chapter 5 – Limitation periods

One fundamental requirement of being a lawyer is to identify and comply with the relevant limitation period. Every time you take instructions ask yourself “what is the relevant limitation period in this case.”

Failure to comply with a limitation period can have bad consequences for the client, the PSO and you. In Vanuatu, the law is restrictive. It is often impossible to file a claim out of time.

Limitation periods are time periods prescribed by statute during which actions must be brought in order to avoid such actions becoming statute barred. When an action becomes statute barred it means that proceedings may not be issued.

Note the difference between a “limitation period” and a time period to lodge an appeal. A “limitation period” relates to filing a new claim. If the limitation period is not complied with, the claim will be statute barred. This is a serious situation for you, the client and the PSO. Appeal time periods are not so serious. It is not too difficult to seek an extension of time for filing an appeal.

The [Limitation Act](#) is the relevant Vanuatu Act. It is very similar to the English [Limitation Act \(UK\)](#) as it stood in 1963. Although there were subsequently substantive amendments to the English Act culminating in the [Limitation Act 1980 \(UK\)](#), the Vanuatu Parliament did not adopt any of the amendments when enacting its own [Limitation Act](#).

The Vanuatu Act is restrictive. It is difficult for a claimant to proceed with a claim that would otherwise be out of time. On the other hand, the English Act gives the judges a fairly wide discretion to extend the period in the interests of justice and fairness. The reason for pointing out the difference is to stress how inflexible the Vanuatu Act is and therefore how important it is to make sure that you are always conscious of when the limitation period expires, as once it has passed, your client is prevented from instituting his or her claim.

Because it is often impossible to file a claim out of time, identifying and complying with the relevant time limit for a civil claim is important. If you fail to identify the relevant time limit, or fail to file a claim before the expiry of the time limit, you may be guilty of professional negligence. This may result in a civil claim being filed against the PSO, and also against the lawyer personally. The PSO, or the lawyer, may need to pay the damages that would have been awarded if the claim had been filed before becoming statute barred. This could be expensive for the PSO.

In personal injury cases there is a three-year limitation period from when the alleged **negligence** or **breach of duty**, causing injury, occurred.

The relevant time limits in some other cases are:

Contract claims: Six years from the date on which the cause of action accrued. In breach of contract claims that is six years from the date on which the alleged breach occurred.

Tort claims other than personal injury: Six years from the date on which the tortious conduct took place.

Actions for an account: Six years from the date on which the matter in question arose.

Actions on a judgment: 12 years from the date of on which the judgment became enforceable. Judgment interest more than six years old cannot be recovered.

Rent related claims: Six years after the rent in question fell due.

Actions to recover from a will or deceased estate: 12 years.

Employment cases

Section 20 of the [Employment Act](#) provides a **three-year limitation** period for “**remuneration**” claims. The three- year time limit is mandatory—there is no discretion to extend time. The extension provisions within section 15 of the [Limitation Act](#) do not apply. “Remuneration” includes wages, annual leave and sick leave.

However “remuneration” does not include severance pay. There is a **six-year limitation period for severance**, as per the [Limitation Act](#). See [National Bank of Vanuatu v Cullwick \[2002\] VUCA 39](#).

So there is a mandatory three-year limitation period for wages and leave entitlements. But there is a six-year limitation period for severance entitlements.

Election cases

The PSO does not act in election cases. However it may be useful to know that the limitation period for filing an election petition is 21 days from the publication of the results in the Gazette. There is no provision for an extension of time.

Extension of time

Under the [Limitation Act](#), there are limited circumstances in which a claim can be filed out of time, that is, after the expiry of the relevant limitation period. See [Nikiau v Telecom Vanuatu Limited \[2014\] VUSC 90](#) and [Taiwia v Edward \[1998\] VUCA 14](#).

An extension of time may be possible if the client has not obtained legal advice until after the limitation period has expired, or if the client first obtained legal advice within 12 months of the expiry of the limitation period.

In personal injury cases, the limitation defence is not available:

if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which:

- (a) either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period; and
- (b) in either case was a date not earlier than twelve months before the date on which the action was brought.

The “material facts” of a “decisive character” must be discovered after the expiry of the limitation period, or within 12 months before the expiry of the limitation period. These facts must have previously been not known by the claimant and his lawyer [section 15(3)]. The claim must be filed within **12 months** of discovering the new facts.

Limitation may not be available as a defence in other rare cases, if:

- the client is suffering from a disability [section 10]. Disability includes a person of unsound mind or an “infant”
- there is fraud by the defendant or mistake [section 14]
- the defendant has stated that the limitation period defence will not be relied upon, and later changes his position, there may be an argument of waiver or estoppel:

when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. [*Moorgate Ltd. v. Twitchings* (1976) QB 225 per Lord Denning]

See [Commonwealth v Verwayen \(1990\) 170 CLR 394](#) as referred to in [Taiwia v Edward \[1998\] VUCA 14](#).

An application for an extension of time should be filed before you file the claim, or file at the same time as the claim. You can also file the application for extension of time after the claim is filed however there is an additional requirement under section 16(3) of the Act that the claimant must prove he was not aware that the claim was out of time when it was filed. See [Vanuatu Brewery v Aru \[2000\] VUCA 9](#) and [Aru v Vanuatu Brewery Ltd \[2002\] VUCA 43](#).

What to do if the claim is out of time

If you are dealing with a file which has become statute barred, consult with the Public Solicitor. If the other side have indicated that they intend to rely on the [Limitation Act](#) as a defence, and you can see no way around the defence, then advise your client of what has occurred and recommend that they seek some independent legal advice about their rights as they may have an action against this office in negligence.

Do not assume that the other party will rely on the [Limitation Act](#). Unless they formally raise it do not mention the issue to them.

File management and limitation periods

A common problem is that while negotiating the settlement of a claim you may not think that it is necessary to issue proceedings. Often the three-year period passes before settlement and before you have issued proceedings resulting in the opportunity for the other side to say “bad luck, the time’s up, the case is closed”.

It is important to take note of the date of the accident when you first take instructions, and to identify when the limitation period will expire. A few basic steps will help you to ensure that the period does not expire

before you commence proceedings:

1. On the front right hand corner of the file write the “Limitation expiry date 23/11/2014.”
2. If the limitation period expires in the current year put it in your diary with a reminder 1 month before the date.
3. If the limitation period expires in the following year or even later put a reminder in your diary for the December of that year to put it into next year’s diary.
4. Use Outlook Calendar on your computer to remind you of the expiry date.
5. Put the dates in the main appointments diary as a reminder in the same way as suggested in 3.
6. Draft the pleadings as soon as you can in order to have them on file ready should they become necessary.
7. Regularly check all your files to make sure you are aware of any approaching time limits.

The need for legislative reform

In [Vanuatu Brewery v Aru \[2000\] VUCA 9](#) the Court of Appeal described the [Limitation Act](#) as “unnecessarily complex” and “difficult to understand”. The court recommended that the Act should be re-enacted in terms that were simple, clear and easy to understand. Unfortunately this has not yet occurred.

Limitation in criminal proceedings

Section 15 of the [Penal Code](#) states:

15. Limitation in criminal prosecutions

No prosecution may be commenced against any person for any criminal offence upon the expiry of the following periods after the commission of such offence:

- (a) in the case of offences punishable by imprisonment for more than 10 years – 20 years;
- (b) in the case of offences punishable by imprisonment for more than 3 months and not more than 10 years – 5 years;
- (c) in the case of offences punishable by imprisonment for 3 months or less or by fine only – 1 year.

Also be aware of delay in criminal proceedings. An accused person has a Constitutional right to a “fair hearing within a reasonable time” [section 5(2)(a) of the [Constitution](#)].

For discussion of this provision see [Public Prosecutor v Emelee \[2005\] VUCA 31](#) and [Public Prosecutor v Silas \[2013\] VUSC 48](#).

Chapter 6 – Advocacy and etiquette

Written submissions and other court documents

Written submissions should be as short and simple as possible. Do not use complicated words or long sentences.

In terms of format, use 12 or 14 point text and make sure the line spacing is 1.15, 1.5 or double spacing. Standard font is either Times New Roman or Arial. The right hand margin should be “justified” so that the page has a clean look on both sides.

When you quote case law or legislation, indent the quote. There is no need to put the quote in *italics* - this can make it harder to read. You may want to reduce the font size and line spacing for quoted sections.

Use page numbers so the Judges can easily refer to them during the court hearing. You may also consider using paragraph numbers - that is a matter of personal style.

Practice directions

You should be familiar with the [Legal Practitioners Act – Rules of Etiquette and Conduct of Legal Practitioners Order 2011](#).

There are also a number of Practice Directions relevant to appearing in court. These can be found in the Salmon folder called “[Practice Directions](#)”.

In terms of dress code, male lawyers should wear a white shirt, tie, dark pants and dark shoes or formal sandals. Female lawyers should wear a white shirt or blouse, dark skirt or trousers, and dark shoes or formal sandals.

Appearing in court

Other suggestions include:

- Be early for court, properly prepared and dressed appropriately. Always have your diary.
- Turn your phone off.
- Announce your appearance by saying “May it please the court, counsel’s name is....I appear for ...”
- Address a Magistrate as “Your Worship” and a Judge as “Your Lordship”, “My Lord” or “My Lady”. Do not say “you” to a judicial officer.
- Stand when speaking to or being spoken to by a judicial officer.
- If your opponent stands to speak, you should sit down.

- Do not say “thank you” to the judge or magistrate. Instead say “May it please.”
- Stay silent and still when the oath is administered.
- When your matter is concluded, ask to be excused, or stay at the bar table until the next counsel arrives, and then leave. Give priority to more senior counsel when mentioning cases, and wherever possible allow members of the private bar to mention matters before you.
- Do not mislead the court. This means you must not make a submission which you know to be false. If you do not know the answer to a question, do not guess. Just say “I do not know”, and offer to find out.
- If you later realise that you have misled the court, correct the court record. If this is not possible without harming your client, seek leave to withdraw from the matter.
- Your professional reputation is everything. Protect it at all costs. Once lost, it is irretrievable.
- The art of persuasion is being the most reasonable person in the court room.
- In change of plea or other contentious cases, get signed instructions.
- If you are worried that you have an ethical problem, assume you do, and choose the more ethical option.
- When in court, do not read the newspaper, talk loudly, put feet up on the bench, eat or drink.
- Develop your own style of advocacy that suits your personality. Be relaxed and use pauses. Speak clearly and loudly enough for everyone in court to hear you. Use eye contact.

Chapter 7 – Oaths and sworn statements

You will be required to draft and file sworn statements while working at the PSO.

Rule 2.6 and Rules 11.3-11.7 of the [Civil Procedure Rules](#) provide guidance for the use of sworn statements. See also Form 3 of the [Civil Procedure Rules](#) for a precedent of a sworn statement.

Make sure that the oath and signature of the sworn statement do not appear on a page by itself—there should always be some of the text from the previous paragraphs on the same page as the oath and signature.

A Commissioner of Oaths must witness a sworn statement. Some staff at the Magistrates’ Court and the Supreme Court are Commissioners of Oaths. They usually witness sworn statements.

In criminal matters in the Supreme Court, it is arguable that a legal practitioner not appearing in the case can witness an affidavit [section 229 of the [Criminal Procedure Code](#)]. However to avoid doubt it is recommended to always use a Commissioner of Oaths.

A Commissioner of Oaths cannot witness a sworn statement if he or she is representing a party, or has an interest, in the matter for which the sworn statement is being used [section 11(2) [Oaths Act](#)].

Exhibits should be marked with the initials of the person making the sworn statement e.g. “EX 1” and the Commissioner must state on it:

This is the exhibit referred to in the sworn statement of X sworn/declared before me on this day of 2014.

For **translated statements**, if the statement is interpreted into another language for the deponent, indicate this at the end of the statement by writing:

I certify that the sworn statement has been translated to the deponent in the (state which) language that the deponent understands. The deponent acknowledged that he understood what was contained in the sworn statement.

Signature of interpreter

Full name of interpreter

Chapter 8 – Court tours

The PSO sends lawyers on court tours conducted by the Supreme Court and the Magistrates' Court. The Santo, Tanna and Malekula offices make efforts to attend circuits conducted near to their respective offices.

Going on circuit is one of the more challenging aspects of working at the PSO. It is also one of the most fulfilling parts of the job. You get to meet grassroots people from all corners of the nation and visit places that lawyers rarely get to see.

The workload can be demanding. Court often sits into the evening and clients may want to provide instructions at all hours of the day and night. This requires patience and perseverance on your part. Keep in mind that for the client, this may be their only day in court in their entire life, and therefore it is a nervous and important occasion.

It is important that you make adequate preparations for the circuit. Before the circuit:

- Make sure all of your court cases listed in Port Vila during the circuit week are properly prepared for another lawyer. Prepare detailed written instructions for each file and speak directly to the lawyer handling the file if there is any special requirement on the file.
- Do not go on circuit if you are listed for a trial or appeal in Port Vila. Alternatively arrange for a different lawyer to appear in the Port Vila case.
- Speak to the prosecutor to try to obtain a copy of the court list. Ask if any matters are listed for trial.
- Locate files from the previous circuit court to that location. If necessary, speak to the lawyer who attended the previous circuit to find out if there are any cases requiring special preparation or any other matters that you need to be aware of.
- Attend the pre-tour court conference and be ready to advise the court of the status of each case.
- Confirm travel and accommodation bookings with the administration section.
- Take sufficient pens, notepads, new files, forms, application forms and this handbook. Take the office laptop if it is available.
- Take hard copies of the relevant legislation including the current [Penal Code](#) and [Criminal Procedure Code](#).
- If there is **any chance** you will be required to travel by boat, take a life jacket and waterproof container for your mobile phone and other electrical items. If you travel by boat, inform the office of your likely route and time and place of arrival. Confirm safe arrival with the office.

Enjoy the week on circuit and remember that you are an ambassador for the PSO and the legal system.

Chapter 9 – Legal research

Undertaking effective research is a core skill of a PSO lawyer.

Legislation

Vanuatu legislation is available on [PACLII](#).

Warning: The 2006 Consolidated Acts are not normally current. Cut and paste the 2006 Act with relevant amendments passed since 2006. For example, there have been at least three Acts since 2006 to amend the [Employment Act](#). The [Penal Code](#) and [Criminal Procedure Code](#) have also had several important amendments since 2006. You find the amending Acts by searching under the “[Sessional Legislation](#)” link.

Cut and paste all the amendments to get an updated copy of the Act. Make sure you are working with an updated and consolidated copy of the legislation.

Be aware that United Kingdom legislation as at 1980 may also be relevant law. You can find relevant UK Acts by searching under the “[United Kingdom Legislation in Vanuatu](#)” link on PACLII.

Case law

When searching for relevant case law, try to identify significant Court of Appeal of Vanuatu decisions. This is the highest court in Vanuatu and its decisions are binding authority.

When you search for a legal phrase or term, the cases you find will usually highlight the search term with arrows. For example:

Thirdly, for **severance**, he accepted that the remuneration figure which should be used in calculating the **severance** should be VT350,000 and **not** the figure of VT250,000 which the Appellant Authority claimed was the Respondent’s correct salary.

Avoid printing the case with these arrows. It does not look professional. You can remove the arrows by clicking the “No Context” link which appears at the top of the case, just above the case name. See the “No Context” link highlighted below:

Court of Appeal of Vanuatu

You are here: [PacLII](#) >> [Databases](#) >> [Court of Appeal of Vanuatu](#) >> [2005](#) >> **[2005] VUCA 19**
[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Context](#) | **No Context** | [Help](#)

Jenshels' Annotated Civil Procedure Rules

This is an essential text for civil cases.

Halsbury's

Halsbury's Laws of England is an encyclopedia of law. It provides a detailed summary of the law in England and Wales. The 50 volumes are in the Port Vila office.

In Vanuatu, the Court of Appeal often quotes from *Halsbury's* when discussing principles of common law. The volumes are alphabetical – A through to Z. Volumes 11(1) –11(4) deal with criminal law. Volume 12 deals with assessment of damages in contract and tort.

Bullen and Leake's Precedents of Pleadings

There are two copies of this book in the Port Vila office. Use this text for drafting pleadings.

Archbold – Criminal Procedure and Practice

There are two copies of this book in the Port Vila office. This text contains a summary of English Law and Procedure. Look for sections that discuss and explain the common law on a particular issue. Post 1980 English legislation is not relevant to Vanuatu.

Ross on Crime

There are several copies of this book in the Port Vila and provincial offices. It is an excellent resource on criminal law.

Other texts

The office has copies of other important legal texts, especially the Common Law Series. These include:

Clerk & Lindsell on Torts, Chitty on Contracts, MacGregor on Damages, Phipson on Evidence.

PART 2
FAMILY LAW

Chapter 10 – Divorce, maintenance, custody and property

When a client comes to see you as a result of a marriage break up, the issues that you may need to address are:

- Divorce.
- Maintenance (child and spousal).
- Custody of children and access.
- Division of property on separation.

Divorce

Vanuatu has a system of “fault-based” divorce. This is different to other common law countries where divorce is based on a “no-fault” system.

In Vanuatu, a divorce can only be granted if the respondent has engaged in certain specific behaviour—adultery, cruelty or desertion, etc. The person seeking divorce must allege that the respondent has engaged in adultery, cruelty or desertion etc. Once that wrong behaviour is alleged, the respondent can consent to the divorce or oppose the divorce. A person seeking divorce cannot rely on their own adultery or cruelty or desertion as a ground for divorce.

This fault-based system makes it very difficult for a person to achieve a divorce where the respondent has not engaged in adultery, desertion or cruelty etc. There are many cases where the respondent has not engaged in the any of the specific wrong behaviour therefore a divorce is not possible—even if the respondent is willing to consent to a divorce.

This fault-based system is different to a ‘no-fault’ divorce system where the normal requirement for a divorce is proof or acceptance that the marriage has completely broken down. The court does not look at why the marriage has failed. In a ‘no-fault’ system, the court is not concerned about who is responsible for the failure of the marriage.

Divorce, or dissolution of marriage, is provided for under Part II of the [Matrimonial Causes Act](#). The form of petition appears in the schedule to the Act. You need to file:

1. A Petition for Dissolution of Marriage – Form C.

2. A sworn statement including the Declaration in Form D.
3. A copy of the marriage certificate.

There is a sample Petition (Form C) and sworn statement (Form D) at the end of this chapter.

A marriage under custom can only be dissolved under custom. You cannot file a petition for dissolution of a custom marriage with a court.

For marriages before a Registrar or Minister, either the husband or the wife may petition for the dissolution of the marriage. Sections 5 and 13 set out the limited grounds upon which the court may pronounce a decree of divorce:

1. **adultery**, or
2. **deserted** the petitioner without just cause for a period of at least three years immediately preceding the presentation of the petition, or
3. has since the celebration of the marriage treated the petitioner with persistent **cruelty**, or
4. is incurably of **unsound mind** and has been so continuously for a period of at least five years immediately preceding the presentation of the petition, or
5. seven years or more of continuous absence and no contact or other information as to whereabouts gives rise to a **presumption of death**.

There are further restrictions if the parties have been married for less than two years [section 6].

The petitioner must, in the absence of admissions by the respondent, prove the grounds alleged in the petition.

If adultery is alleged, unless there are special grounds, the adulterous person should be named and joined as a co-respondent to the petition [section 8]. The sample documents at the end of this chapter have been drafted in a simple way and the co-respondent has not been named or joined as a party. The sample documents seek the permission of the court to proceed in this way.

Section 6 of the Act sets out the court's duty on hearing a petition.

A respondent to a petition may contest the grounds alleged by the petitioner in order to avoid a decree of divorce. Alternatively he/she may decide to cross petition for divorce alleging grounds against the petitioner [section 11].

When taking instructions you can use a blank copy of the Sample Petition form and hand write

the details so that it may later be typed up.

If it seems that the petition is likely to be contested, ensure you take detailed instructions regarding the evidence in support of the petition.

Pursuant to the [Magistrates' Court \(Civil Jurisdiction\) Act](#), Magistrates may only hear uncontested divorce petitions. Where a petition is contested it should be referred to the Supreme Court for hearing.

Responding to a petition

You may be required to act for a respondent in a divorce case. You will need to file an **Reply** (Answer) to the petition. A sample Reply can be found at the end of this chapter. Depending on your instructions, you may need to include a cross-petition in the Reply. Useful precedents can also be found in *Rayden on Divorce*. There is a copy of this text in the PSO Library.

Foreign marriage

Persons married in a foreign country can apply for divorce in Vanuatu if both parties are domiciled in Vanuatu. To establish the domicile requirement, there needs to be an intention to establish a principal permanent home in Vanuatu, and an intention to continue to reside in Vanuatu indefinitely. See *Halsbury's Vol 8(3)* at para 43.

Nullity

In rare cases, a client can seek dissolution of the marriage by a decree of nullity. See Part 1 of the [Matrimonial Causes Act](#). Examples of nullity situations include:

- where the marriage was induced by duress or mistake
- one party was of unsound mind and incapable of understanding the nature of the ceremony
- marriage between prohibited category of blood relative
- refusal or incapacity to consummate the marriage
- one of the parties was of unsound mind, suffering epilepsy or venereal disease
- the wife was pregnant to another man at time of marriage.

Some of these provisions are very old fashioned and could be reformed.

Maintenance – spousal

In most divorce cases there will be a related claim for maintenance for the spouse and/or children.

In the [Matrimonial Causes Act](#), interim spousal maintenance pending the granting of the divorce is referred to as alimony [section 14(1)].

At the end of the petition, where the relief sought is set out, include claims to the following:

- that the respondent pay to the petitioner the sum of X VT per month/week by way of interim maintenance pending the final determination of the petition
- that the respondent pay to the petitioner the sum of X VT per month/week by way of maintenance.

If the full hearing of the matter is likely to be delayed then you may need to apply for interim maintenance if the husband is refusing to pay any maintenance when he clearly has the capacity and when the wife is suffering economic hardship as a result of his non-payment.

In either case it is important to obtain a sworn statement from the client setting out in detail the client's income and expenses, together possibly with some explanation, in order to demonstrate the need for financial support. The other party should provide a similar sworn statement so that the court can make an assessment of the relative capacities of the parties.

As with any application, in order to succeed you must have sufficient evidence to support the claim, in this case, to financial support.

It is also important to be aware of the [Maintenance of Family Act](#), which makes it a **criminal offence** to fail to make adequate provision for the maintenance of a wife or legitimate children under the age of 18 years. This Act only applies to persons who are married. It does not apply to persons who are already divorced. In proceedings under the Act, the court has the power to make an order for maintenance in addition to convicting the husband in respect of his past failure.

It is possible therefore in circumstances where the wife is simply in need of maintenance to refer her to the police for the matter to proceed as a criminal matter under the [Maintenance of Family Act](#). PSO lawyers should not initiate criminal proceedings under this Act.

Maintenance – child

The claim for child maintenance is also brought as part of the divorce proceedings and

interim orders pending final determination of the petition may be made [section 15]. The claim can be made on behalf of adopted children and ‘illegitimate’ children who are accepted as part of the family.

In applications for child maintenance, present, by sworn statement, evidence of the cost of feeding, clothing and generally caring for the children.

In respect of children born outside marriage, the mother may apply to the Magistrates’ Court for an order for maintenance against the man alleged to be the father under the [Maintenance of Children Act](#).

Section 2 sets out the time frame during which an application under the Act may be made.

Sections 3 and 4 set out the minimum evidentiary basis for establishing a cause of action under the Act.

The criminal provisions of the [Maintenance of Family Act](#) apply to the maintenance of legitimate children of the marriage under 18 years of age.

Maintenance – without a petition for divorce

If a client wants maintenance without applying for a divorce, an application can be made under sections 7 and 11 of the [Guardianship of Minors Act \(1971\) \(UK\)](#).

Custody and access

Generally, custody applications may only be dealt with by the Supreme Court because of the limit on the jurisdiction of the Magistrates’ Court in cases concerning “guardianship of minors” under section 2 of [Magistrates’ Court \(Civil Jurisdiction\) Act](#). This has been taken to mean that Magistrates do not have the power to deal with contested custody matters. It should be noted however that the Magistrates’ Court often makes temporary custody orders in domestic violence cases. These orders are aimed at achieving harmonious family relationships and preventing disputing couples from using custody of children to gain an advantage in their dispute.

Section 15 of the [Matrimonial Causes Act](#) gives the Supreme Court power to make provision with respect to the custody and education of the children of the marriage.

The right to apply for custody is not restricted to an application as part of divorce proceedings. Application may be made at any time when the custody and guardianship of a child becomes

an issue. However most claims will be made when the divorce proceedings are filed and the court may make interim orders pending the full hearing of the application.

Each case will depend on its own facts. It is the welfare and the best interests of the child, which are the court's paramount concern [[Kong v Kong \[2000\] VUCA 8](#)].

In some circumstances, someone other than the legal parents may seek an order for custody and guardianship of the child.

Whoever does not have custody will usually be granted access. Access arrangements can usually be made between the parties, although in some extreme cases it may be necessary for the court to determine appropriate access.

Damages for adultery

Section 17 of the [Matrimonial Causes Act](#) gives the court power to award damages for adultery. This should be pleaded at the appropriate paragraph in Form C in Schedule 1. Damages can only be claimed as part of a petition for divorce. See [Nguyen v Nguyen \[2013\] VUSC 204](#) and [Banga v Waiwo \[1996\] VUSC 5](#).

Division of property

The final element for consideration as part of a divorce is the division of the property of the marriage.

The relevant English legislation which has application in Vanuatu for the purposes of property division is the [Matrimonial Proceedings and Property Act \(1970\)](#), on the basis that the [Matrimonial Causes Act](#) is silent on the subject property division.

The English Act was considered in [Joli v Joli \[2003\] VUCA 27](#) where the court stated:

Depending on the length of time the parties have lived together, and their respective contributions the Court might reach a conclusion, as a matter of fact in the circumstances of the case, that matrimonial assets should be divided in a roughly equal fashion. However such a result is **not** because of any presumption of law, but because of the respective positions and contributions of the parties. Even where parties have never been married, the application of similar considerations in equity may lead to the imposition of a trust on assets such that assets acquired by the parties during their co-habitation will be divided roughly equally.

Another relevant case is [Hanghangkon v Hanghangkon \[2010\] VUSC 117](#), where the court

divided the property equally between the parties.

De facto relationships and division of property

A claim for property can be made even where there has been no marriage. A claim can be made for property after the break-up of a de facto relationship. Equitable principles apply, as outlined by the Vanuatu Supreme Court in [Joli v Joli \[2003\] VUCA 27](#) and by the Court of Appeal in [Mariango v Nalau \[2007\] VUCA 15](#).

SAMPLE PETITION FOR DIVORCE FORM C

**IN THE MAGISTRATE COURT OF
THE REPUBLIC OF VANUATU
PORT VILA**
(Matrimonial Jurisdiction)

MATRIMONIAL CASE NO OF 2012

BETWEEN: JAMES SMITH

Petitioner

Andrew Bal
Public Solicitors Office
P.O Box 794
Port Vila

AND: MARY JONES

Respondent

Wilco Hardware Ltd
PMB 1288
Port Vila

PETITION FOR DISSOLUTION OF MARRIAGE

The Petition for divorce shows:

1. That on the 9th day of April 2008, at the Anglican Church in Port Vila the petitioner was lawfully married to Mary Jones (hereinafter called the respondent).
2. That after the marriage the petitioner and the respondent lived and cohabited in Port Vila for 1 year 8 months and that there is the following child of the marriage now living –

Junior Smith (DOB 3 January 2009)

3. That there have been no previous proceedings in this court or any other court with reference to the petitioner's marriage either by or on behalf of the petitioner or the respondent.
4. That in December 2010, the petitioner moved out of the matrimonial house due to issues affecting their marriage.
5. That in January 2011, the petitioner travelled to Santo, urging the respondent to follow him, but the respondent refused, instead advising the petitioner to move on with his life.
6. That the petitioner resided at Santo for 1 year, whilst the respondent remained in Port Vila, residing with her family at Freswota 2 Area.
7. That the petitioner returned to Port Vila around March, 2012. He attended to the respondent's premises at Freswota 5, with intention to re-unite with the respondent. However to his disappointment, the petitioner noticed the respondent was dwelling or co-habiting with another partner, Tony Blake.
8. At such time, despite the petitioner's persistence for the restoration of their marriage, the respondent told the petitioner to move on with his life as she is currently co-habiting with a new partner and there is no way the marriage could be restored.
9. That the petitioner has taken all necessary steps to re-unite or restore the marriage with the respondent but the respondent has refused and continues to co-habit with the said Tony Blake.
10. That the petitioner therefore files this divorce proceeding on the grounds of the respondent's adultery with Tony Blake.
11. That the petitioner and the respondent are both domiciled in Vanuatu.
12. **The petitioner therefore prays that the court decree:**
 - (a) that the marriage between the petitioner and the respondent be dissolved;
 - (b) that the petitioner may have the custody of the child of the said marriage;

- (c) that Mr Tony Blake be excused from being made a co-respondent on grounds of expediency and that there are no orders being sought against him.

- (d) that the respondent pay to the petitioner the sum of VT 3000 per week by way of interim maintenance pending the final determination of the petition.

- (e) that the respondent pay to the petitioner the sum of VT 3000 per week by way of maintenance.

- (f) Further Orders and Relief the Court deems just and fair.

Dated this 10th day of December 2012 at Port Vila.

Petitioner's Lawyer

THE MAGISTRATES' COURT FOR **PORT VILA**
TO: **MARY JONES** of North Efate living in Port Vila, *Respondent*.

TAKE NOTICE that the above petition has been set down for hearing Magistrates' Court at Port Vila on the day of 2012 at o'clock in the noon and you are required to appear at the court on the day and at the hour aforesaid for the hearing of the petition otherwise the hearing of the said petition may be proceeded with and judgment given in your absence.

Dated the day of 2012

MAGISTRATE

SAMPLE DECLARATION FORM D

IN THE MAGISTRATE’S COURT OF MATRIMONIAL CASE NO OF 2012
THE REPUBLIC OF VANUATU
PORT VILA

In the matter of the petition of James Smith for a decree for dissolution of marriage.

BETWEEN: JAMES SMITH

Petitioner

AND: MARY JONES

Respondent

**SWORN STATEMENT AND DECLARATION OF JAMES SMITH IN SUPPORT OF
THE PETITION FOR DISSOLUTION OF MARRIAGE**

I, James Smith. of Port Vila, the petitioner in this cause, solemnly and sincerely declare as follows -

1. That the statements contained in paragraphs 1–12 of my petition dated are true.
2. That the statements contained in paragraphs 1–12 of my said petition are true and correct to the best of my knowledge, information and belief.
3. That no collusion or connivance exists between me and the respondent in any way whatever.

DECLARED by the said
this day of 20.....
before me:

Magistrate

SAMPLE REPLY TO PETITION

**IN THE MAGISTRATE’S COURT OF
THE REPUBLIC OF VANUATU
PORT VILA
(Matrimonial Jurisdiction)**

MATRIMONIAL CASE NO OF 2012

BETWEEN: JAMES SMITH

Petitioner

AND: MARY JONES

Respondent

REPLY TO PETITION

The Respondent, in REPLY TO THE PETITION filed in this matter says:

1. That she married the petitioner on the 9th day of April 2008 at the Anglican Church in Port Vila.
2. That from that marriage, she and petitioner have 1 child, **Junior Smith** (DOB 3 January 2009)
3. That the respondent denies the allegation made by the petitioner alleging that she committed adultery during the marriage with Mr Tony Blake.
4. That after the said marriage, the petitioner has committed adultery with a woman by the name ANNE JONES who was his ex-girlfriend. The petitioner and Ms JONES now live together. Their adultery is longstanding and ongoing. There have been marital problems caused by the said adultery.
5. That on many occasions the petitioner assaulted the respondent and sent her out of his home.
6. That during the marriage, the petitioner did not want the respondent to stay in his home, because he wanted to bring his new girlfriend home. Due to that reason the petitioner left the matrimonial home and went to live in Santo.

7. That on January 5th 2011, the respondent had to take a Domestic Violence Protection Order against the petitioner because of his violent behaviour towards her.
8. That since 2011 the respondent has been living with her parents, and the child Junior Smith. The petitioner was not supportive in maintaining her and the child.
9. That the respondent claims 700,000VT damages in respect of the adultery of the petitioner.
10. That the respondent therefore prays that the court will be pleased to decree:
 - (a) That the prayer of the petition be rejected.
 - (b) That the marriage between the respondent and the petitioner be dissolved under section 11 of the *Matrimonial Proceedings Act* on the grounds of adultery by the petitioner.
 - (c) That the said petitioner do pay the respondent the sum of 700,000VT damages in respect of his adultery and domestic violence.
 - (d) That Ms ANNE JONES be excused from being made a co-respondent on grounds of expediency and that there are no orders being sought against her.
 - (e) That the petitioner pay maintenance to the respondent in the sum of 4,000VT each month until the respondent remarries.
 - (f) That the respondent pay maintenance for the child in the sum of 4,000VT each until the child reaches the age of 18 years.
 - (g) That the respondent may have such further and other relief as may be just.

DATED this 20th day of December 2012 at Port Vila

Francis Tasso
Public Solicitor's Office
Respondent's Lawyer

SAMPLE SWORN STATEMENT IN SUPPORT OF REPLY

**IN THE MAGISTRATES COURT OF
THE REPUBLIC OF VANUATU
PORT VILA
(Matrimonial Jurisdiction)**

MATRIMONIAL CASE NO OF 2012

BETWEEN: JAMES SMITH

Petitioner

AND: MARY JONES

Respondent

SWORN STATEMENT IN SUPPORT OF REPLY TO PETITION

In the matter of the **Petition for Dissolution of Marriage,**

I, **MARY JONES**, of Port Vila, the respondent in this cause, solemnly and sincerely declare as follows -

1. That the statements contained in paragraphs 1–10 of my REPLY dated 20 December 2012 are true.
2. That the statements contained in paragraphs 1–10 of my said REPLY are true and correct to the best of my knowledge, information and belief.
3. That no collusion or connivance exists between me and the respondent in any way whatever.

DECLARED by the said
this day of 20.....
before me:

Magistrate

Chapter 11 – Adoption

There is no Vanuatu Act of Parliament dealing with the adoption of children.

Adoption of children is something that has long been recognised in custom and therefore there would appear to be a strong case for continuing to recognise adoptions which take place in custom. The [Constitution](#) provides that customary law is to continue to have effect as part of the law of Vanuatu.

For adoptions outside of custom, the English legislation which applies in Vanuatu is the [Adoption Act 1958 \(UK\)](#). It is well summarised in *Halsbury's*. Generally the Supreme Court Registry will have all of the necessary forms. The registry staff often assists the public with adoption matters. Where a contested matter arises which the court staff are unable to deal with, you may need to have regard to the law as it appears in *Halsbury's*.

Section 3 of the [Adoption Act 1958 \(UK\)](#) provides that:

An adoption order shall not be made in respect of any infant unless he has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order ...

International adoptions

For guidance on the requirements for an international adoption, see the case of [In re MM, Adoption Application by SAT \[2014\] VUSC 78](#). In this case, a same sex couple from New Caledonia applied for adoption of a Ni-Vanuatu child under pre-independence French law. The court declined the application for adoption for several reasons.

See also [In re Adoption Act 1958 \(UK\), Child M \[2011\] VUSC 16](#). The case involved an application for adoption of a 13-year-old girl by a New Caledonian family. The court discussed the relationship between the [Adoption Act 1958 \(UK\)](#) and Vanuatu's international obligations under Article 21 of the UN Convention on the Rights of the Child. Given the importance of custom and culture, a Vanuatu court will require evidence that an international adoption is in the best interests of the child.

BLANK ADOPTION FORM - *adopting parents*

**IN THE SUPREME COURT OF
REPUBLIC OF VANUATU**

Adoption Case No. of 20

IN THE MATTER OF:

AND IN THE MATTER OF: THE ADOPTION ACT OF 1958

We, the undersigned, being desirous of adoption of an infant, under the *Adoption Act 1958*, hereby give the following particulars in support of our application:

1. Name of first applicant in full:

Address:

Occupation:

Date of birth:

Relation (if any) to the infant:

2. Name of second applicant in full:

Address:

Occupation:

Date of birth:

Relation (if any) to the infant:

3. We are resident and domicile in.....

4. We are married to each other and are the persons described as in the marriage certificate appended to our affidavit verifying this statement.

5. The infant is of the sex and is not and has not been married.

6. He/she was born on the and is the person mentioned in the birth certificate appended to our said affidavit.

7. The infant is the child of of the Republic of Vanuatu.

8. If an adoption order is made in pursuance of this application the infant is to be known by the following names:

CHRISTIAN NAME:

SURNAME:

9. The infant was received into our care and possession in the day of and has been continuously in our care and possession since that date.

10. Neither of us has made a previous application for an adoption order in respect of the infant.

11. We have not received or given any reward or payment for, or in consideration of, the

adoption of the infant or for giving consent to the making of the adoption order.

Dated at Port Vila, this day of 20

First applicant:
Second applicant:
Witness:

BLANK ADOPTION FORM –birth parents

**IN THE SUPREME COURT OF
REPUBLIC OF VANUATU**

Adoption Case No. of 20

IN THE MATTER OF:

AND IN THE MATTER OF: THE ADOPTION ACT OF 1958

WHEREAS an application has been made by and..... both of in the Republic of Vanuatu, for an adoption order in respect of an infant, of nationality.

We, the undersigned and of the Republic of Vanuatu, being the father and mother of the infant hereby state:

1. We understand that the effect of an adoption order will be to deprive us permanently of our rights as parents and transfer them to the applicants, and in particular we understand that if an order is made we shall have no right to see or get in touch with the infant or to have her/him returned to us.
2. We further understand that the court cannot make an adoption order without the consent of each parent or guardian of the infant unless the court dispenses with a consent on the grounds that the person concerned had abandoned, neglected or persistently ill-treated the infant, or cannot be found; or is incapable of giving consent, or is unreasonably withholding consent or has persistently failed without reasonable cause to discharge the obligations of a parent or guardian.
3. We further understand that when the application for an adoption order is heard, this document may be used as evidence of our consent to the making of the order unless we inform the court that we no longer consent.
4. We hereby consent to the making of an adoption order in pursuant of the application.

This form duly completed was signed by the said parents on the day of 20

Signature:

Signature of witness:

Address and occupation:

Signature:

Signature of witness:

Address and occupation:

BLANK ADOPTION FORM –birth parents

IN THE SUPREME COURT OF
REPUBLIC OF VANUATU

Adoption Case No. of 20

IN THE MATTER OF:

AND IN THE MATTER OF: THE ADOPTION ACT OF 1958

We, and in the Republic of Vanuatu
Jointly and severally make oath and say as follows:

- 1. The statements contained in the writing document signed by both of us respectively and now produced and shown to us marked “A” are correct and true in every particular.

- 2. That we exhibit attached hereto:
 - (a) Our Marriage Certificate.
 - (b) The Birth Certificate of the Infant.
 - (c) The Medical Certificate of the Applicants.

Sworn at Port Vila by the above-named }
Deponents on the day of }
..... 20..... }
Before me:
 Commissioner for Oaths

Chapter 12 – Domestic violence and restraining orders

Clients often attend the PSO because they have been assaulted, harassed or threatened. This chapter deals with three types of restraining order:

1. Family Protection Order
2. Domestic Violence Protection Order
3. Civil Law Restraining Order – ex parte injunction connected to a civil claim.

Referrals to Vanuatu Women's Centre

The Vanuatu Women's Centre (VWC) provides a broad range of support services for women. Consider referring victims of domestic violence to the VWC. They have offices in Port Vila, Santo, Lenakel and Sola, and they also have representatives in other provinces.

The VWC has specialist counsellors to help domestic violence victims make appropriate decisions about their situation. The centre also has a legal officer who acts in family law cases. Women who are in danger can also seek temporary accommodation at the centre. While the PSO can only provide legal assistance, the VWC can provide a broader range of legal and welfare support services for women.

Another advantage of referring women to the VWC is that it avoids a potential conflict of interest in cases where the person accused of domestic violence is charged by police. The VWC usually requires women to provide a medical report and a copy of a police statement outlining the details of any domestic violence incident. It therefore makes sense for the VWC to act for the victim in any application for a protection order, and for the PSO to act for the person accused of the criminal offence. If the PSO acts in the protection order matter, there may be a conflict of interest in any related criminal matter. This could result in the accused person being unrepresented.

Education and awareness is a major part of the work of the VWC. It must be remembered that any assault or other violence towards a woman is a criminal offence. Assaulting a woman is not just a wrong against an individual person (a civil wrong)—it is first and foremost a criminal wrong, a crime against the laws of the state.

Crimes, as public wrongs, should be prosecuted by police. In this respect, there is an opportunity for police to be more proactive in prosecuting perpetrators of domestic violence. You may wish to explain these concepts to your client and invite them to pursue criminal charges through the police. The police have a Family Protection Unit with officers who are trained in domestic violence.

Once a complaint of assault or domestic violence is made to police, the complaint should be dealt with in the same way as any other criminal offence. Where domestic violence results in injury to the victim, there is no reason why the police cannot arrest an accused person immediately for an offence of

assault. The accused person could then be granted bail with appropriate conditions to protect the victim, or even refused bail in serious cases.

However, the police normally summons rather than arrest persons accused of domestic violence. The reality is that victims of domestic violence are often in need of urgent protection. Police investigations in cases of domestic violence often do not happen fast enough to provide this urgent and immediate protection. Alternatively, a victim may want protection, but may not want to report the matter to police and may not want any criminal charges to be laid. In these cases, either the PSO or VWC apply for a Family Protection Order.

Family Protection Orders

The [Family Protection Act 2008](#) provides for protection orders against family members and also establishes an offence of domestic violence. Family Protection Orders can be made in the Magistrates' Court or Island Court. The Supreme Court does not deal with Family Protection Orders unless the case is taken on appeal.

