PACIFIC
JUDICIAL STRENGTHENING INITIATIVE

Pacific Judicial & Court Reform Resource Collection

Volume 3: Access to Justice

NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme

AUSTRALIA

FEDERAL COURT OF AUSTRALIA

These resources are available for downloading from the Federal Court of Australia's website - www.fedcourt.gov.au

Keywords: Judicial reform, court reform, judicial orientation, judicial mentoring, judicial decision-making

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstances.

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Introduction

The Pacific Judicial Strengthening Initiative (PJSI) was launched in June 2016 in support of developing more accessible, just, efficient and responsive court services in Pacific Island Countries (PICs). These activities follow on from the Pacific Judicial Development Program (PJDP) and endeavour to build fairer societies across the Pacific.

The Partner Courts are: Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Republic of Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu.

PJSI was delivered by the Federal Court of Australia on behalf of the New Zealand Ministry of Foreign Affairs and Trade.

Toolkits

Through their practical, step-by-step guidance these toolkits have supported partner courts to implement their reform and development objectives locally. As the PJSI reaches its conclusion, it is hoped that these resources will continue to be of value to law and justice sectors and development practitioners globally.

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Revised May 2021

NEW ZEALAND FOREIGN AFFAIRS & TRADE Aid Programme

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Toolkits are evolving and changes may be made in future versions. For the latest version of the Toolkits refer to the website - **http://www.fedcourt.gov.au/pjsi/resources/toolkits**

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstances.

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PJSI Toolkits

Introduction

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Toolkits

PJSI aims to continue ongoing development of courts in the region beyond the toolkits already launched under PJDP. These toolkits provide support to partner courts to help aid implementation of their development activities at a local level, by providing information and practical guidance. Toolkits produced to date include:

- Access to Justice Assessment Toolkit
- Annual Court Reporting Toolkit
- Enabling Rights and Unrepresented Litigants Toolkit
- Family Violence/Youth Justice Workshops Toolkit
- Gender and Family Violence Toolkit
- Human Rights Toolkit
- Judges' Orientation Toolkit
- Judicial Complaints Handling Toolkit
- Judicial Conduct Toolkit
- Judicial Decision-making Toolkit
- Judicial Mentoring Toolkit
- Judicial Orientation Session Planning Toolkit
- National Judicial Development Committees Toolkit
- Project Management Toolkit
- Public Information Toolkit
- Reducing Backlog and Delay Toolkit
- Remote Court Proceedings Toolkit
- Training of Trainers
- Time Goals Toolkit
- Efficiency Toolkit

These toolkits are designed to support change by promoting the local use, management, ownership and sustainability of judicial development in PICs across the region. By developing and making available these resources, PJSI aims to build local capacity to enable partner courts to address local needs and reduce reliance on external donor and adviser support.

PJSI is now adding to the collection with this new toolkit: **Human Rights Toolkit**. This toolkit aims to increase the ability of judicial and court officers to apply human rights in their daily work and practice to improve the quality of justice provided by courts. It will provide partner courts with an overarching perspective on how human rights principles link together across multiple aspects of courts' work. The toolkit provides judicial leaders practical guidance on how to develop and implement on a human rights strategy and action plan in their courts, and contains many useful checklists, flow-charts and advice for courts.

Use and Support

These toolkits are available online for the use of partner courts. We hope that partner courts will use these toolkits as/when required. Should you need any additional assistance, please contact us at: **pjsi@fedcourt.gov.au**

Your feedback

We also invite partner courts to provide feedback and suggestions for continual improvement.

Dr. Livingston Armytage

Technical Director, Pacific Judicial Strengthening Initiative, May 2021

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Additional Documentation

Abbreviations

CAT	Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
CBO	Community-Based Organisation
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of TheirFamilies
CRoC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FCA	Federal Court of Australia
GBV	Gender Based Violence
ICAAD	International Center for Advocates Against Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention of the Protection of the Rights of All Migrant Workers and Memberof Their Families
M&E	Monitoring and Evaluation
NGO	Non-Governmental Organisation
NZ MFAT	New Zealand Ministry of Foreign Affairs and Trade
PIC	Pacific Island Country
PJDP	Pacific Judicial Development Programme
PJSI	Pacific Judicial Strengthening Initiative
RRRT	Regional Rights Resource Team
S-GBV	Sexual-Gender Based Violence
SOP	Standard Operating Procedures
SPC	Secretariat of the Pacific Community
TOR	Terms of Reference
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UPR	Universal Periodic Review

1 Introduction

1.1 Need for this Toolkit

Courts throughout the Pacific are often the final-stage protectors of people's human rights. It is therefore very important that all judicial officers, whether they work in village courts or the highest appeal courts, as well as all court officers, understand these rights and are able to apply them in their daily work. This is especially important because most serious human rights issues – especially for people who are poor, who live in remote locations and for women, children and people with disabilities – come up in ordinary, everyday cases dealt with by lower-level courts, and are never appealed to higher courts.

Aside from in judgments, courts as a whole, need to take a system-wide approach to strengthening the application of human rights principles across all court activities. This is so that Pacific citizens can be confident that courts will properly protect their human rights: by providing them with high quality and fair justice services regardless of who they are, what kind of case they bring, which part of the country they are from, or which part of the court system they come into contact with.

1.2 Aims of this Toolkit: How it can be used and by whom?

This toolkit provides an over-arching perspective on how human rights principles link together across all the different aspects of the courts' work. It is aimed at increasing the ability of judicial and court officers to apply human rights in their daily work and practice to improve the quality of justice provided by courts. It also encourages judicial leaders to develop and implement a human rights strategy and action plan in their courts, so that human rights sit at the centre of the courts' work and guide strategic planning and development processes.

To address these aims, this toolkit provides:

a) Step-by-step guidance as to how court leaders can develop a human rights strategy and action plan to identify, strengthen, measure and track the progress made towards more consistent application of human rights principles across all court activities. The guide includes what the strategy and action plan should contain, how it can be integrated into the court's overall development plan, who should be involved and the steps to be taken from the beginning to the end of the human rights strategy cycle.

b) A number of 'quick reference guides' in relation to particular themes, which explain how judges and court staff can apply human rights standards in their daily work. These guides have been designed to be used by:

- **All Judicial Officers (both lay and legally trained).** This toolkit will help judges to identify relevant human rights issues in their cases, apply relevant human rights standards and resolve any conflicts which might arise between human rights standards and other laws or customary practices.
- **Court administrators and court officers.** The contents of this toolkit could also be used to help court administrators develop Standard Operating Procedures for how court staff should apply a human rights-based approach in their day-to-day roles, such as by helping disadvantaged peopleuse the courts, creating systems to receive feedback on court performance, collecting good case data to help improve court services, and ensuring the confidentiality of court users' informationthrough secure file management and registry processes.

- **Regional/National Training Team members.** This toolkit can be used by Regional/National Training Team members as a basis for them to develop further human rights training packages tailored to the specific needs of judicial officers and court officers.

c) **Six Human Rights Checklists** translating human rights standards into detailed, step by step practical guidance for Chief Justices, Judicial Officers and Court Staff, addressing six key thematic human rights areas including court responses in cases involving: children, victims of family and sexual violence, people with disabilities, detainees and providing more general guidance on creating welcoming and inclusive courts. These Checklists are designed to support coordinated, whole-of-court response capacity to common human rights issues and challenges facing Pacific Courts.

While this methodology has been undertaken as a pilot in the Solomon Islands and will also be modified for implementation in Papua New Guinea, Tonga and Kiribati, it can equally be modified and used by other PIC Courts participating in the PJSI.

1.3 Other Relevant Toolkits

This toolkit provides an overview of how human rights principles relate to different aspects of courts' work. This is a broad topic that cuts across several other themes and areas of work, covered in more specific PJSI toolkits. It is therefore suggested that this toolkit be read alongside these other toolkits, including the:

- Judicial Decision-Making Toolkit (2015);
- Access to Justice Assessment Toolkit (2014);
- Enabling Rights and Unrepresented Litigants Toolkit (2015);
- Gender and Family Violence Toolkit (2017);
- Family Violence and Youth Justice Project Toolkit (2014);
- Annual Court Reporting Toolkit (2014);
- Toolkit for Public Information Projects (2015);
- Toolkit for Building Procedures to Handle Complaints About Judicial Conduct (2015); and
- To avoid repetition, where an overlapping issue arises, this toolkit refers the reader to these other toolkits for more detailed guidance.

2 Human Rights 'In a Nutshell'

2.1 What are human rights?

Human rights are the most basic entitlements that all people have, simply because they are human beings. They cannot be granted or taken away by any state or other entity, except in very limited circumstances set out in valid laws. All people are equally entitled to enjoy their human rights without discrimination, including on the basis of their country of birth, sex, age, race, religion or other identity features.

Human rights standards set out the minimum conditions necessary for people to live with dignity and to be treated fairly. They cover basic needs for survival such as food, clean water, shelter, health care and education. They also cover social and cultural issues relating to participation in the workplace, social security, family life and cultural life. Finally, they express the entitlement of all people to be treated equally and to live their lives in safety, freedom and to be protected against abuse by governments and others who have power over their lives.

2.2 Common misconceptions about human rights

Sometimes people mistakenly think that having human rights allows people to ignore their usual community or social obligations. Others sometimes think that human rights provide a justification for anti-social or selfish behaviour or a lack of self-discipline. These are both misconceptions of human rights.

Human rights cover only fundamental rights and freedoms and still allow plenty of space for diverse societies to organise themselves according to their traditions or systems of communal or family support or exchange, in accordance with expected social or cultural roles. It is only where a social or cultural obligation crosses a line of becoming unduly oppressive, harmful, abusive or exploitative that human rights ideas can and do play a challenging role. In reality, most human rights values are already imbedded in some way within Pacific cultural values, even if the language used to describe each is different. See Part 9 'Quick Reference Guide for Reconciling Human Rights and Customary Practices' for further discussion of this theme.