If your client is seeking a restraining or protection order against a person who is not a family member, you will need to file a “civil case restraining order”. See the section later in this chapter.

How to apply for a Family Protection Order

Under the [Family Protection Act 2008](#), a person can apply for a family protection order against a family member. A family member includes a husband, wife, de-facto, parent, child, brother, sister, brother-in-law, sister-in-law and “any other person who is treated by the person as a family member.” [section 3]. This is a broad definition.

An application can be made orally, in writing, by email, fax, radio or phone [section 28(1)]. Importantly, there is no court fee for making the application.

If the application is made in writing, the application form found in Schedule 1 of the Act may be used:

SAMPLE APPLICATION FOR PROTECTION ORDER OR TEMPORARY PROTECTION ORDER

TO COURT OR AUTHORISED PERSON:

COMPLAINANT and PERSON ACTING ON BEHALF OF COMPLAINANT (if applicable):

ADDRESS:

DEFENDANT:

ADDRESS (if known):

DATE OF APPLICATION:

GROUNDS FOR MAKING APPLICATION:

There is no filing fee for making an application and costs cannot be awarded unless the claim is frivolous or vexatious.

The application does not need to be made by the complainant personally. If the complainant consents, the application can be made on behalf of the complainant by a friend, family member, lawyer or police officer.

Grounds for making a Family Protection Order

An Island Court or a Magistrates' Court can make a Family Protection Order if an act of domestic violence has been committed, or if it is likely an act of domestic violence will be committed.

Section 4(1) defines “domestic violence”:

A person commits an act of domestic violence if he or she intentionally does any of the following acts against a member of his or her family:

- (a) assaults the family member (whether or not there is evidence of a physical injury);
- (b) psychologically abuses, harasses or intimidates the family member;
- (c) sexually abuses the family member;
- (d) stalks the family member so as to cause him or her apprehension or fear;
- (e) behaves in an indecent or offensive manner to the family member;

- (f) damages or causes damage to the family member's property;
- (g) threatens to do any of the acts in paragraphs (a) to (f).

An order can be made even though there is no physical assault. Verbal threats and causing fear by following a person or making phone calls can constitute “domestic violence”.

The well-being and safety of the complainant and any children is most important [section 11(3)].

The Order can include the names of children or other family members who need protection [section 11(5)].

Conditions of Temporary Protection Order or Family Protection Order

The conditions of a Protection Order can include not to approach the complainant, not to contact the complainant and not to attend premises of the complainant, including residence and workplace, as well as other conditions [section 13].

Temporary custody/access of children

When making a Protection Order, the court will usually consider the children in a relationship. Although the Magistrates' Court does not have the jurisdiction to determine custody, there is power to make arrangements for the accommodation of children [sections 11(2)(b) and 20(3)]. These orders should be made for the protection of the children from domestic violence.

There is no general rule, however where the children are young, temporary custody is commonly given to the mother. Where the mother has deserted, temporary custody is sometimes given to the father. However temporary custody should not be given to the father where the children are at risk of domestic violence. Generally, access is given to the party who does not have temporary custody. At all times, the court will attempt to protect the children and promote harmonious family relationships.

Urgent protection orders

If the complainant is in danger of personal injury, and because of distance, time or other circumstance the application needs to be made quickly, the court can make a Temporary Protection Order [section 18].

The court must adjudicate an application for a Temporary Protection Order on the same day it is lodged, unless there are exceptional circumstances [section 31(2)].

A Temporary Protection Order can last up to 30 days and is renewable once for a further period of 30 days. The order can be made ex parte, without the defendant being in court.

Procedure

If there is no urgency or no risk of personal injury, the defendant needs to be served with a summons. Alternatively, if the safety of complainant is seriously threatened, the defendant can be arrested and brought to court [section 35].

The court approaches domestic violence cases differently to other cases. Lawyers are encouraged to take a “back seat” and are generally not very involved in the discussions with the Magistrate. In most cases, the parties will speak for themselves in court. The Magistrate will normally attempt some informal counselling with the parties.

If one or both of the parties has a lawyer representing them, the court will look at any legal issues after listening to and counselling both of the parties.

The defendant can consent to an order without admitting any of the alleged conduct. The defendant can say to the court “I do not agree with the allegations being made against me, however I am willing to agree to an order being made”.

If the defendant does not consent to the order, the matter should be listed for trial. At trial, the applicant must prove on balance of probabilities that that an act of domestic violence has occurred or is likely to occur on the complainant.

Before making an order, the court must explain the purpose and terms of the order, consequences of breaching the order, and how to vary or revoke the order.

Once made, the order is served on the complainant, defendant and the police station closest to where the complainant lives. An appeal can be made to the Supreme Court within 28 days.

Variation and revocation of Temporary Protection Order or Family Protection Order

If a party wants to change the order or cancel the order, he or she must make an application to the court. The parties cannot agree by themselves to vary or revoke the order.

An order can only be varied or revoked by a court or by an authorised person.

Failure to comply with Temporary Protection Order or Family Protection Order

While the making and granting of an application of Temporary Protection Order or a Family Protection Order is a civil case, a failure to comply with a condition of an order gives rise to a criminal offence.

The offence should be reported to police. Police have a duty to investigate and prosecute such an offence.

Domestic Violence Protection Orders

Before the commencement of the [Family Protection Act 2008](#), the standard application in cases of domestic violence was an application for a Domestic Violence Protection Order (DVPO). DVPOs have been largely

superseded by the [Family Protection Act 2008](#).²

You can still apply for a DVPO in the Magistrates' Court, however it is usually easier to apply for a Family Protection Order. Unlike a DVPO, you do not need to file a sworn statement for a FPO.

The two applications are similar and either can be used in cases of domestic violence.

The procedures for DVPOs are outlined in rules 16.16 to 16.20 of the [Civil Procedure Rules](#). You need to file a claim (Form 30) and a sworn statement (Form 31).

Civil Law Restraining Orders

This type of restraining order should be used if your client and the person they are seeking protection from (the defendant) are not in a domestic or family relationship. Your client and the defendant may be neighbours or just strangers.

If the client is seeking a restraining order against a family member, apply for a Family Protection Order. You may wish to refer female victims to the Vanuatu Women's Centre, as they have a lawyer and also counsellors who work in this area.

When it falls on the PSO to apply for a civil law restraining order, the application is made in the civil jurisdiction of the courts. What is sought in such applications is a form of injunction to restrain certain conduct which would otherwise give rise to a civil claim. Although this procedure has been followed for many years now with different degrees of success, it is not a form of relief which is ideally suited to the civil jurisdiction. Civil procedure is time consuming and there are filing fees.

Most importantly, any application for a civil law restraining order **must be accompanied by a civil claim** with an identifiable cause of action. For example, you may need to file a civil claim in tort for assault and battery, and apply for the restraining order as a type of injunction attached to the civil claim.

The civil jurisdiction is concerned with compensating the victim for any damage suffered, while the criminal jurisdiction is concerned with the prosecution of crimes committed, prevention of future crimes and punishment of offenders. Because the large majority of victims of violence, especially women, are concerned about the prevention of further violence rather than recovering damages from the perpetrator, assault cases should really be commenced as a criminal case. Criminal courts are better placed than civil courts in dealing with violence.

You may therefore choose to refer the victim back to the police and tell the victim to insist on charges being brought against the defendant.

There are times when it may be necessary to apply for a civil law restraining order. It may be in the interests of the person's immediate safety or when police action may be too late to prevent further

² See comments at p221 [Jenshels' Annotated Civil Procedure Rules](#).

assaults. In those rare circumstances the procedure to follow is:

1. Obtain a sworn statement from the victim setting out in as much detail as possible all assaults made by the defendant on the victim.
2. The sworn statement should include details of any violent behaviour, and quotes of any abusive or threatening language towards the victim.
3. If injured, ask the victim to obtain a medical report. It is seen as important by the courts that there is some corroborative evidence from a doctor who has examined the victim and can attest to the injuries being consistent with an assault.
4. The client should explain in their statement why the defendant is likely to commit further assaults and what if any steps have been taken to report the matter to the police. Include in the sworn statement a brief summary of what the police said or did/didn't do.
5. Explain to the client that she or he will need to commence proceedings for damages for assault as she must have a cause of action in order to even issue the proceedings in the civil court for an injunction. You will need to draft the Claim, if not when you apply for the orders, then in any event soon after.
6. Prepare an Application (Form 10), draft orders, sworn statement explaining why the application needs to be heard urgently and ex-parte. "Ex parte" means in the absence of the defendant. You may also need to file an 'undertaking as to damages'. See rules 7.5, 7.6 and 7.7 of the [Civil Procedure Rules](#). Be aware that the Magistrates' Court is usually reluctant to hear an application ex parte if the defendant lives on Efate. In such a case you should serve the defendant, so that he or she can attend court for the application.
7. Once you have the above documents prepared contact the court registry about obtaining a time for the ex-parte hearing.
8. Make sure your client goes with you to the hearing in case you need to get any further oral evidence from them should the Magistrate be uncertain about any aspect of the application.

Criminal charges and bail – an alternative model for protecting victims

As discussed above, an assault, whether on a stranger or family member, is really a criminal matter, which should be dealt with by the police. A client who wishes to restrain another person from violence or threatening behaviour can report the case to the police and ask for criminal charges to be laid. Police can impose bail conditions on the defendant which act to restrain the defendant from approaching, contacting, threatening or further assaulting the complainant.

The offence of assault is provided by section 107 of the [Penal Code](#). If the assault involves any harm or injury, the police can arrest the accused person instead of proceeding by way of summons. The police

have the power to arrest without a warrant in the case of s107 (b), (c) and (d). See section 12(1) of the [Criminal Procedure Code](#) and the definition of “cognisable offence” in section 1 and the schedule.

The police have power to impose bail, with or without conditions, after the arrest. The Magistrate has power to grant bail, with or without conditions, when the accused appears before the court for the first time. See section 60 of the [Criminal Procedure Code](#).

Currently, the standard police practice is to summons domestic violence offenders rather than arrest them. Police may need to be reminded of their power to impose bail conditions on the perpetrators of violence against women. Bail conditions can provide protection to women. A breach of bail should result in arrest and may result in the accused being remanded in custody.

The sort of bail conditions that could be imposed could include:

1. that the accused leave the matrimonial home.
2. that the accused not approach or contact (directly or indirectly) the complainant or any prosecution witnesses.
3. that the accused not assault or otherwise physically threaten the complainant.

Such bail conditions would have the same effect as conditions sought by way of a restraining order. Protection by way of bail conditions could be obtained at no cost to the victim, and less work for the PSO lawyer.

Summary

A possible approach for domestic violence and restraining order cases:

1. If the case involves a female victim, refer the matter to Vanuatu Women’s Centre.
2. Advise the victim to lodge a complaint with police, provide details of any witnesses and request charges to be laid.
3. If the victim has received any treatment in hospital or attended a doctor about the assault then they should obtain a medical report on the form used by the police.
4. Apply for a Family Protection Order or civil law restraining if necessary for the safety of the victim.

FAMILY PROTECTION ORDER FLOW CHART

Application made by complainant, family member, police officer, lawyer or Magistrate. An application is made orally, by phone, fax, email or in writing. Defendant must be a family member.

All applications are heard in a closed court.

If the case is **urgent** and if there is a risk of personal injury, a Temporary Protection Order can be made *ex parte* for up to 30 days. An application for a Temporary Protection Order should be adjudicated by the court on same day it is lodged.

For **non-urgent** applications, the defendant is summonsed to attend court. If there have been serious threats, the defendant may be arrested and brought to court.

Defendant can **consent** to the making of a Family Protection Order without admitting any of the alleged conduct.

If defendant does **not consent** to the application, the matter is listed for trial. Trial must be given priority.

Court hears evidence at **trial**. The order is granted if it is proven on the balance of probabilities that an act of domestic violence has occurred or is likely to occur on the complainant. DV includes threats and stalking.

Before making an order, the court must **explain** the purpose and terms of the order, consequences of breaching the order, and how to vary or revoke the order.

Once made, the order is **served** on the parties and the Police Station closest to where complainant lives.

An **appeal** against the making of an order, or refusal to make an order, can be made to the Supreme Court within 28 days.

Failure to comply with any condition of a Temporary Protection Order or Family Protection Order is a criminal offence and must be prosecuted by police.

PART 3
CRIMINAL
LAW

Chapter 13 – The lawyer client relationship – criminal cases

Managing client expectations

When you first meet your client, explain that you work for the PSO. Explain that your services are free-of-charge. Your job is to advise, take instructions, and conduct the defence role in the criminal proceedings to the best of your knowledge, skill, and experience.

As a defence lawyer, you have a very important role to play in proceedings, including:

- You must protect the innocent from conviction.
- You must only enter a guilty plea for a client if he or she instructs you that he or she has committed the offence that makes up the charge.
- Before a plea is entered, you must take full instructions from a client and advise the client of any available defences and whether or not the evidence is capable of proving the charge.
- You must represent a client at trial who wants to plead not guilty, even if the evidence is strong, and even if the case is controversial or your client is unpopular.
- You must ensure that your client receives a fair trial according to law.
- At trial, object to evidence that is inadmissible if it is against the interests of the client's case.
- You must put your client's case to the prosecution witnesses who contradict his or her story. This is known as the Rule in '[Browne v Dunn](#)'.
- You must not mislead the court.

The legal system relies on the defence lawyer fulfilling his or her duties. The court assumes that you will carry out your duties as required. Failure to carry out these duties may lead to a miscarriage of justice for your client, and a finding of professional negligence against you.

You are not there to invent or provide a defence or to “get your client off” the criminal charges. Your duty is to provide legal advice and representation. Do not suggest instructions or make decisions for your client about how to plead, ask for bail and so on. Your client makes these decisions about their case.

Do not put ‘pressure’ on a client to plead guilty. Remember, it is the client's case and they decide whether to plead guilty or not guilty.

Give your client a genuine assessment of their chances of succeeding at trial. If the case against your client is very strong or overwhelming, tell your client and explain the reasons why the case is strong. Your advice might include a summary of the evidence expected at trial. Also explain the discount available for pleading guilty, and the option of “pleading guilty with an explanation”. Sometimes a client just wants to explain their side of the story to the court. Such a situation does not necessarily warrant a

trial.

It is a good idea to explain that, although you are acting on instructions, decisions about how the trial is to be run, and the strategy and tactics made in the case, will mostly be yours, but subject to their consent. Explain the decisions you make during the case, and why you have made them.

Taking instructions

Read out each witness statement to the client and ask for his or her response. Write the instructions down in the first person – for example: “I did not hit John Tawi. He hit me”.

Read the police interview to the client and ask if the transcript is an accurate record of the conversation with police. Ask your client if the police interview involved any threats or offers of inducements, or other improper conduct.

Getting the client to write down his or her story can be useful. You may want to provide a copy of the PI bundle to the client.

Once you have full instructions, assess whether the client has a defence to the charge. Discuss the elements of the charge and the strength of the evidence with your client.

Explaining the criminal trial process

Many clients may have no understanding of some of the important principles of criminal law. For guilty plea matters, explain the various components of the court process, including entry of the plea, reading of the facts, acceptance of the facts, submissions by counsel and then sentencing remarks by the court.

For clients who are about to go to trial, you may wish to tell your client:

Today’s conference is to explain the trial process. The following legal rules apply to criminal trials:

- The charges are laid by the prosecution.
- The prosecution acts for the State, not for the complainant, and not for the police. The prosecution must make an independent decision about the appropriate charges. The prosecutor does not just follow the wishes of a complainant or a police officer.
- Out of court settlement through custom or other means does not mean that the charge will be withdrawn. This is because a crime is a wrong against the State, not against an individual complainant. The decision to prosecute involves an assessment of the public interest, not just the interests of the parties involved in the court case
- The law says that you are presumed innocent.
- The prosecution must prove the charge beyond reasonable doubt. You do not need to prove to the court that you are innocent. The prosecution must prove you to be guilty.
- ‘Proof beyond reasonable doubt’ means the evidence must be very strong for a court to find you guilty. If the evidence is too weak you will be found not guilty. If the judge thinks it is a 50/50 chance you are

guilty, or only a possible chance that you are guilty, you must be found not guilty. Even if the evidence shows that you are probably guilty, this is not strong enough for proof beyond reasonable doubt.

- The magistrate or judge makes sure that your trial is fair. They will decide the case and will do so only on the basis of evidence provided in open court. The magistrate or judge is not allowed to have private discussions with the defence or prosecution outside of court.
- The prosecution will try to prove its case by bringing witnesses to court. The witnesses will tell their story to the judge.
- The witnesses will be asked questions by the prosecutor.
- What a witness says inside court is the evidence. The evidence is what the witness says in court, not what the witness has written in his or her statement.
- As your lawyer, I am allowed to ask each witness questions. This is called cross-examination. I can test the evidence of each witness in this way.
- At the end of the prosecution case, you have two options. You can either give sworn evidence on oath (and be cross examined by the prosecutor), or give no evidence. You can also call witnesses.

I will now read you all the witness statements and ask you for your story.

Guilty plea

Only represent a client on a guilty plea if your client accepts the elements of the offence. If the client does not admit the offence you cannot appear on a guilty plea because you would be misleading the court.

You need to be familiar with the [Legal Practitioners Act – Rules of Etiquette and Conduct of Legal Practitioners Order 2011](#), in particular, Rule 87(4)(b):

4. If:

a defence lawyer is told by his or her client that he or she did not commit the offence; or

if a defence lawyer believes that on the facts there should be an acquittal, but for particular reasons the client wishes to plead guilty,

the defence lawyer may continue to represent the client, but only after warning the client of the consequences and advising the client that the lawyer can act after the entry of the plea only on the basis that the offence has been admitted, and put forward factors in mitigation.

If the client refuses to accept the elements of the offence, but still wants to plead guilty, explain to the client that you cannot act in the matter, even if it is a minor criminal charge. The reason for this is clear. If the client later decides that they are unhappy with their sentence, they will most likely tell an appeal court that they told you, their lawyer, that they were not guilty. You will be in a difficult situation and may be required to give evidence and be cross-examined before the appeal court.

As a lawyer, you cannot be part of a “guilty plea of convenience”. When a defendant pleads guilty, the court assumes that the defendant has admitted the truth of the allegation to his or her lawyer. Unless

your client admits the elements of the offence to you, do not appear on a guilty plea.

In the event that your client subsequently changes his or her instructions and admits the offence, only act for your client on written instructions that they accept the elements of the offence. See the relevant form at the end of this chapter.

Reversing a guilty plea

You need to have full instructions before the charge is read to your client and the plea is entered. You need to provide advice to your client **before** any plea is entered. It is too late to get full instructions after the entry of the plea.

Once a plea of guilty is entered by an accused that is represented by a lawyer, it is difficult to change the plea to not guilty. For this reason, take great care in advising your client of the significance of entering a guilty plea.

If your client indicates that he or she wants to reverse the plea of guilty and change their plea to not guilty, you will be in a difficult situation. In most cases you will not be able to continue to act in the matter, because the court may need to inquire about the legal advice that you provided before the guilty plea was entered. Such an inquiry goes to your competence and also goes behind lawyer client privilege. You may need to provide a sworn statement and you may be cross-examined. In such a situation you will have to withdraw from the matter and refer the client to another lawyer, as you cannot appear as witness and counsel in the same case. Seek the advice of your supervisor if this situation arises.

The defendant, perhaps with fresh counsel, will have to make an application to withdraw the plea of guilty. The defendant will have to satisfy the court that he or she should be allowed to withdraw the plea, and may have to lead evidence as to how a plea of guilty came to be entered in the first place.

The relevant test is outlined in [Public Prosecutor v Rarua \[2008\] VUSC 18](#) and [Public Prosecutor v Varasmaite \[2011\] VUSC 277](#). The discretion to allow the plea to be vacated will only be exercised in “clear cases” and “very sparingly”.

If your client was unrepresented when he or she entered a guilty plea, the court is more likely to accept the application to have the guilty plea withdrawn. Explain to the court that the client was unrepresented when the plea was entered, and now that he or she has received legal advice, the client wishes to defend the matter and plead not guilty.

Getting written instructions on the plea

This will always be a matter for your personal judgment, however consider obtaining signed instructions for difficult clients or for cases involving serious charges. Getting the client to sign written instructions can be useful if an allegation is later made that you pressured the client to plead guilty. Examples of written instruction templates are at the end of this chapter.

Pleading not guilty after the client has admitted the offence to you

The client who instructs you that she or he committed the offence however wants to plead not guilty puts you in a difficult situation. Rule 87(3) states:

3. If at any time before or during a defended trial a client makes a clear confession of guilt to his or her defence lawyer, the lawyer may continue to act only if the plea is changed to guilty or the lawyer:
 - (a) does not put forward a case inconsistent with the confession; and
 - (b) continues to put the prosecution to proof and, if appropriate, asserts that the prosecution evidence is inadequate to justify a verdict of guilty; and
 - (c) does not raise any matter that suggests the client has an affirmative defence such as an alibi, but may proceed with a defence based on a special case such as insanity, if such a course appears in the lawyer's professional opinion to be available.

Your instructions in a trial will amount to 'putting the prosecution strictly to proof'. All you can submit is that the evidence does not prove the charge. You cannot put any question in cross-examination that suggests that your client did not commit the offence. You cannot call any evidence to rebut the prosecution evidence that your client committed the offence. For example, you could not call witnesses to support an alibi, which you know to be false.

At the end of the prosecution case, you can address the court that the prosecution's evidence fails to establish a *prima facie* case. You can also make a closing submission that the evidence fails to establish your client's guilt beyond reasonable doubt.

Inform your client that, under the circumstances, this is the only way the trial can be conducted. If your client insists on giving evidence in the trial, or on having witnesses called, you cannot continue to act in the matter, as you cannot call evidence that you know to be false.

In a situation such as this, it is essential that you get written instructions from your client. At the end of this chapter, there is an example of written instructions from your client to put the prosecution to strict proof.

Disclosing the criminal record of your client

As a general principle, defence lawyers have no duty to disclose to the court or prosecution any material against the client's interests and should not do so unless instructed by your client. Rule 87(6) states:

6. A defence lawyer must not disclose a client's previous convictions without the client's authority.

If the criminal record tendered on bail or at sentence is inaccurate or incomplete, you are under no obligation to advise the prosecutor or the court of the inaccuracy. You should, of course, advise the court of any error that is unfavourable to your client. However, you are constrained in what you can say about the favourable but inaccurate record. You cannot positively assert that something is true if your instructions indicate it is not true. Therefore, you cannot take advantage of an absence of entries on a criminal record and make submissions that your client is a first offender if you know that to be false. Simply say nothing on the issue of their criminal history—you cannot mislead the court.

If the complainant does not attend the trial

Your advice to your client could be in the following general terms. If the complainant does not turn up to court:

- The prosecutor may be forced to proceed to trial in the absence of the complainant or witness. If there is no evidence from the complainant, or crucial witness, the matter may be dismissed. This will depend on the other evidence in the case.
- The trial might be adjourned and the police may try to find the complainant or witness to bring him or her to court.
- A warrant may be issued for the complainant's arrest if she or he was summonsed to attend court and failed to answer the summons. If such a warrant is issued and executed, the complainant may be held in custody until the matter is heard, or may be granted bail.

Advise your client that any contact between your client and the complainant that could be viewed as pressure on the complainant not to attend court could result in serious charges being laid against your client. It may also be a breach of bail conditions.

Withdrawing from a case

Some reasons why you may need to withdraw from a matter include:

- Legal assistance has been refused by the PSO, for example if client has failed the means or merit test.

Advise the client that they can appeal the decision of the Public Solicitor and seek an order from the Supreme Court that the PSO act in the case. Advise the court that you are withdrawing from the case because legal assistance has been refused.

- Your instructions are withdrawn or otherwise terminated by the client.

This means you have been sacked by the client. If your instructions are withdrawn or terminated, you are no longer retained to appear. You do not need to seek the court's leave to withdraw in this situation. As a matter of professional courtesy, inform the court and the prosecution that your instructions have been withdrawn.

- An ethical issue has arisen requiring you to withdraw.

For example, a client may tell you that he has given false evidence during a trial, or that he has bribed a witness.

Where an ethical issue prevents you from continuing to act in a matter, the correct approach is to seek leave to withdraw. If you say to the court, "I seek leave to withdraw, an ethical issue has arisen", or words to that effect, the court should grant leave for you to withdraw. You may be asked what the nature of that difficulty is, particularly if it looks like a trial will have to be adjourned and valuable court time will be lost. You

may only be able to answer in the most general terms, and you should certainly not disclose privileged information to the court.

The court should usually not refuse leave where you indicate that it is an ethical problem that forces you to seek leave to withdraw.

Contact with complainants and prosecution witnesses

At law ‘there is no property in a witness’, so you can speak with prosecution witnesses. However, you have a duty not to influence a witness. A practitioner must not suggest, or encourage another person to suggest, to any possible witness the content of any particular evidence that the witness might give at any stage in the proceedings.

It is best not to have any contact with a complainant so that you avoid any possible allegation of interference. If for some reason you are speaking to a complainant, have an independent person present, such as another lawyer. Under no circumstances should your client be present during such a conference.

If your client brings the complainant to you, explain to your client that the complainant should speak to the prosecutor. Inform the prosecutor as soon as possible in the event of any contact with a complainant.

Keep detailed file notes of any contact with the complainant.

Discussions with judicial officers

Extreme care should be taken when speaking with judicial officers outside of open court about current cases. If you are invited to chambers to discuss a particular case you should attend together with the prosecutor.

Be aware that your client is not present during such meetings and it is more appropriate to have discussions in front of them in open court. That is a matter that requires you to exercise judgment and consider all the relevant circumstances.

Never discuss a pending case with a judicial officer in a social setting, such as a market or Nakamal. See Rule 75(3) of the [Legal Practitioners Act – Rules of Etiquette and Conduct of Legal Practitioners Order 2011](#).

INSTRUCTIONS TO PLEAD GUILTY

1. I instruct my lawyer that I wish to plead **guilty** to the charge(s) of.
2. The elements making up the charge have been explained to me.
3. The prosecution facts have been read to me by my lawyer. I understand what is being said about me by the prosecution.
4. I accept the prosecution facts are true.
5. [Alternatively] The following facts are disputed.
6. I accept that I committed the offence(s).
7. I know that I could plead not guilty and make the prosecution prove its case beyond reasonable doubt. I do not want to do this.
8. It has been explained to me that I could be sentenced to prison.
9. It has also been explained to me that I should get a discount off my sentence for pleading guilty, but this has not been guaranteed by my lawyer.
10. No pressure has been placed on me by my lawyer to plead guilty.
11. This document has been translated and read to me in Bislama.

Name
Date

Witness
Date

**INSTRUCTIONS TO PLEAD NOT GUILTY AFTER ADMITTING GUILT TO
INSTRUCTED LAWYER**

1. I instruct my lawyer that I wish to plead **not guilty** to the charge(s) of
2. The elements making up the charge have been explained to me.
3. The prosecution facts have been read to me by my lawyer. I understand what is being said about me by the prosecution.
4. I acknowledge that the prosecution facts accurately describe what I did, and that these facts establish the elements of the offence. However, I still wish to plead not guilty and have my lawyer represent me at my trial.
5. My lawyer has explained to me that I can instruct another lawyer because: knowing that I am guilty it would not be possible for my lawyer to suggest to any prosecution witness that they were not telling the truth about my involvement; that any prosecution witness could only be generally tested about what they heard and saw; and that my lawyer could not call me or any other witness to give evidence suggesting that I did not commit the offence, because to do this would be to promote a lie and mislead the court.
6. I want the prosecution to be required to conduct a trial to prove its case beyond reasonable doubt.
7. It has been explained to me that I could be sentenced to a significant amount of time in prison, and that I miss out on any discount for a plea of guilty if I proceed with my trial and am found guilty.
8. My lawyer has advised me that the account that I have given is consistent with a plea of guilty.
9. This document has been translated and read to me in Bislama.

Name
Date

Witness
Date

INSTRUCTIONS TO PLEAD NOT GUILTY TO VERY STRONG PROSECUTION CASE

1. I instruct my lawyer that I wish to plead **not guilty** to the charge(s) of
2. The elements making up the charge have been explained to me.
3. The prosecution facts have been read to me by my lawyer. I understand what is being said about me by the prosecution.
4. My lawyer has advised me that the prosecution case against me appears to be very strong.
5. I do not accept that I committed the offence(s).
6. I want to make the prosecution prove its case beyond reasonable doubt.
7. It has been explained to me that I could be sentenced to prison.
8. It has also been explained to me that I could get a discount off my sentence for pleading guilty, and that I will not get a discount off my sentence if I plead not guilty and am convicted after trial.
9. It has also been explained to me that I could plead guilty and have a hearing on any disputed facts.
10. No pressure has been placed on me by my lawyer to plead not guilty.
11. This document has been translated and read to me in Bislama.

Name
Date

Witness
Date

Chapter 14 – Advising clients at the police station

PSO lawyers may receive a phone call advising that there is a person in police custody, who is being interviewed under caution or who is about to be interviewed under caution, and who is seeking legal advice. A good start point is to ask for the full name of the person in custody and the charges being investigated. Also check if the suspect is a child (i.e. under 18 years). For serious charges (e.g. homicide or sexual intercourse without consent) or in cases involving child suspects, it is recommended, if possible, to attend the police station to provide advice to the client. If it is a minor charge, advice on the phone is usually sufficient.

At the police station

If you decide to attend the police station, advise the police officer of this and ask the officer to stop any interview that has been commenced or to wait until you arrive before commencing an interview.

When you arrive at the police station, introduce yourself to the interviewing police officer. Write down the name of the officer in charge of the investigation and any officers that you speak to. Keep good notes of all conversations and advice.

Find out as much about the case being investigated as possible and take notes:

- Is the person under arrest—are they free to leave?
- When were they arrested?
- Is the person under 18 years old—are they a juvenile? If they are, has a responsible adult been contacted?
- What is the nature of the incident being investigated?
- What are the allegations?
- What is the likely charge(s)?
- Has an interview commenced?
- Will the person be released after interview?

If the person is not under arrest, this means they are free to leave the police station. Advise them of this and suggest that they leave the police station immediately.

If the police say the person is under arrest, they are not free to leave. Examine the power of the police to arrest the suspect. In Vanuatu, police can arrest a person without warrant who is reasonably suspected of having committed a cognisable offence. However there is no power to arrest a person without warrant for the purpose of questioning. See the decision of Spear J in [George v Sandy \[2013\] VUSC 180](#).

Police can only arrest a person if they have a warrant, or if the offence is a “cognisable offence”. See the

schedule to the [Criminal Procedure Code](#) for a list of cognisable offences.

If there is no arrest warrant, and if the offence being investigated is not a cognisable offence, the arrest is unlawful. Tell the police of this fact and ask them to immediately release the person.

If, however, the arrest is lawful, request to speak to the client in private. Introduce yourself to the client and explain that you are a lawyer, that you work at the PSO, and that you are there to assist them and provide legal

advice. Ask your client how long they have been kept in custody, what food or drink they have been provided, if they have been ill-treated or threatened and if so, by whom.

Ask the client if she or he wants you to contact a family member or other support person.

Tell the client what you know about the case. Explain to the client that the police want to ask them questions and record their answers.

Advise the client that they have a right to silence. They do not need to answer any questions. The right to silence is guaranteed by law.

It is normally in a client's best interests to tell their story only when they go to court and not during a police interview. Advise the client that when the case goes to court, they will usually in serious cases have a lawyer to help them, and the judge or magistrate will act like a 'referee' to make sure the case proceeds fairly.

Advise the client that if they wish to exercise their right the best way to remain silent is for the client to tell police "I do not wish to answer any questions". The client could tell police "I want to tell my story at court, not at the police station."

The client may wish to tell police "My lawyer has advised me to sit quiet and not answer any questions". These statements allow the client to 'shift' their decision to remain silent back to the lawyer. This is less confrontational and will make the client feel more comfortable. The client may be feeling under pressure because they are in custody, and may feel embarrassed to refuse a request of a police officer. The client could tell police, "My lawyer has advised me to sit quiet and I will follow that advice".

In the event that your client wishes to remain silent, advise the client that if police continue to ask questions about the incident they should answer each question with "no comment". Alternatively the client can just sit in silence (mute). The police are not allowed to force a person to answer questions.

Explain **why** it is best not to answer any questions. You could mention some of the following 10 reasons to the client:

1. There is no lawyer or judge present in a police interview to make sure the questions are fair and lawful. It is best to tell your story at court, in front of a judge or magistrate. The judge acts like a referee and makes sure the questions are fair. The lawyer will also be at court and make sure the questions are fair.
2. It is best to tell your story in court after you have heard the other witnesses tell their story.

3. If you get confused, or forget something or make a small mistake during a police interview, it may look bad for you in court.
4. It is best to get full and proper advice from a lawyer before you tell your story.
5. The advice to remain silent is based on many years of experience of PSO lawyers. Many people living in prison would not be there if they had chosen to remain silent at the police station.
6. Telling your story to police will not stop the charges being laid. The police have most likely already decided to lay charges so it is best to just stay quiet for now.
7. If appropriate, you can always provide a statement to police at a later date. This can be by way of interview or a written statement. There is no need to rush things and provide a statement today.
8. Telling your story to police will not help you get bail. It may make it harder to get bail.
9. The best option is to tell your story once in court, and only once. If you tell your story to police, and then for a second time in court, there is a greater chance that there will be inconsistencies in your stories. The prosecution will cross-examine you on any inconsistencies and submit that your story is unreliable because of the inconsistencies.
10. The law says that the prosecution is required to prove any charges in court. An accused person does not have to prove anything. You are presumed to be innocent. Therefore there is no reason to tell your story to police.

The client can either accept or decline your advice. Remember you advise, they decide. If the client accepts your advice, tell the police:

“My client has instructed me that he/she does not wish to answer any questions. I ask that you do not interview my client, and do not ask my client any questions about the incident.”

If the police start the interview, there is always the danger that the client will answer the preliminary questions (name, address) and then continue providing answers to questions about the incident itself. This danger should be identified to the client and explained. Perhaps suggest to the client that they answer “no comment” to questions other than their name and address.

You have the choice to be present during any interview. Generally, this is not recommended. If you are present during the interview there is a risk that you will become a witness in the case. If you have done a thorough job in advising the client you should not be needed in the interview.

However, if the client is a juvenile, or suffering from a mental disability, or otherwise vulnerable, you may choose to sit with them in the interview and provide assistance. Do not hesitate to interrupt the police questioning in order to assist your client.

After the interview, the police will either grant or refuse bail. A police officer can grant bail with

conditions. In cases involving children, it may be necessary to remind the police of the applicable principles of juvenile justice:

- detention should only be used as a last resort
- wherever possible children should be diverted from the formal justice system.
- reintegration is not usually served by being remanded in custody.

If police intend to refuse bail, take preliminary bail instructions at the police station. You may need to contact family or friends for a subsequent bail application at court later that day.

Voir dire on a record of interview

Some trials involve a challenge to the admissibility of the record of interview. If you attend a police station to provide legal advice, make detailed notes of your attendance and keep them on the file. See the chapter on voir dire.

Possible reasons for excluding interviews from evidence include:

1. The accused was held in unlawful custody at the time of interview. Remember, there is no power to arrest a person for questioning or remove a person from a Correctional Centre for interview. See [Tunat v Public Prosecutor \[2014\] VUCA 36](#).
2. No lawyer or parent offered for a juvenile.
3. Police did not use the correct words of the caution.
4. Police gave the caution too late, after they had already asked about the truth of the allegations and obtained an admission.
5. The accused was not properly asked if he understands the caution.
6. Threats, violence and other inducements were used by police, either before the interview, or at the interview.
7. An accused was being interviewed as a witness not a suspect, when they are in fact a suspect.
8. The interview was not properly recorded and read back to the suspect.
9. The record of interview was not signed by the accused.

When taking instructions from clients, be aware of all the possible arguments for excluding a record of interview.

Chapter 15 – Juveniles

Representing children who come into conflict with the criminal law can be very challenging. You will need extra time and care to build trust, take instructions from and give advice to your young client.

When dealing with a juvenile, your instructions need to come from the client, not from the parent or guardian. The juvenile is the client, not the parent. A juvenile may feel shy or embarrassed telling their story in the presence of their parent. In such a situation, you may need to ask to speak with the child in the absence of parents so that you can get proper instructions.

Where possible, a juvenile should attend court with a parent or guardian. Sometimes the child will not want their parent at court, possibly out of shame or because they fear being disciplined by their parents. Talk to your client about the benefits of having family support at court.

Due to their immaturity and inexperience children are particularly vulnerable in the legal system and it can be very satisfying to use your skills and expertise to uphold their rights and ensure that they understand what is happening to them.

Principles and procedure

There are a number of special principles contained in the Convention on the Rights of the Child (which Vanuatu ratified in 1993) and other related international instruments. These “juvenile justice principles” can be summarised as follows:

- “Best interests of the child”
This means that the most important consideration in any decision affecting a child is how to achieve the best possible outcome for that particular child.
- “Diversion”
This means that wherever possible, children who commit crime should be moved away from the formal justice system (e.g. given a warning by the police instead of being charged.)
- “Custody as a last resort”.
This means that the placing of children in custody should only be used when all other options have been exhausted. Any period of custody for a child should be for the shortest possible period of time. This is particularly relevant for bail applications and sentencing.
- “Rehabilitation and reintegration”
This means that the response to children who commit crime has to focus on supporting their rehabilitation and their ability to integrate back into their communities. This is especially important for sentencing and can be contrasted with the principles that apply to sentencing adults.

2013 Memorandum of Agreement

Currently there is no juvenile justice legislation in Vanuatu. In February 2013, a Memorandum of Agreement (MOA) was signed by the courts, PSO, SPD, Correctional Services and other stakeholders. The document endorses universal juvenile justice principles, and urges the government to implement youth justice legislation.

In the meantime, the MOA proposed the following youth justice measures be implemented:

1. The Public Solicitor will provide a roster of lawyers to be contacted during office hours and after hours to provide advice to young persons in police custody.
2. Police will divert as many youth offenders as possible. Diversion options include on the spot warning, caution, mediation and community conferences.
3. The charge sheet for young offenders will clearly state the age of the youth and identify the case as a youth justice case.
4. There will be a separate list day for young offenders at Port Vila Magistrates' Court. This will be the third Thursday of every month.
5. Where possible, there will be a more informal layout of court room furniture.
6. The PSO will provide a lawyer for each young person appearing in court.
7. Court sittings will be in private.
8. Correctional Services will attend the court sittings and provide reports on young offenders. A custodial sentence will be a sentence of last resort.
9. Separate custodial facilities will be developed for young persons.
10. Data will be collected on youth justice cases and the agreement will every six months for the next two years.

Relevant legislation and case law

In most common law jurisdictions, a juvenile or young person is normally defined as a person under 18 years of age. However section 54 of the [Penal Code](#) refers to minors being those aged under 16 years. Otherwise the [Penal Code](#) is silent on the age of a young offender. There is a need for legislative reform in this area.

Section 17 of the [Penal Code](#) deals with the age of criminal responsibility. Children under 10 cannot be charged with a crime. There is a presumption of *doli incapax* for those **under 14 years of age**. This means that the law presumes that children between 10 and 14 do not know that their actions are criminally wrong, that is they lack the necessary *mens rea*. The prosecution must overcome this presumption with evidence that the child did know that their conduct was criminally wrong. Unless there is evidence beyond reasonable doubt that the child appreciated their actions as criminally wrong, as opposed to naughtiness or morally wrong, the child must be found not guilty. See 1–37 of *Archbold*

42nd edition and [C v DPP \[1995\] 2 All ER 43](#).

Section 54 of the [Penal Code](#) provides that a person under 16 should not be sentenced to imprisonment unless no other sentence is appropriate, and that reasons need to be given if they are sentenced to imprisonment. This section reflects the common law principle that prison is a last resort.

Juveniles should only be interviewed by police if there is a parent or guardian present.

In terms of sentencing young offenders, the courts have emphasised that rehabilitation should be a priority. In [Heromanley v Public Prosecutor \[2010\] VUCA 25](#) the Court of Appeal said:

Whilst the sentencing of young offenders is never an easy task the objectives and the interests of society are not seriously in doubt. It is to enable young offenders to be rehabilitated and grow up to become responsible law-abiding members of society. This purpose is discernible from the provisions of sections 37, 54 and 58H of the [Penal Code](#). In the sentencing of young offenders we consider that the dual purposes of punishment and deterrence may need to give way to reform and rehabilitation.

We consider that the imposition of an immediate sentence of imprisonment on these young first offenders with the inevitable consequence of exposing the appellants to long term hardened criminals would be counter-productive and inappropriate.

Chapter 16 – Bail and arrest

Bail involves an accused person making a promise to attend court. In exchange for that promise, the accused is given his or her liberty and released from custody.

Bail is consistent with the presumption of innocence. If a person is presumed innocent until proven guilty, that person should not be imprisoned before trial unless there are very good reasons for doing so.

If an accused person is refused bail, and later found not guilty at trial, or is given a non-custodial sentence after being found guilty at trial, an injustice may have occurred. A grant of bail avoids the miscarriage of justice of a person being remanded in custody and then being found not guilty of the charges.

A very important part of being a lawyer at the PSO is to advise clients about bail and to assist clients in applying for and obtaining bail.

Why bail is important (according to Tom Loughman, a former PSO lawyer):

1. Bail recognises and promotes the presumption of innocence.
2. A person's liberty is a fundamental civil right and no person can be arbitrarily detained.
3. Being in custody reduces the ability of an accused person to prepare their defence.
4. Being in custody makes it more difficult to engage in customary settlement.
5. Housing and feeding remand prisoners is a cost to the state.
6. There is cost to community and family if a person cannot work.

Bail for any charge carrying life imprisonment (homicide, mutiny, sexual intercourse without consent) can only be granted by the Supreme Court.