Another common misconception is that human rights prevent parents from disciplining their children. Teaching children the boundaries of acceptable behaviour is a key responsibility of being a good parent and is completely consistent with children's human rights. It's all about the way that it is done. Human rights approaches focus on helping parents to develop the skills they need to teach and discipline children in loving effective ways that are based on respect and not ways based on fear or physical violence.

2.3 How do international human rights standards come about?

International human rights standards are recognised through gradual processes of building agreement between different countries. A 'human right' is recognised when enough countries agree that the entitlement is of such importance that it should be observed globally as a human right. Individual countries then commit themselves to protecting that human right in their own country.

The human rights that have been agreed between enough countries are written down in documents called treaties, also known as conventions. The Government of each country decides which human rights it will commit itself to recognising and fulfilling, by signing and ratifying treaty documents. Some human rights standards have been recognised by so many countries for so long that even those countries which have not signed the relevant treaty are still bound by those human rights standards, under what is called customary international law (See Annex A.1-A.5 Introduction to Human Rights, for more background to the development and sources of international human rights, a glossary of relevant terms and current Pacific ratifications of human rights treaties).

2.4 Obligations of Countries that Ratify Human Rights Treaties

When a national government signs and ratifies a human rights treaty, it agrees to ***respect, protect and fulfil*** those human rights for all of its citizens. Governments are expected to take actions such as passing laws, developing new policies, funding new public services and raising community awareness, to make sure their citizens know about their rights and are able to actually exercise them in practice.

All three branches of the government - the legislature, which makes laws; the executive, which implements and enforces laws; and the judiciary, which independently interprets and decides how laws are applied – are each responsible for taking actions to respect, protect and fulfil human rights standards.

As there is no international legal system with the power to enforce all the human rights treaty commitments made by governments, most interpretation and application of human rights treaties standards is actually done by national courts. This is why national courts ***have a key role*** in protecting the human rights of the citizens in each country.

2.5 How are human rights standards applied in national legal systems?

How a human rights treaty is applied in national law will depend on what is said in each country's national constitution. Some national constitutions say that ratified treaties automatically become part of the national law of that country. Others say, (including most PICs participating in PJSI,) that national parliaments need to pass an enacting law before the treaty can be fully considered as national law. However, even before a treaty has been incorporated through a national law, the Government, including the courts, cannot simply ignore the treaty, as discussed below.[1] Some country's constitutions, such as Fiji, Tuvalu and Papua New Guinea, say that courts can refer to human rights treaties as guidance in decision-making, even if the country has not ratified the convention.

Aside from human rights standards found in international human rights treaties, many of the same human rights standards can already be found in individual country's national constitutions and other national laws.

- **National Constitutions** are the supreme source of law in all PICs and provide the foundation for all other laws. Many Pacific constitutions contain a ***Bill of Rights***, which outline allthe fundamental human rights of every person in that country.Most of these mirror international human rights standards fromtreaties.
- **National Legislation** Many human rights standards and protections are also found in individual national laws. For example, the Solomon Islands 'Family Protection Act 2014' protects the human right of all family members to live free fromfamily violence.
- **Common law or 'judge-made' law** The common law system of precendent is based on judges' previous decisions dealing with similar situations. It is another important source of human rights law in the Pacific

Case Study: Solomon Islands Constitutionally Protected Human Rights

Chapter II "Protection of Fundamental Rights and Freedoms of the Individual" protects the right to life, personal liberty, freedom from slavery, forced labour, inhuman treatment, discrimination based on race; deprivation of property; violation of home and privacy; freedom of conscience, expression, assembly, association and movement.

It also provides for compensation for infringement of rights and freedoms and enforcement of protection provisions.

[1] Readers need to be aware that there are also other situations when states may be bound by human rights standards despite not having signed a treaty, and these may need to be researched as/when necessary. These include, for example,situations where human rights standards have been in use by so many countries for so long, that they have become partof 'customary international law', which all countries are bound by.

Bringing these points together, the degree to which judges can directly apply human rights standards in their cases will depend on:

1. which treaties the country has ratified;
2. which of these have been enacted in national laws;
3. which human rights are protected in the national constitution;
4. which human rights are protected in other national laws; and
5. how other judges have decided similar cases.

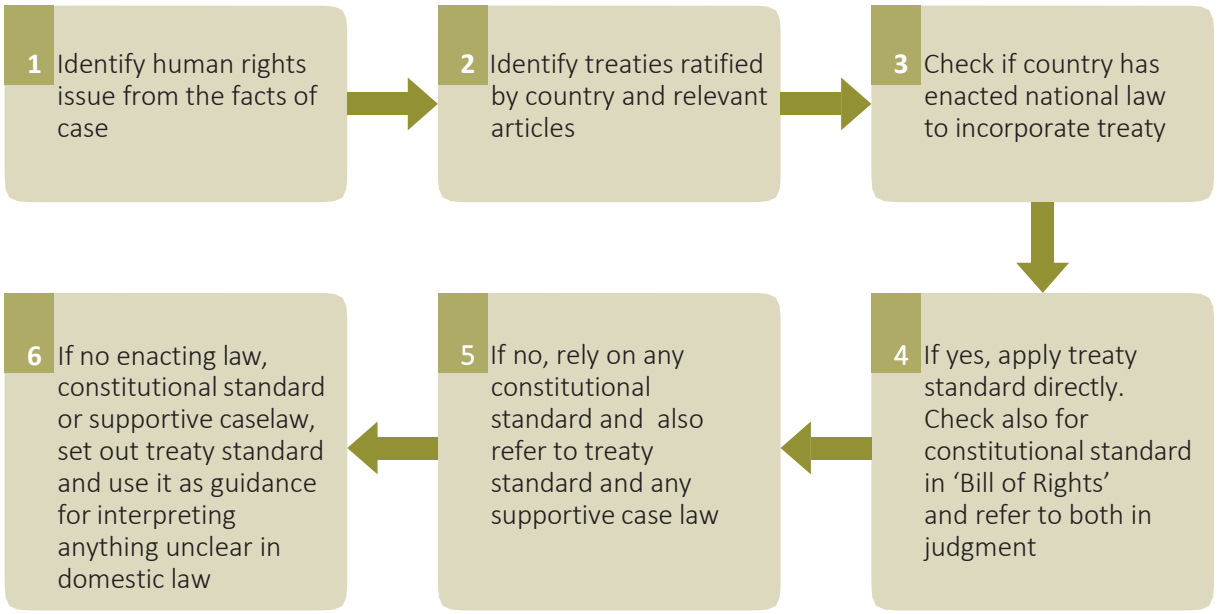
Often, judges will be taking into account a combination of these sources to guide them in how they apply human rights standards, as shown in the table below.

2.5.1 Degree to which Ratified Treaty Standard can be applied

Level of Application	Level of domestic support for using treaty	How treaty standard can be applied
Maximum	• National law enacting human rights treaty.	Treaty standard can be directlyapplied as though it were a national law.
Strong	• National constitution protects particularhuman rights; but • No national law enacting human rights treaty.	Constitutional standard can be relied on to strike out any domestic law that is wholly orpartly inconsistent with the Constitutional standard. Courts should make reference to the treaty standard in interpreting the content of the constitutionalstandard.
Middle	• No mention of particular human rights innational constitution; • No national law enacting treaty; but • Some case law saying treaties can be used to interpret national laws consistently with treaty standard (on the basis Parliament didnot intend that an Act conflict with a ratifiedtreaty unless it explicitly says so ('legitimate expectation').	Treaty standard can be used to interpret any domestic law in a way that is consistent with the treaty standard.
Weaker	• No mention of particular human rights in national constitution; • No national law enacting treaty; and • No case law or case law supports only limiteduse of treaty standards to interpret unclear national laws (i.e. treaty standards have no application where the national law is clear, even if it is not compliant with the treaty standard).	Treaty standard can only be used to interpret any unclear domestic law or provision.

2.5.2 Steps for Applying Human Rights Standards in PICS Where Enacting Law needed

(See Annex A.6–A.8 for further details and guidance).



3 Developing a Court Human Rights Action Plan

This section is directed to the Court's leadership and provides a 'step-by-step' guide to developing a human rights strategy and action plan for courts.

3.1 Identify Objectives of a Court Human Rights Strategy and Action Plan

The first step is to identify the specific objectives of developing a human rights strategy and action plan for your court. You may be able to think of others, but some good reasons for having one include, to:

- Bring human rights ideas and standards to the heart of court strategic planning and developmentprocesses;
- Link together all the different ways in which human rights are relevant to courts' work;
- Help courts to identify their human rights priorities and the actions they can take to strengthen implementation across all court activities; and
- Use human rights implementation indicators to track progress as part of overall efforts to strengthen court performance, especially regarding the quality of substantive justice, to complement the 15 'Cook Island Indicators' already in place.

3.2 Who should be involved in developing, monitoring, implementing and evaluating the plan?

The next step is to identify who should be involved in each of the main stages of developing, implementing, monitoring and evaluating the plan, and who should have general oversight of the entire cycle. The answer to this latter question will likely be the same core team responsible for the court's overall strategic planning and development processes. This will usually include:

- The Chief Justice and Deputy Chief Justice(s);
- Justices involved in managing Court committees;
- Chief Judges or Chief Magistrates that lead courts across all levels of the court hierarchy;
- Chief Registrar/Clerk of each of the levels of courts;
- Other members of the senior management team; and
- Other court officers responsible for managing an area of the Court's business such as Client Services.

In relation to developing and implementing the plan, there are several good reasons why courts should take an inclusive approach and involve some external actors:

1. It can give courts the opportunity to benefit from the expertise and experience of a wider group of people who look at the justice system from different vantage points. Inputs from a broader experienced group of human rights/justice sector actors will enable the court to build an even better plan.
2. It can provide opportunities to work with other parts of the justice system (both government and non-government) to achieve better cooperation and linkage in aspects of implementing roles or activities in the plan.
3. Involving others outside of the court is itself evidence of the court's commitment to transparent ways of working as a public, accountable institution that welcomes engagement and is outwardly looking for ways to be relevant and connected with community priorities.