Arrest

Police can arrest a person without a warrant if the police officer suspects on reasonable grounds that the person has committed a cognisable offence [section 12 [Criminal Procedure Code](#)]. A list of cognisable offences appears at the end of the chapter, and can also be found in the Schedule to the [Criminal Procedure Code](#).

Police can also arrest a person without warrant if the person:

- commits a breach of the peace in the presence of the police officer
- wilfully obstructs a police officer in the execution of his duty
- is found loitering at night if the police officer suspects on reasonable grounds of having committed or being about to commit an offence [section 12 [Criminal Procedure Code](#)].

Police can also arrest a person if a warrant has been issued for the arrest of that person [section 52 [Criminal Procedure Code](#)].

Any person who is arrested by police must be brought to a police station and then to a court “**without unnecessary delay**” [section 15, section 52 CPC]. This applies to arrests with or without warrant.

‘Necessary delay’ may involve time to interview witnesses or the accused. However a delay for several days would be likely to be unnecessary and could result in the detention of the accused being unlawful and any confessional evidence obtained during the unnecessary detention being excluded at trial. A civil claim may also be possible.

It is widely accepted that a person arrested without warrant should be brought to court within 24 hours. See section 18 of the [Criminal Procedure Code](#).

How long the police can hold a person before interview

If the person is not under arrest, they are free to leave the police station at any time. The police have no right to hold them. If the person is under arrest, they should be interviewed by police immediately.

In [Tor v Public Prosecutor \[2003\] VUCA 2](#) the Court of Appeal held that a six-hour delay before interview was unacceptable. An overnight wait would be “intolerable”:

The first matter to be noted is that when police take someone in for questioning, they can do so only if the person on their own volition and free will wishes to go with them to the police station. When they arrest to get a person to the police station and they want an interview it is essential that it happens immediately. Holding someone for six or seven hours is unacceptable. It creates a real perception that the person is being disadvantaged in what for many people is a very alien situation until the interview. Holding them overnight prior to interview is intolerable.

The police have no power to remove a person from a Correctional Centre for the purpose of conducting an interview. See [Tunat v Public Prosecutor \[2014\] VUCA 36](#).

Talk to the client about bail

Does the client want to make a bail application? Remember you advise the client and the client instructs you. The client makes decisions after receiving your advice and input. However the final decision on any issue, including bail, rests with the client. You need to provide realistic advice to your client, even if that advice is that there is little or no merit to a bail application.

In providing advice, you need to weigh up the factors relevant to bail.

For example, if your client is charged with sexual intercourse without consent; and the brief of evidence includes eye witness statements that your client committed the offence; and he has made full admissions to police; and admits the offence to you; and he has prior convictions for similar offending; and a history of

warrants; then there is not much chance of getting bail. Your job is to advise your client of this. On the other

hand, if the evidence is weak; and there are no admissions; and the accused is young and employed and has a stable residence, there may be good prospects of bail being granted.

Juvenile clients require special consideration. In Vanuatu juveniles are kept in custody with adult prisoners. This is in contravention of international standards. Also consider the importance of bail for the rehabilitation and reintegration prospects of child defendants.

If your client wants bail, take instructions. See the instruction sheet at the end of this chapter. Be ready and willing to ask for bail on the first court date, even with minimal instructions. If bail is refused, once the PI bundle is received, or further instructions are taken, you can argue a ‘change in circumstances’ and make another application.

Police can grant bail

The police have the power to grant bail to an accused person [section 60(1) [Criminal Procedure Code](#)]. If you get instructions from a person in police custody you can ask to speak to the relevant police officer about bail.

Court bail – talk with the prosecutor about bail

Ask the prosecutor what his or her position is on bail. Feel free to discuss the merits of bail with the prosecutor. Sometimes it is easier to persuade the prosecutor to consent to bail than to persuade the magistrate to grant bail if it is opposed by the prosecution.

If the prosecutor agrees to consent to bail, discuss suitable bail conditions. If the prosecutor intends to oppose bail, try to find out their reasons for opposing bail, and develop arguments against those reasons.

Factors relevant to bail

In [PP v Festa \[2003\] VUSC 65](#), the court identified six factors relevant to bail:

1. Whether there is a risk that the defendant will fail to appear in court

The fundamental question is whether the accused will appear at court. Ties to family and community, a permanent residence and stable employment all demonstrate that there is no real risk of absconding while on bail.

Is the accused married? Does he or she have kids? Do the kids attend school? How long has the accused lived in Port Vila? Does he or she own a house? Does he or she have a job?

2. Whether there is risk that the defendant might interfere with other witnesses or other evidence

This risk can normally be dealt with by conditions not to approach or contact witnesses. You may need to propose a bail residence some distance away from the residence of

witnesses.

3. Whether there is a risk that the offender may offend while on bail

Previous convictions may be relevant to the risk of reoffending. Small matters such as idle and disorderly or traffic matters should not have an impact on bail. If the previous convictions are old the court should place very little weight on them. Having no previous convictions, or only very old convictions, demonstrate that there is no real risk of committing further offences while on bail.

4. The nature of the offence with which the defendant is charged

It will be more difficult to get bail for a more serious offence.

5. The strength of the evidence and probability of conviction

If the evidence is weak then there is a better chance of getting bail.

6. The seriousness of the punishment for which the defendant is liable

If the normal punishment for the offence is a fine, community-based order or a suspended sentence, then this is a very strong reason to grant bail. Why send a person to prison at the start of the case if they will not be sentenced to prison in the event they are found guilty?

Bail conditions

Possible bail conditions include a night-time curfew, surrender of passport, not to leave Efaté, regular reporting to police/prosecutions.

Applying for bail in the Magistrates' Court

In court, state that “there is an application for bail”. Try to let the prosecutor state the reasons for opposition to bail first, then you can reply with your submissions.

The proper starting point is that there should be a presumption for bail. Direct your submissions towards there being insufficient reasons **not** to grant bail.

Emphasise the positive aspects of the client’s situation. Consider family and community ties, employment, study, youth, no priors, weak prosecution case, delay before trial, surety, co-accused on bail, hardship to others and other matters.

Be willing to address the weaknesses in the evidence that supports the charges. Read the outline of police facts before the bail hearing and identify weaknesses in the evidence. If the charges are unlikely to be proven at trial, why should an accused person be remanded in custody?

Propose suitable conditions. Be persuasive. Submit that the concerns of the prosecution can be addressed by bail conditions rather than refusal of bail. In borderline cases, suggest that it is an appropriate case for

bail with strict conditions.

Be aware that a magistrate can refuse bail even if the prosecutor consents to bail. Be prepared to make a full bail application even if the prosecution intend to consent to bail.

If bail is refused, the magistrate is required to advise the accused of the option of making a fresh application for bail in the Supreme Court. Section 66 of the [Criminal Procedure Code](#) states:

Upon the refusal by the Magistrates' Court of an application for bail, the magistrate shall state the grounds for such refusal and shall read aloud to the applicant in open court the following statement–

Your application for release from custody on bail having been refused by this Court, you now have the right to make a fresh application for bail to the Supreme Court. If you so desire, the matter will be referred immediately by this Court to the Supreme Court, which will review your application as soon as possible. You will remain in custody in the meantime but will suffer no disadvantage by reason of making a further application to the Supreme Court. Do you wish the Supreme Court to consider your application for release from custody on bail?

The accused can also make a further bail application in the same court if there is a change of circumstances. Bail can be considered more than once throughout the proceedings. Passage of time can be a 'change of circumstance'.

Applying for bail in the Supreme Court

The same factors are relevant to bail in the Supreme

Court. You can apply for bail in the Supreme Court if:

- you have unsuccessfully applied for bail in the Magistrates' Court, OR
- the charge is homicide or other offence that carries life imprisonment, OR
- the matter has been committed for trial and is currently listed before the Supreme Court.

File an application for bail and a sworn statement in support of the application. Examples of these documents can be found at the end of this chapter. The sworn statement should address the factors that are relevant to bail.

If bail has been refused by a magistrate, the bail application to the Supreme Court is treated as a fresh application, not an appeal against the refusal of bail [section 66 [Criminal Procedure Code](#)].

The decision by the Supreme Court on bail is final. You cannot appeal against the refusal of bail by a Supreme Court judge [section 70 [Criminal Procedure Code](#)]. However you may reapply for bail if circumstances change.

Appeal bail

If an appeal is lodged against conviction or sentence, the appellant can seek bail pending appeal [section 209 [Criminal Procedure Code](#)].

The application for appeal bail can be heard in chambers. If making the application in the Supreme Court, file an application and a sworn statement in support, and serve on the Public Prosecutor's Office.

Because the appellant stands convicted, he or she no longer has the presumption of innocence. This is a similar situation to **bail pending sentence**. It is more difficult to be granted bail pending sentence or pending appeal than bail before conviction.

The test is whether or not a grant of bail is in the interests of justice. See [PP v Walker \[2007\] VUSC 73](#), and [PP v McEwen \[2011\] VUSC 280](#)

Appeal bail should be granted if the sentence will expire, or be substantially completed, before the appeal is heard. In [Silas Robert v Public Prosecutor \[2013\] VUCA 25](#), the appellant won his appeal and had his custodial sentence overturned. After being refused appeal bail, the appellant served almost his entire sentence (several months) for no good reason. Refusal of appeal bail in that case resulted in a significant injustice.

Breach of bail

If your client is arrested for breaching a condition of bail, for example for breach of a curfew, the police are required to bring the arrested person to court. The arrested person may still apply for bail, even if the previous bail conditions said something like “in the event of a breach of bail the accused will be sent to prison”.

Get instructions on the breach of bail. Does the client admit the breach? If not, then you will need to advise the court the breach is disputed and the police will be required to provide evidence in court to prove the alleged breach. If the breach is admitted, ask the client why he or she breached bail. Was there any good reason for breaching the bail condition?

You will then need to seek instructions on applying again for bail. Does the client want to apply for release on bail? If yes, advise the court that the breach is admitted and that there is a further application for bail. You then make submissions on bail to the court, addressing the normal factors, as well as the reason for the breach of bail. Remember the main purpose of bail is not to punish an accused, but to ensure the accused attends court. Try to explain the breach of bail and convince the court to provide a further chance on bail, possibly with more restrictive bail conditions.

Cases on bail

[Leo v Public Prosecutor \[2013\] VUSC 195](#) is an important case about bail. The court heavily criticised the common practice by lawyers who agree to a remand in the Magistrates Court, and then later apply for bail in the Supreme Court. This practice:

diminishes and devalues the constitutional “*presumption of innocence*” and an accused person’s fundamental right to personal liberty and freedom of movement [see: Article 5 (1) & (2)].

The court held that the primary statutory consideration for bail is to ensure that the accused person will appear at his next court appearance date. The court also criticised the police for not laying all the relevant charges at the one time. The police had laid charges for separate incidents after the accused had been granted bail:

A person’s liberty should not be so-easily prejudiced by the mere laying of successive charges by the police or prosecution after he has been granted bail

The court followed case of [PP v Festa \[2003\] VUSC 65](#).

BAIL INSTRUCTION FORM

Name of client:

Age:

Name, phone number and workplace of parent/guardian/relative:

Date of arrest:

Time spent in custody:

Charges:

Date of offences:

Residence location:

Rented or owned

Duration at residence:

Occupation:

Position:

Duration:

Location:

Other family and community ties:

Complainant name:

-Gender

-Age

-Residence

-Occupation

Custom settlement/reconciliation (Yes/No):

Wife employed/unemployed:

Children:

Secondary school/Primary

Pending and ongoing bills:

-Rent

-Electricity

-Water

-Loan

-any other

Investigation status: (pending/complete)

Any previous conviction:

Community service:

Religion:

Passport (Y/N):

1. Risk that the defendant will fail to appear in court
2. Risk that the defendant might interfere with other witnesses or other evidence
3. Risk that the offender may offend while on bail
4. The nature of the offence with which the defendant is charged
5. The strength of the evidence and probability of conviction
6. The seriousness of the punishment for which the defendant is liable
7. Proposed conditions

Police reporting

Curfew

Not to contact or approach witnesses

Not to associate with co-accused

Surrender passport

SAMPLE BAIL APPLICATION

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
PORT VILA
(CRIMINAL JURISDICTION)**

Bail Application Case No. Of 2012

BETWEEN: JAMES KALO
Applicant

Public Solicitors Office
P.O Box 794
Port Vila

AND: PUBLIC PROSECUTOR
Respondent

URGENT BAIL APPLICATION

The Applicant applies for bail pursuant to section 60 of the [Criminal Procedure Code](#).

The Applicant is charged with:

Count 1: Sexual intercourse without consent contrary to section 91 (b)(iv) of the [Penal Code](#).

The applicant applies for bail on the grounds that:

1. On 7 June 2012, the Applicant was arrested and held in custody on remand.
2. On 12 December 2012, this matter was listed for trial. The trial was unable to proceed due to the Prosecutions failure to summon the witnesses to attend court. The trial proceedings were adjourned to 5 and 6 February.
3. The Applicant was remanded in custody until 5 February 2013.
4. The Applicant has no previous criminal convictions.
5. He is 46 years old and originally from the Island of Santo.
6. He resides with the de-facto wife, Sylvie Jones at a rental house located at Pango with his three children, Stephen aged two, Junior (adopted) and John aged one.
7. The Applicant is the sole income earner. His de-facto wife is unemployed.

8. He is a mechanic and owns a private garage business earning a reasonable income to finance his family.
9. He pays house rent, the electricity and water bills and the household daily expenses.
10. His continued remand will deny his family financial support through the festive season.
11. He attends Presbyterian Church services and fellowships regularly.
12. He assists in community with activities. He contributes in fundraising and cleanup programs.
13. The Complainant is currently 14 years old and lives at Ohlen Area, Port Vila.
14. The Applicant agrees not to interfere with any of the Prosecution witnesses until the trial date.
15. The Applicant agrees to comply with any other bail conditions should he be granted bail.

It is respectfully submitted that the following bail conditions should be imposed:

1. The Applicant not to interfere with the prosecution witnesses.
2. The Applicant not to leave the island of Efate.
3. The Applicant to report at the Prosecutions Office every Friday during working hours.

Counsel for the Applicant

Filed on: _____
Filed By: Public Solicitors Office

SAMPLE SWORN STATEMENT SHORT VERSION

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
PORT VILA
(CRIMINAL JURISDICTION)**

BAIL APPLICATION CASE NO. ___ OF 2012

BETWEEN: JAMES KALO
Applicant/Defendant

Public Solicitors Office
P.O Box 794
Port Vila

AND: PUBLIC PROSECUTOR
Respondent

SWORN STATEMENT IN SUPPORT OF URGENT BAIL APPLICATION

I, James Kalo, of Pango Half Road, Port Vila, Efate in the Republic of Vanuatu, swear under oath the following are true:

1. I am the Applicant in this matter and I make this statement in support of my bail application filed herein.
2. I acknowledge and confirm all the grounds, events and family matters listed in my bail application to be true.
3. I seek to be released from custody until the trial date listed on 5 February 2013.

Sworn by the said JAMES KALO
At Port Vila on the ___ of Dec 2012) _____
BEFORE ME:

Commissioner of Oaths

SAMPLE SWORN STATEMENT LONG VERSION

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
PORT VILA
(CRIMINAL JURISDICTION)

BAIL APPLICATION CASE NO. __ OF 2012

BETWEEN: JOSEPH SMITH
Applicant

Public Solicitors Office
P.O Box 794
Port Vila

AND: PUBLIC PROSECUTOR
Respondent

SWORN STATEMENT IN SUPPORT OF URGENT BAIL APPLICATION

I, Joseph Smith, of Tagabe Area, Port Vila , Efate in the Republic of Vanuatu, swear under oath the following are true:

1. I am the Applicant in this proceeding.
2. On 20 November 2012, I was arrested remanded in custody for the charge of sexual intercourse without consent contrary to section 91 of the [Penal Code](#).
3. I am 38 years of age.
4. I am married and have four children. The two eldest are currently studying at secondary schools at Tanna Island and my two youngest children are studying at Kawenu Primary School.
5. I am the sole income earner. My wife is unemployed.
6. We reside at a rent house located at Tagabe Area, Port Vila, and if I remain in custody it is likely the landlord will evict my family due to outstanding rents.
7. I work as the Chief Supervising Security at Wantok Hardware Store located in Port Vila.
8. My employment is likely to be terminated should I continue to be on remand.

9. I seek bail to retain my job and support my families with the school fees, rent and basic needs.
10. I have no intention to avoid trial or interfere with the complainant and the prosecution witnesses.
11. The complainant is currently residing at Seaside Tongoa. If I be granted will re-unite with my families at Tagabe River, Port Vila.
12. I assist the community leaders with the activities such as fundraising and cleanup programs in the community.
13. I am a member of Presbyterian Church. I attend services and fellowships and at times contribute donations and gifts.
14. I promise to abide with the bail conditions as outlined in my bail application should I be granted bail.

Sworn by the said JOSEPH SMITH)
At Port Vila on the ____ of Dec 2012)

BEFORE ME:

Commissioner for Oaths

Chapter 17 – Negotiation of charges

In criminal matters, it may be in the best interests of your client to attempt to downgrade or reduce the charges by negotiating the charges with the prosecution. Part of your duty as a defence lawyer is to get the best outcome for your client. This may involve trying to reduce the charges to less serious charges. Consider the following steps:

- Be aware of the danger that your letter might be an invitation for the prosecution to fix the problems with their evidence. Sometimes it is better to simply go to trial and hope that the prosecution does not identify the weaknesses in their case until it is too late.
- If the weaknesses in the prosecution case cannot be overcome by extra evidence, the case is a good one for a negotiation letter.
- You will need to obtain instructions from the client that she or he consents to you entering into negotiations with the prosecution. Advise the client on the strength of the evidence, possible penalties and the discount on sentence for a guilty plea. The client will then instruct you on what he or she wants to do with the case.
- If you are instructed to commence negotiations, identify possible charges and facts that might resolve the matter. Any proposed facts must be consistent with your instructions.
- Write “without prejudice” at the top of the negotiation letter. This reduces the risk of the letter being used against your client in later proceedings. In the letter, propose the charges and facts that you are seeking. Sometimes asking if a plea of guilty to certain charges would be accepted is better than making a direct offer to plead guilty to charges.
- List reasons why your proposal should be accepted. Be persuasive. Refer to the PPO Guidelines where appropriate.
- Be prepared to have a second attempt at negotiating charges if your first proposal is rejected. You may need to propose a different charge.
- If your first offer is rejected, but accepted much later in time (e.g. on the morning of trial), or if the trial results in the outcome you proposed in the negotiation letter, you can use the negotiation letter in the subsequent plea in mitigation. It

demonstrates an early willingness to plead guilty to the appropriate charges, and your client should receive the full one-third discount for an early guilty plea.

Possible reasons in support of your proposal

- There is enough sentencing power under the proposed charges to adequately punish the accused. Look at the maximum penalty available and be ready to submit that the appropriate sentence is less than this maximum penalty.
- Police, prosecution and court resources will be saved by a guilty plea.
- Acceptance of the proposed charges avoids the need for a lengthy or complex trial. This saves resources and is in the public interest.
- The proposed charges adequately reflect the overall criminality of the accused's conduct.
- The proposed charges take account of weaknesses in the prosecution case and possible defence.
- The costs and difficulty of bringing witnesses to court for a trial is not in the public interest in circumstances where the matter could be dealt with by way of a guilty plea to the proposed charge.
- The prosecution cannot prove the elements of the offence beyond reasonable doubt.
- There are no reasonable prospects of a conviction.
- The proposed charge will avoid the ordeal of the victim and witnesses giving evidence and being cross-examined at trial, and having to relive the trauma of the crime.
- The proposed charges will avoid the adversarial nature of a trial and therefore foster reconciliation.

SAMPLE LETTER SEEKING NEGOTIATION OF CHARGES

Date

Our Ref: (PSO file number)

Public Prosecutor's Office
Port Vila
'Without Prejudice'

Dear Sir,

RE: R v JOHN TEVA

This matter is currently before the Supreme Court. The accused is charged with one count of sexual intercourse without consent. He has been in custody since his arrest, a period of about six months.

Would the Crown be willing to accept a guilty plea to one count of Act of Indecency Without Consent (s98 [Penal Code](#)), in full satisfaction of the matter (i.e. withdrawal of the sexual intercourse without consent charge)?

The factual basis of this charge would be that the accused put his hand inside the underwear of the victim and touched her private parts.

The following factors support this proposal:

1. The proposed charge carries a maximum of seven years imprisonment. This is plenty of scope to impose an adequate sentence.
2. A trial on the sexual intercourse without consent charge would be an 'oath on oath' trial. The complainant is the only prosecution witness. There was no recent complaint, as the complainant did not report the incident for almost a month. There is no medical evidence. The prosecution case is not strong. Acceptance of this offer therefore guarantees a successful prosecution.
3. If a trial is avoided the complainant will not be required to give evidence or be cross-examined. She will therefore avoid having to revisit the trauma of this incident.
4. Police, prosecution and court resources would be saved and be able to be used for other important cases.

Please feel free to contact me to discuss this matter.

Yours faithfully,

Sam Brown
Public Solicitor's Office

SAMPLE LETTER REQUESTING WITHDRAWAL OF CHARGES

Date

Our Ref: (PSO file number)

Ms Mary Smith
Public Prosecutor's Office
Port Vila
"Without Prejudice"

Dear Ms Smith,

RE: Regina v Ben JONES

This matter is currently before the Supreme Court awaiting a trial listing. An information alleging INTENTIONAL HOMICIDE has now been filed. It is respectfully submitted that the evidence in this case is so weak that a *nolle prosequi* should be entered and the prosecution discontinued. In summary:

1. Mr Jones participated in a record of interview. In that interview he said that he acted in self defence in stabbing the victim. The prosecution must disprove beyond reasonable doubt any possibility that the accused acted in self defence.
2. There are **no** eyewitnesses to the fight between the accused and the deceased.
3. The injuries suffered by the accused were very serious and consistent with his account given to police. His injuries are consistent with "fending" away an unprovoked knife attack. The police photos of his injuries support self defence.
4. All the evidence suggests the victim started the fight. There is no evidence to suggest the accused started the fight. There is no evidence the accused was angry towards the deceased.
5. The evidence of self defence is overwhelming. There is no evidence that the accused did not act in self defence.
6. There is 'no evidence' to disprove that the accused acted in self defence.
7. There is no reasonable prospect of a conviction.
8. The finances available for prosecutions are limited and should not be wasted on prosecuting inappropriate cases, thereby reducing the resources available to prosecute worthy cases. Only fit and proper cases should be brought before the courts.

Mr Jones has been in custody for more than six months. The justice of the case warrants this prosecution being immediately terminated by way of filing a *nolle prosequi*.

Yours faithfully,
Sam Brown
Counsel for Mr Jones
Public Solicitor's Office

Chapter 18 – Preliminary enquiries

A preliminary enquiry, also known as a PI or committal hearing, must be held if the offence cannot be tried by the Magistrates' Court. Typical offences requiring a PI include homicide, sexual intercourse without consent, unlawful entry of a dwelling house, and cannabis offences.

A PI must be held for any offence which has a maximum penalty of more than 10 years imprisonment. A PI should be conducted by a senior magistrate.

Section 14(4) of the [Judicial Services and Courts Act](#) states:

4. A senior magistrate may on application or at his or her discretion hear and determine in a summary way criminal proceedings for an offence for which the maximum punishment does not exceed imprisonment for 10 years. However, a senior magistrate must not impose a sentence greater than imprisonment for 5 years.

It follows that a senior magistrate cannot finalise an offence that has a maximum penalty of more than 10 years imprisonment.

However, by way of [Practice Direction](#) dated 8 April 2004 (available in the SALMON folder), the Chief Justice has extended the jurisdiction of the Magistrates' Court so that cases involving Theft, Misappropriation and False Pretences of less than VT1,000,000 can be finalised in the Magistrates' Court.

Sections 143–146 of the [Criminal Procedure Code](#) outline the procedures for a PI.

An accused cannot be committed for trial in his or her absence. The defendant must be physically present at the PI. The prosecutor must also be present [[PP v James \[2010\] VUSC 149](#); [Public Prosecutor v Tiabong \[2012\] VUSC 136](#)]. This is especially important in cases where there are several co-accused. Only those accused who are present in court can be committed for trial.

The prosecution will prepare a brief of evidence for the PI. This is known as the “PI bundle”. The bundle will contain statements of witnesses; any statement by the accused to the police; as well as any other reports or documents which form part of the prosecution case.

At the PI proceedings, the senior magistrate will have a copy of the “PI bundle”. This is the written evidence relied upon by the prosecution. The senior magistrate should then read the statements and other documents in the bundle. Unlike a trial, the prosecution witnesses do not

attend court to give oral evidence and there is no cross-examination.

The accused (the CPC refers to the ‘intended accused’) has a right to make a statement to the court. Tactically, it is normally best that the accused not make a statement during the PI. There is no benefit to be obtained from making a statement. The guilt of the accused is not being determined at the PI. The court is only required to determine whether or not a *prima facie* case exists. The defence case, including the statement of the accused, is not relevant to whether or not the accused is committed to stand trial. The risk is that by making a statement the accused might set up a potential inconsistency with his or her statement to police or statement at trial. This should be avoided. It is normally best to reserve the defence and any statement until trial.

The accused is not required to enter a plea at the PI.

A person is committed to stand trial at the end of the PI if there is a *prima facie* case against the accused. The senior magistrate must analyse the evidence and apply this test.

As defence counsel, if the prosecution evidence falls short of a *prima facie* case, make a submission that there is no *prima facie* case (that is, no case to answer). For example, if there is no evidence of the age of the complainant in a case of unlawful sexual intercourse, then there may be no *prima facie* case, as there is no evidence to prove an essential element of the offence. If there is no *prima facie* case then the accused should be discharged. On the other hand, if there is clearly a *prima facie* case on the material before the court, you may wish concede this to the court.

The test for a *prima facie* case is the same as the test for a “case to answer”. There must be some evidence to support each of the essential ingredients or elements of the offence. [[Koroka v Public Prosecutor \[2007\] VUCA 3](#)]. The English case of [R v Galbraith](#) has been adopted in Vanuatu in [PP v. Samson Kilman & Others \[1997\] VUSC 21](#) and [Public Prosecutor v Benard \[2006\] VUSC 26](#). The test stated by Lord Cane CJ in [R v. Gailbraith \(CA\) \(1981\) 1 WLR 1039](#) is:

1. If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty the judge should stop the case.
2. The difficulty arises where there is some evidence but it is of tenuous character, for example, because of weakness or vagueness or because it is inconsistent with other evidence.
 - (a) Where the judge concludes that the Prosecution case taken at its highest is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case.

- (b) Where however the Prosecution is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to a conclusion that the defendant is guilty then the judge should allow the matter to be tried.

It is best practice for accused persons to be legally represented at the PI. A defence lawyer is a safeguard to make sure proper procedures are followed and that the accused understands the court process.

Relevant PI cases

In [Moti v PP \[1999\] VUCA 5](#), the Court of Appeal held:

1. The senior magistrate is required to be satisfied that there is some evidence to establish each of the elements or ingredients of the offences.
2. There is no right to cross-examine witnesses at a PI.
3. If the accused wants to make a statement, this should be made before the senior magistrate decides if there is a *prima facie* case.
4. The senior magistrate is required to record his decision in writing, and in particular, state whether he authorises or does not authorise the laying of the proposed Information against the intended accused [section 146(1)]. Section 146 (3) expressly prohibits the acceptance by the Supreme Court Registry of any information unless it has been '**specifically authorised**' by a decision of the senior magistrate.
5. The CPC does not provide any basis for the laying of an "ex officio information in the Supreme Court.

The senior magistrate's function is not, except in the most exceptional circumstances, to weigh the strength of evidence but merely to decide whether there is material which if unchallenged at trial could reasonably lead to conviction [[Moti v S, An Infant \[2000\] VUCA 3](#)].

As a matter of common sense, dismissing a case at PI calls for an indication of why the conclusion has been reached. The senior magistrate should give reasons for dismissing a case at PI [[Moti v S, An Infant \[2000\] VUCA 3](#)].

Offences carrying up to five years can be tried in the Supreme Court if they are founded on the same facts or were part of a series of offences of a similar character as one which could only be tried in the Supreme Court [[Public Prosecutor v Kaloris \[2002\] VUSC 38](#)]. This means that an Information can be filed in the Supreme Court containing minor charges as well as serious charges.

Chapter 19 – Pleas of mitigation – sentencing submissions

Full instructions required before entry of plea

You must get full instructions from the client before a plea is entered. Read the prosecution facts to the client before a plea is entered, and ask the client if the facts are agreed.

Once a client pleads guilty with a lawyer representing him or her, it is very difficult to change the plea. You may be required to give sworn evidence on any application to change the plea and your competence will be examined by the court. If you appear for a client who pleads guilty without you having already taken full instructions and provided proper legal advice, you may be guilty of professional negligence.

Make sure that the charge is appropriate. Is a lesser charge more appropriate? Do the agreed facts make out the offence?

Before you go into court, read the facts to your client, sentence by sentence. Note any dispute on the facts and, in the event of a factual dispute, approach the prosecutor to have the facts amended.

If the prosecutor does not agree to your client's version of events, go back to your client and seek further instructions. If the facts are not admitted then you may need to conduct a disputed facts hearing, also known as a Newton's Hearing. See [Malvaru v Public Prosecutor \[2011\] VUCA 34](#) and [Moli v Public Prosecutor \[2012\] VUCA 20](#).

“Admitting the facts” involves accepting the prosecution facts to be true. In some cases, especially for minor and inconsequential factual differences, you may prefer to proceed with the plea in mitigation and simply point out to the judge that some facts are not accepted and ask for those facts to be disregarded on the basis that they do not have “sentencing significance”.

Advise the client of any possible consequences of a penalty which will follow the guilty plea. This may include imprisonment, drivers licence disqualification, loss of job, forfeiture of property used in the offence or civil claim liability. Be aware that a criminal conviction may prevent some international travel. The court can sentence without a conviction being recorded, which may allow your client to travel internationally [section 43 [Penal Code](#)].

Appearing in court

Explain to the client what will happen in court. Outline the formal process for taking a guilty plea and making submissions. The charge will be read, a plea entered, and then the prosecutor will read the facts to the court. You will then be asked if the facts are agreed. If the facts are agreed, the prosecutor will then tender any previous convictions. You will be asked whether your client admits the previous convictions. Then you make your submissions on sentence. The prosecutor may or may not make submissions in reply. Sentence will then be imposed.

When making submissions, your task is to be persuasive. Make eye contact with the judge or magistrate. Be realistic and sincere. Use appropriate and original turns of phrase to capture the essence

of your plea. Be ready to answer questions from the bench. Explain why your proposed sentence is suitable.

Develop your own style and method for pleas in mitigation. A standard format for a plea in mitigation may involve the following steps:

1. A very brief introduction of your client. For example:

“Ms Agnes is a 25 year old mother of four children with no prior convictions. This offence happened two days after her mother died.”

The introduction should be positive and brief, usually one or two sentences. Use your client’s name. Humanise your client. Communicate any vitally important information in this opening sentence. This could be the client’s employment, or health status, or disability, or any other powerful personal circumstance that you will be relying on for mitigation. The circumstance may relate to the offence itself. The introduction should grab the attention of the magistrate and take the focus away from the crime itself, which will have just been described to the court. Your introduction is an important opportunity for persuasion. You can establish the theory or case concept underlying your submissions.

Avoid repeating information already provided to the court, such as the charges or the facts of the offence. The introduction is a once off opportunity to persuade the court. Lead with your best point.

2. The circumstances of the offence.

How and why did your client come to commit the offence? Tell their story of what happened. What was their role? Was there planning or premeditation, or was it spontaneous? Was the client a leader or lesser player? Need or greed? Was there provocation or duress?

Focus on facts that mitigate or explain the commission of the offence. Identify mitigating factors relevant to the objective criminality of the offence.

3. Personal circumstances of your client. You may wish to highlight the best parts of the pre- sentence report. Consider:

- personal and family circumstances.
- education/employment.
- Health.
- prior good character—get character references if possible.
- prior criminal record—gaps, seriousness, commencement.
- prospects of rehabilitation.

4. Mitigating factors. These will justify a reduction in the sentence and also provide counterbalance to any aggravating factors. Consider:

- time of entering the plea—early or late? An early plea normally attracts a full one-third discount.
 - evidence relating to contrition and remorse.
 - delay.
 - youthfulness.
 - compensation and/or reconciliation.
 - co-operation with police.
5. **Technical aspects to sentence.** These may include the timing of the plea, time spent in custody, parity with co-offenders, totality, prior criminal history, legislative provisions as to penalty or sentencing options.
 6. **Guideline Cases.** Consider the starting point and appropriate deductions. The three stage approach to sentencing is outlined [Public Prosecutor v Andy \[2011\] VUCA](#). For cannabis cases, see the guideline in [Wetul v Public Prosecutor \[2013\] VUCA 26](#). For sexual intercourse without consent, see the guideline in [Public Prosecutor v Scott \[2002\] VUCA 29](#).”
 7. **Comparative sentences.** See the SALMON “sentencing table” folder for summaries of sentences for the most common offences.
 8. **Conclusion.** Your final chance to persuade. You may wish to seek a specific type of sentence. In borderline custody cases, give strong reasons for not sending the client to prison. You could submit that the offence does not warrant the immediate removal of your client from the community and their family environment.

Guideline case – the three stage approach to sentencing

In [Public Prosecutor v Andy \[2011\] VUCA](#), the Court of Appeal outlined the three stages of the sentencing process:

First Step: The Starting Point

The starting point can be defined as the sentence of imprisonment that reflects the seriousness of the offence and the culpability of the actual offending; that is, the specific actions of the offender and their effect in the context of the specific charge and its maximum sentence. In this first step, there is no consideration of circumstances which are personal to the offender. The calculation has regard only to the seriousness of the offending.

Second Step: Assessment of factors personal to the offender

Once the starting point has been reached, the Court then embarks on the second step which is the assessment of the aggravating and mitigating factors relating to the offender personally. It is under this head that aggravating matters such as the past history of the offender will be considered. If there are previous convictions, particularly for a similar type of offence, this may result in the starting point being increased. Under this head, mitigating factors such as a lack of previous relevant convictions, good character and

remorse will be assessed and may result in a reduction of the starting point to reach a second stage end sentence.

Third Step: Deduction for Guilty Plea

Once this process has been completed, as a third step, the trial judge will then consider what discount from the second stage end sentence should be applied for a guilty plea. The greatest discount allowed under this head will be a discount of one third where the guilty plea has been entered at the first reasonable opportunity. A later guilty plea will result in a smaller discount. No discount is available under this head if the charges have been defended through a trial.

Reconciliation and compensation

Customary settlement, reconciliation and compensation is not relevant at the charging stage. Custom reconciliation cannot prevent the laying of the appropriate charge. Compensation cannot be used as a bargaining chip in deciding the appropriate charge. Compensation cannot be used to change the type of sentence. It can only be used to reduce the quantum of sentence. See [Public Prosecutor v Gideon \[2002\] VUCA](#) and the useful paper by [Swamy, 'Custom Reconciliation in Sentencing for Sexual Offences in Vanuatu' Journal of South Pacific Law \(2009\) 12\(1\)](#).

Reconciliation is an important part of resolving disputes in Vanuatu. Commonly, traditional forms of reconciliation and compensation are happening at the same time a criminal case is progressing through the courts. The promotion of reconciliation is provided by section 38 of the [Penal Code](#).

The importance of “*klinim fes*” was discussed by the Court of Appeal in [Edgel v Public Prosecutor \[2011\] VUCA 37](#).

In [Tari v Public Prosecutor \[2011\] VUCA 26](#), the Court of Appeal reduced a sentence from the starting point by one-third on the basis of significant custom ceremony and settlement. See also [Paterson and Jowitt, 'More on Customary Reconciliation ceremonies on Sentencing for Criminal Offences', Journal of South Pacific Law \(2008\) 12\(2\)](#).

Compensation is also relevant to sentence in criminal cases. See sections 39–42 of the [Penal Code](#).

PLEAS OF MITIGATION: PSO CHECKLIST

1. Examine the elements of the charge and the available evidence. Can the charge be proved? Consider negotiation of a lesser charge.
2. Does the client admit the offence? You cannot represent a client on a guilty plea where the client denies the offence or asserts their innocence (this is known as a “guilty plea of convenience”).
3. Always read the prosecution facts to the client before a guilty plea is entered. Ask the client if he or she agrees with the facts. If facts are disputed, negotiate the facts with the prosecution.
4. The prosecution facts should not allege conduct which amounts to an additional uncharged offence [[Public Prosecutor v Shing \[2015\] VUSC 58](#) and [R v De Simoni \(1981\) 147 CLR 383](#)].
5. If a complex client, or a serious charge, obtain written signed instructions from the client. Those instructions should include the fact that the client is making a free choice in pleading guilty and that prison is the expected result.
6. Consider obtaining character references. In some cases you may wish to call evidence in court from family or character witnesses.
7. Be structured and persuasive in your submissions. Identify the key features of the case that assist your client. Emphasise your strong points.
8. When you appear in court, respond directly to questions from the magistrate or judge. Be aware of matters which the individual judge or magistrate may regard as important. Be realistic. Being reasonable makes you more persuasive.
9. In borderline custodial cases, ask for a suspended sentence. Submit that the defendant is not a person who needs to be removed from his or her family and community.
10. Explain the sentence imposed to the client and advise the client of the right to appeal.

SAMPLE SENTENCING SUBMISSIONS

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
PORT VILA**
(Criminal Jurisdiction)

Criminal Case No. of 2013

PUBLIC PROSECUTOR

-V-

ALBERT GARAE

SENTENCING SUBMISSIONS FOR THE DEFENDANT

Introduction

Albert Garae has pleaded guilty to two counts of Act of Indecency with a Young Person, contrary to section 98A of the [Penal Code](#). The maximum penalty for each offence is 10 years imprisonment.

Mr Garae is a 37-year-old man who lives on Futuna Island and works as a fisherman. He has two children. He is divorced and looks after his children including payment of school fees. He was in custody from 5 April 2013 to 18 April 2013. He has no prior criminal history.

Mr Garae has performed a customary reconciliation ceremony with the father and the mother of the victim in the presence of the Chief Tasso and other family members. This ceremony was photographed and witnessed by the probation officer.

Circumstances of offence

It is a serious case of act of indecency with a young person.

The offending involved more than incident. Count 1 involved Mr Garae rubbing his penis on the vagina of the victim. Count 2 involved Mr Garae forcing the victim to masturbate him.

The 14-year-old victim is the adopted daughter of Mr Garae.

Mr Garae accepts the summary of facts. Mr Garae also accepts that the offending involved a trust relationship.

Personal circumstances

Mr Garae's home island is Futuna Island. He is the youngest of 12 children.

He was married but his wife ran away with another man. They have been divorced for three years. He has custody of the two daughters of the marriage. The daughters both attend school. He pays the school fees from the little money he makes from fishing.

Pre-sentence report

The pre-sentence report contains some very positive information:

- Chief Mako regards Mr Garae as a very reliable man in the village.
- He contributes fish for fund raising and other community functions.
- Mr Garae expressed insight into his offending.
- Mr Garae showed remorse, stated he was sorry and stated he will not re-offend in the future.
- Mr Garae is motivated to undertake rehabilitation programs.
- Mr Garae performed a custom reconciliation ceremony. This involved payment of three plain mats, one feather mat, a kava stump and 3000VT
- There was acceptance and forgiveness from the victim’s parents and other family members.
- Mr Garae continues to have the strong support of the Chief.

It is submitted that Mr Garae has good prospects of rehabilitation.

Mitigating factors

There are a number of mitigating factors:

1. Mr Garae immediately admitted his offending and cooperated with police.
2. He has pleaded guilty at the first opportunity. This has saved the court’s time and also means the victim does not have to give evidence.
3. No prior convictions.
4. Good work history.
5. Strong community support.
6. Mr Garae has expressed insight and remorse for his offending.
7. Custom reconciliation ceremony.
8. Sole income earner for his children.

Comparative sentences

In [Public Prosecutor v Banga \[2013\] VUSC 34](#), the offender was 53 years old and in a “bubu” relationship with the five-year-old victim.

The facts were:

“The Defendant led the Complainant into a nearby kitchen where he then pushed his hand into the front part of the Complainant's trousers. The Defendant caressed the Complainant's vagina area with his finger. The Defendant then

removed his trousers and exposed his penis to the Complainant and said words to the effect that the Complainant should perform oral sex on him. The Complainant refused. The Defendant then proceeded to kiss the Complainant in her mouth and cheek.”

The offender was sentenced to two years imprisonment, suspended for two years.

The victim in PP v Banga was much younger, being just five years old.

In Public Prosecutor v Keleb [2009] VUSC 11, the offender was 55 years old and the victim was seven years old.

The facts were:

“You called the 7 year old victim who was playing outside your house with 2 friends, to come to you in your kitchen. When the victim came to you, you touched her vagina through her panty and you said to her that you wanted to suck her vagina. After that the victim returned and told her friends about what you had done and said to her.”

The offender was drunk at the time of the incident. The court noted the “brief, singular, non-penetrative nature of the assault”. The offender was sentenced to 12 months imprisonment suspended for two years.

The victim of PP v Keleb is much younger than the victim in this case.

In Public Prosecutor v Mahit [2012] VUSC 231, the 38-year-old offender was a senior fisheries officer and a close friend of the parents of the 15-year-old victim.

The offender offered stopped his vehicle and offered a lift to the victim. She initially refused, but eventually accepted. Once in the vehicle, he closed the windows. He then started to touch her on her upper body around her breasts. She pushed the hands off and then he touched her on the upper legs and rubbed his hands around her genital region over her clothing. This occurred while the car was moving. The victim jumped from the vehicle and rolled down to the side of the road and then ran screaming to her mother's office.

This case involved the confinement of the child victim in a moving vehicle and the offence only stopped because the victim jumped out of the vehicle.