External actors the courts may wish to consider including in consultation or other processes to develop and implement human rights strategies and action plans are:

- Prosecution service and police, including family, juvenile protection units where they exist;

- Public Solicitor's Office and Bar Association, other civil society legal aid providers;
- Ministry of social and/or women's affairs;
- National human rights institution/ombudsman;
- Human rights, justice, women's, children's, people with disabilities' NGOs/Community-Based Organisations (CBOs), including religious organisations that provide social or justice services to these groups;
- Law schools and media; and
- Regional Rights Resource Team, Secretariat of the Pacific Community (RRRT/SPC), United Nations (UN) agencies and other international organisations.

Courts can engage external actors at all or any stages of the planning or implementation process. Generally, the earlier and the greater the involvement of external actors, the better the plan. Coordination of implementation activities with other actors can greatly magnify the impact of the results. The main drawback of more inclusive processes is that they generally take more time and organisation. However, providing the consultation approaches are well-organised, their value will usually far outstrip the cost of the time invested.

If the court has a monitoring and evaluation ('M&E') section or officer, then they can undertake these roles in relation to the human rights plan and report-back to the steering group. Otherwise, the steering group can consider delegating this responsibility to specific staff, or, if the court has the resources, hire a consultant to conduct an evaluation, to capture 'lessons learned' and take these forth into the next human rights action planning cycle.

For example, a decision by the courts to start collecting separated gender, age, disability data, might well trigger similar decisions in other institutions. When all key institutions in the justice chain collect agreed-on data fields, this provides a very powerful tool for more specifically diagnosing problems and remedies, resulting in a greatly strengthened sector.

3.3 Kicking off the Process with an Assessment

A good starting point for developing a court human rights strategy and action plan is to undertake a baseline assessment of how the court currently implements human rights standards and engages with human rights principles in its work. There are four main areas to cover in such an assessment:

- **Access to Justice:** This would involve a review of the degree to which the court is succeeding inmaking sure that all people can readily use the courts and that the courts are able to respond tocommunity justice needs, especially the needs of those who are poor, live in remote areas, andgroups facing other justice barriers, such as women, children and people with disabilities.
- **Procedural Justice Standards:** This would include a review of the fairness of processes used by the courts, in particular, the degree to which judges and court staff understand and apply fair trial standards in cases, including the right to justice without undue delay.
- **Substantive Justice Standards:** (The content of the values or standards reflected in judges' decisions): This would include a review of the human rights standards applicable in the country (from treaties,constitution and national laws) and the degree to which judges and court staff understand and usehuman rights standards in their daily work.
- **Accountability and Transparency:** This would involve a review of the degree to which courts areaccountable to the public including: how they provide information concerning their activities and results; how they engage communities in their work; and whether they have effective feedbackmechanisms and responsive processes for dealing with complaints, including against judges.

One option is for the court to call a 'kick off' consultation meeting to invite internal and external participants to provide their input on the Terms of Reference, which defines the scope and purpose of the assessment. Alternatively, the court can do the assessment itself and then seek the input of external actors to develop the plan. A further option is to consult the wider group only once a full draft of the draft strategy and action plan has been developed.

3.4 What should the human rights strategy/plan include?

The idea is that courts can use the material in this toolkit, (especially the Quick Reference Guides) to help them select areas of focus and identify goals/activities to include in their human rights strategies and action plans.

See also the following section on 'Access to Justice' for further guidance on areas to assess and Annex B.1 and B.2 for suggested 'goal' and 'indicator' templates.

Timeframe

- Consider looping the plan into the court's existing strategic planning cycle from the outset (i.e. The initial plan may need to be limited to whatever period is remaining in thecourt's regular planning cycle and then integrated into the next full planning cycle).

Assess

- Degree to which the court currently implements human rights standards across all four key human rights-related aspects of the court's work/activities: substantive justice, procedural justice, access to justice, and accountability/transparency of justice.
- Advisable to develop a specific Terms of Reference for the assessment so that its goals are clear. Those courts without the in-house expertise should consider seeking funds from the PJSI, or other sources, to hire a consultant to undertake the first assessment in collaboration with relevant court staff. The consultant TOR could reflect a capacity development aspect, so that over time the court increases its ability to undertake or update the initial assessment, in-house.

Sources

- The assessment can be based on a wide range of sources, both primary and secondary sources, such as UN and other human rights reports or surveys, court judgments, data, user-surveys, access to justice assessments.

Goals

- Areas where improvement is most urgently needed. Frame strategic goals around these areas.
  - Aim to choose no more than 2-3 key areas to focus on, as it is better to succeed even if only on a small number of practical changes than to be overwhelmed by the scale of change needed, and then achieve nothing.
- This toolkit (especially the Quick Reference Guides) identify many relevant standards andsuggested actions that courts can take to improve access to justice for women, children,people with disabilities.

Activities

- Break each goal down into the actions or steps needed to achieve the identified goal.
- Ensure inclusion of who will be responsible for taking each of the actions forward and for ensuring they are completed.
- Also include what resources will be needed to undertake each of the actions.

Indicators

- To enable monitoring of the implementation of the plan, carefully consider possible indicators. Ensure that all indicators are 'SMART', meaning that they are:
  - *Specific* – target specific areas for improvement and answer 'what', 'who', 'how' and 'where' questions.
  - *Measurable* – be something that can be counted, observed, analysed or tested. Something that answers the question, 'How will you know when it has been achieved or not?'.
  - *Achievable* – be something that is motivating and achievable within the courts available resources.
  - *Relevant* – be something that is meaningfully linked (based on research or knowledge) to the result sought and important or central to achieving that result.
  - *Time-bound* – specify when the result(s) can be achieved.

4 Quick Reference Guide to Providing 'Access to Justice'

4.1 What is Access to Justice?

> 'Access to Justice' is the ability of people to seek and receive a remedy in formal or informal justice processes, in compliancewith human rights standards. (*UNDP*)

Most people across the Pacific do not easily or readily turn to state courts to solve their problems. This may be because they prefer to settle disputes themselves or within their communities, often using informal or customary justice systems. Providing these mechanisms are capable of delivering outcomes that respect the parties' human rights, then such systems can greatly increase community access to justice and relieve the burden on state courts. Such systems should also be strengthened to increase their reach, effectiveness and compliance with human rights standards. If, however, people use informal or customary justice only because they do not have any real choice to use the state justice system (because they lack knowledge, resources or the ability to do so), or if these systems are incapable of respecting their rights, then they are denied their right to access justice. Similarly, if state courts do not comply with the parties' human rights, then people are also denied their right to access justice.

It is this gap in unmet legal needs - of those who would prefer to use state courts if they could, or where informal justice solutions do not satisfy the parties or protect their rights – that state courts should try to address. To do so, courts need to actively find out what prevents particular groups from using state courts and work to address these barriers. It is only by ensuring that all citizens can practically exercise their rights under state law that all people can enjoy 'real' equal protection of the law and not just in theory. Demonstrating that justice processes are available to everyone in practice, is also an important way for courts to earn and maintain public trust and confidence.

4.2 What is a 'human rights based approach' to providing access to justice?

A 'human rights-based approach' means providing justice services from a broader understanding of basic human rights and dignity. The PANEL principles (below) underpin a human rights-based approach in practice. In the context of providing justice services, they entail the following:

P **Participation**: meaning the courts reach out to communities with information about using the courts, provide access to everyone (close, affordable, welcoming, understandable), maximise community participation in decisions re services.

A **Accountability (and transparency)**: meaning courts publicly account for the justice services they provide, have systems for user and community feedback and processes for dealing fairly with complaints by court users.

N **Non-discrimination (and equality)**: meaning these principles are reflected in court decisions and courtscater for **Empowerment**: meaning communities where court users are made aware of their rights, knowhow to claim them and receive assistance to do so, where needed.

E

L **Legality**: meaning court decisions and processes are legal, including that they adhere to human rights standards.

4.3 Finding out which groups face what barriers to accessing justice

Not everyone within a society has the same opportunities to access justice. A first necessary step is for courts to find out which groups in their communities face barriers to accessing their services and to understand what these barriers are. It is only by doing so that courts can develop solutions towards providing everyone with equal access to justice and protection under the law.

4.3.1 Gather and Analyse Court-User Data

One starting point to find out more about which groups face barriers to accessing justice and what those barriers are is to gather and analyse court data. The more detailed and 'broken down' (or disaggregated) the data, the better the ability of the court to understand how different groups use the courts and to see patterns in what kinds of results they achieve and within what time frame. Having data on who uses the courts and for what, also provides strong clues as to who is not using the courts and the kinds of issues that are not being brought to courts. This information helps us to identify potential areas of unmet need for justice services (addressed further below).

A well-prepared public Annual Court Report – if available – is the ideal place to find this vital court data. If this kind of data is not currently collected by the court, then it should become an urgent priority to commence doing so. Without it, the court is unable to make informed decisions about where to concentrate its reform attention and resources, and is also unable to meet its obligations to ensure public accountability and transparency.[2] PJDP has developed step-by-step guides for data collection in courts, including for developing an Annual Court Report (See Annual Court Reporting Toolkit, November 2014). Below are some suggested minimum data fields to give courts the most important information they need to start analysing court caseloads from an access to justice perspective.