The starting point was 12 months imprisonment. The court then sentenced the offender to nine months imprisonment and suspended it for a period of two years plus 200 hours of community work and 100,000VT compensation.

Conclusion

It is accepted the court should impose a term of imprisonment. It is submitted that the term of the imprisonment should be suspended. A 200-hour community work order and two-years supervision could be imposed in addition to a suspended sentence. A suspended sentence would be practicable and consistent with the safety of the community pursuant to section 37 of the Penal Code.

The grounds for suspending the sentence are:

- plea of guilty
- cooperation and remorse
- custom reconciliation
- first offender.

.....
Pauline Kalwatman
Counsel for the Defendant
Office of the Public Solicitor

SAMPLE CHARACTER REFERENCE LAYOUT

PP v John Smith

Date

The Presiding Magistrate/Judge
Magistrates/Supreme Court at Port Vila

Dear Sir/Madam,

RE: Character Reference for John Smith

GENERAL TOPICS TO BE COVERED:

- The writer knows about the charge[s].
- How long the writer has known the accused.
- How the writer got to know the accused.
- What the writer thinks of the accused.
- Anything specific about the accused.

Yours faithfully

Signed

Name printed

Chapter 20 – Warrants

What to do if a client approaches you at the office and they have a warrant outstanding

If a client approaches you while a warrant is in existence for their arrest, advise the client to surrender to the court.

You can assist them by relisting the matter and then appearing on an application to have the warrant vacated. Because the client would be voluntarily surrendering to the court, there are strong grounds for them to be granted bail by the court. If courts refuse bail in these circumstances people may be less willing to surrender on warrants, and this is not in the public interest. Be ready to explain to the court why the person failed to appear previously and also be ready to propose bail conditions.

What to do when a client has been arrested on a warrant

- Speak to the prosecutor to determine why the warrant was issued. Ask the prosecutor if there are any fresh offences or if the only charges are those on the warrant.
- If it is a minor matter in the Magistrates' Court (such as traffic offences) go through the prosecution statement of facts with the client. If they client indicates that the alleged facts are true, and the client is willing to plead guilty to the charge, then finish the matter there and then. Do not adjourn it again. Given that your client is already at court you may as well deal with as much as you can and this will save you all having to go back to court on another occasion. Pleading guilty and receiving a non-custodial sentence avoids the risk of being refused bail and thereby sent to prison for a matter which would not result in a prison sentence upon conviction.
- If it is not possible to immediately finish the case (for example if it is a not guilty plea or serious charge), you will need to adjourn the case. You may need to get copies of the witness statements and take further instructions.
- If the prosecutor is applying to have the client remanded in custody then take instructions for a bail application. Just because the client has been arrested on a warrant, it does not then mean that they should be automatically remanded in custody. It depends on the circumstances of the case
- Ask the prosecutor about his or her attitude to bail. It may be that they agree to bail again despite the client being arrested on a warrant.
- Take instructions from client about why they failed to appear in court. If they have breached bail conditions such as reporting conditions, find out why they have not been complying with their conditions.
- Check to see if the warrant was issued for a failure to attend court on bail, or a failure to attend court in response to a summons. Failure to respond to a summons is less serious

than failing to attend on bail. It means your client has not had the chance of bail previously and this may be a good reason for bail to be granted. Also check to ensure that the summons was properly served, and whether there is sworn statement of service.

- If instructed to apply for fresh bail, ask the client to propose a relative, friend or employer who would be willing to provide a surety for the attendance of the client at court. A further bail application is more likely to be successful if there is a surety to propose and again is more likely to succeed if the surety is present in court. A short adjournment (say to later that same day or to the next day) may be required in serious cases to give time to contact the surety and have them attend court. In any bail application for a person arrested on a warrant, the court still needs to consider the factors relevant to bail (risk of failing to appear; risk of flight and risk of commission of further offences). You will need to ensure that your instructions address all of these issues. Refer to the bail application instruction sheet in the bail chapter.

Chapter 21 – Supreme Court plea days

The Supreme Court in Port Vila usually lists criminal cases for plea on the first Tuesday of each month. A calendar of plea dates is issued at the start of each year.

Lawyer allocation

The Public Solicitor usually designates a particular lawyer to coordinate and supervise cases for each plea day. The designated lawyer should obtain the court list as early as possible and ensure that full instructions have been obtained from each client.

The designated lawyer may need to request copies of the PI bundle and charges from the Public Prosecutor's Office. If these documents are only provided at the last minute, such as on the morning of the plea date, the case will most likely need to be adjourned for full instructions to be obtained. Do not rush into a case if you have just been given the charges and a PI bundle. Ask for an adjournment and explain that you need time to get full instructions. This may result in the case being adjourned for up to a month.

It is preferable for a client to have the same lawyer from the start of his or her case until it finishes. It is best practice to attend the plea date for your client. However, if your client is due to appear at a plea date and you are not able to personally appear in court, provide a comprehensive file note outlining your instructions to the designated lawyer to appear on your behalf. Also advise your client of the name of the PSO lawyer who will appear in the case.

Negotiation of charges

If your instructions reveal that the correct charge should be something less than the charge on the information, propose an adjournment of the taking of the plea to enable you to pursue negotiations with the prosecution for an alternative charge. If the matter does not resolve by negotiation, then a trial date may eventually be required.

Before the plea day

Contact your client and make sure he or she attends court on the set date at the correct time.

If your client does not attend court, be ready to advise the court that you are either in contact with the client or you have lost contact. Also be ready to advise the court of bail conditions and the last known place of residence.

On the plea day

If the charge is to proceed, the prosecution is required to file an "information". This is the charge sheet that is filed in the Supreme Court, sometimes also known as an "indictment".

Entering a plea

Prepare your client for the reading of the charges and the entry of pleas. The charges will be read in court and your client is required to enter a plea of guilty or not guilty. Make sure your client understands the process in advance.

You will need to have full instructions and a good understanding of the evidence in the PI bundle. Remember, for accused persons represented by counsel, if a guilty plea is entered, that plea will be ‘locked in’ and extremely difficult to change at a later date. It is absolutely essential that you have discussed the charges, evidence and plea with your client before he or she enters their plea. Your role as lawyer is to provide advice about the charges and the strength of the evidence. The judge will assume that this has occurred. It will be embarrassing if your client does not understand the charge or does not know what is happening in court.

If a guilty plea is entered, the matter is normally adjourned to another date for mitigation submissions to be made. A pre-sentence report may be ordered.

If a not guilty plea is entered, the court may set a trial date. The judge may, either at the plea day or at a later conference, ask defence counsel to provide information in relation to the following matters:

1. An estimate of the number of days a trial might take.
2. How many prosecution witnesses and how many witnesses the defence proposes to call at trial (if any).
3. Whether any witness statements can be tendered by consent. It may not be possible to indicate this information until closer to trial. Seek advice from a senior lawyer if you are unsure about this.
4. Whether there are any preliminary issues to be addressed before the trial. For example, challenge to a record of interview (voir dire), fitness to plead issues, alibi witnesses, interpreter problems.
5. Are further disclosures or particulars to be provided by the prosecution?

If your client is in custody you may need to consider whether or not to make a bail application.

Plea days are a good forum to develop advocacy skills and confidence in the Supreme Court. You will need to be well prepared. You will have to answer questions from the Judge and be able to provide accurate and useful information to the court.

Chapter 22 – Criminal trials

Appearing for an accused person at a criminal trial is a core skill of a PSO lawyer.

An accused person is presumed innocent. The defendant does not need to prove facts showing he or she may be not guilty. The defendant does not need to prove anything. The prosecution must prove any charge beyond reasonable doubt. This is a very high standard of proof, much higher than the civil standard of proof on “balance of probabilities”.

A criminal trial is different to a civil trial. Sworn statements are not admissible as evidence in a criminal trial. Instead, witnesses must attend court to give oral evidence. Defence counsel must be aware of the duty to the court and the duty to his or her client.

The role of a defence lawyer

Your role as defence lawyer is to provide the best defence possible for the accused. You must also ensure that the trial is fair. You are required to be courageous as defence counsel. The role of defence counsel involves being required to confront witnesses, prosecutors and judges.

You are required to object to inadmissible evidence. In doing this, you may need to make submissions contrary to the views of the judge and prosecutor. Do not “give in” to the position taken by the prosecutor or the preliminary comments of a judge. On critical issues, request the opportunity to make written submissions and seek a formal ruling from the judge.

For example, in a recent Supreme Court homicide trial, the defence counsel wanted to call witnesses at trial, but the prosecutor objected. The defence counsel just ‘gave in’ to the objection and failed to make a submission on the issue or ask the judge for a ruling. The witnesses did not give evidence. This led to a miscarriage of justice. The Court of Appeal said:

it was a fundamental error for defence counsel to give in to the prosecution objection when he wanted to call witnesses to give evidence which was about this crucial point. If there was objection by the prosecution to this evidence being called the Chief Justice should have been advised and his ruling requested. Without that occurring we must conclude that a serious breach of process occurred and an unsafe or unsatisfactory decision emerged.

The court expects and assumes that you are performing your role as defence counsel. This is part of the adversarial trial process. Performing this role may be challenging and difficult, however failure to fulfill these duties can give rise to findings of professional negligence against counsel, and injustice for the client.

The charge

The starting point of any criminal case is the charge. Identify the elements of the offence. For example, for a charge of sexual intercourse without consent, the elements are:

1. sexual intercourse
2. without consent
3. the accused did not believe on reasonable grounds that the complainant was consenting [[McEwen v. Public Prosecutor \[2011\] VUCA 32](#)].

Once you know the elements of the offence, then you can think about the issues in the case.

Be aware of possible technical issues with the charge such as time limits [see Chapter 5 and section 15 of the [Penal Code](#)], double charging and failure to provide proper particulars.

Where an information contains several charges, you may need to speak with the prosecutor to clarify whether a charge is a representative count or an alternative charge.

Representative counts

A **representative count** is sometimes used where there are many incidents of criminal conduct covered by the one charge. For example, in sexual cases, there may have been many occasions of sexual intercourse over a six-month period against the same victim. Rather than charge every incident, a single representative count is sometimes used. This is usually because the victim is unable to properly identify and distinguish each individual incident. The prosecution only needs to prove one incident to prove the representative charge.

Alternative counts

Alternative counts involve the prosecution charging a defendant with more than one count for the same act or same conduct. An alternative count is a lesser charge to another charge on the information.

There can be many reasons for using alternative counts. One reason is that the prosecution might think that the evidence to prove the most serious count is not very strong. In this situation, the prosecution might add one or more less serious counts as “back up” charges to the most serious count. “Back up” count is another term for alternative count. The words “count” and “charge” mean the same thing.

If the evidence is not strong enough to prove the main charge, then the prosecution will hope that the evidence is strong enough to prove one of the “back up” charges. That way the defendant is still guilty of a lesser charge if he is found not guilty of the main charge. He is found guilty of something, rather than being found not guilty of a single serious charge and then escaping punishment.

Alternative charges always relate to the same act or conduct. For this reason **the defendant can only be found guilty and sentenced for one of the alternative charges**. That is why they are called “alternative charges”. He cannot be found guilty of more than one of the alternative charges.

For example, in a sexual case, the prosecution may allege that the defendant had sexual intercourse without consent with a 14-year-old girl. Assume the case involved a single wrongful act. Assume the evidence of penetration is a little weak—perhaps the girl is not 100% certain that there was penetration. Also assume that the evidence about consent is disputed. Perhaps the defendant told police

in his interview that he believed the girl consented to sex. In such a case, the prosecution might charge the defendant with:

Count 1: Sexual intercourse without consent.

This is the main charge or lead count. It is the most serious charge.

Count 2: Unlawful sexual intercourse.

This is an alternative to Count 1. It relates to the same conduct as Count 1. The prosecution does not need to prove lack of consent to prove this count. They only need to prove the girl was under 15 and there was sexual intercourse. This count is therefore easier to prove than Count 1.

Count 3: Act of indecency.

This is a further alternative to both Count 1 and Count 2. It is a “back up” charge in case the evidence at trial does not prove penetration.

The prosecution should indicate that these are alternative charges, either by stating it in the words of the charge, or underneath the charge, or by telling the court and defence counsel.

If the defendant pleads guilty to one of the alternative counts, such as Count 2 or Count 3, the prosecution can choose to accept that guilty plea in “full satisfaction” of all the counts. That is a decision for the prosecution to make.

For example, in the above case, the defendant may choose to plead guilty to Count 2, and not guilty to Count 1. This would be if he accepts having sex, and accepts the girl was under 15, but denies lack of consent.

The prosecution can choose to accept the guilty plea to Count 2 and withdraw counts 1 and 3.

Alternatively, the prosecution can choose not to accept that guilty plea to Count 2 in full satisfaction of the case, and proceed to trial on all the charges.

If at trial, the main charge is proven, the defendant is sentenced only on the main charge. If the main charge is not proven, his guilty plea to Count 2 will then be accepted by the court and he will be sentenced only on Count 2.

Because the three counts all relate to the same conduct or act, at the end of the case, the defendant can only be sentenced on one of the three counts. It would be double punishment if the defendant was found guilty of more than one charge or sentenced for more than one charge relating to the same act.

Alternative and representative charges are often used in sexual cases. In drafting the information, the prosecutor should clearly indicate whether a charge is representative or alternative. If you are in doubt, seek clarification **before** pleas are entered. You cannot expect your client to enter pleas unless everyone understands the nature of the charges.

Client communication

Explain the trial process before the trial starts. The lawyer advises the client and the client instructs the lawyer. It is the client's trial.

The brief of evidence

This is also referred to as the PI bundle. It contains all the charges, witness statements, medical reports, photographs, sketch plans and record of interview.

These documents are not the evidence in the trial. These documents are the evidence **expected** to be given by the witnesses when they attend the trial. The evidence in the trial comes from the witnesses who give oral evidence in court. The evidence of a witness must be oral. Unless you consent, a written witness statement is not admissible as prosecution evidence. Exhibits such as maps and photographs are normally tendered through a witness. You need to study all this material and know every detail of the expected evidence:

- Check the dates of witness statements. If the statement was made several months after the incident, it may be unreliable as a tool for refreshing memory because the events were not fresh in the mind of the witness when the statement was made.
- Identify inconsistencies within a statement and between different witnesses. Inconsistencies in evidence can give rise to a reasonable doubt.
- Identify favourable evidence and witnesses. You may want to boost the credibility of favourable witnesses in cross-examination. During cross-examination you may need to introduce favourable evidence which the witness fails to mention during examination in chief.
- Prepare a chronology.
- Consider preparing evidence summaries or tables. Tables can help you with planning your cross-examination and are also useful in closing submissions. For example:

Witness	Who decided to destroy the hall?	Did defendant order his son to light the fire?	How was fire started?	Did defendant throw water on fire?	Other inconsistent evidence
Paul Taro	Deft told community to pull down hall	Yes	Deft gave lighter to son. Son lit roof of hall directly	Deft got bucket of water and tried to put out fire	Hall completely burnt
John Smith	Community decided to pull down hall	No mention of this in witness statement	Deft lit bamboo with match and then put bamboo to wall	No mention of deft putting out fire	Deft ordered son to throw things in church
Rose Moti	Community told deft to burn down hall	Yes.	Son struck match to paper and put paper to roof	Deft tried to put out fire	Son dismantled walling of hall

The record of interview

The prosecution will usually tender the record of interview through the interviewing police officer.

You will need to take detailed instructions from your client about the record of interview. If the record of interview helps your case, or is neutral to your case, then there is no difficulty with consenting to it being tendered.

However, if the record of interview contains admissions or other confessional material, you may need to look into the circumstances surrounding the interview and determine whether there are any grounds to challenge the admissibility of the interview. Ask your client:

- Was he or she assaulted or threatened by police?
- Was there any promise made by police in exchange for making a statement?
- Is the transcript of the interview accurate? Was everything recorded by police, or were there extra discussions not recorded?
- Was the accused in lawful custody when he or she was interviewed? For example, if the accused had been held for more than 24 hours or removed from the Correctional Centre by police, the custody may be unlawful thus making the interview inadmissible.
- Was the accused properly cautioned?

The admissibility of a record of interview is challenged by conducting a voir dire. The prosecution must prove beyond reasonable doubt that the confession was voluntary, that is, not induced by threats or inducements, and given in circumstances where the accused was aware of his or her right to silence.

If the confession was voluntary, it can still be excluded on grounds of unfairness. The accused must establish on the balance of probabilities that it would be unfair to admit the evidence.

Sometimes the record of interview will contain parts which are prejudicial or otherwise inadmissible. There may be questions about previous convictions or other irrelevant matters. These parts of the record of interview should be deleted and not put into evidence. You should be able to negotiate these types of edits with the prosecutor.

See the chapter on voir dres and confessions.

Additional material and particulars

In preparing for the trial, consider obtaining as much material as possible about the circumstances around the offence, the investigation and the arrest of the accused. You can request or subpoena the following:

- Written particulars of the charges.
- Police note book entries.

- Police station registers and diaries.
- Records of Interviews of co-accused or other suspects.
- Criminal history of witnesses.

This material can greatly assist with cross-examination.

It can also be helpful to view the crime scene before the trial. You may rely on the [Supreme Court Practice Direction for Disclosure in Criminal Cases \(23.2.00\)](#). This is saved on SALMON.

What are your client’s instructions?

Give the client a copy of the PI bundle. If the client is not a good reader, read aloud all the witness statements.

You need to get detailed instructions about each and every witness statement. One option is to ask the client to write down their story. It is important to record your client’s version of events so that you can properly put their story to the witnesses. This must be done to comply with the rule in ‘[Browne v Dunn](#)’. This rule requires you to put your client’s version of events to any witness who has a different version of those events. Failure to comply with the rule may result in an unfair trial, and lead to an appeal on grounds of negligence of trial counsel.

Sometimes your client’s instructions will be difficult to believe. You may wish to gently cross-examine the client and test their story. Is the story plausible?

It is important to give realistic advice. You can also explain the discount for a guilty plea. If the case is complex, or the client is difficult, get signed instructions.

Is there a defence?

Be aware of defences under the [Penal Code](#) such as self defence or mistake of fact. Analyse the evidence and the law to see whether the accused has a defence to the charge.

The prosecution must negative or disprove self-defence, accident and claim of right. The defence does not need to “prove” these defences. These defences must be disproved by the prosecution beyond reasonable doubt.

Even if there is no obvious defence available, the prosecution case may be weak. The evidence may not be strong enough to prove the charge. Conducting the trial in these circumstances may involve “putting the prosecution to strict proof”. This involves relying on the presumption of innocence and making the prosecution prove its case, or hopefully, fail to prove its case.

Identify the issues

Focus on the real issues. Do not get distracted by irrelevant matters. Most criminal trials focus on one or two major issues. For example, there may be an issue of consent in a sexual case. Or the issue in an

assault case may be self-defence or identification. After taking instructions from the accused and examining the evidence, identify the main issues and prepare the case based on these issues.

Preparing the defence case

Preparing the defence case requires hard work. Some of the matters to consider include:

- Is there a conflict of interest between co-accused? You cannot act for both accused if there is a conflict.
- Should the client give evidence? Remember, there is no obligation for the accused to give evidence. The accused does not need to prove anything. The trial judge is not allowed to infer guilt because the accused did not give evidence at trial. Advise your client of their choice to remain silent or to give sworn evidence. Comment on the advantages and disadvantages of each option. Sometimes the accused who gives evidence only strengthens a weak prosecution case.
- Can you put the character of the accused in issue? If you attack the bad character of prosecution witnesses, or lead good character of the accused, the prosecution can lead evidence of the bad character of the accused.
- Are there any defence witnesses? You may need to interview and summons them to court. Should the prosecution call these witnesses instead? The prosecution has a duty to call all relevant witnesses. See [R v Apostilides \(1984\) 154 CLR 563](#).
- Do you need to serve an alibi notice? Alibi defences are very rarely successful, so be very cautious about giving notice of an alibi until you have thoroughly investigated it.
- Develop a defence case theory. Why is there a reasonable doubt?
- Start preparing by drafting your closing address. This will remind you of all the items of evidence that you need to present at trial.
- Know the evidence and the applicable law.
- Seek advice from colleagues if you are unsure.

Speaking with the prosecutor before the trial

It is important to communicate with the prosecutor in the lead up to the trial. You may want to request a list of witnesses and potential exhibits. You may need clarification on charges.

It can also be useful to ask the prosecutor about the witnesses. Have the witnesses been summonsed? Have the witnesses been interviewed (conferenced) by the prosecutor?

You may want to speak with expert witnesses, such as a medical officer, before the trial. The final days before the trial is also a good time for last minute negotiations and charge bargaining.

At trial

If you are ready to proceed with the trial, and on the first day of the trial there are no prosecution witnesses at court, consider opposing adjournment applications by the prosecution. The prosecution may have to tender no evidence, and this will result in the acquittal of the accused.

Interpreter

Be aware of the role of the court interpreter. If an interpreter is used, make sure that they only act as a “translating machine”. Their role is to interpret each question and answer. The interpreter must not explain questions to the witness, or engage in a whispered conversation with the witness. As defence counsel, you may need to make sure that the court uses the interpreter appropriately. See section 121 of the [Criminal Procedure Code](#).

Voir dire

A voir dire may be required to determine the admissibility of evidence. The trial judge will hear the evidence subject to objection during the voir dire. The parties will then make submissions on the admissibility of the evidence, and the judge will make a ruling on whether the evidence is admitted in the trial or excluded from the trial. A voir dire is also called a “trial within a trial”. A voir dire can be conducted either before the trial commences or during the trial. For example, if you object to evidence given by a witness, the trial may need to be stopped for a period of time so that a voir dire can be conducted. After the voir dire is conducted, the judge will make a ruling, and then the trial can continue.

For disputed confessions, it is normal to conduct the voir dire before the trial commences. See the chapter on voir dire in this handbook.

The start of the trial - entry of plea

The charge(s) will be read to the accused. Prepare your client for this process. Explain what will happen so that the appropriate plea is entered.

Statement of presumption

The trial judge will read the presumption of innocence statement, as required by section 81 of the [Criminal Procedure Code](#).

Exclusion of witnesses

The judge should make an order that all potential witnesses leave the court room. This reduces the risk that the evidence of one witness will be influenced by the evidence of other witnesses. The accused is allowed to stay in the court room and hear the evidence of each witness.

Opening address

The prosecutor will normally make an opening address. This is not evidence. It is just a statement of what the prosecutor expects the evidence to be.

Examination in chief

The prosecutor will then call the first witness and conduct examination in chief.

Leading questions are not permitted during examination in chief, unless the evidence is not in dispute.

Listen to questions and anticipate objections. The following questions can be objected to:

- Leading questions on matters in dispute.
- Questions on matters that are not relevant.
- Questions seeking an opinion. A witness should only give evidence about what they saw and heard.
- Hearsay questions. Do not allow a witness to give evidence an out of court conversation where the other speaker in the conversation is not being called as a witness.
- Double questions.
- Questions that have already been answered.
- Questions which misquote evidence already given by a witness.
- Question which ask the witness to speculate.
- Questions which ask a witness to guess what another person was thinking or why another person did something.
- Questions asking about law or legal issues which need to be decided by the judge.

When you make an objection, stand and say “objection” or ‘I object’. Explain the reason for the objection. Note the ruling and, if it is a very important ruling ask the judge to make a written note of the nature of the objections and the ruling. This may be important for a later appeal.

The more incriminating evidence you can exclude, the better for your client. In terms of your case theory, the best evidence for the defence is ‘no evidence’. There is an old defence lawyer saying that “evidence is the enemy”.

A criminal trial is not a search for the truth. Rather, it is an attempt by the prosecution to prove the charge beyond reasonable doubt. The function of defence counsel is to challenge and test the admissible evidence, while objecting to inadmissible evidence.

Cross-examination

Cross-examination is often about matters other than what happened. Ask leading questions.

Use cross-examination to get helpful evidence from a witness. You can also use cross-examination to discredit unfavourable witnesses or evidence. Put your case to the witnesses. Do not cross-examine unless you need to.

Identify a theory or strategy for cross-examining the witness. This will depend on your instructions and defence case theory. Possible approaches include:

- Bias.
- Poor recollection/memory.
- Unable to recall surrounding details.
- Unreliable - intoxicated, age, mental illness.
- Dishonest - prior convictions.
- Evasive - minimising own role or not telling whole truth.
- Prior inconsistent statement - unreliable.
- Evidence as told by someone else, not what they observed.
- Embellished or exaggerated evidence.
- Discredit using fixed evidence (e.g. a document).
- Discredit using evidence of other witnesses.
- Do not introduce incriminating evidence through cross-examination. This is a big danger and will make the case worse for your client.
- Use leading questions.
- Do not ask one too many questions—leave the conclusion for submissions, do not get the witness to agree with your submission.
- Do not repeat the evidence in chief.

During cross-examination, you must comply with the rule in '[Browne v Dunn](#)'. Under this rule, defence counsel is required to put to each of the prosecution witnesses the accused's own case which concerns that witness. For example, if the accused has a different account of a conversation than a witness, defence counsel should put that different account to the witness. Failure to challenge the evidence of a witness will may prevent counsel making closing submissions contrary to the evidence of the witness. If you forget to put the necessary questions to the witness, the normal remedy is for the witness to be recalled and the questions put to the witness. See *Phipson on Evidence* at paragraph 12–35.

Do not put invented or made up stories to a witness in cross examination. A lawyer cross-examining a witness must not put any proposition to a witness that is either not supported by reasonable instructions or that lacks foundation by reference to credible information in the lawyer's possession [Rule 82(3) [Legal Practitioners Act – Rules of Etiquette and Conduct of Legal Practitioners Order 2011](#)].

Re-examination

The purpose of re-examination is to clarify matters raised in cross-examination. Questions must relate to a matter raised in cross-examination. New matters cannot be explored. Leading questions are not permitted.

As defence counsel, be ready to object to leading questions and questions that do not arise from cross-examination.

Agreed facts

You can agree facts and excuse witnesses if appropriate. This can save time and also reduce the issues at trial. If the statement of the witness does your case no harm, and the witness is available to give oral evidence, and you have no cross-examination, consider tendering the written statement by consent. See section 84 of the [Criminal Procedure Code](#).

Prosecution duty to call all relevant witnesses

The prosecutor has a duty to call all relevant witnesses, unless the evidence of the witness is incapable of belief.³ A prosecutor cannot refuse to call a witness for tactical reasons, or because the witness does not help the case theory of the prosecution. Refusal to call a relevant witness denies the defence the opportunity to cross-examine, and gives the prosecutor an unfair advantage of cross-examining the witness. This may result in a miscarriage of justice.

You may need to make an application to the court for the prosecutor to call a witness, or as a last resort, ask the court to call the witness under section 82 of the [Criminal Procedure Code](#).

The prosecutor must call all witnesses who gave a statement which forms part of the PI bundle, unless seven days' notice is given before the trial [section 162(2) of the [Criminal Procedure Code](#)].

³ *R v Oliva* (1965) 49 Cr. App R 298 at 309-310; *The Queen v. Russell-Jones* (1995) All ER 239; ; *R v Apostilides* (1984) 154 CLR 563

No case submission

When the prosecution closes its case, the trial judge is required to make a ruling on whether or not there is a case to answer. A ‘prima facie case’ is the same concept as ‘a case to answer’.

In [PP v. Samson Kilman & Others \[1997\] VUSC 21](#) the court approved of the following passage by Lord Cane CJ in [Reg. v. Gailbraith \(CA\) \(1981\) 1 WLR 1039](#). The relevant passage reads as follows:

1. If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty the judge should stop the case.
2. The difficulty arises where there is some evidence but it is of tenuous character, for example, because of weakness or vagueness or because it is inconsistent with other evidence.
 - (a) Where the judge concludes that the Prosecution case taken at its highest is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case.
 - (b) Where however the Prosecution is such that its strength or weakness depends on the view to be taken of a witness’s reliability or other matters which are generally speaking within the providence of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to a conclusion that the defendant is guilty then the judge should allow the matter to be tried. (Per. Lord Land CJ at p. 127).

In [Public Prosecutor v Le Blanc \[2005\] VUSC 98](#) the court said:

When a submission of no case to answer is made it can be up held, for example, when there is no evidence to prove an essential element of the alleged offence or where the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it... this is a weak, tenuous and vague prosecution based largely on speculation and there is certainly insufficient evidence to satisfy me that the matter is such as to call upon the accused to answer the allegations made against her. I find that the evidence is so manifestly deficient that no reasonable tribunal could safely convict on it.

If there is no case to answer the charge will be dismissed. If there is a case to answer, the trial will continue.

The defence case

If there is a case to answer, the trial judge will read the statement of rights to the accused, as required by section 88 of the [Criminal Procedure Code](#):

In making your defence in this trial, you are entitled, in addition to calling other persons as witnesses, to give evidence yourself on your own behalf, upon oath or affirmation and subject to cross-examination by the prosecution. However you are not obliged to give evidence and may elect instead to remain silent. If you do not choose to give evidence, this will not of itself lead to an inference of guilt

against you.

There is no requirement for an accused person to give evidence or call other witnesses. The accused has a right to remain silent.

There are many cases where there is a reasonable doubt after the accused remains silent, even after the court finds enough evidence for a case to answer. See [May v O’Sullivan \(1955\) 92 CLR 654](#):

When, at the close of the case for the prosecution, a submission is made that there is “no case to answer”, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a “case to answer” has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. A magistrate who has decided that there is a “case to answer” may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made “a prima facie case”, but it does not follow that in the absence of a “satisfactory answer” the defendant should be convicted. (at p659)

Defence counsel may choose to make an opening address [section 165 [Criminal Procedure Code](#)]. If you choose to make an opening address, keep it short and simple. Identify the main issues and give a brief summary of the expected evidence.

Should the defendant give evidence?

This can be a difficult decision. You can provide advice, but the final decision rests with the client. Ask yourself: **will the client give good evidence?** There are many cases where a weak prosecution case is made stronger by a defendant who gives poor and unconvincing evidence.

If the defendant chooses not to give evidence, defence counsel can still call other witnesses or raise matters through effective cross-examination of prosecution witnesses:

The law in this country as in many others preserves the right to silence. Whether it should be exercised calls for a careful assessment of the evidence which exists and which needs to be countered. If an accused is not going to give evidence, raising matters through other witnesses may be necessary or appropriate [[Koroka v Public Prosecutor \[2007\] VUCA 3](#)].

If you intend to call a defence witness, take a full written statement from the witness before the trial and summons the witness to court.

For defence witnesses, defence counsel conducts examination in chief, then the prosecutor can cross-examine, and afterwards defence counsel can re-examine the witness.

Counsel should not speak to a witness who is under cross-examination

Section 83 of the [Legal Practitioners Act – Rules of Etiquette and Conduct of Legal Practitioners Order 2011](#):

83 Communicating with witness during hearing

1. A lawyer must not communicate with a witness during the course of cross-examination or re-examination of that witness or between the cross-examination and the re-examination, except where good reason exists and with the consent of either the judge or the lawyers for all other parties (or, where a party is unrepresented, the consent of that party).
2. To avoid doubt, subclause (1) applies during adjournments of the hearing.

Closing address

Remember the fundamental starting points. These are the presumption of innocence and proof beyond reasonable doubt. Assist the trial judge with directions on law. The trial judge must direct him or herself on any relevant legal issues. Identify and quote evidence that supports your case. Be structured and persuasive. Focus on the real issues.

Use legal phrases to support your submissions. These may include “unsafe to convict”; “oath on oath case”; “no reason to prefer evidence of prosecution witnesses”; “suspicion but not proof beyond reasonable doubt”; “reasonable hypothesis consistent with innocence”; “if this was a civil case the evidence would be strong enough”.

Respond to the prosecution submissions.

Beyond reasonable doubt

There are some Vanuatu cases about reasonable doubt. In [Koroka v Public Prosecutor \[2007\] VUCA 3](#):

In any criminal case the crux is whether the prosecution has proved beyond reasonable doubt the essential elements of the offence. Where there is available evidence that would exonerate or limit responsibility of an accused person that means the Court must consider whether the denial or explanation might reasonably be true. If it could be, then the charge has not been proved beyond reasonable doubt.

In [Public Prosecutor v Tugu \[2012\] VUSC 128](#):

The prosecution brings the charges and the prosecution must prove them. The accused has to prove nothing at all. Indeed, the prosecution has to prove each essential element of a charge to the high criminal standard of beyond reasonable doubt before the Court can find the accused guilty of that charge.

Proof beyond reasonable doubt simply means that the Court is left sure of guilt. If the Court is not sure, if the Court is only left with a suspicion as to guilt, if the Court concluded that offence probably occurred or is more likely that not to have occurred then the response of the Court must be to find the accused not guilty.

In [Public Prosecutor v Hortial \[2004\] VUSC 27](#):

Thus, there are two competing and diametrically opposed versions. One equally as strong as the other. I have no reason to prefer one version to the other. The scale in this case is equally balanced and when that occurs the Prosecution has failed to prove the case to the standard of proof beyond reasonable doubt. The Court is not saying that the events referred to by the complainant never happened. It is saying that the Prosecution has not proved the case to the required standard.

In summary when I look at the case and the burden of proof and the principles that apply to all criminal trials I cannot be sure, having heard the evidence, of the guilt of the accused. He must as a result of that be acquitted.

See also also [Malsoklei v Public Prosecutor \[2002\] VUCA 28](#) and [PP v Sam \[2014\] VUSC 133](#).

Judgment and verdict—the judicial reasoning process

In delivering a verdict, the trial judge is required to identify the process of reasoning involved in reaching the verdict. The trial judge must explain why certain evidence is accepted or rejected. Failure to explain the analytical process may give rise to a ground of appeal. See [Picchi v Public Prosecutor \[1996\] VUCA 9](#):

What is fundamental is an isolation of the critical points, a succinct determination of any conflicts and a reasonable summation of the analytical process involved. It is a case of how and why the verdict not merely a recording of what was said.

Appeal

The accused has 14 days to appeal the verdict of guilty. An appeal may therefore need to be filed before sentence has been delivered.

Chapter 23 – Voir dires and confessions

In criminal cases, statements made by an accused against himself or herself are called “confessions”.

A confession is regarded as hearsay because it is a previous statement made “out of court”. However the law of evidence makes a confession admissible as one of the exceptions to the rule against hearsay:

It is to be remembered that any confession which arises in these circumstances is material which the Court receives as an exception to the hearsay rule. The law begins from the point that a witness cannot give evidence of what is said by another person outside of Court. The exception which is relevant is that the free will voluntary statement of a person against their interest can be received. If all those requirements are not met the evidence will not be admitted as testimony [[Tor v Public Prosecutor \[2003\] VUCA 2](#)].

At common law, a confession is only admissible if it is made freely and voluntarily.

It has long been established...that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority [[Ibrahim v R \[1914\] AC 599](#)].

The prosecution must prove beyond reasonable doubt that the confession was voluntary. *Halsbury's* 4th edition at paragraph 1543:

If objection is taken to the admissibility of a confession.....the judge must hold a trial within a trial in the absence of the jury at which he must hear evidence on the voir dire as to the circumstances in which the confession was made; and he must rule on the basis of that evidence whether or not the confession should be admitted. The prosecution has the onus of satisfying the judge beyond reasonable doubt that the confession is admissible.

In [Public Prosecutor v Naicah \[2003\] VUSC 77](#):

It is for the prosecution to show beyond reasonable doubt the statements were voluntary. It is not for the defendants to show they weren't.

A useful recent case on voir dires is [Public Prosecutor v Misipi – Reasons for Decision \[2015\] VUSC 55](#).

Oppression

A confession is not admissible if it has been obtained by oppression. Oppression was discussed in [R v](#)

[Priestly \(1965\) 51 Cr App R 1](#):

..to my mind, this word, in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary...Whether or not there is oppression in an individual case depends upon many elements. I am not going into all of them. They include such things as the length of time of any individual period of questioning, the length of

time intervening between periods of questioning, whether the accused person had been given proper refreshment or not, and the characteristics of the person who makes the statement. What may be

oppressive as regards a child, an invalid or an old man or somebody inexperienced in the ways of this world may turn out not to be oppressive when one finds that the accused person is a tough character and an experienced man of the world.

Unfairness

Where a confession was voluntary and therefore admissible, it was nevertheless liable to be excluded by the judge if obtained by improper or unfair means [See *Phipson on Evidence* 39-02, 39-03].

See also *Murphy on Evidence*, 4th Edition at page 228:

In addition to the rules governing admissibility, at common law the trial judge had power to exclude a confession, in the exercise of his discretion, where it had been obtained by means or following a breach of the Judges' Rules. The Judges' Rules were rules of conduct and procedure for the guidance of police officers and others concerned in the arrest, detention and interrogation of suspects...in *R v May* (1952) 36 Cr App R 91, Lord Goddard CJ held that the trial judge might refuse to admit a statement if a breach of the rules occurred.

The Judges' Rules

The Judges' Rules were developed in England in 1912 and updated in 1964. They are administrative directions to police about how to conduct interviews with suspects. Their status was discussed in *R v Voisin* [1918] 1 KB 531:

These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice... statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial.

There is no Court of Appeal authority on the status of these rules in Vanuatu. However the rules were applied in *Public Prosecutor v Misipi – Reasons for Decision* [2015] VUSC 55. Vanuatu police are trained to comply with the 1912 Judges' Rules, so you may want to cross-examine police during the voir dire about whether they complied with the rules. The 1912 Judges' Rules can be found at the end of this chapter. See also *Phipson on Evidence* 39–02.

Can police hold a suspect in custody for interview?

If the person is not under arrest, the police have no right to hold the person and the person is free to leave the police station at any time. A suspect who is not under arrest may choose to voluntarily participate in an interview, however defence counsel should normally advise a suspect to remain silent and not participate in an interview.

If the person is under arrest, police should interview them immediately. Again, the normal advice to a client under arrest is to remain silent in a police interview and not answer questions, or just say “no comment”.

In [Tor v Public Prosecutor \[2003\] VUCA 2](#) the Court of Appeal held that a six-hour delay in custody before the police interview was unacceptable. An overnight wait would be “intolerable”. The Court of Appeal held that the treatment of the suspect raised questions about the integrity of entire criminal justice system:

- There was a three-month delay between the offence and the arrest.
- The suspect was arrested at work in the afternoon and the interview commenced at 9pm.
- The interview went for three hours yet the transcript of the interview was only three pages.
- The suspect was cross-examined by police.
- The suspect was not allowed to tell his side of the story and called a liar by police.
- The police should have made an appointment for the suspect to attend the police station.
- The record of interview should have been tape-recorded.
- The police are required to produce a complete record of everything said during the interview.
- The suspect was given no food.

The Court of Appeal said:

All the evidence establishes that the interview process went on for 3 hours. The record of it is less than 3 pages of handwriting. Mr. Tor is insistent that he was not allowed to tell his story but was required to respond only to questions put to him by the police officers. After 3 hours of discussion we would expect that there would be many many pages of record. What the Court must have available is the total interchange which takes place between the suspect and the police not merely those parts which the police think it would convenient for the Court to see.

It is beyond our comprehension why in 2003 when people are to be interviewed there is not a tape recording made of everything that is said by every person who is involved. In that way the Court can have evidence about which it can have a degree of confidence. It will disclose exactly what was being said and how it was said....

Mr. Tor’s evidence was strong and insistent that he was not allowed to tell his story. He said he was consistently told he had to answer the questions of the police. The fact that is how the police do things is confirmed in a submission from the State. It is quite wrong. Interviews in these circumstances are not opportunities for police to cross examine people. It is an opportunity for the police to facilitate the accused telling their side of the story if that is what they want to do. There is no question that the proper caution was given to Mr. Tor but the giving of a caution is not a licence for police to question and control suspects in any way they choose.

The police have no power to remove a person from a Correctional Centre for the purpose of conducting an interview. See [Tunat v Public Prosecutor \[2014\] VUCA 36](#).

How to challenge the admissibility of a confession—the voir dire

Defence counsel can challenge the admissibility of a confession by conducting a voir dire. A voir dire is a ‘trial within a trial’.

The truth of the confession is not relevant to its admissibility. The issue is not whether the confession is true, but whether it was given voluntarily, or whether it was obtained unfairly. During the voir dire, the court should not look at whether or not the confession was true, and you should object to any questions about the truth of the confession.

So there are two main grounds for challenging the admissibility of a confession:

1. That the confession was not voluntary. The prosecution must prove beyond reasonable doubt that the confession was voluntary.
2. That the confession was obtained by improper or unfair means. For example, a breach of the Judges’ Rules. The defendant must establish the unfairness on the balance of probabilities. The court must exercise discretion in deciding whether or not to exclude the evidence.

Step 1: Get instructions from the client about the circumstances of the interview

Get instructions from the client about the statement or interview given to police. Are there any grounds to challenge the admissibility of the statement? Possible questions include:

- What happened from the time of the arrest until the end of the interview.
- Were any threats or promises made by police.
- Was the caution given? Did they understand the caution? Did the police use the proper words in the caution? The proper caution is:

“Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.”
- Check the interview transcript. Is it signed? Was there a witnessing officer at the interview?
- Does the transcript of interview include the total interchange with the police, or were things said in the interview that were not recorded in the transcript?
- Can the accused read and write?
- Was the statement or interview transcript read back to them before they signed it?

- Did the accused ask for a lawyer at the interview?
- Was the accused lawfully arrested? Was he or she held in lawful custody? Was it a cognisable offence?
- Was the accused detained for an unreasonable length of time?
- Was the accused given food and water?
- Did the police follow their own guidelines for conducting interviews? See the police guidelines.
- Was there oppression?
- If the accused was a juvenile, was a parent or guardian present during the interview?
- Was the accused removed from the Correctional Centre for a police interview?

Step 2: Advise the prosecutor that you will be challenging the admissibility of the confession

Write a brief letter to the prosecutor advising that you will be challenging the admissibility of the police interview on grounds of voluntariness and/or fairness. Advise that you will seek a voir dire before the commencement of the trial. Advise that you will ask the judge to rule on the admissibility of the evidence. Tell the prosecutor that you require relevant witnesses to attend the voir dire, including interviewing and/or arresting police (exactly who is a relevant witness will depend on your instructions).

Request a copy of:

1. The watch house register with full details of the prisoner's time in police custody, including meals, movements, injuries, visitors and relevant times.
2. Police note book entries of interviewing police officers
3. Any other notes or documents relating to the arrest, custody and interview of the client.

These documents should be disclosed as a matter of fairness. If the case was a civil matter, disclosure would be compulsory under the [Civil Procedure Rules](#) [Rule 8.2]. The same requirement for disclosure should apply in criminal matters. You may rely on the [Supreme Court Practice Direction for Disclosure in Criminal Cases \(23.2.00\)](#). This is saved on SALMON. If not disclosed, file and serve a summons for production of documents on the Commissioner of Police under section 76 of the [Criminal Procedure Code](#)

Step 3: Advise the court that you are challenging the admissibility of the confession and request a voir dire

Tell the court that you are challenging the admissibility of the confession. Propose that a voir dire be conducted before the trial commences. You can tell the court this at a pre-trial conference, or at the start of the trial. You may need to provide some brief information about the reasons for your challenge.

Step 4: Conduct the voir dire before the trial commences

Because the defendant has a right to give evidence on the voir dire and also a right to remain silent during the trial, the voir dire should be conducted before the trial commences. This way the defendant can make an informed decision about whether or not to give evidence at trial at the end of the prosecution case. The defendant cannot give evidence in the defence case at trial without knowing whether his confession is admitted or excluded. It is not practical for the admissibility of the confession to be determined half way through a trial, as the parties will get confused about whether evidence is being given for the voir dire or in the trial proper. So the voir dire should be conducted before the trial proper commences.

During the voir dire, the prosecution will call the relevant witnesses and conduct examination in chief. This will normally include the police officers who conducted the interview. You may also ask for the arresting police officers to give evidence.

It is normal for the record of interview to be tendered for the purpose of the voir dire. The judge will therefore read the admissions and then later be required to determine whether they should be admitted at trial.

Defence counsel will then cross-examine each witness after they have given their evidence in chief. Defence counsel should comply with the rule in '[Browne v Dunn](#)' and put the case of the defendant relevant to the voir dire to each witness. For example, you may need to put that the police assaulted the defendant.

After the prosecution case on the voir dire is closed, the defendant may give evidence on the voir dire [[R v Cowell \[1940\] 2 KB 49](#)]. It is normal for the defendant to give evidence about the circumstances of the interview and, if relevant, the arrest. In doing so, the defendant is not obliged to testify as to any matters concerning the circumstances of the alleged offence itself [[Wong Kam-Ming v R \[1980\] AC 247](#)]. The defendant should not be cross-examined or asked about the truth of the confession.

Admissions made by the defendant during the voir dire cannot be used against him at trial [[R v Brophy \[1982\] AC 476](#)].

Defence witnesses can also be called during the voir dire. For example, a person may have witnessed an assault by the police.

Step 5: After the voir dire

If the challenge to the admissibility of the confession succeeds, the trial continues without the evidence of the confession. If the accused gives evidence in the trial, he cannot be cross-examined about the contents of the police interview. The interview cannot be used as a prior inconsistent statement, because the judge has ruled the interview to be inadmissible.

If the challenge to the admissibility of the confession fails, the confession will be put into evidence

by the prosecutor during the trial. Defence counsel is entitled to cross-examine again the witnesses who gave evidence on the voir dire.

What if the confession is admitted into evidence but remains disputed by the defendant?

The judge should warn himself or herself that it is dangerous to convict the accused where the only substantial evidence is a disputed confession.

The following passage from the High Court of Australia case of [McKinney v R \(1991\) 171 CLR 468](#) may be helpful:

19. The contest established by a challenge to police evidence of confessional statements allegedly made by an accused while in police custody is not one that is evenly balanced. A heavy practical burden is involved in raising a reasonable doubt as to the truthfulness of police evidence of confessional statements, for, in the circumstances which invariably attend that evidence, a reasonable doubt entails that there be a reasonable possibility that police witnesses perjured themselves and conspired to that end. And, as is made clear in Wright (at p 317) and Carr (at pp 337-338), the contest is one which may entail other forensic constraints or disadvantages. Thus, the jury should be informed that it is comparatively more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to police evidence of confessional statements than it is for such police evidence to be fabricated, and, accordingly, it is necessary that they be instructed, as indicated by Deane J. in Carr, at p 335, that they should give careful consideration as to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding that guilt has been established beyond reasonable doubt is a confessional statement allegedly made whilst in police custody, the making of which is not reliably corroborated. Within the context of this warning it will ordinarily be necessary to emphasize the need for careful scrutiny of the evidence and to direct attention to the fact that police witnesses are often practised witnesses and it is not an easy matter to determine whether a practised witness is telling the truth. And, of course, the trial judge's duty to ensure that the defence case is fairly and accurately put will require that, within the same context, attention be drawn to those matters which bring the reliability of the confessional evidence into question.

See also the dissenting judgment of Kirby J from the Solomon Islands case of [Osifelo v R \[1995\] SBCA 11](#).

THE JUDGES' RULES 1912–1918

One - When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

Two - Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be.

Three - Persons in custody should not be questioned without the usual caution being first administered.

Four - If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words "be given in evidence".

Five - The caution to be administered to a prisoner when he is formally charged should therefore be in the following words:

"Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence."

Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

Six - A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.

Seven - A prisoner making a voluntary statement must not be cross examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

Eight - When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

Nine - Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

Chapter 24 – Mental health

Some criminal clients suffer from mental health problems. Dealing with a client who has mental health issues can require considerable patience and effort. You may need to adjourn a matter to obtain a medical report. Advise the court of the mental health issue and hopefully the court will be understanding of the potential difficulties in dealing with the case.

Identifying that your client may have a mental health problem

Recognising signs of mental illness can be difficult. In more obvious cases, your client may have difficulty understanding and responding to you. This can sometimes be only a language problem. However it can also be evidence of a mental illness or other mental health condition. Inappropriate laughter, talking to oneself, hearing of voices and expression of delusions are also possible signs of mental illness.

Try to obtain as much information as possible about any mental condition. Options include:

- Ask your client if he or she has a mental health condition.
- Ask your client if he or she has ever been admitted to a hospital for mental health problems.
- Ask your client if he or she takes medication currently, or has taken medication in the past for a mental health condition.
- Try to contact relatives of your client and ask them about your client.
- Speak to the prosecutor to see if there is any suggestion of mental health issues on their file.
- Search for previous closed PSO files of the client.
- Contact the medical records section at the Vila Central Hospital and ask if they are aware of your client. The hospital may be reluctant to release information without a signed medical authority form (see the end of this chapter).
- Contact Correctional Services and ask if they have information relating to the mental health of your client.

The relevance of a mental illness or mental condition

See the flow charts at the end of this chapter.

Minor charges

If your client appears to have a mental illness or condition, and the charges are minor, consider adjourning the case and writing to the prosecution seeking withdrawal of the charges. It is not in the public interest to use limited resources prosecuting mentally ill persons for minor offences. Explain the

nature of the illness and provide evidence, such as a medical report or contact details of a relative of your client.

If your client is facing minor charges and is present at the Magistrates Court, feel free to invite the prosecutor to talk with your client. If it is clear to the prosecutor that your client is ill, stand the matter in the list and invite the prosecutor to seek instructions for the withdrawal of the charges.

Also, make efforts to contact family of the client so that the client is not released into a situation where the client, or the public, are not safe.

Mentally ill at the time of the offence

For serious charges, a person who was mentally ill at the time of the offence may have a defence of ‘insanity’, as defined in section 20 of the [Penal Code](#). If a person is found not guilty by reason of insanity, he or she may be confined either in custody, or in a specified health institution for up to five years [sections 58ZE and 58ZF of the [Penal Code](#) and section 92 [Criminal Procedure Code](#)].

A person may not be insane at the time of the offence, but may be found to have been suffering from diminished responsibility because of an abnormality of mind that falls short of insanity. The court can make a custody or treatment order that is appropriate. Any punishment must be mitigated because of the diminished responsibility.

Mentally ill at the time of trial - fitness to plead

If the client is suffering from a serious mental illness, he or she may be unfit to plead.

A person who was mentally ill at the time of the offence may either be ‘fit to plead’ or ‘unfit to plead’ at the time of trial.

The test of fitness to plead is outlined in [Public Prosecutor v Raymond \[2014\] VUSC 150](#), where the Chief Justice followed the cases of [R v Presser \[1958\] VR 45](#), [R v Pritchard \(1836\) 173 ER 135](#), and [Kesavarajah v The Queen \(1994\) 181 CLR 230](#).

To be ‘fit to plead’, a person must be able to:

1. Understand the nature of the charge.
2. Plead to the charge and exercise the right of challenge (challenge refers only to jury trials).
3. Understand the nature of the proceedings, namely that, that it is an inquiry as to whether the accused committed the offence charged.
4. Follow the course of the proceedings.
5. Understand the substantial effect of any evidence that may be given in support of the prosecution.
6. Make a defence or answer the charge.

Getting a medical report about fitness to plead or insanity.

Get a medical report addressing the issue of fitness to plead before any plea is entered.

Ideally, request a psychiatric report from a doctor so that ‘client lawyer’ privilege is preserved if the report does not assist your client’s case. If you request the report, the contents of the report are privileged until you decide to release the report to the court and the prosecution, if that course of action is in the best interests of your client. Once you receive the report, decide whether it is in your client’s interests to use the report in court. If the report does not assist your client, keep the report on file and do not release it to the prosecution or court. That is the right of your client and your duty as his or her lawyer.

However if the court requests the report, then there is no ‘lawyer client’ privilege attached to the report. This can become relevant if the accused makes admissions to the doctor about the charges, or if the report does not help your client’s case.

Another relevant factor is that the court can order the accused to be detained in a hospital for up to one month for a report to be prepared [section 91 [Penal Code](#)]. A shorter period of time may be adequate, and you may submit that there is no need for any confinement for a report to be prepared. Fortunately there is one doctor with psychiatric training (Dr Obed) currently working in Vanuatu.

Raise the issues of mental illness and/or insanity at the plea date before any plea is entered, and at a conference before any trial is listed. A **sample section 91 application** can be found at the end of this chapter.

Provide the doctor who is preparing the report with a copy of any medical records, charges, witness statements, record of interview and prosecution facts. Also direct the doctor to the relevant legal test for insanity or fitness to plead.

If your client is found to be unfit to plead, then a Guardianship Order is made [section 13 [Penal Code](#)]. If your client is found to be fit to plead, then he or she will stand trial.

Relevant legislation includes section 91 and 92 of the [Criminal Procedure Code](#) and sections 13, 20, 24, 25, 58ZE, 58ZF of the [Penal Code](#).

Relevant Case Law includes [Public Prosecutor v Raymond \[2014\] VUSC 150](#); [Public Prosecutor v Tamata \[2010\] VUCA 26](#); [Public Prosecutor v Sablan \[2003\] VUSC 37](#); and [Tamal v Public Prosecutor \[1982\] VUSC 6](#).

Mental health and sentencing

If your client is suffering from a mental illness or mental condition, either at the time of the offence or the time of sentence, or both, this may be a relevant factor on sentence.

The moral culpability of your client may be diminished by reason of their mental illness or mental condition. The blameworthiness of your client will be less than that of a person without a mental condition.

A defendant with a mental illness should not be used as an example to others for principles of general deterrence. There is no point in a court imposing a harsh sentence on your client for the purpose of deterring other ‘like minded’ persons; that is, other persons with the same or similar mental condition. The nature of mental illness is such that deterrence will have little or no impact on their behaviour.

However, a court may have to give more consideration to the protection of the community as a principle of sentencing. This would particularly apply to a mentally ill person who is a repeat serious offender, especially for violence, and whose behaviour is difficult to control.

There are strong reasons for not sending mentally ill persons to prison. Prisons should not be used as ‘de-facto’ mental institutions. A prison environment could further harm a person’s already fragile mental state.

What to do if your client threatens self-harm or suicide

If your client threatens harm while in custody, immediately inform the Director of Correctional Services, both verbally and in writing. If your client is appearing in court in custody, mention your concerns to the magistrate or judge and indicate that your client has threatened self-harm.

If your client is on bail, refer them to the hospital. Also contact a relative and advise them of the situation. Make an immediate file note, recording what your client said, and your actions in response.

Your mental health

Working as a lawyer at the PSO can be a stressful and difficult job. The workload is high. The pay, in relative terms, is low. Rarely will you be thanked or recognised for your efforts. The job involves dealing with the liberty of clients. Your client may be facing the prospect of spending the rest of his or her life in prison.

You are required, on a daily basis, to confront prosecutors, judicial officers and witnesses, and explain matters on behalf of your clients. The subject matter of the crimes of your clients can be very distressing and harrowing. It is therefore normal for lawyers at the PSO to suffer from stress, burn-out and general feelings of frustration, even disillusionment.

You need to be aware of this possibility and be ready to deal with these feelings as they arise. Some advice for preventing and dealing with these issues include:

- You can only do your best. Nobody is the perfect lawyer.
- Take regular leave. Taking a couple of weeks leave two or three times a year allows for you to completely forget about work and relax.
- Stay fit and healthy. Eat enough healthy food. Get enough sleep.
- Learn to switch off from work at the end of the day. Pursue other interests, with family or hobbies.

- Talk to your supervisor if you are feeling stressed.
- Offer to help out other lawyers when they appear stressed.
- Work as a team so that other lawyers do not resent having to do work that should be yours.
- If a particular file or client is causing you too much stress, talk to your supervisor and discuss options for reallocation.
- Ask for help from family or medical professional if things are getting too difficult.

FITNESS TO PLEAD FLOW CHART

IS THE ACCUSED FIT TO PLEAD? s 91 CPC

Fitness to plead = fitness to stand trial = capable of making his defence.

Court must look at mental state of accused at time of trial or PI.

To be fit to plead, a person must be able to: [*Kesavarajah v The Queen* (1994) 181 CLR 230]

1. Understand the nature of the charge.
2. Plead to the charge
3. Understand the nature of proceedings, i.e., that it is an inquiry as to whether the accused committed the offence.
4. Follow the course of proceedings.
5. Understand the evidence.
6. Make a defence or answer the charge.

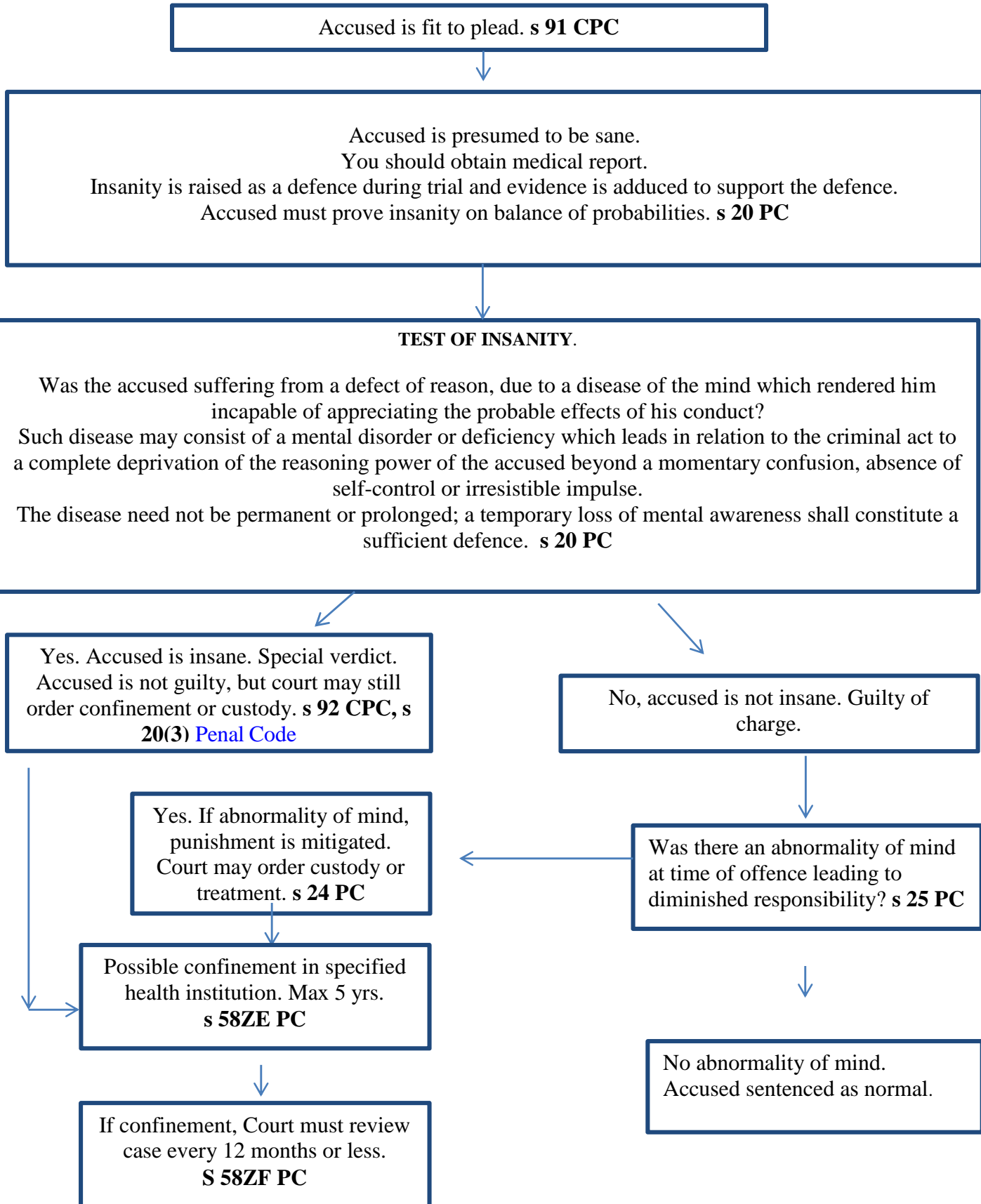
Court orders accused to be detained in hospital for a report for up to a month.
s91 CPC

If unfit to plead, then a Guardianship Order is made.
s13 [Penal Code](#)

If fit to plead, the accused stands trial.

Was accused insane at time of offence?
See insanity flow chart

INSANITY FLOW CHART



SAMPLE SECTION 91 APPLICATION

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Criminal Jurisdiction)**

Criminal Case No. of 2014

PUBLIC PROSECUTOR

V

JOHN TAWI

APPLICATION FOR AN ENQUIRY INTO FITNESS TO STAND TRIAL

The defence applies for orders:

1. That the court undertake an enquiry into the fitness of the accused to stand trial pursuant to section 91(1) of the [Criminal Procedure Code](#).
2. That the accused be detained in a hospital for medical observation and for a medical report to be prepared for the court.
3. That upon presentation of the medical report, the court declare the accused to be unfit to stand trial.
4. That the court make an order to postpone further proceedings in this case pursuant to section 91 (2) of the [Criminal Procedure Code](#).
5. That the court deal with the accused under the relevant provisions of the [Penal Code](#), as required by section 91 (3) of the [Criminal Procedure Code](#).
6. That the court makes an order for the accused to be placed under guardianship by virtue of section 13 of the [Penal Code](#).

On the grounds that:

1. That the accused is deaf and mute. He cannot speak. He cannot hear. He cannot read or write. He cannot communicate by any type of formal sign language. He is unable to conduct a defence to the charge. This renders him unfit to be put on trial.

“In *Reg. v. Presser*, Smith J. elaborated the minimum standards with which an accused must comply before he or she can be tried without unfairness or injustice. Those standards, which are based on the well-known explanation given by Alderson B. to the jury in *R. v. Pritchard*, require the ability (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge. (Citations omitted)” [*Kesavarajah v The Queen* (1994) 181 CLR 230 at paragraph 31, cited in *R v Abdulla* [2005] SASC 399 (21 October 2005)]

2. That although the accused can understand some very basic informal sign language, he is unable to communicate accurately his story to his lawyer or to the court.

To be fit to stand trial, the accused must have the capacity to communicate specific and detailed information. A general capacity to communicate on ordinary matters is not sufficient to be fit to stand trial.

R v Pritchard [1836] EngR 540

3. That the accused, by the provisions of section 5(2)(a) of the Constitution, has a constitutional right to a fair hearing.

“Fundamental rights and freedoms of the individual

(2) Protection of the law shall include the following –

- (a) everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence;
- (b) everyone is presumed innocent until a court establishes his guilt according to law;
- (c) everyone charged shall be informed promptly in a language he understands of the offence with which he is being charged;
- (d) if an accused does not understand the language to be used in the proceedings he shall be provided with an interpreter throughout the proceedings;”

4. The accused is not able to properly understand the proceedings.
5. The accused cannot understand the evidence.
6. The accused is not able to communicate his story. He cannot give evidence.

DATED THIS DAY 2nd SEPTEMBER 2014.

.....
Francis Tasso
Counsel for the Defendant
For and on behalf of the
PUBLIC SOLICITOR

SAMPLE LETTER SEEKING MENTAL HEALTH REPORT

Dr Jimmy Obed
Psychiatrist
DEPARTMENT OF HEALTH
VANUATU

Dear Dr Obed,

Re: Request for psychiatric report on Johnny Tawi

This office acts for Mr Tawi in relation to his criminal charges. He is currently in custody at Luganville Correctional Centre. His court cases have been adjourned for this office to obtain a psychiatric report. We would be grateful if you could assess Mr Tawi and provide a report on the three issues outlined below. The report will be protected by lawyer client confidentiality, and should therefore be provided to this office but not to the Court.

Please find attached a copy of a mental statement examination by Dr Vurobaravu dated 12 January 2015. We have also attached the alleged facts for each set of charges faced by Mr Tawi. The most serious case involves an allegation of sexual intercourse without consent on 4 January 2015, some 8 days before the mental state examination.

1. Fitness to plead

Please provide an opinion on whether or not Mr Tawi is currently fit to plead.

In *R v Presser* [1958] VR 45, the Court explained the concept of fitness to plead:

[The accused needs] to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in the court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.

To be fit to plead, a person must be able to⁴:

1. Understand the nature of the charge.
2. Plead to the charge
3. Understand the nature of proceedings, ie, that it is an inquiry as to whether the accused committed the offence.
4. Follow the course of proceedings.
5. Understand the evidence.

⁴ *Kesavarajah v The Queen* (1994) 181 CLR 230

6. Make a defence or answer the charge.

2. Defence of insanity

Section 20(2) of the Penal Code sets out the test of insanity:

(2) It shall be a defence to a criminal charge that the accused was at the time in question suffering from a defect of reason, due to a disease of the mind which rendered him incapable of appreciating the probable effects of his conduct. Such disease may consist of a mental disorder or deficiency which leads in relation to the criminal act to a complete deprivation of the reasoning power of the accused beyond a momentary confusion, absence of self-control or irresistible impulse. Any mental disorder which has manifested itself in violence and is prone to recur is sufficient. The disease need not be permanent or prolonged; a temporary loss of mental awareness shall constitute a sufficient defence.

English common law provides:

“to establish a defence on the grounds of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.”⁵

Please provide an opinion on whether Mr Tawi was insane at the time of the offences.

Was he suffering from a defect of reason, due to a disease of the mind which rendered him incapable of appreciating the probable effects of his conduct?

We ask that you examine the circumstances surrounding each offence separately and provide a separate opinion in relation to each individual offence.

3. Diminished responsibility.

If Mr Tawi was not insane at the time of an offence, the Court may still consider whether or not he was suffering from diminished responsibility. However, if Mr Tawi was insane at the time of an offence, the issue of diminished responsibility does not arise.

Section 25 of the Penal Code provides:

25. Failure of plea of insanity

(1) If a plea of insanity fails, it shall be open to the court to find the accused guilty of the charge. The court may decide that the accused, although not insane within the meaning of section 20, was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind or any inherent cause or induced by disease or injury, as diminished his responsibility for his acts.

If insanity does not apply to Mr Tawi, please provide an opinion on diminished responsibility.

Was Mr Tawi suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind or any inherent cause or induced by disease or injury, which diminished his responsibility for his acts?

⁵ M’Naghten’s Case (1843) 10 CL&F 200

This case is next listed for the Supreme Court on....

We would be grateful if you could provide a report as soon as possible.

Please feel free to contact me to discuss this request.

Yours faithfully

Name of Lawyer

AUTHORITY TO RELEASE MEDICAL INFORMATION

TO: NAME OF HOSPITAL OR DOCTOR OR OTHER AGENCY

I, [insert NAME OF CLIENT], [Insert DATE OF BIRTH], hereby authorise [insert NAME OF LAWYER], my legal practitioner from the Public Solicitor's Office, to obtain copies and originals of all records, reports, notes and other documents relating to my medical conditions.

Signed _____

Witness _____

Date _____

PART 4
CIVIL LAW

Chapter 25 – Working in the civil jurisdiction

A civil matter is any matter that is not a criminal matter. Criminal matters are initiated by the police or the Public Prosecutor's Office. Civil matters are commenced by a claimant. The majority of PSO clients in civil matters are claimants.

The courts in the civil jurisdiction are the same as the courts in the criminal jurisdiction.⁶

The jurisdiction of the courts is defined by the amount of the claim. PSO lawyers should be familiar with the [Judicial Services and Courts Act](#).

The Island Courts

PSO lawyers do not appear on behalf of clients in the Island Courts.

Section 27 of the [Island Courts Act](#) states:

No legal practitioner shall be entitled to take any part in the proceedings of an island court.

The maximum amount an Island Court can award in the exercise of its civil jurisdiction is VT50,000 [section 12], although it does have the power to order compensation, costs and restitution of property [section 13].

There is a right of appeal to the Magistrates' Court. Appeals must be lodged within 30 days, however this can be extended if the extension of time application is lodged within 60 days of the Island Court decision.

The [Island Courts \(Civil Procedure\) Rules 2005](#) can be found on PACLII.

Island Courts no longer have jurisdiction to hear disputes relating to ownership of customary land [section 22]. Customary land disputes are heard in the Customary Lands Tribunal.

The Magistrates' Court

The [Magistrates' Court \(Civil Jurisdiction\) Act](#) sets the limits for the Magistrates' Court's

⁶ For more information on the court system in Vanuatu see Jennifer Corrin-Care, Tess Newton and Don Paterson *Introduction to South Pacific Law* (Cavendish Publishing Ltd, London, 1999) 323-328.

jurisdiction. The court has jurisdiction in civil matters in claims in which the amount claimed or the value of the subject matter does not exceed VT1,000,000. Where the dispute is between a landlord and tenant, the limit is VT2,000,000.

The court also has jurisdiction in uncontested divorce applications and claims for spousal or child maintenance where the amount claimed does not exceed VT1,200,000. However claims relating to the custody, guardianship or adoption of children must be brought in the Supreme Court.

Matters involving wills, bankruptcy, insolvency and liquidation of corporate bodies must also be brought in the Supreme Court.

The time limit for a Civil Appeal from the Magistrates' Court to the Supreme Court is 28 days [Rule 16.28(1) of Part 16 of [Civil Procedure Rules](#)].

The Supreme Court

The Supreme Court has “unlimited jurisdiction throughout Vanuatu to hear and determine any civil or criminal proceedings in Vanuatu, including matters of custom” [section 28 (1)(a) [Judicial Services and Courts Act](#)].

The Supreme Court can hear appeals from the Magistrates' Court.

The Supreme Court is the final court of appeal for the determination of questions of fact which arise in the Magistrates' Court. However, an appeal lies to the Court of Appeal from the Supreme Court on a question of law if the Court of Appeal grants leave [section 30(4) [Judicial Services and Courts Act](#)].

The Court of Appeal

The Court of Appeal has jurisdiction to hear and determine appeals from judgments of the Supreme Court [sections 45–48 [Judicial Services and Courts Act](#)]. The Court of Appeal can hear fresh evidence.

Rules of procedure in the Supreme Court and Magistrates' Court

The [Civil Procedure Rules](#) commenced on 31 January 2003. They apply to civil matters in the Magistrates' Court and Supreme Court. [Jenshels' Annotated Civil Procedure Rules](#) sets out the rules and also provides a helpful commentary. PSO lawyers should have their own copy of the [Civil Procedure Rules](#).

The intention of the rules is to enable the courts to deal with cases justly. The rules aim to ensure a fair and efficient process for both parties.

It is very important to be familiar with the rules as they govern what is required of the parties to civil proceedings, the procedures and forms to be used, and when and how certain steps in the proceedings must be taken.

Rules of procedure in the Court of Appeal

The [Court of Appeal Rules](#) are formerly known as “The Western Pacific (Courts) Order In Council 1961, Court of Appeal Rules 1973”.

They provide separately for appeals in civil and criminal matters as well as appeals from the Supreme Court, exercising its appellate jurisdiction.

Chapter 26 – Civil claims against the Government

PSO lawyers should be familiar with the section 6 of the [Government Proceedings Act \(2007\)](#) (now called [State Proceedings Act](#)) and the amendments contained in the [Government Proceedings Amendment Act \(2010\)](#).

Section 6 of the [State Proceedings Act](#) states:

6 Notification of intention to institute proceedings

1. No proceeding against the State, other than an urgent proceeding or a Constitutional proceeding, may be instituted under section 3 unless the party intending to do so first gives written notice to the State Law Office of such intention.
2. The notice under subsection (1) must:
 - (a) include reasonable particulars of the factual circumstances upon which the proposed proceedings will be based; and
 - (b) be given not less than 14 days and no more than 6 months prior to the institution of proceedings.

A notice must therefore be sent to the State Law Office in all matters involving claims against government departments or other government agencies. The notice must be sent at least 14 days before you file a claim.

SAMPLE SECTION 6 NOTICE

Attorney General
State Law Office
PORT VILA

NOTICE TO START PROCEEDINGS AGAINST THE REPUBLIC OF VANUATU

We refer to the above matter pursuant to the State Proceedings Act. We are putting you on notice that we intend to challenge by way of Judicial Review the decision of Public Service Commissioner to terminate Mr Bill Tawi of the Department of Customs and Inland Revenue.

We will challenge the process of termination. From our view the Public Service Commission process was illegal and unjust. The procedures used to terminate Mr. Tawi were unlawful.

Should there be any queries, please contact Mr Brian Livo of this Office.

Yours faithfully,

PUBLIC SOLICITOR

Chapter 27 – Stages of a civil case

The following is only intended as a rough guide to conducting a civil matter from start to finish.⁷ The “rules” referred to in this chapter are the [Civil Procedure Rules](#).

Taking instructions: What is the client’s claim and what are the elements of that claim?

It is important when seeing the client for the first time to try and ascertain what kind of claim they may have, if any. Consider, while taking instructions, the basic elements of that claim. During the client interview, identify the facts you will need to prove in court if you are to establish the claim.

In some cases you will not be able to identify straight away the nature of the claim. Don’t worry. This happens to everyone. It may just be that the client’s complaint does not give rise to a legal claim at all.

In those circumstances it is best to get as much information as you can from the client, then take the time to think about the case and discuss with colleagues. There is no shame in telling a client that you need to think about what they have told you, or to research the issues they have raised.

However, always make another appointment for them to come back to see you. By doing this the client will know that he/she is going to get an answer and it will force you to deal with the issue by a particular date.

What is the evidence and where will it come from?

You must then determine what evidence the client can provide to help prove those elements and where else that evidence may need to come from. Whether each of the elements of the claim can be proven will have a strong bearing on whether the claim is worth litigating. Tell the client if the case has no merit.

⁷ Parts of this Chapter have been taken directly from the very useful CLE paper “Stages of a Civil Proceeding”, prepared by Ms Viran Trief Molisa, Solicitor General of Vanuatu, presented on 24 April 2014. Flow charts have been taken from “[Jenshels’ Annotated Civil Procedure Rules](#)”.

Sending the first letter to the other side

Once you have the basic facts and are satisfied that, if proven, those facts could establish the claim, the next step is to send a letter to the other party alerting them to the nature of your client's claim. This is called a "letter of demand" or "letter before action".

This letter does not need to set out each element of the claim. Rather, it should bring to the person's attention facts which demonstrate that your client has a strong claim, and unless that claim is properly addressed, it is likely to end up in court.

The letter should provide some sort of time limit for a response, and indicate that failure to respond will result in commencement of court proceedings. Also indicate that in the event of successful court proceedings, you will seek an order that legal costs be paid by the other side.

Settlement negotiations

Vanuatu has a strong culture of resolving disputes within the community. This should always be the first option for resolving civil disputes. Filing a court claim should be the last option for a client. Make sure that every effort has been made to resolve a dispute by way of negotiation and mediation before you consider commencing legal proceedings.

Legal proceedings can take a long time. One party will lose, and that could be your client. Legal proceedings can also be costly and stressful. Most significantly, legal proceedings are not aimed at healing or resolving the problems between the parties in a way that makes life easier for both parties. Legal proceedings are adversarial. This involves a contest between the parties. Explain this to your client. Legal proceedings may not be in the best interests of your client.

Often the initial letter will lead to a response opening up some dialogue about possible settlement. However remember that if you are ever discussing settlement or writing letters proposing some form of settlement, always ensure the conversations or the letters are "**Without Prejudice**". The purpose of this is to make sure that admissions made in these letters are not used as evidence against your client in later court proceedings. Admissions of fact made during genuine efforts to negotiate a settlement are privileged.

If no settlement

It is essential therefore that if you write a strong letter of demand you must be prepared to take the next step of issuing proceedings and to do so without delay.

If you don't follow up with proceedings, you will soon develop a reputation for going no further than a letter of demand. Ultimately this will mean that letters of demand from you are ignored and are therefore a waste of time—both yours and the client's. You will thereby lose a useful tool in avoiding unnecessary litigation.

One of the most important things to remember about being a litigation lawyer is to establish a **reputation for getting things done**. In that way people on the other side of a claim will start to assume a number of things about you that work in your client's favour and they may give you the benefit of the doubt if they are assessing whether you will be able to prove your client's case.

A lawyer that is renowned for not pressing litigation will always have to work so much harder to settle a case.

Start the proceedings

If you have been unsuccessful in trying to resolve the claim at this stage it is **essential** you **do not delay** in drafting and filing the proceedings.

The reasons for this are:

1. a claim may become time-barred under the [Limitation Act](#) if proceedings are not commenced within a prescribed period—see the chapter on the [Limitation Act](#).
2. to keep the pressure on the other side—to show them you mean business. The more time and money that they have to spend in a short period of time the more likely that they may consider settlement as an attractive option.

Pleading the claim—statement of the case

The pleading of the claim is dealt with in more detail in a separate chapter.

A proceeding is started by filing a claim [Rule 2.2]. A statement of the case is set out in a claim, a defence or a reply [Rule 4.1(1)].

The purpose of statements of the case is set out the facts (as each party sees them), and show the areas of agreement and disagreement [Rule 4.1(2)]. Do not plead law or evidence, just the facts.

The pleadings establish the “issues between the parties” that need to be decided by the court

[Rule 4.1(2)(c)].

Notice of acting as a lawyer

You must file a notice (Form 35) once you begin to act for a party and once you cease to act for a party [Rule 18.8].

Urgency

If your claim is urgent you must state the urgency in the claim and advise the court staff in writing of the urgency at the time the claim is filed [Rule 18.2].

Discovery

The other main procedural matter at this stage is discovery.

Although rarely an issue in personal injury claims, it is usually a part of commercial claims for breach of contract.

Discovery is the process where each side provides to the other side all of the documents in its “possession, custody or control” which are relevant to the issues in dispute.

In the Supreme Court, a party must disclose all documents which it seeks to rely on and all documents which will help the other party’s case [Rule 8.2(1)]. The duty of disclosure is continuous [Rule 8.8]. Discovery is done by way of sworn statement with a “list of documents”.

Documents which are properly the subject of claims of privilege do not have to be disclosed [Rule 8.2(1)].

You can apply for an order for disclosure before proceedings have started, that is before you have filed a claim [Rule 8.13(1)].

Written questions can be sent to the other party. These are called “interrogatories” [Rule 8.19].

In the Magistrates’ Court, a party must disclose all documents it seeks to rely on at trial. A party can seek an order for disclosure of particular documents [Rule 8.28].

In all cases, advise your client of the obligation to disclose documents.

Discovery’s importance is that it helps to prevent ambushing and ensures all documents

held by either party which may be relevant are available to the court and to the parties. There will be times when you will uncover documents discovered by the other side which are very useful to your case.

Subpoena of documents

The power to “subpoena” or summons documents from persons who are not parties to the litigation is another aspect of the documentary trail.

Rule 8.14 deals with disclosure by someone who is not a party. You will need to file a sworn statement with your application setting out the reasons why the documents should be disclosed.

For example, you may wish apply for disclosure of banking records. The procedure is especially useful in maintenance cases or cases where one party’s financial affairs are in issue. Sometimes the records will be able to confirm, for example, receipt of a payment which the person has denied receiving. On other occasions they may serve to discredit a person’s evidence about his or her financial affairs.

Preparing for a trial is about gathering the evidence together by using the different procedures available for gaining access to documents. Through that process you may identify witnesses who can assist in giving evidence. Those potential witnesses should be interviewed so that you know what evidence they may be able to provide. It is very risky to call a witness without knowing what their evidence is likely to be.

Ending a proceeding early

A proceeding can end without trial in a number of different ways:

- **Default judgment.** This is available where no response or defence is filed [Rule 9.1]. If the claim is for damages (rather than a fixed sum owed), the court will not just award the amount claimed. Instead, the court will order default judgment on liability, and then adjourn for an assessment of damages [Rule 9.3(4)].

A party can apply to set aside a default judgment. It is important to remember that a default judgment can be set aside as it is not final. The defendant must show good reason why a defence was not filed, and also establish that there is an arguable defence [Rule 9.5(3)]. The defence needs to file a Form 14.

- **Summary judgment** may be awarded where a defence is filed but the defendant does not have any real prospect of defending the claim [Rule 9.6]. The danger of applying for summary judgment is that the decision may be appealed successfully and the proceedings will be delayed and then have to go back for a trial. The claimant may be required to pay the appeal costs of the other party if the appeal is successful.

Summary judgment cannot be ordered where there is a substantial question of fact or a difficult question of law [Rule 9.6(9)].

However summary judgment is appropriate to avoid the time and cost of a fully contested matter when the plaintiff's claim is clear and where the defendant is only trying to waste time.

For a useful summary of relevant case law on summary judgment see [ANZ Bank \(Vanuatu\) Ltd v Traverso \[2012\] VUSC 222](#).

A Form 15 should be used, together with a sworn statement in support. The defendant may also file a sworn statement in defence, arguing why there is an arguable defence.

- **Offers of settlement** can be made and accepted. A Form 16 should be sent to the other party [Rule 9.7]. If both parties agree, they sign the settlement form and the party who made the offer files and serves the document. If a proceeding is settled under this rule, the court must note on the file that the matter has been settled but must not enter judgment in favour of the claimant [Rule 9.7(5)]. If the terms of settlement are not complied with, the other party may file an application for judgment.

If an offer of settlement is rejected, and the outcome of the case after trial is equal or better than the settlement offer, then the party who rejected the offer may be required to pay indemnity costs. See the chapter on costs.

- **Discontinuing proceeding.** If the claimant discontinues, he or she may not revive the claim [Rule 9.9(4)].
- **Striking out** is provided by Rule 9.10 and the court's inherent jurisdiction. A court may dismiss proceedings for want of prosecution or strike out as an abuse of process (e.g. for inactivity). Grounds for striking out include:
 - If the claimant does not take the steps in a proceeding that are required by

rules to ensure the proceeding continues.

- Failure to comply with an order of the court.
- If no steps are taken for three months, a show cause notice is issued.
- If no steps are taken for six months, the claim may be struck out without notice.

Summary and default judgment—make sure the other party is aware of the court date

You cannot apply for summary judgment or default judgment unless there is evidence that the other party is aware of the court date. The best evidence is a sworn statement of service of the Court Notice of Conference/ Hearing. An email from the lawyer for the other party which demonstrates his or her knowledge of the court date is also good evidence. You can always telephone the other lawyer and remind them of the court date and make a file note. That would be good evidence as well.

The court does not have any duty to serve court notices. The party bringing the application must make sure the court notice has been properly served. See [Nafilua v Ialipen \[2013\] VUCA 11](#) and Part 5 of the [Civil Procedure Rules](#).

Mediation

The court can refer a matter for mediation [Rule 10]. Mediation can be a cheaper and faster way of finishing a case. A mediator is a neutral and independent party. Mediation is “a structured negotiation process in which the mediator... helps the parties... to achieve their own resolution of the dispute” [Rule 10.2].

Mediation is voluntary [Rule 10.6].

If settlement is reached, the court may approve it however the orders do not constitute judgment against a party [Rule 10.9(3)].

The costs of a mediator are to be paid by each party equally, unless the parties agree otherwise [Rule 10.10].

If mediation is unsuccessful, no inference may be drawn against a party due to the failure to settle the matter through mediation [Rule 10.15].

Despite the lack of power to require the parties to mediate, an unreasonable refusal may result in

costs [Rule 10.3(2)].

Evidence

In civil trials, evidence in chief in the Supreme Court is given by sworn statement [Rule 11.3]. The purpose of this rule is to promote efficiency and reduce surprise at trial.

A sworn statement may contain only relevant material. Relevant material is that evidence required to prove or to rebut a party's case, and references to documents in support of that material [Rule 11.4(1)].

The function of a sworn statement is to give evidence of facts. Legal arguments and conclusions ought to be raised in submissions, not sworn statements.

Any documents referred to in a sworn statement must be:

1. attached to the sworn statement
2. identified by the initials of the deponent and numbered sequentially [Rule 11.5(2)].

A sworn statement may refer to a thing other than a document, This is known as an "EXHIBIT" and is considered part of the sworn statement [Rule 11.5(3)].