[2] Particular aspects of court accountability and transparency are part of a human rights-based approach, however havealready been addressed in detail in other toolkits. These areas and toolkits are: *Issues of disaggregated data, Cook Island Indicators for Court Performance, public annual court reports and publication of court decisions (on PacLII), see Annual Court Reporting Toolkit. *Public information, including media coverage of the court's work, see Toolkit for Public Information Projects. *Handling of complaints including against judges, see Toolkit 'Building Procedures to Handle Complaints about Judicial Conduct'

4.3.2 Minimum Data Fields/Breakdown by Party

Standard Recommended Court Form Disaggregated Data Fields

Case management systems can include data fields to ensure the court is adequately protecting the human rights of particular groups of court users. Below are the data fields recommended in order to give the Court adequate visibility of these court users so that the Court is able to ensure universal access to justice and ensure the full and effective participation in any court proceeding for all court users.

Type of Case

- **Criminal**: property-related/crimes against the person (broken down further into physical/sexual/other crimes);
- **Family Protection Orders**: interim/ final
- **Family**: Divorce, child custody, maintenance (spousal/child/ both), adoption, property settlement. Note Y/N if violence was a factor in each case type; and
- **Other Civil**: Discrimination/ inheritance/ land/ contractual/ other.

Information about the parties

TYPE OF PARTY

- family/protection/other civil cases: applicant or respondent
- criminal cases: defendant, victim, witness
- any case type: witness

RELATIONSHIP BETWEEN VICTIM/PLAINTIFF AND OPPOSING PARTY

- Data Field drop down menu: family member, intimate partner, known person (ie neighbour/friend/ employer/ work colleague), stranger, other (space to specify)

EXTRA QUESTIONS IN CRIMINAL CASES

- Is the defendant currently in pre-trial detention?
- Duration of pre-trial detention (in days)
  More than 12 months? Y/N (Yes, red flag)
- Is the defendant under 18 years old? Y/N
- Place of detention (space to write location)
- Next hearing date: D/M/Y

EXTRA QUESTIONS FOR FAMILY LAW AND PROTECTION ORDER CASES*

Has the respondent/ defendant allegedly behaved in a manner that:

- is physically or sexually abusive
- is emotionally or psychologically abusive (including by threatening the affected person or another, repeated verbal abuse or 'put downs', controlling behaviours such as socially isolating the person or so the person fears for their safety or for another)
- is economically abusive (including; taking or selling property without permission, or forcing the person to hand over control of assets, income or finances, or preventing person from working)
- is emotionally or psychologically abusive (including by threatening the affected person or another, repeated verbal abuse or 'put downs', controlling behaviours such as socially isolating the person or so the person fears for their safety or for another)
- combination of above

Remaining Fields For all Case Types

GENDER

Data Field: **drop down menu**: M/F / X (indeterminate, intersex, unspecified)

AGE

- Data Field: Date of birth (D/M/Y)
- Under 18 years at filing: Y/N
- Under 18 years at time of alleged offence/incident: Y/N

DISABILITY/IMPAIRMENT*

- Data Field 1: Disability **drop down menu**: Do any parties in this case have a disability? Y/N/Don't know
- Data Field 2: Type of impairment **drop down menu**: vision/ hearing/ mobility/ intellectual impairment/mental Illness/ multiple
- Data Field 3: What kind of special assistance will they need from the court? (with space to write notes)

Legal Representation

Data Field **drop down menu**: self-represented/ private lawyer/ legal aid (state/NGO/other)

Court Fees*

- Fee waiver sought: Data Field drop down menu: Y/N
- Application fee: Data Field drop down menu: paid/waived

Case Management

- Data field: Number of days from filing application to final determination
- Data field: Number of adjournments
- Data field: Reason for each adjournment (drop down menu)
  - Parties not present:(further drop down, suspect, victim, witness, prosecutor, defence lawyer).
  - Parties not prepared: (further drop down suspect, victim, witness, prosecutor, defence lawyer)
  - Police/prosecution/civil investigation not completed
  - Delay in receiving forensic evidence results
  - Court scheduling delay
  - Other

Case Outcome

CRIMINAL CASE

Data field: **drop down menu**: Acquittal/Conviction.
If Conviction, **drop down menu**: Custodial Sentence (Duration), Suspended Sentence (Duration), Fine, Order of compensation, Community Service, Other (space to write)

FAMILY/PROTECTION/OTHER CIVIL CASE

- Data Field Options: Interim Protection Order Granted/ Interim Protection Order Not Granted/ Final Protection Order Granted/ Final Protection Order Not Granted

* These data fields require corresponding questions in either police/ prosecution initiating files or civil case forms depending on the type of case. An example of the disability questions to include in civil forms based on the Washington Group Short Questions are below:

NOTE: QUESTIONS FOR CIVIL/ FAMILY CASE FORMS

Q1 Do you have a disability, impairment or long-term health condition that may affect your participation in court? Yes/ No

Q2 Tick any of the following that are appropriate:

- ☐ Do you have difficult seeing?
- ☐ Do you have difficulty hearing?
- ☐ Do you have difficulty walking or moving around?
- ☐ Do you have difficulty understanding or concentrating?
- ☐ Do you have difficulty being understood by others?