Sworn statements which are filed and served become evidence in the proceeding unless they are ruled inadmissible material [Rule 11.7(1)]. Before trial, usually at a conference, file and serve a formal application which outlines your objections to any evidence contained within sworn statements. Refer to individual sentences and paragraphs. Include the reason for the objection. The same rules of evidence applying to admissibility of oral evidence at trial apply to written evidence contained in a sworn statement. Therefore it is very important that sworn statements are drawn carefully and by someone who understands the issues between the parties. Also, it is very important to make a proper and timely objection to a sworn statement which contains inadmissible material.

At trial, you can conduct cross-examination and re-examination on the contents of the sworn statements. Make sure to advise the other party that you require a witness to attend court for cross-examination. You must give notice under Rule 11.7(4).

A witness may give evidence by phone or video [Rule 11.8].

A party can issue summons to a witness to give evidence or produce documents [Rule 11.5]. This is also known as a "subpoena". This is a good method of obtaining evidence to support

your case.

Trial

A trial must be in open court [Rule 12.2]. A court may hear argument on preliminary issues to resolve part/whole of proceeding without a trial [Rule 12.4].

In a civil trial, the claimant presents his case first if he has the burden of proof on **any** question [Rule 12.1(3)(a)]. The defendant presents his case first only if he has the burden of proof on **every** question [Rule 12.1(3)(b)].

The normal order of proceedings is:

- opening address then evidence in support
- cross-examination of witnesses
- other party's opening address and evidence
- cross-examination of the other party's witnesses
- first party then others' closing addresses [Rule 12.1(4)].

Judgment and enforcement

Judgment must be in writing [Rule 13.2(2)]. It must cover the matters set out in Rule 13.1(1). Judgments are enforced by enforcement orders and enforcement warrants [Part 14 of the Rules].

An enforcement conference should be listed immediately after judgment [Rule 14.3(1)]. Use a Form 10 application to request an enforcement conference.

Basic steps in contested Supreme Court litigation

In **contested** Supreme Court litigation the basic steps are:

- Proceedings are commenced by filing a claim in the court registry [Forms 5 and 6]. A filing fee may be payable.
- A statement of the case is set out in the claim. "Statements of the case" are sometimes called "pleadings".
- Serve the defendants with court sealed copies of the claim. The claim must

be served within three months of filing.

- The person who serves the claim should complete a sworn statement of service.
- The defendant must file a response [Form 7] or a defence [Form 8] within 14 days. If a reply is filed first, the defence may be filed later, so long as it is filed within 28 days of the service of the claim.
- If appropriate, the claimant then files a reply to the defence [Form 9].
- After the defence is filed the case will be listed for conference. If there is a long delay in listing a conference, you can write to the judge [Rule 6.3(3)]
- The purpose of the conference is to enable the judge to actively manage the proceeding.
- At the conference directions may be given for discovery and inspection of documents.
- The case may then be listed for a Trial Preparation Conference.
- The case may then be listed for trial.

Procedure is not something that can easily be taught in a manual like this and therefore it is important to become familiar with the rules. You will become more comfortable with civil litigation and will find there is nothing mystical about these rules. In fact they actually help to manage the conduct of litigation.

SAMPLE LETTER BEFORE ACTION

‘Without prejudice except as to costs’

Dear Mr Smith,

RE: MONEY OWED

I am the lawyer for Ms Jones.

Please find enclosed a copy of an original invoice dated **1 January 2013**. This invoice was for catering services provided to you by Ms Jones. These services were provided under an agreement between you and Ms Jones. This invoice has not been paid.

Please pay this money within **14 days** from the date of this letter.

You can make a cash payment direct to my client at her home address in Freswota 1.

If you want to pay by instalment, please contact me at the Public Solicitor’s Office to discuss this option.

If this money is not paid within 14 days, my client will commence legal proceedings to recover the debt. This is a final warning letter. This letter may be tendered in court as evidence of your failure to pay.

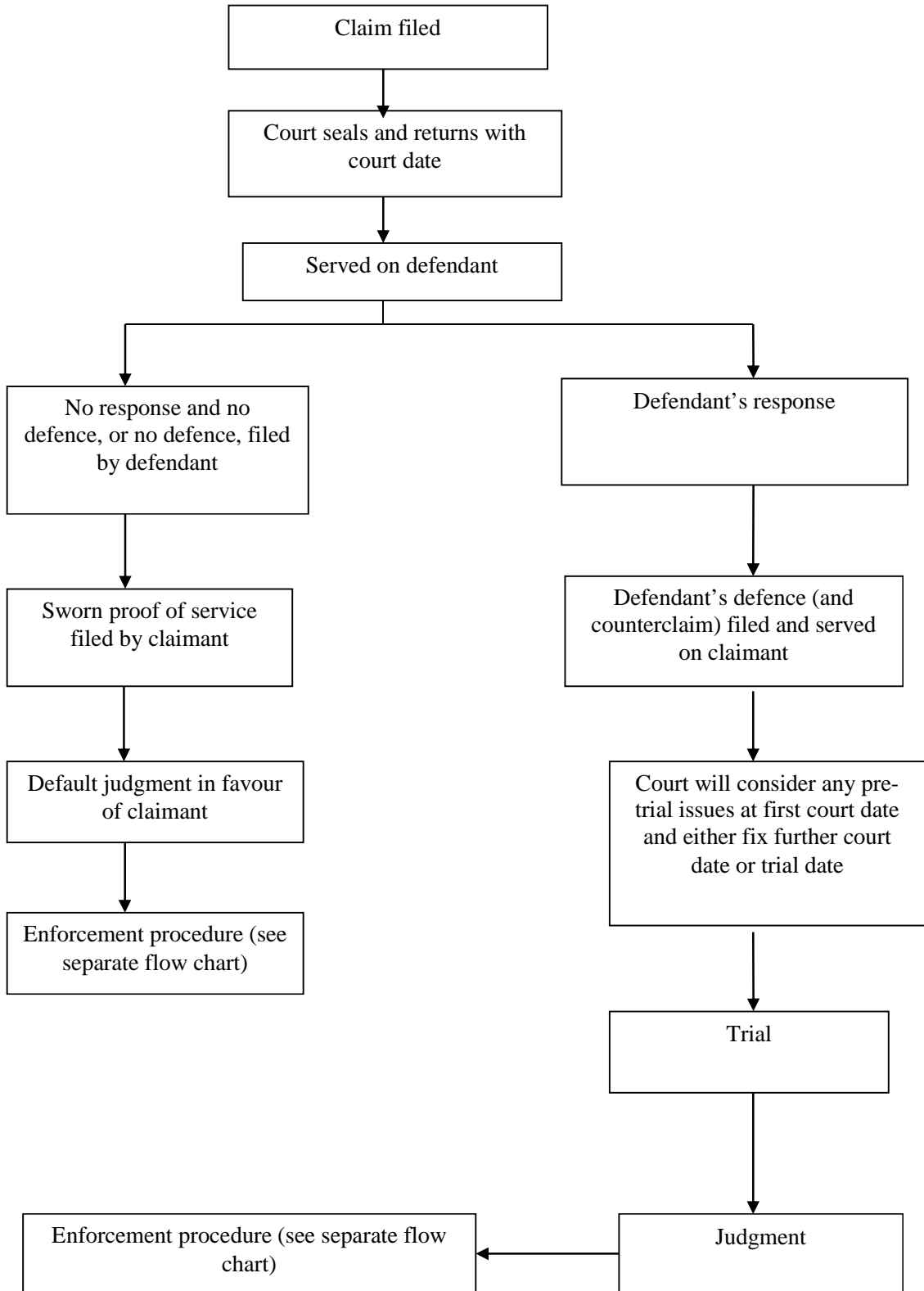
If court proceedings are commenced my client will seek an order for you to pay legal costs in this matter.

Yours faithfully,

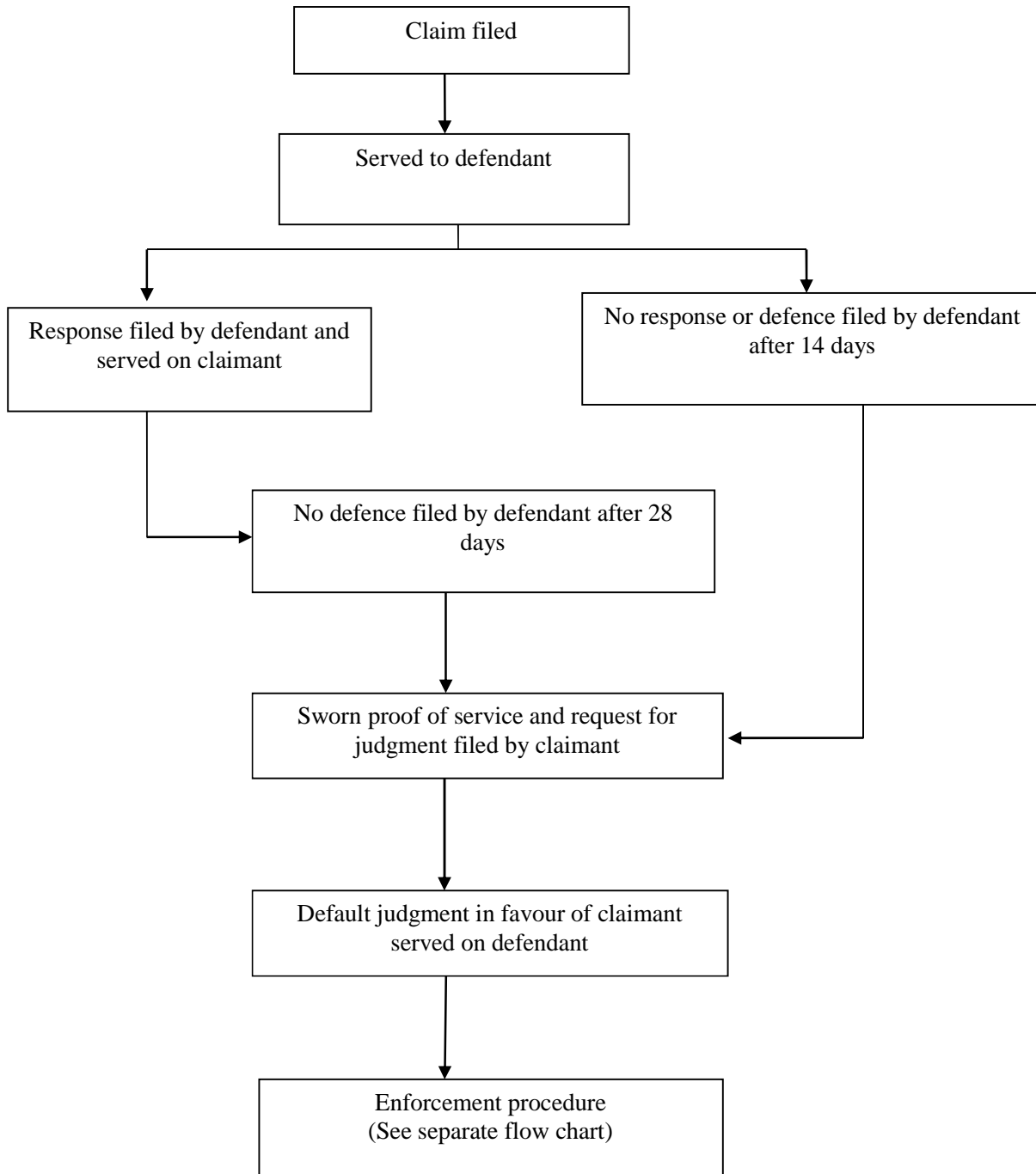
Jane Ramo

Public Solicitor’s Office

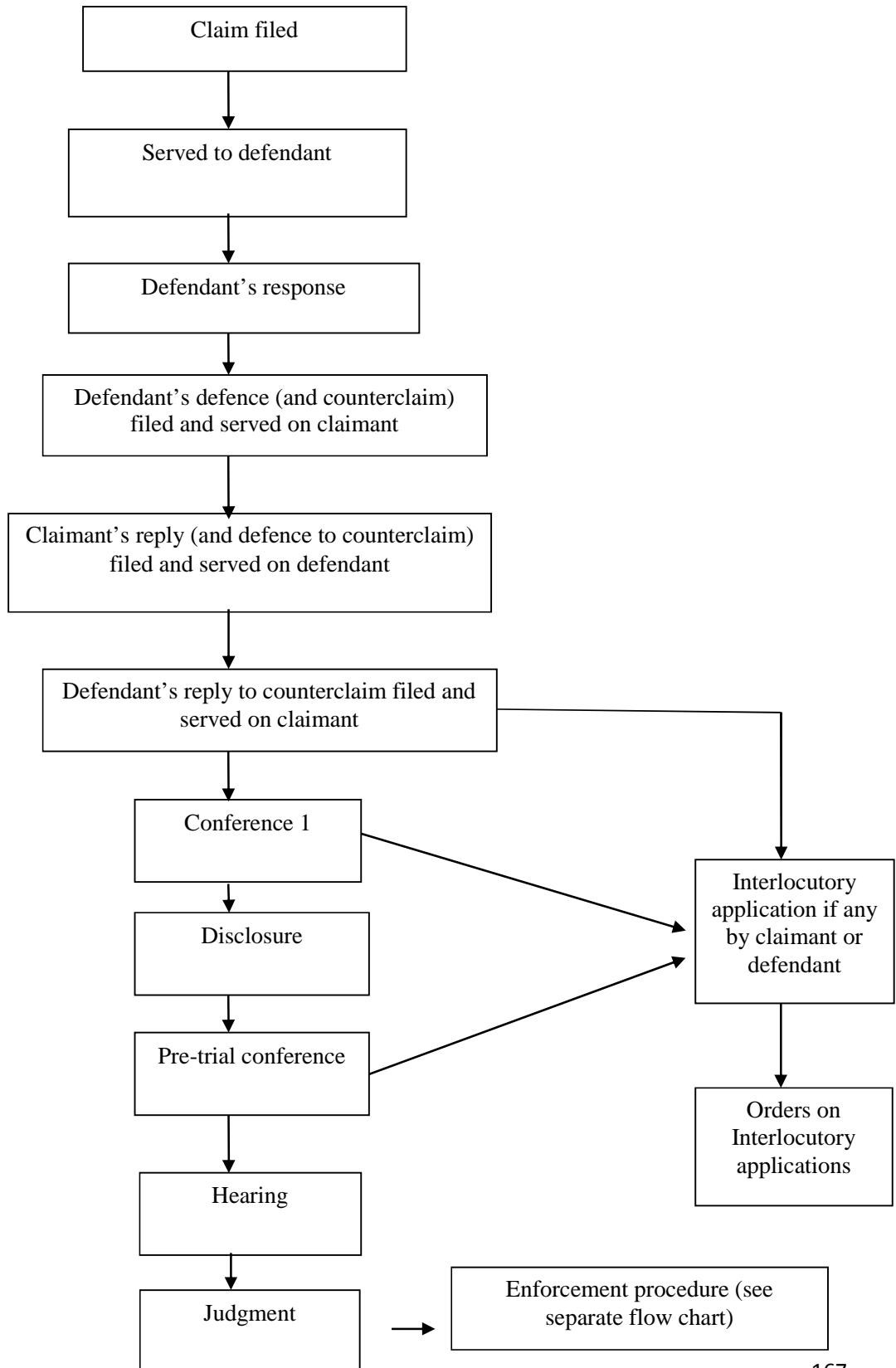
MAGISTRATES' COURT PROCEEDING FLOW CHART



SUPREME COURT UNDEFENDED PROCEEDING FLOW CHART



SUPREME COURT DEFENDED PROCEEDING FLOW CHART



Chapter 28 – Drafting the claim

Form 5 is used for Supreme Court claims and Form 6 is used for Magistrates' Court claims.

Address

The claim must also set out the address of the claimant, which is to be used for service of documents.

The statement of the case

Within the claim, you are required to set out a statement of the case. The statement of the case is also referred to as the “pleadings”.

A statement of the case is a summary of the material facts on which the party relies in support of the claim or the defence.

Plead facts not law.

Research the law. For example, [Land Leases Act](#) cases must be filed in the Supreme Court.

The statement of the case should use clear and simple language. Use consistent terminology. It should be concise. Use headings and labels. Remember, you are telling the story of the client.

Under Rule 4.2, each statement of the case must:

- Be as brief as the nature of the case permits.
- Set out all the relevant facts on which the party relies, but not the evidence to prove them.
- Identify any statute or principle of law on which the party relies, but not contain the legal arguments about it.
- If the party is relying on custom law, state the custom law.
- Set out the remedies or orders sought. At least one form of relief must be sought against each defendant.

Each matter alleged should be pleaded in a separate paragraph. This allows the defence to admit, not admit or deny each paragraph.

All material facts on which you rely must be set out in the pleading. If material facts are omitted from the pleadings you will need to obtain the court's leave to amend your pleading to include them. If such leave is not granted, you will not be able to lead any evidence going to those facts which have not been pleaded.

Make sure that you identify the parties correctly. You may need to attend Vanuatu Financial Services Commission to look at the company register. If a business is not a company, you will need to sue the

individual who owns the business. See the sample claim at the end of this chapter.

In cases where the defendant's state of mind is in issue you must also set out particulars of the facts which you say go to evidence the particular state of mind.

See for example typical particulars of alleged negligence in a road traffic case:

1. driving at a speed which was excessive in the circumstances
2. failing to keep any or any proper lookout
3. failing to warn of his approach.

In addition, other types of cases where particulars must be stated in the pleading include:

- Misrepresentation.
- Fraud.
- Breach of trust.
- Wilful default.
- Undue influence.

The pleading of such particulars serves to show that it is those facts which are relied upon to prove the relevant state of mind of the defendant.

If the person has been convicted of a criminal offence arising out of the circumstances in issue you must plead the particulars of the conviction if you wish to rely upon it.

What are the relevant facts?

They are the facts which must be proved in order to establish the existence of the cause of action. They also include the facts which the other party will have to meet at trial. Present all the facts which prevent the other party from being surprised at trial.

If the cause of action or the entitlement to sue depends on a statute you must plead all of the facts necessary to bring you within that statute.

Before preparing your pleading ask yourself the following questions:

1. What is my cause of action?
2. What material facts do I have to prove to establish my cause of action?

Precedents

Use Bullen & Leake's *Precedents of Pleadings* as a guide to some of the basic forms of pleading. You can also refer to *Pleadings Without Tears*. There are also precedents on the "Salmon" shared drive. These resources also provide examples of defences. Precedents serve as a useful starting point, but normally require some adaptation.

Remember that you can amend your claim. After discovery, new facts may emerge and you may need to amend your statement of the case. Alternatively, you may need to correct a mistake or defect. An amendment may be made at any stage of the proceedings. Leave is required [Rule 4.11].

Damages

Under Rule 4.10, the nature and amount of damages, including special and exemplary damages, must be stated in the claim.

The object of an award of damages is to give the claimant compensation for the damage, loss or injury suffered. As a general rule, the measure of damages is:

that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been had he not sustained the wrong for which he is now getting his compensation or reparation.⁸

The object of damages for breach of contract is to put the party whose rights have been violated, so far as money can do, in the same position as if his rights had been observed [[Republic of Vanuatu v Mahit \[2014\] VUSC 44](#)].

General damages refer to all items of loss which the claimant is not required to specify in order to recover them at trial. These damages are presumed and are the necessary and immediate consequences of the wrongful act. The amount of general damages in terms of money is a matter for the judge to determine in each case. In many cases no precise measure can be indicated. An example of such damage is the kind of damages awarded for personal injuries and falls generally in the category of unliquidated damages.

In personal injury cases, “the purposes of general damages is to compensate for pain, suffering and loss for amenities” [[Bernard v Blake - Judgment \[2013\] VUSC 217](#)].

Special damages include all items of damage which do not flow in the ordinary course and are exceptional in some way. For example, complications arising from personal injuries suffered. This type of damage must be claimed specifically and proved strictly. They fall generally in the form of liquidated damages. Examples include medical costs actually incurred or lost wages.

Exemplary damages are awarded for conduct which outrages the court. The defendant’s conduct is the relevant factor, not the claimant’s loss.

There is a useful discussion about the different heads of damages in [Jenshels’ Annotated Civil Procedure Rules](#), and in [Banga v Waiwo \[1996\] VUSC 5](#). See also [Vanuatu Copra and Cocoa Exporters \(VCCE\) Ltd v Vanuatu Coconut Product Ltd \(VCPL\) \[2011\] VUCA 29](#).

Amending the statement of the case

⁸ Lord Blackburn in *Livingstone v Rawyards Coal Co.* (1880) 5 App Cas. 25, 39

If you forget to plead a material fact you will generally be permitted to amend your statement of the case. However, if you leave the application to amend the pleading to the very last minute at the hearing, you may incur cost penalties and the trial may need to be adjourned.

Another important issue to keep in mind is that if your amendment extends to pleading a claim that had not been pleaded previously, the amendment will not be allowed if the application to amend is made after the limitation period for that particular cause of action has expired.

When you decide that you need to amend your pleading, the following procedure for applying for leave to amend should be observed:

1. Write to the other side and indicate that you propose to apply to amend.
2. Set out in your letter the precise amendments you wish to make.
3. Ask whether they have any objection to the proposed amendment. If they do object you will need to apply for leave and should consider filing an application [Form 10] with the proposed amendment attached.
4. If they do not object you should be able to leave the application to amend to the start of the hearing or when the matter is next before a judge. Where the other side has no objection, the court's leave should be a formality.

The defence

If the defendant intends to contest the claim, the defendant must file and serve a defence on the claimant within 28 days. The defence must contain a statement of the defence case [Rule 4.5].

The purpose of the defence, when read together with the statement of the case, is to identify the issues in dispute between the parties. Those issues, once defined, determine what evidence needs to be led and the scope of discovery. Discovery only needs to be made of documents relevant to the issues in dispute.

Each and every allegation in the statement of claim should be responded to either:

3. by admitting it
4. by denying it and stating what happened, or
5. by stating the defendant does not know and cannot reasonably find out about it.

If you do not specifically respond to a pleading of fact, that fact will be taken to have been admitted [Rule 4.5.5].

Once a fact is admitted, the claimant is no longer required to lead any evidence on it. However there may sometimes be an explanation for an admission which serves as a defence.

Sometimes it will not be possible to admit or deny a particular fact as it may not be within your client's knowledge. In those situations the response is to plead that you do not know and cannot admit the matters so

pleaded [Rule 4.5.6].

Furthermore, sometimes it will be to your advantage to force the claimant to call a particular witness in order to prove a particular fact. It may be that you need to be able to cross-examine that witness to obtain certain evidence to help your case, and it is only by the claimant calling him as a witness that you will be able to do so. In those circumstances it is best not to admit the particular fact in question.

It is a further function of the defence to state the grounds and the material facts on which the defendant relies for his defence. Sometimes the defence will be no more than a denial of what the claimant has alleged. However if there is a positive defence, the defendant must state what happened [Rule 4.5(b)].

It is important to remember that if the defence relied upon raises issues of fact not arising out of the statement of claim, they must be pleaded.

If there is some fact or circumstance which means that the claimant's claim cannot be maintained, for example the claimant has waived his claim or released the defendant from liability, then that fact must be specifically pleaded in the defence [Rule 4.7]. Other examples could include:

1. that the [Limitation Act](#) bars the claim
2. that the contract which is sued upon is illegal
3. facts that may take another party by surprise if not mentioned.

Procedures in the civil jurisdiction are designed to avoid one party being caught by surprise by the other's case.

Defences can also be pleaded in the alternative even if one alternative contradicts the other. For example on the one hand you may simply deny the allegation and in the alternative you may state: "In the alternative, if the defendant did ... (as alleged), which he denies, he says that ...".

There may also be times when the defence to the claim is that the claimant owes the defendant a sum of money whether by way of debt or damages. This is called a defence by way of **set off**. However it only amounts to a defence and is not a claim to receive the money. A defence by way of set off is essentially saying "even if I owe him X, he owes me Y, so I should only have to pay him the difference (or sometimes nothing at all depending on the amounts involved)."

If the defendant claims to be owed an amount which is in excess of the amount claimed by the claimant, it is better to file a "**counterclaim**" in addition to the defence. See notes below regarding counterclaims.

Generally speaking it is advisable to simply file a counterclaim in addition to a defence which denies liability. Examples can be found in Bullen & Leake.

Remember, if you do not respond in your defence to a particular allegation, you will be taken to have admitted it.

As with the statement of the case, you can apply to amend your defence but otherwise you will be bound by what the defence states or omits as the case may be. The procedure for seeking to amend the defence is the same as the procedure for amending the claim.

However, once you have admitted a fact it is very difficult to seek to withdraw that admission later on. In such cases you have to establish that the admission was a mistake and you have to bring the evidence to show that it was a mistake. You virtually have to prove that the admission was wrong. You cannot just change your mind and simply amend an admission so that it becomes a denial. Because of this rule it is very important to be absolutely sure when you admit a fact.

The counterclaim

A counterclaim must be pleaded like a claim as it amounts to a claim by the defendant against the claimant. The document may be named “Defence and counterclaim” and you should use subheadings “Defence” and “Counterclaim” with paragraph numbers in uninterrupted sequence.

All the same rules that apply to statements of the case therefore apply to a counterclaim.

Note that if the subject matter of the counterclaim has absolutely nothing to do with the dispute the subject of the claimant’s claim, the court may, on the application of the claimant, order the matters the subject of the counterclaim to be dealt with separately.

The party against whom a counterclaim is made may file a defence to the counterclaim. The document can be headed “Reply and defence to counterclaim”.

Counterclaim against additional party—Third Party Notice

The issue of a Third Party Notice by a defendant is very much like a counterclaim but instead of claiming against the claimant, the defendant claims against a third party.

The procedure to be followed is set out in Rule 4.9. The defendant must serve the defence and counterclaim, and the claim, on the other party.

Assume A sues B for compensation for damage to his vehicle caused by B. If B is of the view that C, perhaps the driver of A’s vehicle, was totally or partially responsible for the accident, B would join C as a party to the proceedings. To do so, a counterclaim should be filed.

Another example may be that if A sues B and B believes he is insured against A’s claim and B’s insurer, C, denies that B has any claim against it, B would need to join C as a third party to the action, and claim an indemnity from C under the policy. In other words, B says that C should pay whatever liability B may have to A.

The majority of third party notices are based on the principle that if the defendant is liable to the claimant then the third party is liable to the defendant as to part (i.e. contribution) or as to the whole (i.e. responsibility for the liability or payment of the liability, in the case of insurance) with the third party.

Again, the third party against whom the notice is issued will need to file a defence to the Third Party Notice.

If a Third Party Notice is to the effect that “if anyone is liable it is the third party”, it is generally advisable for the claimant to apply to amend his claim and to join the third party as a defendant, just in case liability

does in fact fall on the third party.

The reply

A reply is essentially the claimant's response to the defence.

If a claimant does not file and serve a reply, the claimant is taken to deny all the facts alleged in the defence [Rule 4.6]. There is rarely any need to file a reply, as the issues in dispute are usually sufficiently addressed in the statement of the case and the defence read together. However if the defendant raises new issues of fact, it may be necessary to file a reply in order to specifically deny the facts alleged in support of the defence [Rule 4.6(2)]. An example may be if the defendant raises an estoppel by way of defence.

Summary

Content

- What do you need to prove? Include all relevant information. Leave out irrelevant information.
- Plead the material facts which show there has been a legal wrong. The material facts are the facts which matter.
- Also plead the facts which justify the remedy which is being claimed.
- The defendant must state whether a pleaded fact is admitted, not known or denied. If you do not plead a certain fact, but only include it as a particular, then the defendant does not need to respond to that allegation. There is a benefit in requiring a defendant to respond expressly to each allegation.
- You should have evidence available to prove each pleaded fact. Is there a sworn witness statement or a document to prove the fact alleged? Obtain the evidence before you draft the pleading.
- Sometimes you may need to explain to the client that without evidence you cannot plead a certain case or particular allegation.
- Pleadings should be persuasive—they are advocacy. Why should your client win?
- Identify the relevant statute or principle of law you rely on, but do not include legal arguments.
Rule 4.2 (1) (c):
e.g. breach of contract, negligence.
- It is a basic requirement of procedural fairness that a party is aware of the case against him or her.

It is absolutely essential that the pleading ... should state those facts which will put the defendants on their guard and tell them what they will have to meet when the case comes on for

trial [Philipps v Philipps (1878) 4 QBD 127 at 13].

Structure and technique

- Describe the parties at the start. Is the party a company? Is the party a family representative?

“X is a company capable of suing and being sued”

“X represents the family known as Family Tasso.” See Rule 3.12
- Use real names as labels for the parties (if appropriate). The claimant (**John Tawi**). It is easier to follow the narrative if you use the label ‘John Tawi’ instead of the label ‘the claimant’. It also humanises your client.
- Tell the story of your client in a chronological order. Start at the beginning. Use a new paragraph for each date or event.

“On about 1 September 2013 ...”
- Use keywords if appropriate to label important parties and evidence.

e.g. “the car repair contract”
- Use subheadings.
- Use simple English and short sentences. Imagine that you are writing the claim so that it can be understood by a 12 year old. Transform complex material into sentences that are simple and easy to understand.
- Summarise verbal conversations and other evidence with sub paragraphs (a), (b), (c), and then roman numerals if needed (i), (ii), (iii).
- Use consistent terminology. The same word should have the same meaning throughout the document.
- The sample claim at the end of this chapter has been prepared by Edward Nalyal.

SAMPLE SUPREME COURT CLAIM

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)**

CIVIL CASE No. _____ OF 2013

BETWEEN: JOHN NAKO trading as Red Roster Fuels of PO
Box 204, Lenakel, Tanna, in the Republic of
Vanuatu
Claimant

Edward Nalyal & Partners
Claimant's lawyer

AND: PANGO MARINE HOLDINGS LIMITED
trading as the MV Sunshine of PO Box 102, Port
Vila, in the Republic of Vanuatu
Defendant

SUPREME COURT CLAIM

If for fixed amount:

The claimant claims: (to be assessed)

Interest: (to be assessed)

Filing and service fees: 22,000VT

Total claimed and costs: (to be assessed)

Date of filing: February 2014

Filed by: Edward Nalyal

Address for service:

Edward Nalyal & Partners Barristers & Solicitors

Second Floor, Pilioko House, Lini Highway

PO Box 5056, Port Vila, Vanuatu

Tel: 27595/Fax: 27656

Name and address of claimant's lawyer

1. The claimant is an individual able to sue and be sued and trades, at Lenakel Tanna, under the business name Red Roster Fuels.
2. The defendant is a local company able to sue and be sued in its corporate name.

3. The defendant was also, at all material times, the owner of the vessel MV Sunshine (the vessel), and was, at all material times, liable to the claimant for any loss caused by the vessel as regards the claimant's fuel.
4. In or about December 2013, it was verbally agreed between the claimant and the defendant that the defendant would carry on the vessel, the claimant's diesel from Port Vila to Lenakel, Tanna, and the claimant would pay the defendant for that service (the agreement).
5. Pursuant to the agreement the claimant purchased the fuel to be carried on the vessel to Tanna.

Particulars

Invoice dated 13 December 2013 showing payment of 10,000 litres of diesel in the sum of 2,000,000VT by the claimant from the fuel supplier, the BP Petroleum Limited.

6. The said fuel was delivered by BP Petroleum Limited to the vessel.

Particulars

Bulk delivery report dated 19 December 2013 showing the diesel was delivered by BP Petroleum Limited to the defendant's vessel.

7. On or about 16 December 2013, the vessel sailed from Port Vila for Tanna Island.
8. On its journey to Tanna, the vessel sunk at North Tanna and as a result the diesel was not delivered to the claimant
9. The defendant breached the term of the agreement as regards the transport of the claimant's fuel to Tanna.

Particulars

- a) *The defendant failed to deliver the claimant's fuel to Lenakel, Tanna.*
- b) *The defendant failed to ensure that the vessel was seaworthy so that the vessel could carry the claimant's fuel safely to Tanna.*

10. The claimant has requested several times from the defendant reimbursement of the price of the fuel, however, the defendant has failed and/or refused to reimburse the claimant.
11. The claimant demand, in writing, from the defendant, payment of the fuel price.

Particulars

Letter dated 10 January 2014 from John Nako to Pango Marine Holdings Limited demanding payment of 2,000,000VT by 24 January 2014.

12. Despite service on the defendant of the letter referred to in paragraph 11, it has failed and/or refused to pay the claimant the fuel price.
13. The claimant's lawyer demanded payment of 2,000,000VT from the defendant.

Particulars

Letter dated 4 February 2014 from Edward Nalyal & Partners, on behalf of John Nako to Pango Marine Holdings Limited demanding payment of 2,000,000VT by 2pm, Monday 18

February 2014.

14. Despite service of the said letter of demand to the registered office of the defendant, the defendant has failed and/or refused to pay 2,000,000VT.
15. The claimant has suffered and continues to suffer loss and damage, as a result of the defendant’s breach of the agreement.

AND THE CLAIMANT CLAIMS:

1. Judgment in the sum of 2,000,000VT (fuel price).
2. Interests at 5% per annum on the fuel price from 13 December 2013 to date of judgment.
3. Costs of this proceeding against the defendant.
4. Such further orders this court considers just.

Signed by the claimant OR claimant’s lawyer)

at _____)
Place _____)
on _____)
Date _____)

Signature of claimant’s lawyer

Chapter 29 – Debt recovery

The term “debt recovery” or “money claim” covers all sorts of claims where the amount in dispute is easily determined. This type of claim is for a “fixed amount” of money, and is sometimes referred to as a “liquidated sum”.

Such sums can arise from a loan, a sale of some item of property for a fixed price, or a contract claim for work done or services rendered. This type of claim relates to any sum which can be easily and definitely calculated, most commonly by reference to the terms of an agreement between the parties.

A liquidated sum is to be contrasted with damages cases which involve an unliquidated sum. For example, an amount for damages for pain and suffering in a personal injury case is dependent upon an assessment of damages by the court and is therefore an unliquidated sum.

When pursuing a claim for a fixed amount, the basic procedures to be followed are:

1. Letter of demand.
2. Issue the claim and serve personally on defendant.
3. Either:
 - (a) proceed to a contested hearing, or
 - (b) apply for default judgment under Rule 9.2 using Form 12.

There is a fairly straightforward procedure for obtaining a default judgment if the defendant does not appear to defend the claim.

The following is a summary of the relevant procedures.

1. File the claim, including the Statement of the Case.
2. Arrange personal service of claim on defendant and prepare and have the statement of service sworn.
3. Attend court on appointed day for hearing.
4. If defendant appears, the court will ask if he/she admits the debt.
5. If the debt is admitted the court should then enter judgment but may allow time to pay or payment by installments.
6. If the debt is not admitted, the court will generally adjourn the matter for hearing at a future date and to allow you to bring all your evidence and witnesses.
7. If the defendant does not attend court, and no defence or reply has been filed, hand up to the magistrate or judge the sworn statement of service in order to prove that the defendant was given sufficient notice of the claim and the hearing [Rule 9.1].
8. After filing or handing up the proof of service, you then file a Form 12, which is a request for judgment against the defendant for the fixed amount claimed plus interest and

costs.

9. The request for default judgment may be made orally in the Magistrates' Court. However default judgment cannot be given in the Magistrates' Court before the first hearing date [Rule 9.2(3)(6)].
10. The normal practice is for the magistrate to adjourn the case for hearing of the default judgment application. File a Form 12 and serve it on the defendant. Sometimes service of the application results in the attendance of the defendant at court.
11. If the defendant again fails to attend court, the application or default judgment will be heard *ex parte* (in the absence of the other party). You may need to explain the nature of the case and the relevant cause of action to the court. An order for default judgment is discretionary. There is no entitlement to default judgment. It may be refused if it will lead to injustice.

Default judgment for damages claims

If your claim is for damages instead of a fixed amount, follow the steps above. However, you will need to file a Form 13. The court will then determine the amount of damages.

Chapter 30 – Personal injury

The **limitation period** for personal injury arising claims arising from negligence is **three years**. It is difficult to file a claim after the expiry of the three-year limitation period. Note the date of accident as soon as you take instructions from a client and record the limitation date in your diary and on the file cover.

Personal injury claims arise when a person sustains injuries to his or her person because of someone else's negligence or other conduct. The injury can arise in any circumstances, including motor vehicle accidents, the so called "slip and fall" cases, boating accidents or any other case where there is injury caused by negligence.

Summary of steps

1. Take a full and detailed statement from the client. Remember the three-year limitation period. An extension of time may be possible if the client did not obtain legal advice before the expiry of the three-year period. An extension of time can be extremely difficult to obtain.
2. Obtain witness statements if liability is likely to be an issue.
3. Obtain hospital notes plus medical reports.
4. Find out if other party is insured.
5. Send an initial letter of demand to the party responsible party plus a copy to insurer.
6. Explore the possibility of settlement if the injuries have stabilised.
7. If settlement has not occurred, **file a claim**, and make sure you do so before the limitation period expires. Unless you are sure total damages will be less than VT1,000,000, file the claim in the Supreme Court.
8. When the case is ready for hearing, prepare and serve a **Particulars of Claim**. This is a document which sets out the special damages claimed and summarises the basis of the general damages claim, including details of how the injuries have affected the person's day to day enjoyment of life or indeed if the injuries are likely to shorten the person's life expectancy.

The damages that can be recovered can be broken down into **special** and **general** damages.

Special damages

Special damages are all those costs that are incurred as a result of the injuries together with any loss of wages or other income or possible future loss of wages or other income. Examples include:

- All medical expenses (including likely future costs) for doctors, medicines.

- Cost of items such as wheel chairs, crutches/walking sticks or any other equipment acquired as a result of the injuries.
- Wages lost while the client was off work. Even if he is paid sick leave, he is still entitled to recover the wages for the period as long as he repays his employer, and the employer re-credits him with the lost sick leave.
- Any loss of income in the future because the injuries prevent the client from working in the same job or earning the same level of salary. Estimating future loss of income can be difficult. However, the courts have tried to develop some guiding principles which are set out in *McGregor on Damages*.
- Any special costs flowing from the injuries, such as adjustments to the home to accommodate for example, a person in a wheelchair.

General damages

General damages are damages that are awarded to the injured person for the pain and suffering they have gone through as a result of the accident. It is impossible to put a value on such things, but as money is the only available means of compensating such suffering, the courts have over the years sought to standardise the relative levels of compensation.

A very useful and recent case is [Bernard v Blake \[2013\] VUSC 217](#). In that case Justice Spear applied the Judicial Studies Board (JSB) Guidelines from the United Kingdom to assess general damages for personal injury. The relevant United Kingdom award was reduced because of the different circumstances and standard of living in Vanuatu. Justice Spear awarded approximately two thirds of the damages which would have been awarded in the United Kingdom. In previous cases, Vanuatu courts have reduced the JSB Guideline amount by half.

The insurers tend to apply these principles when assessing appropriate levels of compensation for the purposes of settlement.

In cases where liability is not in dispute, the matter should be able to resolve by negotiation with the insurer. Contributory negligence may be an issue in some cases.

Motor vehicle claims

When did the accident occur? Remember that the claim may become statute-barred after three years from the date of the accident. If the client has come to see you towards the end of the three-year period you will need to make sure that you commence proceedings in time.

Take a detailed statement from the client relating to the circumstances of the accident including the date, time and place of the accident, the registration details of the other vehicle, and the name and contact details of the driver of the other car. If the police attended the scene, obtain a copy of the police report and particulars of any charges laid.

If the client was admitted to hospital as a result of the injuries, obtain copies of all the hospital's notes and records. If the client has also seen a private doctor or similar treatment, obtain reports from those doctors. When obtaining the reports you will need to provide need a signed authority from the client.

Under Section 41 of the [Road Traffic \(Control\) Act](#) it is against the law to drive a motor vehicle without having in place compulsory third party insurance against liability for bodily injury to third parties. This insurance is commonly known as CTP insurance.

This means that in any motor vehicle accident, there should be an insurer who will meet all claims against the responsible party. The insurer cannot avoid payment to the third party, for example, because the responsible driver was drunk. See Section 41 (3) of the [Road Traffic \(Control\) Act](#).

Because such insurance exists in the large majority of cases it is important to find out from the owner of the other car who he is insured with.

Once you know the identity of the insurer, send a letter of demand to the driver responsible and send a copy to the insurer of the vehicle, if known. It is important that the insurer becomes involved because you can then try to settle the matter. Negotiating settlement money from an insurer is often easier than enforcement of a successful claim against a driver.

Before you can consider settling a claim you will need to be sure that the person's injuries have stabilised and that they will not require any further medical treatment. If further treatment is going to be required, it may be sufficient to obtain from the doctor an estimate of the costs for such treatment so that they can be taken into account in assessing the compensation payable.

Uninsured vehicles

It is unlawful for an owner to drive, or to permit another person to drive, an uninsured vehicle [section 41 of the [Road Traffic \(Control\) Act](#) and [Vanuatu Teachers Union v Obed \[2013\] VUCA 22.](#)]

If the vehicle was uninsured, claim against **both the driver and the owner** of the vehicle. The owner is negligent by failing to insure the vehicle and permitting it to be driven by the driver.

Slip and fall cases

These cases arise from incidents in which someone injures himself or herself in a fall, and where responsibility for the fall can, in whole or in part, be attributed to the condition of the area where the person fell. The typical cases are people slipping on a wet floor or falling down steps.

Find out whether the owner or body responsible for the location of the accident has public liability insurance. For example, if the client slipped and fell at a hotel, the venue may be covered by insurance. Where there is an insurer involved, and provided some level of negligence or blame can be attributed to the condition of the premises, you should usually be able to settle some sort of claim on behalf of the client. If there is no insurer, you will need to negotiate directly with the other party.

The procedure is much the same as for the other types of personal injury claims referred to above. If

possible, inspect the site of the accident and take photographs if possible to use as evidence. The owner may decide to make some changes to prevent a repeat of the accident, so take photographs as soon as possible after the incident.

For further background to this area of law as to the duties of care owed to different categories of persons who happen to be on the premises, see the textbooks on torts, under “occupiers’ liability”. A recent example of a slip and fall case is [Bernard v Nigel \[2011\] VUSC 37](#).

Work related cases

The other category of personal injury cases arise out of injuries sustained during the course of a person’s employment. For a personal injury in the course of employment, two separate claims can be filed.

The first is a Workmen’s Compensation Claim. In Vanuatu it is compulsory for employers to take out insurance in respect of injuries sustained by their employees during the course of their employment. There is no need for the employee to prove negligence on the part of the employer for worker’s compensation. It is therefore usually referred to as a “no fault” scheme. Compensation is payable even where the employer is not at fault.

For employers, insurance is compulsory under the [Workmen’s Compensation Act](#). **The limitation period for these claims is six years.**

The insurance policy sets out exactly what is covered which is usually:

1. out of pocket expenses such as medical costs
2. lost wages
3. an amount to compensate for any ongoing disability, which is determined by reference to a disability schedule.

Where a client comes to the office seeking compensation for an injury suffered during the course of his employment, firstly write to his employer inquiring about whether the employer has workmen’s compensation insurance. If they do, then write to the insurer about the matter and proceed to pursue the claim with the insurer. This may involve, in the case of a disability claim, having the client submit to a medical examination by a doctor nominated by the insurer.

However it is always best to ask the insurer for a copy of the policy so that you can double check the worker’s entitlements under the policy. It would be a very rare occurrence that you would have to commence any proceedings.

The second type of claim is a common law claim in negligence. You will need evidence that some responsibility for the accident can be attributed to the negligence of the employer or a fellow worker (an employer is vicariously responsible for the negligent acts of his employees). You can pursue both a

common law claim and a Workman's Compensation Claim.

The courts have long accepted that an employer owes a duty of care towards his workers to ensure their safety in the workplace. In [Vanuatu National Provident Fund Board v Aruhuri \[2001\] VUCA 16](#), the Court of Appeal said:

a contract of employment and the relationship of employer and employee is a special relationship where the very nature of the relationship imposes a duty on the employer to ensure the health (both physical and mental), safety as to the place, equipment and system of work provided and welfare of employees. This latter duty has not been the subject of interpretation but in our view must include a duty to consider and address the concerns of employees before inanimate objects; a duty to warn employees and to provide information, instruction, training and supervision; and the maintenance of a safe means of ingress and egress from the work place to name but a few.

A breach of any one of these duties will generally give rise to a claim against the employer. See the cases at the end of this chapter for examples of employer liability for personal injury.

Assault claims

These claims usually rely on the tort of “trespass to the person”, not negligence. More specifically, the tort is assault or battery. The limitation period is six years, not three years.

There is very rarely any insurance to meet such claims. If the injuries arise from an assault by a security guard it may be that the employer has insurance cover, although this is probably unlikely. The same steps apply to the preparation and quantification of the claim:

1. Obtain detailed statements from witnesses and the client.
2. Obtain any hospital notes/medical records.
3. Calculate special and general damages.

If criminal charges are filed, you can apply under the [Criminal Procedure Code](#) for compensation to be awarded at the conclusion of the criminal trial, which in most cases is the most practical way to proceed.

TABLE OF PERSONAL INJURY CASES

CASE	FACTS	GENERAL DAMAGES	SPECIAL DAMAGES	TOTAL
Bernard v Ridgway Blake [2013] VUSC 217; Bernard v Nigel [2011] VUSC 37	Slip and fall at lawyer's office. Occupier liable for injuries. Fractured ankle healed, but back injury remained. Incident also caused diabetes.	VT3,000,000 JSB Guideline reduced by one third.	Loss of earnings: VT4,000,000 Medical: VT4,189,148 Interest: VT2,000,000	VT13,189,148
Garu v Leong [2013] VUSC 222	14-year-old shop assistant struck by motor vehicle driven by member of public in ABM car park. Employer failed to provide safe system of work. Six weeks in hospital. Right leg 2cm shorter. 70–100% loss of function in leg. Ongoing pain.	Pain and suffering: VT750,000 Loss of amenities: VT1,500,000 Permanent Disability: VT4,000,000 Loss of future earnings: VT1,250,000	Loss of wages: VT14,000	VT 7,514,000
Atis v. Natapei [2010] VUSC 176	32 year old struck by motor vehicle. Injury to lower back, hip and knee. Walked with limp and ongoing pain.	Pain and suffering: VT500,000 Loss of amenities: VT200,000	Medical: VT9,388 Loss of future earnings: Not yet determined. Court required further evidence.	Interim judgment only. No final amount determined.
Obed v Kalo & VTU [2008] VUSC 47; Vanuatu Teachers Union v Obed [2013] VUCA 22	Severe ankle injury after being struck by a motor vehicle. 85% loss of use of leg. 42 years old.	Loss of future earnings: VT8,455,200 Pain and suffering and loss of amenities of life: VT2,755,000 JSB Guideline reduced by half.	Loss of wages before judgment: VT2,700,000	VT13,910,200
Shem v. North Efate Timber Ltd. [2008] VUSC 48	Claimant cut off four fingers from left hand while making furniture. 85% loss of left hand. Employer liable.	VT4,000,000 JSB Guideline reduced by half.	Insufficient evidence provided. No award made.	VT4,000,000
Alphonse v. Tasso [2007] VUSC 54	Claimant assaulted by several men. Abrasions, loss of tooth, swelling, bruising, pain and loss of sleep.	VT441,883 Aggravated damages: VT100,000	VT711,060 Dental work required in Noumea Interest: VT59,027	VT1,311,970
Enterprise Roger Brand v. Hinge [2005] VUCA 21, [2005] VUSC 71	Furniture maker fell 13 metres through roof onto concrete floor. Employer liable. 50% loss of use in right hand, 90% loss of use of left elbow and 30% loss of use of wrist.	Permanent disability: VT4,500,000 Pain and suffering: VT500,000	VT36,000	VT5,036,000
Santo Veneers & Timber Ltd v Stephens [2005] VUCA 16	Chainsaw operator injured by falling tree. Employer failed to provide safe system of work, supervision and safety equipment.	VT2,000,000 before Judge deducted Workman's Compensation payment of VT339,220		VT1,660,780
Solzer v. Garae [1992] VUSC 3	Driver of motor vehicle injured in accident. Fractured heel, leg and cheekbone. Eyesight reduced.	VT3,000,000 reduced to VT2,475,000 due to contributory negligence. UK award reduced by half.	VT3,749,077 Interest: VT739,797.94	VT6,962,875

Chapter 31 – Motor vehicle insurance policies

Who caused the accident?

Clients often attend the office seeking compensation for property damage or personal injury arising from a motor vehicle accident.

First try to identify who caused the accident. Is your client at fault? Police reports and the “[Australian Road Rules](#)” [on AUSTLII] may identify who caused the accident.

For example, the following vehicles are normally (but not always) at fault in an accident: an overtaking vehicle, a vehicle changing lanes, a vehicle pulling out from the kerb, a vehicle entering a roundabout, a vehicle travelling behind another vehicle, a vehicle turning into traffic.

If your client was at fault then there may be no merit in seeking damages from the other party

Types of motor vehicle insurance

In Vanuatu there are two main types of motor vehicle insurance—compulsory third party (CTP) only, and comprehensive.

The differences are as follows:

Compulsory third party insurance only

CTP is insurance required to be taken out by every owner of a motor vehicle. This insurance is compulsory for all vehicles [section 41 (1) of the [Road Traffic \(Control\) Act](#)]. It is insurance which indemnifies the owner and any driver against liability to another party for death or bodily injuries suffered by that other party. Insurers cannot rely on any terms or conditions in the insurance policy which attempt to limit or exclude liability for such compensation [section 41 (3)].

In Vanuatu, most CTP insurance policies also include insurance for property damage to the other party’s vehicle or property. Check the terms of the insurance policy.

If the case involves personal injury, death or damage because of a vehicle accident, the insurer of the vehicle at fault is required to pay compensation for personal injury, death or property damage suffered by the other party who was not at fault.

Government vehicles are not required to have compulsory insurance [section 41(4)].

Comprehensive insurance

This policy also covers the owner for damage to the driver's own vehicle, whether that damage is caused by the other party or by the owner. However, it does not insure the owner in respect of any personal injuries he or she suffers as a result of his or her own fault.

Claims

Write to the other party (the owner of the vehicle) to find out if he or she has insurance. If the other party has insurance, then you can try to negotiate a settlement directly with the insurer.

For personal injury claims, you will need a medical report.

For damage to vehicle claims, the insurer will require quotes for repairs.

If you file a claim, you claim against the driver of the other vehicle, normally in negligence. If the driver was driving for work purposes, you may be able to sue the employer (vicarious liability).

If the vehicle at fault had no insurance

If the vehicle at fault had no insurance, then the claimant must sue the driver personally. You can also sue the owner for being negligent and permitting the vehicle to be driven without insurance. If the driver is an employee, the claimant can sue the employer by way of vicarious liability.

If the party not at fault has comprehensive insurance, he or she can claim on their own policy.

It is a criminal offence not to have CTP insurance, contrary to Section 41 (1) of the [Road Traffic \(Control\) Act](#).

The “excess”

An “excess” is a fee that must be paid by the party who relies on their own insurance.

For example, if a policy has an excess of VT27,000, then the policy owner must pay the first VT27,000 of the repair cost. If the total damage is VT50,000, then the owner pays VT27,000 excess, and the insurer pays the remaining VT23,000 of the cost of repairs. If the damages are

VT27,000 or less, the insurer pays nothing.

If the other party has third party property insurance, then the claimant should be able to recover from the other party's insurer without making a claim on his or her own policy and thereby avoid paying the excess amount.

If the other party is uninsured, the best thing to do is for the owner to claim on his or her comprehensive policy if they have one. That way all the owner has to pay is the excess.

If the driver at fault was drunk or not licensed to drive

Under section 41(2) of the [Road Traffic \(Control\) Act](#), the insurer is required pay damages for personal injuries caused by the driver, even if the driver is drunk. Any condition in the policy that suggests the insurer is not liable for personal injury is deemed to be an invalid condition.

In cases of property damage, the insurance policy does not apply when a driver is drunk. Check the terms of the policy. If drunk, the driver at fault will be personally liable for property damage.

The insurance company can sue the driver at fault

Once the insurer pays the claim, the insurer becomes "subrogated" to the rights, or "takes over" the rights, of the insured.

If the insurer believes that the other party is responsible for the damage, the insurer can sue the other party in the name of the insured to recover the damages.

For example, in one PSO case, a driver smashed into several new cars owned by the defendant. The defendant had comprehensive insurance. The insurer compensated the defendant. The insurer then sued the driver, who was a client of the PSO. The driver had to pay damages to the insurer.

Chapter 32 – Fatal accidents

Prior to the [Fatal Accidents Act 1846 \(UK\)](#), claims arising out of the neglect or wrongful act of another person could not be sued upon once the victim died. This restriction related to actions which had not been commenced prior to the death of the victim as well as those which had already been instituted.

As a result of the passing of that act, subsequently consolidated by the [Fatal Accidents Act 1976 \(UK\)](#), and also the [Law Reform \(Miscellaneous Provisions\) Act 1934 \(UK\)](#), all causes of action (except defamation) vested in any person on his death and survived for the benefit of his estate and dependants.

There is a **three year limitation period**. See [Law Reform \(Miscellaneous Provisions\) Act 1934 \(UK\)](#).

The English law as described continues to apply in Vanuatu by virtue of the [Constitution](#), there having been no equivalent legislation passed by the Vanuatu parliament since independence.

Vanuatu law, as it applies relevant English law, allows the following heads of compensation to be recovered in the case of a fatal accident:

1. Dependants' pecuniary (financial) loss under the [Fatal Accidents Act 1976 \(UK\)](#).
2. Funeral expenses. This is under the heading "Special damages".
3. Damages for loss of expectation of life under the [Law Reform \(Miscellaneous Provisions\) Act 1934 \(UK\)](#).
4. Pain and suffering between act and death under the [Law Reform \(Miscellaneous Provisions\) Act 1934 \(UK\)](#).

The best way to prepare a fatal accident claim is to read the recent Vanuatu cases which appear in the table at the end of this chapter. Those cases will help you draft a letter of demand, and also prepare a claim if needed.

Pecuniary loss

This element of the claim arises under the [Fatal Accidents Act 1976 \(UK\)](#). Although the UK Act has been further amended since 1976 to expand the class of dependants, the provisions that apply in Vanuatu remain those in force in 1976. The dependants entitled to claim are

limited to:

1. the wife or husband of the deceased
2. the parents or grandparents of the deceased
3. the children and grandchildren of the deceased
4. any person who is, or is the child of, a brother, sister, uncle or aunt of the deceased.

The loss which is claimed under this head is the loss of the pecuniary benefit arising from the dependant's relationship with the deceased. In the majority of cases the lost benefit in question is the deceased's income, or at least that part which he or she contributed for the benefit of the dependant.

The courts have been willing to compensate a dependant who has lost the benefit of the deceased's services provided some monetary value can be attributed to those services. The best example is where a housewife is killed and the husband has to replace her services with those of a paid housekeeper. Although the wife was not contributing actual income, her services can be valued by reference to the cost of replacing what were previously free services. Another example might be where an elderly parent loses a child who until that time had been caring for them, and as result of the child's death they are forced to pay for equivalent care.

There is no need to show that the dependant was receiving the benefit at the time of the accident. All that has to be shown is a reasonable expectation of receiving the benefit in the future. For example the parents of a child killed near the completion of his studies and prior to entering into the work force are entitled to claim the loss of financial support that they would have expected to receive from the child during his working life. The workings of custom law in Vanuatu and the obligations of children towards their immediate and wider family as they grow are very important in this regard.

The assessment of the compensation payable under this head is difficult and arbitrary. Some of the matters that need to be taken into account in assessing the extent to which the dependant's future support has been affected by the death of the person include such matters as:

1. the age and health of the deceased at the time
2. the age and health of the dependant
3. the prospects of remarriage in the case of a dependant spouse
4. the likelihood of the marriage between the deceased and the defendant breaking

up

5. the likelihood of salary increases and job promotions
6. the living standard expected
7. the benefit in receiving a lump sum now which can be invested so as to earn future income
8. the vicissitudes of life.

All of the above issues make it impossible to guarantee any degree of accuracy in calculating the value of the dependency. However if you follow the guidelines established by the cases, you should be able to make a sufficient assessment to be able to negotiate a reasonable settlement. The starting point is the deceased's annual salary, or the value of the contribution made by the deceased to the family. Consider the following:

- In the case of other dependants outside the immediate family, try to determine the level of financial contribution that he or she made or would have made. If services were being provided rather than financial assistance calculate the value of those services.
- Determine how many working years the deceased had left and how much longer the dependant would have been expected to have remained dependant.
- Bear in mind the possibility of increases in salary through promotions. You can obtain this information from the former employer who would need to give evidence on the subject should the matter be contested.

Look at the relevant Vanuatu cases which are mentioned below.

Chapter 34 of *McGregor on Damages*, dealing with "Torts causing death" deals with the assessment of multipliers and multiplicands in great detail and familiarise yourself with the relevant cases which are well set out in that text.

Where there is a competently advised insurer responding to the claim, you should be able to settle the large majority of such claims.

Funeral expenses

Another head of recoverable loss is funeral expenses. There is no guidance in the legislation as

to what constitutes “funeral expenses”, although it seems that it ultimately comes down to what is reasonable.

There may be an argument that funeral expenses in Vanuatu should be considered in the context of customary obligations, especially with regard to the cost of 5 day, 10 day, 50 day and 100 day memorial services.

Generally it is the case under Vanuatu custom that a great financial burden falls on the parents as regards the funeral and associated ceremonies. In addition to having to meet transport costs for family to travel to the funeral there is also a customary obligation to make gifts of mats, pigs, yams to the uncles and aunts on each parent’s side. While such obligations may be foreign to Australian law or English law, they are an integral part of the customary law of Vanuatu.

It certainly seems arguable that the Vanuatu courts should adopt a more expansive interpretation of “funeral expenses” than would say an English or Australian court especially having regard to Article 95(3) of the [Constitution](#) which provides:

Customary law shall continue to have effect as part of the law of the Republic of Vanuatu.

The memorial service expenses are an integral part of the cost of burying the deceased and may also therefore be claimable under the same principles.

Loss of expectation of life

This head of damage has been arbitrarily quantified by the courts as a relatively nominal sum to compensate for the loss of life. The award is made in favour of the deceased’s estate and is claimable under the [Law Reform \(Miscellaneous Provisions\) Act 1934 \(UK\)](#).

The sum awarded is periodically increased to take account of inflation. In the 1981 Supreme Court case of [William v. Obed \[1981\] VUSC 1](#) the court followed English cases and awarded VT185,000 being the Vatu equivalent of £1,000.

The law in Vanuatu remains as it was in England prior to 1982 and awards for loss of expectation of life are still made. In 2011, an award of VT600,000 was made, a 20% increase on the award in 2008. Using this rate of increase, a 2014 claim could be worth VT720,000.

See the recent cases of [Iokhauto v South Island Shipping Cooperative Ltd \[2011\] VUSC 343](#), [Esley v Toara \[2000\] VUSC 78](#), [Kapiel v Jenkinson \[2002\] VUSC 20](#) and [Naio v Bedford \[2008\] VUSC 84](#).

Pleading a fatal accidents claim

Examples of the pleading of a fatal accident claim appear in Bullen & Leake under the chapter heading “Fatal accidents”.

Claims on behalf of dependants under the [Fatal Accidents Act 1976 \(UK\)](#) should be covered in one claim. Identify the main dependant, usually the spouse or parents, and bring the claim in their name.

Claims on behalf of the estate must normally be brought by the personal representative—either the executor (if the deceased had a will appointing an executor), or the administrator appointed by the court to administer the affairs of the deceased and to distribute the estate in line with the laws with regard to intestacy.

TABLE OF RECENT FATAL ACCIDENT CASES

Case	Facts	Dependants	Loss of expectation of life	Fatal Accident Act	Funeral expenses	Other damages	Total damages
Iokhauto v South Island Shipping Cooperative Ltd [2011] VUSC 343	Wife and two children swept overboard from ship	1	VT600,000 each. Total VT1,800,000	VT5,000,000. 20 years at VT250,000 per year for the wife. Nothing awarded from deceased children	VT200,000	VT5,000,000 for punitive damages because ship sailed against warning and overloaded	VT12,000,000
Naio v Bedford [2008] VUSC 84.	Not provided	5	VT500,000	VT15 million. Includes 5 million for loss of business activities	VT1,000,000	VT100,000 for pain and suffering between accident and death	VT16,600,000
Esley v Toara [2000] VUSC 78	Road traffic accident. Single man aged 15 with no kids	4	VT500,000	VT2 million. 20 years at VT100,000 per year	VT415,023	VT100,000 for pain and suffering between accident and death	VT3,015,023

Chapter 33 – Employment

“Employment” or “labour” matters relate to claims which arise out of the relationship between a worker and an employer. These claims often involve a worker being dismissed or terminated.

PSO and the Department of Labour

Some employment matters can be referred to the Department of Labour. Consider referring those clients who are still in their employment relationship, that is, clients who are still working. These cases may include:

- non-payment or under payment of wages
- unsafe working conditions.

The Department of Labour also provides useful reports in cases involving entitlements after dismissal from employment. These reports can be used in settlement negotiations and you may wish to use them as evidence in court claims.

Employment Act

The consolidated edition of the [Employment Act](#) on PACLII is out of date. Make sure you use an updated copy of the [Employment Act](#). There have been several amendments since the 2006 consolidated edition.

Limitation period

There is a three-year limitation period on claims for remuneration [section 20]. This period is mandatory and there is no provision for an extension of time. “Remuneration” includes wages and leave entitlements but does not include severance, so the [Limitation Act](#) limitation period of six years applies to severance entitlements: [National Bank of Vanuatu v Cullwick \[2002\] VUCA 39](#)

Employee or independent contractor?

Employment law applies to workers who are in an employment relationship. This is sometimes called a ‘master servant relationship’ or an ‘employer employee’ relationship. An employee can be contrasted with an independent contractor. An independent contractor is not

an employee, and therefore is not entitled to the protections or entitlements provided by the [Employment Act](#).

An employee is engaged under a contract **of** service. An independent contractor is engaged under a contract **for** services. An independent contractor is required to look after his or her own sick leave, annual leave, overtime, VNPF and other entitlements.

You may need to identify whether your client is an employee or contractor before you provide any legal advice.

The common law test of whether a person is an employee is outlined in *Halsbury's* [16(1A) at paragraph 4], and *Chitty on Contracts* [31st edition, Chapter 39–009 to 39–025]. See also the recent case of [Makin v Independent Foundation Committee Inc. \[2014\] VUSC 128](#).

Termination of employment

Most employment cases at the PSO involve termination of employment. In the majority of private sector dismissals, common issues include:

- What were the reasons for dismissal?
- Was appropriate notice given, and was the severance correctly calculated?
- If serious misconduct is alleged, were the procedures under the [Employment Act](#) followed?

Constructive dismissal

Where an employer behaves in a way which is a repudiation of the contract, and the employee then terminates the contract, there is a constructive dismissal.

The employee may have resigned because the employer made it impossible for the employee to continue to work. In substance there has been a dismissal of the employee, even though it may appear that the employee has resigned.

See section 53 of the [Employment Act](#) and [Nipo v Vanuatu Football Federation \[2007\] VUSC 65](#).

Is there a written contract?

In all employment cases, first check to see if there is a written contract. The terms of the

contract may specify entitlements over and above the minimum “safety net” entitlements under the [Employment Act](#). A written contract cannot reduce minimum entitlements such as minimum hourly rate, sick leave and annual leave. Any contract which includes conditions in breach of the minimum standards contained within the [Employment Act](#) is an illegal contract.

If there is no written contract, in order to determine the terms of conditions of employment, you will need to rely on any oral agreement between the parties as well as the conduct of the parties.

Termination of employment – what to claim?

A court can only award heads of damages which are pleaded. For example, a court cannot award common law damages if these are not pleaded in the claim.

The following entitlements are minimum entitlements guaranteed by the [Employment Act](#) and, if relevant to the client’s circumstances, these should be pleaded in a claim:

1. Unpaid annual leave – section 29

You can only claim for annual leave which has been accrued but not yet taken. Annual leave should be calculated up until the end of the notice period.

If the employment contract is terminated within the first six months, there is no annual leave entitlement.

For workers with one to six years of service, the [Employment Act](#) provides a minimum amount of leave on full pay of 1.25 days per month. 15 days annual leave are accrued each year.

For workers with seven to 19 years of service, the minimum leave on full pay is 1.75 days per month. 21 days annual leave are accrued each year.

These rates are further increased again after 20 years of service (36 days per year), 25 years (48 days annual leave) and 30 years of service (72 days annual leave).

These annual leave rates do not apply to agricultural workers.

2. Pay in lieu (instead) of notice – section 49

If no notice is provided to the employee, or less notice than that required, the employee can claim for pay in lieu of notice.

Where the employee has worked for less than three years, only 14 days' notice is required, or less notice if the normal pay period is less than 14 days.

Where the employee has worked for more than three years, three months' notice is the minimum requirement [section 49].

3. Severance

The entitlement to severance of one month's pay for each year of service is provided by section 54. For a worker who is terminated within the first 12 months, there is no entitlement to severance.

For a worker who is terminated after working for 12 months or more, there is an entitlement to severance.

For a worker who resigns in good faith, i.e. voluntary resignation, the worker is only entitled to severance if he or she has worked for at least six years.

Severance is also payable where:

- the employee resigns because of illness or injury (with a medical certificate)
- the employer dies and the employee is not offered continuing work on same or better conditions
- retirement upon 55 years of age
- the employee dies in service [[Kapalu v Teaching Service Commission \[2014\] VUSC 89](#)].

Workers recruited from overseas are not entitled to severance.

Note that the 2009 [Employment Act](#) amendments increased severance to one month's pay per year of service. The amendments have a retrospective effect: [Wilco Hardware Holdings Ltd v Attorney General \[2013\] VUCA 12](#) and [Attorney General v ANZ Bank \(Vanuatu\) Ltd \[2012\] VUSC 241](#).

Also note that a contract can specify severance entitlements over and above the statutory entitlements: [Air Vanuatu \(Operations\) Ltd v Molloy \[2004\] VUCA 17](#).

The relevant date for severance is the date of termination of employment, not the end date of

the notice period [section 56(5) and [Ati v Vanuatu Commodities Marketing Board \[2013\] VUCA 11](#)].

Section 55(5) provides that the employer at the time of ultimate termination is liable to pay severance in respect of the entire period of “continuous employment”. Continuous employment may, depending on the circumstances, include working for a number of different employers [section 54(2)(c) and section 55(3)-(5)]

The most common example is when one employer sells his business and the purchaser keeps the previous staff on as employees in the business. This is the sort of case envisaged by section 55(3)(d). See also [Hack v Fordham \[2009\] VUCA 6](#).

4. Severance multiplier if dismissal is unjustified

Section 56 (4) provides a court power to order payment of **up to six times the severance entitlements if the dismissal was unjustified**. You will need to get instructions on the circumstances of the dismissal.

The employee is not automatically entitled to the maximum six times the normal severance payment. The court must make an assessment, just like an assessment of damages. In [Vanuatu Broadcasting and Television Corporation v Malere \[2008\] VUCA 2](#):

it is not an automatic entitlement. The Court has an ability to make an order up to that maximum but it is not a right. It requires an assessment of the circumstances and a proper judicial determination to be made.

There are two possibilities with regard to the meaning of Section 56(4). In some cases it has been treated as a reflection of the circumstances which lead to the dismissal and in others it has been treated more as compensatory for a person who is unable to obtain work.

Some guidelines were outlined in [Malere and Others v Vanuatu Broadcasting and Television Corporation \[2009\] VUSC 164](#):

it is appropriate for this Court to take into account circumstances existing at the time of the unjustified termination when it comes to assessing the amount to be applied. Without intending to make an exhaustive list of factors that this Court could take into account, factors that could be considered relevant include:-

- (a) did the employee have a good work record?
- (b) had the employee been given any previous warnings?
- (c) was the unjustified dismissal a result of inept handling of the issue by the employer at

the lower end or high handed arrogance at the higher end of the scale?

- (d) was the employee subjected to physical or verbal abuse by the employer at the time of the termination?

Other factors subsequent to the dismissal of the employee can also be taken into account when assessing the amount to be imposed and at what level. As a general principle, factors subsequent to the termination of employment should be factors personal to the employee that are reasonably foreseeable to the employer as potential difficulties an employee might face following the loss of employment. These factors, again without creating an exhaustive list, could include:

- (a) the efforts the employee has made to mitigate his or her loss by looking for new employment;
- (b) the age, qualifications, skills and health of the employee where those factors are relevant to his or her re-employment prospects;
- (c) if the employee has found new employment, is his or her new salary package better or worse than that which he or she has lost?
- (d) has his or her health or that of the immediate family of the ex-employee suffered as a result of the unjustified termination?
- (e) have educational opportunities for the ex-employee's immediate family been lost as a result of the unjustified termination?

It is not possible to give a weighting to any of these factors in comparison to other factors. Also, the weight of a particular factor will differ on a case to case basis. Nor can or should this Court set out a precise mathematical formula for calculating what if any compensatory amount should be paid. The assessment to be imposed will be a result of weighing all relevant factors in light of the circumstances of each case.

Three times the normal severance was ordered in [Public Service Commission v Tari \[2008\] VUCA 27](#). The claimant had been dismissed for misuse of a vehicle and taking a day of leave. The dismissal was unjustified because the Public Service Commission failed to address or invite submissions on section 50(3) of the [Employment Act](#) which states:

Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.

Three times severance was awarded in [Ati v Vanuatu Commodities Marketing Board \[2013\] VUCA 1](#):

This Court identified the relevant principles to the application of s. 56 (4) in [Banque Indosuez Vanuatu Ltd v. Marie Noelle Ferrieux \[1990\] VUCA 3](#). The Court said:-

“In our view Section 56 (4) does not give the Court power to award a sum akin to aggravated or punitive damages, or for loss of career prospects. It merely enables the Court to compensate an employee for any special damage which he has suffered by reason of unjustified dismissal, if the basic severance allowance is insufficient that purpose”.

Five times severance was awarded for a dismissal which was the result of “high handed arrogance” in [Mann v Air Vanuatu Ltd \[2010\] VUSC 168](#).

Two times normal severance was awarded in [Supa v Vanuatu Plant Hire \[2010\] VUSC 166](#). The Judge adopted the guidelines in [Malere and Others v Vanuatu Broadcasting and Television Corporation \[2009\] VUSC 164](#).

5. VNPF contribution

VNPF can be claimed up until the end of the notice period. See [Mann v Air Vanuatu Ltd \[2010\] VUSC 168](#).

6. Common law damages, damages for breach of contract, damages for stress and humiliation

Where the contract is for a fixed and specified term, the court may award damages equivalent to salary until the end date of the contract, minus any alternative salary from new employment which could reasonably have been earned or was actually earned. The employee has a duty to mitigate his or her loss.

Salary until the end of the contract was awarded in [Tari v Republic of Vanuatu \[2012\] VUSC 23](#) and [Mann v Air Vanuatu Ltd \[2010\] VUSC 168](#). In both cases the award was reduced to take into account future salary from new employment.

In contrast, in [Lo v. Sagan \[2003\] VUCA 16](#), there was no award of damages for future salary because it was a contract of unspecified duration, not a fixed term contract. The contract could therefore be terminated on three months’ notice under section 49 of the [Employment Act](#).

In [Vanuatu Maritime Authority v Timbacci \[2005\] VUCA 19](#) the Court of Appeal said:

The legal principles that guide a Court in the assessment of damages for wrongful dismissal are not in doubt and are conveniently summarized in paragraphs 933 & 934 of *McGregor on*

Damages (13th Edition) at page 635. It reads:-

The measure of damages for wrongful dismissal is prima facie the amount that the (Respondent) would have earned had the employment continued according to contract, subject to a deduction in respect of any amount accruing from any other employment which the (Respondent) in minimizing damages either had obtained or reasonably could have obtained. The rule has crystallized anomalously in this form. It is not the general rule of the contract price less the market value of the (Respondent's) services that applies; instead the prima facie measure of damages is the contract price, which is all the (Respondent) need show. This is then subject to mitigation by the (Respondent) who is obliged to place his services on the market, but the onus here is on the (Appellant) to show that the (Respondent) has or should have obtained an alternative employment.

Basically, the amount that the (Respondent) would have earned under the contract is the salary or the wages that the (Appellant) had agreed to pay. (para 934)

Common law damages may also be awarded if the unjustified dismissal resulted in emotional pain, distress and humiliation, or loss to professional reputation.

In [Mann v Air Vanuatu Ltd \[2010\] VUSC 168](#), VT100,000 was awarded for unnecessary humiliation and suffering.

In [Melcofee Sawmill Ltd v George \(2003\) VUCA 24](#), where an employee was abused and sworn at before being sacked on the spot, VT30,000 was awarded.

Note that an award of multiple severance may prevent the award of common law damages. A court cannot award double damages for the same loss.

In [Republic of Vanuatu v Tari \[2012\] VUCA 6](#), the Court of Appeal held that the manner and circumstances of the dismissal had already been considered in the award of six times the normal severance, and therefore common law damages for humiliation could not be awarded. There cannot be a “double award”.

A useful example of the calculation of all these entitlements is the decision in [Vanuatu Maritime Authority v Timbacci \[2005\] VUCA 19](#).

Other employment issues

Can an employer dismiss an employee without good reason by providing three months' notice?

The Court of Appeal has discussed the concept of a lawful but unjustified dismissal.

This issue was determined, for now at least, in the recent Supreme Court case of [Kalambae v Air Vanuatu Operations Ltd \[2014\] VUSC 13](#):

In my view the plain meaning of section 49 is that either party, without any justification or reasons given, may give notice to the other party at any time, orally or in writing, to terminate an employment contract. Noticeable by its absence of these sections is any obligation cast on an employer to treat an employee fairly, including to consult an employee about the risk of termination and the reasons for termination, in circumstances falling short of serious misconduct. To put this in another way, every employee in Vanuatu, no matter how long-serving and no matter how unblemished their work performance record may be, is at risk of their contract being terminated on a maximum of three months' notice. Parliament has decided to strike the balance between employers and employees interests in that way. This is not the balance which has been struck in many other jurisdictions, but it is the law in Vanuatu and the Court must apply it.

Effectively an employer which is willing to provide the requisite notice, or the appropriate payment in lieu of notice, does not have to act fairly towards even a longstanding employee.

An appeal against this decision was dismissed by the Court of Appeal in *Kalambae v Air Vanuatu (Operations) Ltd* [2014] VUCA 34.

Reasons for dismissal – was the dismissal unjustified?

Sometimes reasons for dismissal are not given. If the client has suspicions about the reason for his or her dismissal, the reason should be sought from the employer.

It is important to fully investigate the reasons for dismissal. It is generally accepted that an employer can lawfully terminate someone on grounds of incompetence or financial necessity. However, for example, dismissal on the grounds of an employee's political allegiances would generally be considered unjustified, if for no other reason that it is in contravention of fundamental constitutionally protected rights.

There are a number of grounds for dismissal which a court would find to be unjustified. Article 5 of the [Constitution](#) enshrines certain fundamental rights, such as freedom of conscience and worship, freedom of expression, freedom of assembly and association and equal treatment under the law.

Dismissal due to pregnancy would be unjustified. Belonging to a trade union or making a

complaint are not proper reasons for dismissal [section 50 (2)]. See Section 56(4) regarding unjustified dismissal and breach of contract by the employer: [Banque Indosuez Vanuatu Ltd v. Marie Noelle Ferrieux \[1990\] VUCA 3.](#)

What is serious misconduct?

“Serious misconduct” is not defined in the Act, however section 50 (3) does provide:

Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.

Where a person is dismissed on the grounds of serious misconduct, the employer is not required to give the person any notice, or any compensation in lieu of notice [section 50 (1)]. The employer is not required to pay severance.

The legality of a dismissal for serious misconduct can therefore be very important in terms of the financial entitlements of a client. If serious misconduct can be proven, then there is no entitlement to severance or notice payments. On the other hand, if serious misconduct is not proven, and the employee has been terminated without proper notice, then the dismissal may be unjustified and up to six times severance can be awarded.

Before dismissing an employee for serious misconduct, the employer must first give the employee an adequate opportunity to answer any charges made against the person. Section 50 (4) provides that any dismissal in contravention of that requirement shall be deemed to be an unjustified dismissal. If an employer does not dismiss a person on the grounds of serious misconduct “**within a reasonable time after he has become aware of the serious misconduct**” he is deemed to have waived his right to dismiss the employee on those grounds [section 50 (3)].

Dismissal should be a last resort. An employer has lesser options such as written warnings, demotion or transfer. See [Public Service Commission v Tari \[2008\] VUCA 27.](#)

There are cases that say that driving a government vehicle while drunk and causing damage is serious misconduct. See [Bani v Government of the Republic of Vanuatu \[2007\] VUSC 12.](#)

What about public sector matters?

You will need to refer to the provisions in the [Public Service Commission Staff Manual](#). An electronic copy of this can be found on the SALMON shared folder.

Direct initial correspondence to the legal officer of the Public Service Commission.

Section 76 of the [Employment Act](#) provides that the Act generally applies to public servants.

Checklist – basic entitlements on termination

1. Notice, or payment of salary in lieu of notice.
2. Accrued but unpaid annual leave up to the end of the notice period.
3. Severance calculated by reference to the date of termination. If the termination was unjustified, claim six times the normal severance entitlement.
4. If the employee has regularly worked overtime, you may also ask for overtime during the notice period.
5. VNPF allowances up to the end of the notice period. This may include allowances.
6. Possibly also repatriation costs. See sections 58–63 of the [Employment Act](#).
7. If a fixed term contract, common law damages for breach of contract by the employer. This includes salary until the end of the contract. Note the duty to mitigate loss and find new employment, if reasonably possible. Common law damages may not be available if you are seeking a multiplier of the severance payment.

SAMPLE EMPLOYMENT CLAIM

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)**

CIVIL CASE No. OF 2013

BETWEEN: JOHN NAKO

Claimant

Public Solicitor's Office

Claimant's lawyer

AND: WANTOK VEHICLES LTD

Defendant

SUPREME COURT CLAIM

Date of filing:	February 2014	If for fixed amount:	
Filed by:	Bryan Livo	The claimant claims:	VT2,505,000
Address for:	Public Solicitor's Office	Interest:	5%
Service:	PO Box 794 Port Villa	Filing and service fees:	VT 22 000
		Total claimed and costs:	VT2,577,000

1. The claimant is a Ni-Vanuatu in the Republic of Vanuatu.
2. The defendant is a local company able to sue and be sued in its corporate name.
3. The claimant was employed as a sales person by the defendant under a contract of employment commencing on or about 2 July 2007.
4. The claimant's employment was terminated in or about July 2013.
5. The claimant was being paid a salary of VT60,000 a month at the time of termination.
6. The termination of the employment contract by the defendant was unlawful and unjustified, in that:
 - a) The claimant was not given any warning or notice before the termination.
 - b) The claimant was not given the opportunity to respond to any allegation

laid against him.

- c) There was no good cause for the termination.

7. The defendant has failed to pay the statutory entitlements of the claimant:

- (a) Three months' salary in lieu of notice.

Particulars

$$VT60,000 \times 3 = VT180,000$$

- (b) Severance until the end of the notice period.

Particulars

One month of salary for each year of service.

6.25 years of service.

See paragraph 8 for severance calculation.

- (c) Accrued annual leave until the end of the notice period

Particulars

15 days annual leave each year. Two years accrued leave (30 days or 1.5 months of leave).

$$VT60,000 \times 1.5 = VT75,000$$

8. The termination of the claimant was unjustified. The claimant therefore seeks an award of 6 times the normal severance entitlement.

Particulars

1 month salary x number of years of service x 6

$$VT60,000 \times 6.25 \times 6 = VT2,225,000$$

9. The total damages being claimed is therefore:

Notice 180,000

Severance 2,250,000

Annual leave 75,000

Total VT2,505,000

WHEREFORE THE CLAIMANT CLAIMS:

1. Judgment in the sum of VT2,505,000 for the claimant.
2. Interest at the rate of 5% per annum from 1 July 2013.
3. Cost of proceedings (VT8,000) plus VT1,125.
4. Any other orders this court deems fit.

Signed by the claimant OR claimant's lawyer)

at _____)
Place _____)
on _____)
Date _____)

Signature of claimant's lawyer

Chapter 34 – Breach of contract

Debt recovery and unjustified dismissals are claims which arise from a breach of the terms of a contract. There are many other claims based upon alleged breaches of contract. There are some basic fundamentals to remember when pleading a contract claim.

It is important to ensure that the material facts are pleaded in the statement of claim. Generally speaking, those factors which should be pleaded are:

1. whether the agreement relied upon is written, oral or is to be implied or inferred from the conduct of the parties
2. if the agreement is said to be in writing, the documents making up the agreement should be identified
3. if the agreement is made orally, you should identify the date of the discussions, the parties to the discussions, and the general substance of the agreement as reached in those discussions
4. if it is alleged to be a combination of both, then particulars of both should be set out
5. the consideration for the agreement
6. the material terms of the agreement that are relied upon as giving rise to the claim
7. if there is a condition precedent to the enforceability of the agreement, it should be set out together with particulars of that condition having been satisfied (for the claimant's purposes) or, if the defence to a claim is that the agreement is unenforceable because the condition precedent has not been satisfied; this should be set out in the defence
8. the breaches relied upon to found the claim, whether it be a claim for:
 - (a) damages
 - (b) a declaration that the agreement has been rescinded, or
 - (c) an order for specific performance.

The majority of contract based claims will be claims for damages, although there are

circumstances where your client may require and be entitled to an order for specific performance, that is, an order that the contract be completed by the other party.

Chapter 35 – Costs

Part 15 of the [Civil Procedure Rules](#) deals with costs.

The court has a discretion whether or not to award costs. There is also discretion as to the amount of any costs awarded [Rule 15.1(1)].

The general rule is that the losing party pays the costs of the successful party [Rule 15.1(2)]. This is also referred to as “costs follow the event”.

If the parties do not agree on the amounts of costs to be awarded, the judge must determine the costs [Rule 15.3].

“Costs in the cause” and “costs in the case/application” means the party who eventually wins the case will be awarded costs for the particular interlocutory application before the court.

A self-represented party may recover disbursements, but cannot recover costs [Rule 15.4].

If and when the 2012 amendments to the [Public Solicitor Act](#) are gazetted, PSO lawyers will be able to recover costs.

Advising the client about costs

It is essential that you explain to the client that a costs order may be made against them if they are not successful with their case. Make a note of providing this advice. The Application for Legal Assistance Form has a retainer section indicating that there is a risk of a costs order if the case is unsuccessful. The client should sign below the costs warning in the retainer agreement

Standard basis for costs

This was formerly referred to as ‘party and party costs’.

Costs are normally to be awarded on a standard basis unless the court orders costs to be awarded on an indemnity basis.

Standard basis costs are all costs necessary for the proper conduct of the proceeding and proportionate to the matters involved in the proceeding [Rule 15.5 (1)].

In [Hurley v Law Council of the Republic of Vanuatu \[2000\] VUCA 10](#), the Court of Appeal determined that the rate for standard costs was VT10,000 per hour.

Taxation

When the court says costs are “taxed”, this has nothing to do with the normal meaning of the word “tax”. Taxation of costs means an assessment or adjudication of costs by a judge or registrar. Taxation of costs usually occurs if the parties cannot agree on the proper amount of costs [Rule 15.3].

In [Hudson & Co v Greater Pacific Computers Ltd \[1998\] VUCA 12](#), the Court of Appeal noted:

- Bills of costs should be simple and straight-forward so they can be easily followed by the officer conducting the taxation.
- Every effort should be made to reach agreement. Otherwise the costs of taxation may be expensive.
- Parties should be allowed to inspect the files of the other parties. However confidential client communications should not be made available to the other side.

For other examples of the taxation process, see [Kensington Publications Ltd v Geoffrey Gee & Partners \[2003\] VUSC 17](#) and [Hudson & Co v Sunrise Limited \[1996\] VUSC 2](#).

Indemnity costs

Indemnity costs were formerly known as ‘solicitor client’ costs.

Indemnity costs represent all the work done and expenses **actually** incurred in the proceedings except where they are unreasonably incurred or an unreasonable amount. This may involve the unsuccessful party paying the costs that were agreed by the other party and their lawyer as per their costs agreement (either written or verbal). Some private lawyers in Vanuatu use rates of VT35,000 per hour.

Indemnity costs therefore will usually be higher than standard costs. They will be all costs which are not shown to be unreasonable. If disputed, the benefit of the doubt goes to the party receiving the costs. This is the opposite of standard basis costs, where the benefit of the doubt will go to the party paying the costs.

Costs awarded on an indemnity basis are all costs reasonably incurred and proportionate to the matters involved in the proceeding, having regard to:

1. any costs agreement between the winning party and his lawyer
2. charges ordinarily payable by a client to a lawyer for the work [Rule 15.5(2)]

For indemnity costs, the test is “whether each of the items of work was strictly necessary, and which exceeds that which the unsuccessful party should be required to compensate”.

When can indemnity costs be ordered?

Rule 15(5) provides that the court may order indemnity costs if:

1. the other party deliberately or without good cause prolonged the proceeding, or
2. the other party brought the proceeding in circumstances or at a time that amounted to a misuse of the litigation process, or
3. the other party otherwise deliberately or without good cause engaged in conduct that resulted in increased costs, or
4. in other circumstances (including an offer to settle made and rejected) if the court thinks it appropriate.

Cases involving indemnity costs

In [Air Vanuatu \(Operations\) Ltd v Molloy \[2004\] VUCA 17](#), the Court of Appeal overturned a decision to award indemnity costs. The Court of Appeal found the defence case was not without merit, as the claimant only obtained half of what he claimed:

The awarding of **indemnity costs** arises only in very extreme cases. We are told that there were no submissions made on the point and no opportunity for the parties to comment on the possibility. There is nothing available before us to suggest that even if that opportunity had been provided there would have been any justification to exercise the cost discretion to make such an extraordinary order in the circumstances of this case.

.... We quash the order for indemnity costs made in the Supreme Court and substitute it with an order for standard costs on the amount recovered. (emphasis added)

In [Regona v Director of Land Records \[2008\] VUSC 80](#) the court accepted an hourly rate of VT25,000 for indemnity costs. However the court held that stationery could not be charged as a disbursement. The court also stated:

The award by this Court of indemnity costs to the Claimants cannot be taken to mean that a

Claimant’s Counsel can charge in any manner he chooses provided his client has agreed to that method of charging. It has to be accepted that not all lawyers charge in the same manner or at the same hourly rate. However there must be an element of proportion in the manner and rate charged by the successful party’s counsel. The losing party should not be required to pay for prolixity, where it exists, of the successful party’s counsel or to pay at an hourly rate which is unreasonable or excessive for the work required.

[Prolixity means “excessive length, tedious”]

In [Vanuatu Maritime Authority v Timbacci \[2005\] VUCA 19](#), the Court of Appeal overturned an order for indemnity costs. The court was “satisfied that there were always significant matters which needed to be litigated between the parties.”

In [Sugden v Smith \[2011\] VUCA 22](#), indemnity costs were awarded and the lawyer involved was ordered to pay those indemnity costs personally. The lawyer had refused to withdraw from the case despite having a clear conflict of interest. He also “misused the litigation process”.

The order for indemnity costs was made under Rule 15.5(5), paragraphs (b) and (c).

Wasted costs

The court may order wasted costs if:

1. a party does not appear at a conference or hearing when the party was given notice of the date and time, or
2. a party has not filed and served on time a document that the party was required by the court to file and serve, or
3. a party’s actions, or failure to act, have otherwise led to the time of the court or other parties being wasted.

Wasted costs can only be ordered if extra costs were actually incurred unnecessarily by another party [Rule 15.25 (1)]. Wasted costs can be ordered for all or part of a proceeding.

Wasted costs can be ordered against a lawyer personally if the unnecessary costs were incurred because of the conduct of the lawyer [Rule 15.25 (5)].

Wasted costs can be ordered against a lawyer personally for a wasted proceeding that:

1. has no prospect of success, is vexatious or mischievous or otherwise lacking in legal merit, AND
2. a reasonably competent lawyer would have advised the party not to bring the proceeding [Rule 15.26(1)]

Wasted costs can also be ordered against a lawyer **personally** if the lawyer:

1. did not appear when required, or
2. was not ready to proceed or otherwise wasted the time of the court, or
3. incurred unnecessary expense for the other party [Rule 15.26 (2)].

A court must not make an order for wasted costs against a lawyer personally without giving the lawyer an opportunity to be heard [Rule 15.26 (3)].

Taking into account offers to settle

When considering the question of costs, the court must take into account any offer to settle that was rejected [Rule 15.11].

If you want to make a settlement offer and intend the court to take it into account in later costs proceedings, mark the letter “**without prejudice except as to costs**”. The court might not take into account settlement letters which are only marked “without prejudice”.

The offer to settle should set out the reasons behind the offer and any relevant calculations (e.g. damages and costs).

The Court of Appeal discussed Rule 15.11 in [Hack v Fordham \[2009\] VUCA 6](#).

Calderbank letters

An offer to settle a matter may be regarded as a “Calderbank letter”. This term arises from the case of [Calderbank v Calderbank \[1975\] 3 All ER 333](#), which was an English matrimonial case.

Calderbank letters involve a settlement offer and usually include the heading “Without prejudice save as to costs”.

A Calderbank offer may entitle a party to a different costs order to the normal costs order,

which is that costs follow the event.

A losing party may be awarded costs if the result of the case is more favourable to the loser than their previous offer of settlement. For example, if the defendant offers to settle for VT10,000,000 in damages, and the court only awards VT5,000,000, then the claimant may be required to pay the costs incurred by the defendant after the Calderbank letter was rejected.

In [Triwood Industries Ltd v Stevens \[2012\] VUSC 199](#) the court awarded standard costs up until the Calderbank letter and indemnity costs thereafter. A Calderbank letter had been sent which outlined why the claimant's case was "hopeless" and gave notice that indemnity costs would be sought if the claim failed. The letter stated in part:

I am writing one final time to offer settlement of this matter. The offer is pursuant to rule 15.5.5.d and if rejected the letter will be put to the Court to apply for indemnity costs.

The court found that the case was hopeless and this amounted to exceptional circumstances which justified an award of indemnity costs.

A Calderbank letter written before the claim was filed was regarded as a proper basis for an order for indemnity costs in [Russo & Russo v International Finance Trust Co Ltd \[1998\] VUSC 61](#).

Costs in public interest cases

If a case involves a matter of public interest, the court may make a different costs order than the normal costs order. In [Kalsakau v Principal Electoral Officer \[2013\] VUSC 112](#) the court found that the exposure of electoral irregularities was in the public interest and therefore the losing claimant was not required to pay all the costs of the successful parties:

a person bringing litigation to advance a matter that can legitimately be considered as being in the public interest should not have their public spirited endeavours punished by an order for costs if unsuccessful... Costs are at the discretion of the Court but it is necessary for the Court to have regard to the interests of justice when considering what order for costs should be made.... each case must be approached having regards to its individual circumstances so that in the end costs are awarded on a basis that meets the ends of justice.

Many cases involving the PSO involve matters of public interest. Do not hesitate to seek an order that each party pays its own costs.

Extra charges

A 10% surcharge for urgency was allowed in [Iauko v Vanuaroroa \[2007\] VUSC 70](#).

Additional costs for overseas counsel will not normally be allowed, unless truly justified and established by a certificate of the court [[Hurley v Law Council of the Republic of Vanuatu \[2000\] VUCA 10](#) and [Neel v Blake \[2005\] VUSC 121](#)]

Costs in the Magistrates' Court

The same general rules apply, however a magistrate is required to make a costs order at the time of judgment [Rule 15.10].

There is a scale of costs provided in Schedule 2 at page 211 of [Jenshels' Annotated Civil Procedure Rules](#).

Costs in criminal cases

In [Swanson v Public Prosecutor \[1998\] VUCA 9](#), the Court of Appeal held that costs should only be awarded against a defendant in a criminal case in the most exceptional circumstances. Costs should not be awarded in addition to imprisonment. An accused should be punished for their offending, not for how they conduct their case. There is a constitutional right to plead not guilty, and an accused should not be punished for exercising this right:

defendants should be sentenced for their offending and not for subsequent conduct. Accused persons should not be penalised for exercising their constitutional right to plead not guilty. See [R v Minto \[1982\] 1 NZLR 606](#) and the commentary in *Adams on Criminal Law*, (ed. Robertson) Volume 2 Chapter 3.03.

In regulatory cases such as international fishing offences, the state may try to recover its costs.

Chapter 36 – Probate

Seven basic points

1. For a will to be a valid will, it:
 - (a) must be in writing
 - (b) must be signed on each page
 - (c) must be witnessed by at least two witnesses who also sign the will. A witness must not be a beneficiary. If the witness is a beneficiary, the will is still valid, however the witness loses entitlement to any property under the will
 - (d) must be made by a deponent of sound mind, memory and understanding at the time he or she made the will.

See the [Wills Act](#).

2. If the deceased had a will, the court will grant probate. The executor named in the will needs to file an application for probate using forms 1 and 2 of the [Probate and Administration Rules](#). If the executor is dead or not able to file for probate, an application for administration can be made using forms 5 and 6.
3. If the deceased did not have a will, the court will grant 'letters of administration of the estate'. The next of kin (normally the husband or wife) needs to file an application for letters of administration using forms 3, 4 and 6 of the [Probate and Administration Rules](#).
4. After the application for probate or administration is filed with the Supreme Court, you need to broadcast an advertisement. See Regulation 2.5 and Form 7 of the [Probate and Administration Rules](#). If there is no response within 28 days of the last advertisement, file a form 8.
5. The person who is granted administration or probate does not thereby acquire any right to keep the property. Instead, that person has a duty to divide the property according to the will, or if there is no will, according to the [Queen's Regulation](#) [this refers to the [Succession, Probate and Administration Regulation 1972, Queen's Regulation No. 7 of 1972](#).]

The executor or administrator gets no decision making power as to how the property is divided. The executor or administrator only gets to keep property if he or she is a beneficiary in the will, or a designated beneficiary under the Queen’s Regulation.

6. Ownership of custom land cannot be dealt with, or passed on, under probate law. Custom land can only be dealt with under custom. If there is a dispute about the distribution of custom land, it must be resolved in an Island Court or Land Tribunal.
7. Probate and administration law applies to property such as cash, vehicles, personal goods and leasehold property. Custom law, or the wishes of the chiefs, or any promises made by the deceased that do not amount to a valid will, have no relevance to the distribution of these properties.

Administration of the estate

If there is a will, the executor named in the will is responsible for distributing the estate. The executor should file an application for probate.

Once probate is granted, the executor can use the Grant of Probate to collect all the property of the deceased, pay any debts or funeral expenses, and then distribute the remaining property according to the terms of the will.

Under section 7 of the [Queen’s Regulation](#), if there was no will, administration of the estate is granted to the wife or husband. If there is no wife or husband, then the next of kin is entitled to apply for a grant of administration of the estate. Under the rules, one or more of the children (aged over 21) should be granted administration of the estate.

If these people do not apply, or if the next of kin are not fit to be entrusted, or if there are no next of kin, then administration can be granted to any other person.

Section 7 of the [Queen’s Regulation](#) provides:

PART IV – GRANTS OF LETTERS OF ADMINISTRATION

Persons entitled to grant.

7. The court may grant administration of the estate of a person dying intestate to the following persons (separately or conjointly) being not less than twenty-one years of age –
 - (a) the husband or wife of the deceased; or

- (b) if there is no husband or wife to one or not more than four or the next of kin in order of priority of entitlement under this Regulation in the distribution of the estate of the deceased; or
- (c) any other person, whether a creditor or not, if there is no person entitled to a grant under the preceding paragraphs of this section resident within the jurisdiction and fit to be so entrusted, or if the person entitled as aforesaid fails, when duly cited, to appear and apply for administration.

Division of the estate

If there is a will, the estate is divided according to the terms of the will.

If there is no will, the estate **must** be divided according the [Queen's Regulation](#). Section 6 of the [Queen's Regulation](#) outlines the rules of division of an estate where there is no will. Under the section 6 rules, the administrator holds the property of the deceased on trust. They are the caretaker for the property, not the owner of the property. First they must pay the debts and funeral expenses.

Under this Regulation, the surviving wife or husband is entitled to inherit all of the property up to the value of the first AUD \$10,000 (about VT850,000). After the first AUD \$10,000 is distributed to the wife or husband, the remaining property is then divided between the wife or husband, who gets one third, and the children, who share the remaining two thirds of the property. If any of the children died before the deceased, leaving a child or children, then those surviving children take their deceased parent's share. This is called a 'per stirpes' distribution.

A more detailed summary of section 6 provide the following rules of distribution:

- If there is a surviving wife or husband, the surviving wife or husband takes all personal goods (chattels).
- If the estate is valued at less than AUD 10,000, the wife or husband takes all of the estate. If the estate is valued at more than AUD 10,000, the wife or husband takes the first AUD 10,000, and the remainder is allocated as follows:
- If there are no children, the wife of husband takes half of the rest of the estate.
- If there are children, the wife or husband (in addition to the first 10 000 AUD), takes one third of the rest of the estate, and the children share two thirds of the rest of the estate. If any of the children are already dead, then their children will

share that portion of the inheritance.

- If there is no husband or wife, the children share the estate.
- If there are no children, but both parents are alive, then both parents share the remainder (after the first AUD 10,000) of the estate equally.
- If no children, and only one parent, that one parent takes the remainder of the estate.
- If no parents and no children, the husband or wife takes the remainder of the estate.
- If no husband or wife, and no children and no parents, the brother and sisters and any children of deceased brother and sisters share the estate equally.
- An adopted child is considered to be a child.

In the recent case of [Morris v Abock \[2013\] VUCA 27](#), the Court of Appeal applied section 6 as follows:

20. A consideration of s. 6 points to the estate of Lily Abock falling for distribution as follows:-

- (a) To his surviving wife Elizabeth Abock all the personal chattels;
- (b) Also to his surviving wife Elizabeth Abock, the first “\$10,000” (in Australian dollars broadly equivalent to VT1,000,000) of the residuary estate. Assuming that the property occupied by Beasant Morris is the only significant asset of the estate, this would result in the Estate of Elizabeth Abock taking a majority share in that leasehold residential property which, of course, is the essential subject of the dispute between Beasant Morris and Matthew Abock;
- (c) The remaining balance is then shared:
 - i. one third to his surviving wife Elizabeth Abock
 - ii. two thirds between his (Lily Abock’s) surviving children per stirpes (that is, if one of the children pre- deceased Lily Abock leaving a child or children, then that child or those children would share their deceased parent’s entitlement equally).

Other cases

The Court of Appeal has outlined the probate and administration procedures in the following

cases.

[In re Estate of Molivono \[2007\] VUCA 22](#) the Court of Appeal said:

the granting of probate or administration does nothing to determine ultimate ownership of the personal property of the person who has died. Not only in this case but in others as well we have seen suggestions that the grant of the right to administer an estate meant there was a determination of what property was owned by the estate and also governed its future ownership. Obtaining probate or administration is placing on an individual an extraordinarily solemn duty. It is the duty first to call in and collect all the properties of the deceased person apart from any interest in custom land. Then, they must pay all the debts of the estate. Their solemn obligation is to ensure that what is left is distributed either in accordance with the terms of the will or in accordance with the rules laid down in Queen's Regulations 7. It provides for the executor or administrator no rights of ownership or personal benefit.

A person who is granted probate or administration is answerable to the Court for the proper exercise of the obligation which he or she has chosen to take up ...

When someone dies the first question must be whether any assets of that deceased person require to be administered by will or under a grant of administration. If the answer is yes an application must be made. Those carrying out this task must ensure that before there is any distribution of any realized assets the debts and obligations of the deceased person are identified and met.

If what belonged to the deceased involves questions of customary land ownership then an application should be made (if there is not complete agreement) to a Land Tribunal or Island Court for determination. What happens to rights to customary land will differ from place to place according to tradition and custom. But it will not be a matter which falls to be determined in accordance with rules which apply to personally owned assets other than custom land such as furniture, vehicles, bank accounts and registered leasehold titles.

[In re Estate of Raupepe Fidelia \[2013\] VUCA 6](#) there was a successful appeal against the refusal to grant administration of the estate to the husband of the deceased on grounds he was not capable of administering the estate. The trial judge refused to grant administration for the following reasons (found to be in error):

- the failure of the husband to detail the property of the deceased in his application for administration;
- The receipt by the husband of the death benefit of Vatu 917,280 before administration had been granted. (Incidentally the evidence shows that the appellant has invested a

substantial proportion of this money with a bank for the benefit of the adopted child);

- The fact that the husband was overseas in New Zealand apple picking when the deceased became ill and died;
- The husband never paid bride a price in respect of the deceased in accordance with custom practices in their community; and
- The community chiefs and elders have decided against the grant of administration to the husband and have decided that the benefits of the deceased property be allocated for the benefit of the Family Wass and Family Naova.

The Court of Appeal rejected these reasons, and held that the grant of administration is determined by law:

Where the entitlement of a particular person to a grant of administration is governed by Regulation 7 of the Queen's Regulation, factual matters of the kind considered by the trial Judge are not relevant, and for this reason should not be admitted into evidence.

On the issue of the distribution of the estate, the Court of Appeal said:

The people entitled to receive the benefit of the personal estate of the deceased are determined by law: where the deceased leaves a will dealing with their personal property that property is distributed according to the terms of the will; in the absence of a will the personal property of the intestate deceased will be distributed according to the Queen's Regulation.

Chapter 37 – Land leases

While the PSO does not act in matters involving disputes relating to customary land, the office can act in matters involving registered land leases. This is a difficult and complex area of law.

The starting point in any land lease case is the [Land Leases Act](#). Land lease cases can only be filed in the Supreme Court because section 1 of the [Land Leases Act](#) defines “the Court” as the Supreme Court.

Indefeasibility

Vanuatu has a system of indefeasibility of registered land. This means that a register of land holdings maintained by the state guarantees an indefeasible title to those included in the register. ‘Indefeasible’ means that a right or title in property cannot be made void or cancelled, other than by the operation of the Act itself.

The system is a type of Torrens Title system, which operates on the principle of “title by registration” (i.e. the indefeasibility of a registered interest). However this system only applies to leasehold interests.

Land ownership is transferred through registration of title. If title is lost because of negligence or other improper action by the state in the registration and transfer process, the aggrieved title holder can be compensated.

The Land Leases Register is the central aspect of the land lease system. As the Court of Appeal said in [Ratua Development Ltd v Ndai \[2007\] VUCA 23](#): “the register is everything”.

The register is not proof of custom ownership

In [Ratua Development Ltd v Ndai \[2007\] VUCA 23](#), the Court of Appeal said:

the persons whose titles are registered and protected are the proprietors of the leasehold estate in land, that is, the lessees. The Act does not provide for registration of the interests of custom owners of land (most custom land in Vanuatu is not even subject to leases). Nor does it in any way seek to regulate the custom ownership of land ...

it is clear that the property section is intended to record and identify the details of the lease not the lessors. It follows that the Land Leases Register does not purport to and does not declare the custom ownership of the land subject to a registered lease. There is no Torrens system in respect of those to whom the land belongs, namely the custom owners.

27. Against that background, we turn to consider this caution. The right claimed is “custom ownership”. As stated above, that is not a right which is capable of registration or of obtaining the protection of indefeasibility under the Act.

Cautions

It is assumed that the register is an accurate and complete record of land title. Therefore if a client wants to make a claim against a registered title, he or she should register a caution with the Lands Department. The effect of registering a caution is that any potential purchaser of the leasehold interest will have knowledge of the caution. This may be important to any later dispute alleging mistake or fraud.

The relevant form for lodging a caution can be obtained from the Lands Department.

See sections 93–98 of the [Land Leases Act](#). These sections were discussed in [Ratua Development Ltd v Ndai \[2007\] VUCA 23](#).

Mistake or fraud

Section 100 of the [Land Leases Act](#) applies to cases where registration has been obtained by fraud or mistake. A party can apply to the Supreme Court for rectification of the register in such circumstances. A bona fide purchaser for value will have good title, even if there has been a mistake or fraud by another party. The relevant test is outlined in section 100(2).

The purpose of section 100 was discussed in [Naflak Teufi Ltd v Kalsakau \[2005\] VUCA 15](#):

We are satisfied on a consideration of the object and purpose of the section that, at the very least, a person seeking to invoke section 100 must include a person who has an interest in the register entry sought to be rectified and which it is claimed was registered through a mistake or fraud. Not only must there be proof of mistake or fraud but also that such mistake or fraud caused the entry to be registered. Furthermore it has to be proved that the mistake or fraud was known to the registered proprietor of the interest sought to be challenged or was of such a nature and quality that it would have been obvious to the registered proprietor had he not shut his eyes to the obvious or, where the registered proprietor himself caused such omission, fraud or mistake or substantially contributed to it by his own act, neglect or default. We use the word ‘interest’ in the widest possible sense although accepting it may have in appropriate circumstances be distinguished from a mere busy body.

Other useful cases include [Colmar v Rose Vanuatu Ltd \[2011\] VUCA 20](#), [Kalsakau v Maiiau](#)

[\[2000\] VUCA 11](#), [Roqara v Takau \[2005\] VUCA 5](#), [Aore Island Ltd v Vatarul \[2013\] VUCA 16](#) and [ANZ \(Vanuatu\) Ltd v Gougeon \[1999\] VUCA 15](#).

The State may be required to indemnify a party who suffers damage by way of rectification of the register. See section 101 and [Huang Xiao Ling v Leong \[2013\] VUCA 15](#).

There is also power under section 99 for the Director to rectify the register.

SAMPLE LAND LEASE CLAIM

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)**

CIVIL CASE NO 123 OF 2012

BETWEEN

MARY TAWI
Eratap Village,
South Efate

Applicant

AND

JEAN PAUL LOUIS
Ohlen Area
Port Vila.

Defendant

SUPREME COURT CLAIM

Date of filing: _____
Filed by: _____
Address for _____
Service _____

If for fixed amount:
The claimant claims:
Interest:
Filing and service fees: _____

Total claimed _____

1. The claimant is an elderly lady who lives at Eratap Village. She was the registered title holder (lessee) of the land lease title no. 12/0912/888 (**the property**) situated at Second Lagoon area, in Port Vila.
2. The defendant is a ni-Vanuatu businessman who is currently the registered title holder of the property.
3. Around September 2007 the defendant approached the claimant at Eratap Village and expressed interest in purchasing the property.
4. The claimant told the defendant that the property was not for sale.
5. On or about 1 December 2007 at Eratap village the defendant gave the claimant one million Vatu.

Particulars:

- (a) The defendant told the claimant that the payment was a Christmas present.
 - (b) The defendant said the payment was not for the property.
 - (c) The defendant told the claimant that payment for the property will be made at a later date if there was an agreement reached to sell the property.
6. After handing over the money to the claimant, the defendant told the claimant to sign a document for receiving the money. The claimant signed this document (hereinafter referred to as the “**signed receipt**”).
 7. The defendant also gave another document (hereinafter referred to as the “**second document**”) to the applicant and asked her to sign it.
 8. The defendant told the claimant that the second document was a duplicate receipt in French language.
 9. The applicant signed the second document.
 10. The second document was in fact a transfer of lease title number 12/0912/888 from the claimant to the defendant.
 11. The claimant cannot read or write, other than being able to sign her name.
 12. At the time of signing the second document, the claimant was not aware that the second document was a lease transfer document.
 13. The defendant used the transfer document to register the property in his name.
 14. The defendant has obtained the title No. 12/0912/678 by way of fraud and/or mistake.

Particulars.

- (a) The defendant tricked the claimant by getting her to sign the second document that was in a French language.
 - (b) When the defendant obtained the signatures of the claimant the defendant knew that the claimant could not read or write.
 - (c) The defendant told the claimant that the one million vatu payment was not a payment for the property;
 - (d) The defendant registered the transfer of the property knowing that consent had not been provided by the claimant.
15. As a consequence of the fraud and mistake pleaded above, the claimant seeks an order for rectification of the lease pursuant to section 100 of the Land Lease Act.

Wherefore the claimant claims:

1. That the transfer from the claimant to the defendant in respect of the lease title No. 12/0912/888 be cancelled.
2. That the Lands Department under the Ministry of Lands rectify the registration of land title No. 12/0912/888 by once again registering the claimant as lessee.
3. The defendant be ordered to pay the costs of the claimant.
4. Any other orders the court deems appropriate.

Signature of defendant's lawyer

Date of filing: _____
Filed by : Francis Tasso
Public Solicitor's Office
PO Box 794
Port Vila

PART 5
APPEALS

Chapter 38 – Appeals

Reasonable prospects of success

An appeal should only be lodged if there are reasonable prospects of success. The merits of the proposed appeal should be discussed with the Public Solicitor. You also need instructions from the client that he or she wants to appeal.

Time limits for appeals

In all criminal appeals, the time limit is 14 days [section 201(1) of [Criminal Procedure Code](#)].

For a civil appeal from the Magistrates' Court to the Supreme Court, the time limit is 28 days [Rule of 16.28(1) of Part 16 of [Civil Procedure Rules](#)]

For a civil appeal from the Supreme Court to the Court of Appeal, the time limit is 30 days [Rule 20 of [Western Pacific Court of Appeal Rules 1973](#)].

There is scope to apply for an extension of time. See section 201(6) of the [Criminal Procedure Code](#) or Rule 18.1 of the [Civil Procedure Rules](#). You will need to show good reason why the appeal is out of time and demonstrate that the appeal has reasonable prospects of success.

Appeals from the Magistrates' Court to the Supreme Court

There is a right of appeal from the Magistrates' Court to the Supreme Court pursuant to section 30 of the [Judicial Services and Courts Act](#). An appeal can be relate to a question of fact, or a question of law, or on a question of mixed law and fact. A further appeal can only be made to the Court of Appeal on a question of law.

Sections 200–212 of the [Criminal Procedure Code](#) apply to criminal appeals from the Magistrates' Court to the Supreme Court.

Where the appellant has pleaded guilty in the Magistrates' Court, an appeal can only be lodged against the legality of the sentence.

The appeal must be lodged within 14 days by filing a Notice of Appeal. Within 14 days after filing the appeal, a Memorandum of Appeal must be filed.

The Supreme Court also has a power to review a conviction on its own motion or on petition

pursuant to section 31 of the [Judicial Services and Courts Act](#).

Civil appeals from the Magistrates' Court are governed by Division 9 of Part 16 of the [Civil Procedure Rules](#). See Rules 16.26–16.32.

An appeal must be lodged within 28 days of the decision [Rule 16.28(1)]. A Form 33 must be used. Rules 16.33–16.35 deal with appeals from the Island Court.

Criminal appeals from Supreme Court to the Court of Appeal

Section 200 of the [Criminal Procedure Code](#) provides a right of appeal from a decision of the Supreme Court. An appeal can be lodged against either conviction (the finding of guilt after a trial), or against sentence, or against both conviction and sentence.

Before lodging an appeal, you need to obtain instructions from your client to lodge the appeal. In obtaining these instructions, advise the client of the right to appeal, the possible outcomes, and also provide an opinion as to the merits of the appeal.

If the appellant pleaded guilty in the Supreme Court, an appeal against sentence can only be lodged if the sentence was more than six months imprisonment, or if the legality of the sentence is being challenged [section 200(2)].

For sentence appeals, the appeal will only be allowed if the sentence is manifestly excessive, or if there is a sentencing error. The Court of Appeal has approved⁹ the following passage from [Skinner v. The King \(1913\) 16 CLR 336](#) where the High Court of Australia said:

... It follows that a Court of Criminal Appeal is not prone to interfere with the Judge's exercise of his discretion in apportioning the sentence, and will not interfere unless it is seen that the sentence is manifestly excessive or manifestly inadequate. If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the Judge has acted on a wrong principle, or has clearly overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not.

Lodging a criminal appeal

⁹ Approved in [Public Prosecutor v Andy \[2011\] VUCA 14](#); [Criminal Appeal 09 of 2010 \(8 April 2011\)](#); [Naiio v Public Prosecutor \[1998\] VUCA 1](#); [Criminal Appeal Case 07 of 1997 \(8 January 1998\)](#); [Public Prosecutor v Gideon \[2002\] VUCA 7](#); [Criminal Appeal Case 03 of 2001 \(26 April 2002\)](#)

A Notice of Appeal must be filed within **14 days** of the conviction or sentence order [section 201(1) of [Criminal Procedure Code](#)]. An extension of time can be granted in suitable cases. The Notice of Appeal must contain the Grounds of Appeal.

See the end of this chapter for a sample Notice of Appeal. In a sentence appeal, a common ground is that the sentence is manifestly excessive.

A Memorandum of Appeal must then be filed within 14 days of filing the Notice of Appeal. It is often convenient to file both documents at the same time.

Failure to file a Memorandum of Appeal may result in the appeal being dismissed [section 201(5) of [Criminal Procedure Code](#) and [PP v Warsal \[2014\] VUSC 124](#)].

See the [Supreme Court Practice Direction](#) dated 2 April 2004 for a sample Memorandum of Appeal.

Bail pending appeal

If an appeal is lodged for a client who is serving a sentence of imprisonment, you will need to consider whether or not to apply for bail pending appeal pursuant to section 209 of the [Criminal Procedure Code](#). Sample documents can be found at the end of this chapter.

In an application for bail pending appeal, you will need to demonstrate that it is in the interests of justice that bail be granted.

For example, if the appellant will be required to serve all or most of the sentence before the hearing of the appeal, then this is a strong reason for bail to be granted. To deny bail in such circumstances gives rise to a potential miscarriage of justice if the appeal is eventually successful. Being required to serve a prison sentence that is later overturned is a very serious injustice.

Another exceptional circumstance would be the presence of a very clear error in the trial decision or sentence. The difficulty with this submission is that the trial judge will probably be hearing the application for bail pending appeal. It is unlikely that a trial judge will accept he or she has fallen into error, even if it is a very clear error. The whole concept of a trial judge assessing the merits of an appeal against his or her own decision is problematic. It may be preferable for a different judge to hear the bail application.

There is no right of appeal against the refusal of bail pending appeal by a single Supreme Court judge [section 70 [Criminal Procedure Code](#)].

In your bail submission, make every effort to demonstrate the potential for injustice if bail is refused. It is preferable that bail be granted, and if the appeal is unsuccessful, the appellant will be returned to prison to serve the sentence. This outcome does not give rise to any real injustice.

The power to increase a sentence on appeal

A sentence can be increased on appeal. Advise your client of this risk. The sentence can be increased even where there is no state appeal against the inadequacy of the sentence.

In such cases, the Court of Appeal should provide a warning to counsel that an increase to the sentence is being considered. Such a warning gives the appellant an opportunity to withdraw the appeal and avoid the risk of an increased sentence.

In the case of [Jonathon James v PP \[2013\] VUCA 24](#) the Court of Appeal delivered a “Minute” to counsel. The Minute included the following warning:

We remind counsel that this Court has the power to review any sentence that is appealed before it, and this includes the power, on a defendant’s appeal, to increase the sentence.

The appeal was then withdrawn.

Civil appeals from Supreme Court to Court of Appeal

Civil appeals are governed by the [Western Pacific Court of Appeal Rules 1973](#). An annotated copy of the rules can be found in [Jenshels’ Annotated Civil Procedure Rules](#).

Part 5 of the [Judicial Services and Courts Act](#) also provides guidance as to the jurisdiction and powers of the Court of Appeal.

An appeal from the Supreme Court is lodged by filing a [Form 33](#). It is not acceptable to file a Notice of Appeal stating that the Grounds of Appeal will be provided at a later date. See [William v Ezra \[2013\] VUCA 33](#).

An appeal must be lodged within **30 days** of the Supreme Court decision [Rule 20]. Time starts to run from the date of the decision, even before reasons have been delivered.

An enlargement of time to appeal can be sought if the appeal is out of time [Rule 9]. Relevant factors include the length of delay, reason for the delay, prospects of success and degree of prejudice, which might arise.

The lodgment of an appeal does not stay or suspend the original court order. The court has power to grant a stay [Rule 26].

Leave to appeal is required for interlocutory matters [Rule 21]. An interlocutory decision is one that does not finally determine the rights of a party. An example of an interlocutory decision is an order for default judgment. Rather than lodging an appeal, an aggrieved party can apply to set aside the default judgment. If the application to set aside is refused, then you can appeal to the Court of Appeal.

Just as in a criminal appeal, in a civil appeal the client must provide instructions for the appeal to be lodged. Advise the client on the prospects of success of the appeal, the possibility of a cross appeal, and the risk of a costs order in the event that the appeal is unsuccessful.

Appeal book

A few weeks before the Court of Appeal sittings, a judge will give directions for the preparation and filing of the appeal book. The appeal book should contain all the relevant material from the Supreme Court proceedings.

The recommended index for appeal books and other procedural requirements are listed in the [Supreme Court Practice Direction](#) for Criminal Appeals (2.4.04). This is saved on SALMON.

Written submissions

Your written submissions should be as clear and concise as possible. Do not try to use complicated words or lengthy sentences. Refer to case authorities where appropriate. Court of Appeal authorities are more persuasive than single judge decisions or foreign judgments.

It is a good idea to briefly summarise the appeal in the introduction section. Tell the court what the appeal is about and why it should succeed. Start with the most significant information. Identify the error and explain why the appeal should be allowed. The introduction is an important opportunity to be persuasive. Do not include irrelevant information. For example, here is the introduction from a recent successful appeal:

SAMPLE APPEAL SUBMISSION INTRODUCTION

Introduction

This is an appeal against sentence.

The appellant pleaded guilty to one count of Unlawful Entry and one count of Theft. He was sentenced to 15 months imprisonment for each count, concurrent, and partly suspended after serving nine months imprisonment. The balance of the sentence was suspended for two years.

The appellant entered the house of the victim and stole a circular saw. The victim was the employer of the appellant. The offence was committed because the victim had not the paid appellant his full wages for a period of two months. The appellant had a pregnant wife and had only been paid VT2000 per month. The appellant confronted his employer about the underpayment but the employer did not fix the situation, so he stole the circular saw.

The stolen property was recovered. The appellant was a first offender and a custom reconciliation had been performed.

The appellant has been in custody since 8 May 2013 and is currently serving his sentence.

The above introduction contains relevant factual information to explain what appeal is about, including a summary of the charges, facts and sentence. It avoids repeating unnecessary information that has already been provided to the court, such as a detailed recitation of the charges or the facts or a list of dates of various court appearances. This introduction contains relevant information as to why the appeal should succeed. The strong mitigating factors are identified, as well as the crucial fact that the appellant remains in custody. **The introduction identifies an injustice.** The theory of the appellant's case is that the crime was at the lower end of the scale, the sentence was too harsh, prison should not have been imposed and yet the appellant remains in custody. The central submission is that the court should allow the appeal and release the client as soon as possible. In this sense, the introduction does more than provide necessary factual information. It also attempts to persuade the reader. Put yourself in the position of an appeal judge and ask yourself – does the introduction persuade you that the appeal should be allowed?

In terms of format, use 12 or 14 point text and make sure the line spacing is 1.15, 1.5 or double spacing. Standard font is either Times New Roman or Arial.

When you quote case law or legislation, indent the quote. There is no need to put the quote in italics—this can make it harder to read. You may want to reduce the font size and line spacing for quoted sections.

Use page numbers so the judges can easily refer to them during the appeal hearing. Also consider using paragraph numbers—that is a matter of personal style.

Appearing at the appeal

The Court of Appeal normally sits three times each year. Each sitting lasts for two weeks. The court is usually comprised of six or more judges, including visiting judges from Australia and New Zealand. The trial judge from which you are appealing will not be part of the court that hears the appeal [section 45(3) [Judicial Services and Courts Act](#)].

A callover is normally held on the first morning of the appeal session. Your client should be present at the appeal. If your client is in custody, you may need to provide plenty of warning to the correctional centre to bring the appellant to court. This is particularly important if your client is in custody at Luganville Correctional Centre.

Appeal Court advocacy

The appeal hearing will be very different to appearing before a single trial judge. The Court of Appeal normally asks lots of questions. Advocacy before the Court of Appeal can be a dialogue with many questions and answers.

Relax. Speak clearly. When a person is nervous they often speak too fast. Speak slowly. Use pauses.

Maintain eye contact with the judges. Listen to their questions and do your best to answer the questions directly. Do not read your submissions word-for-word. Instead ‘talk to your submissions’.

Do not try to argue a point that is clearly lost. Move on to your next point and try to maintain your credibility. Start and finish with your strongest points. Tell the court why you should win the appeal.

Have extra copies of cases and other documents. Take the original file to court. The judges may ask about documents or matters that are not contained in the appeal book. Have all the relevant legislation with you.

Be aware that some of the judges may not be familiar with the material in the Appeal Book. The judges may have been too busy to read all of the submissions and all the documents in the Appeal Book. You may need to explain the case from the beginning. However other judges

may be very familiar with all of the material and be ready to argue the issues. Dealing with these very different possibilities is one of the challenges of appellate advocacy.

Most importantly, be well prepared. You will need to know your case inside out.

SAMPLE NOTICE OF APPEAL

**IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU**

Appeal Case No of 20

**IN THE MATTER OF AN APPEAL
FROM THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

SILAS SMITH
(Appellant)

AND
PUBLIC PROSECUTOR
(Respondent)

NOTICE OF APPEAL

TAKE NOTICE that the above named appellant hereby appeals to this Honourable Court against the sentence imposed by the Supreme Court of Vanuatu on the day of 2013 in the criminal case of **Public Prosecutor v Criminal Case No of 20 .**

Grounds of appeal

1. That the sentence is manifestly excessive.
2. That the learned judge erred by failing to properly consider a reduction for the plea of guilty.

AND TAKE NOTICE that the hearing of this appeal will be heard in the Court of Appeal sitting at Port Vila on the day of 201 at am/pm.

DATED AT PORT VILA this day of 201

Counsel for the Appellant

SAMPLE BAIL APPLICATION PENDING APPEAL

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
Criminal jurisdiction

Bail case no..... of 2013

SILAS SMITH
(Appellant)

AND:

PUBLIC PROSECUTOR
(Respondent)

APPLICATION FOR BAIL PENDING APPEAL

If it pleases this Honourable Court, Mr Silas Smith applies for bail pending appeal.

1. On 10 May 2013 the applicant was sentenced to 15 months imprisonment, partly suspended after serving nine months. The sentence was imposed for offences of Unlawful Entry and Theft.
2. An appeal against the severity of sentenced was filed on
3. The appeal is likely to be heard by the Court of Appeal during the sittings from 29 July 2013 to 9 August 2013.
4. The applicant is currently in custody and is due to be released on parole on 24 September 2013, after completion of four and a half month imprisonment.
5. If refused bail, the applicant will complete close to three months of his sentence before his appeal is heard. This is a large proportion of his total sentence of actual imprisonment. It is in the interest of justice that bail be granted to avoid the risk of the applicant serving a term of imprisonment that is overturned on appeal.

Section 209 of the [Criminal Procedure Code](#) states:

“(1) After the entering of an appeal by a person entitled to appeal, the trial court which convicted or sentenced such person may order that he be released from custody on bail subject to such conditions as the court may consider fit.

(2) An application for release from custody on bail under this section may be heard in chambers. In the Supreme Court such application shall be by motion served on the Public

Prosecutor. In the Magistrates' Court such application may be made without formal process to any magistrate.

(3) If the appeal is ultimately dismissed and the original sentence confirmed or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released from custody on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced.”

6. If the applicant loses his appeal after being granted bail, he will return to custody to serve the balance of his sentence. No prejudice will have been caused to any party.
7. However, if the applicant succeeds in his appeal after being refused bail, there is a real risk he will have served an unnecessary term of imprisonment. This would amount to a miscarriage of justice.
8. The applicant submits that his appeal has merit. The applicant was a first offender, he pleaded guilty, the value of the property was small, property as recovered, custom ceremony was completed and the circumstances of offending were very unusual and provided some mitigation. At the appeal, it be will demonstrated that offenders in similar cases have received either a fully suspended sentence or community work order.
9. It is further submitted that it is difficult for this Honourable Court, as the original sentencing court, to assess the merits of the appeal.
10. The applicant can reside on bail in Port Vila at
11. The applicant has strong family ties to Port Vila. He has a wife and young child living in Port Vila and has resided here for many years. He rents a house in Port Vila.
12. The applicant has previously missed one previous court appearance due to a misunderstanding about the court date.
13. Before being sentenced, the applicant remained in Port Vila; he co-operated with the author of the pre-sentence report and attended appointments with the Probation Office; complied with all other bail conditions; and attended other court dates as required.
14. The applicant submits that bail should be granted on the following conditions:
 - (a) He resides in Port Vila with family at
 - (b) He not leave Efate.
 - (c) He report to prosecutions officer every Friday during working hours.
 - (d) He attend the Court of Appeal sittings on 29 July 2013 at 9am and thereafter as required.

15. This bail application is exceptional because of the relatively short period of imprisonment to be served. Three months of the four and a half month effective sentence will be served before the appeal can be heard.
16. It is respectfully submitted that this Honourable Court should take the cautious approach and grant conditional bail. Refusal of bail would prejudice the benefits of a successful appeal and possibly lead to a miscarriage of justice.

John Tawi
Counsel for the Applicant
Public Solicitor's Office