Q3 Would you like the court to contact you to discuss beforehand what help can be provided to you to make it easier for you to participate in and be ready for your court case? Yes/ No

4.3.3 Conduct Court-User Exit Surveys

Court data can be further enhanced by also asking people who have recently used courts, about their experiences – both positive and any challenges they faced. This can be done quite simply by conducting exit surveys as people leave the court. See PJDP 'Annual Court Reporting Toolkit-Additional Information' – for a simple exit survey format that can be readily modified and used. It includes some simple, practical questions and analysis tools to enable courts to use the information they collect to calculate how accessible and fair court users have found their court experiences.

4.3.4 Conduct Focus Group Discussions with particular User Groups

An additional method for finding out in more depth about particular groups' court experiences is by conducting focus group discussions at regular (at least annual) intervals. Focus group discussions usually bring together around 6-8 people to discuss around 6-8 key questions (and additional follow up questions). It is important to ensure that participants give their informed consent[3] to participate in such discussions. To ensure women feel comfortable to openly share their views, it is advisable to conduct separate groups for women and to ensure that both the facilitator and note taker are also female. It may also be advisable to separate groups according to age brackets, if possible (See PJDP 'Access to Justice Assessment Toolkit, September 2014, for further detailed advice regarding conducting focus group discussions and key informant interviews).

These methods, however, cannot tell us who is absent from the courts, or why. To answer these questions, focus group discussions can also be held with members of groups who are under-represented in court actions (non-user groups). Another method is to conduct an 'access to justice survey' with a wide range of communities to assist justice sector agencies plan and deliver their services based on actual need (See PJDP Access to Justice Assessment for further guidance on how to conduct an 'access to justice survey', an activity which has been piloted in the Marshall Islands).

4.4 Common Barriers to 'Access to Justice': Actions Courts Can Take to Address These

Not many PIC courts have conducted access to justice assessments as yet, but each is strongly encouraged to do so. This is because each country has particular challenges, and therefore the solutions to these will also differ.

In the meantime, the experiences of other countries can still provide helpful insights. These experiences show that particular groups in Pacific societies are more likely to face greater barriers to accessing justice. These include: women, children, people with disabilities, people living in remote areas and poor people. There may well be other additional groups in some countries that can be identified through assessment processes (such as elderly persons, or young unemployed men etc.). However, starting with a commitment by courts to address the barriers to justice faced by the above five categories of persons who are known to face similar kinds of barriers, is a good place to start. Consider each of the points below to help start your court's Access to Justice Assessment. See also the 'Access to Justice Assessment Toolkit' for further tools and guidance.

[3] Meaning they understand the voluntary nature of the meeting, its purpose and agree to how any information they provide will be used. For participants under the age of 18, informed consent to their participation must also be providedby their parent or guardian.

Barriers to Accessing Justice (especially for poor & remote communities, children, women and people with disabilities)

4.4.1 BARRIER 1: Lack of knowledge of the law and courts' roles, how to use the courts and help using the courts.

CAUSES

- Lack of opportunity to learn about the legal system: Women typically know less about laws andthe legal system than men because the law is often considered mainly 'men's business'. Sometimeswomen also have less access to education than men;
- People with disabilities also often miss out on the chance to learn about the legal system because information is not provided in ways accessible to them;
- Children frequently do not learn about the legal system at school or at home and information aboutthe law is not widely available through schools, sporting clubs, youth groups etc.; and
- Legal information is often written in very complicated, technical language. 'Plain language' information that addresses common problems is often not available, especially in remote communities.

POSSIBLE SOLUTIONS

- Develop a court outreach program, including in remote areas, to explain to people how they canuse the courts to address their problems and the help available. Make sure special sessions are heldfor some groups like women, children, youth and people with disabilities;
- Widely distribute information about the role of courts in accessible formats including using diagrams and pictures, social media, community radio and drama programs, that show ordinary people using the law. Ensure all these sources of information clearly explain how to use the courts, and where further help is available (See PJDP Toolkit 2015 for Public Information Projects for further guidance); and
- Provide seminars/talks and support civic education in schools/universities/youth centres that cover the role of courts and the rights of all people, including youth. Get young people involved byrunning competitions, providing court tours, and youth volunteer programs in courts to create anatmosphere of people's courts.

4.4.2 BARRIER 2: Lack of ability to attend court due to lack of mobility, time and/or money (to cover transport, accommodation, lost income, court fees)

CAUSES

- Women often have less ability to travel to court than others because they are busy working in and outside the home, including looking after children or others, and sometimes they need permission from male relatives to leave the home. Also, women are generally poorer than men and cannot afford the costs mentioned above, especially if they have to attend court over a period of time; and
- Children and people with disabilities also often cannot travel to attend court, especially on multiple occasions, and are less likely to have funds for travel or court applications.

POSSIBLE SOLUTIONS

- Abolish court fees or establish a fee waiver system for poor and vulnerable groups, especially infamily law or other civil law cases being brought by women, children or discrimination/other casesbrought by persons with disabilities;
- Ensure all circuit courts scheduled are carried out and provide as many additional mobile court services as possible;
- Provide ways for court users to do more 'court business' remotely (e.g. by telephone or internet);

- Provide allowances upfront for poor or vulnerable parties' court-related expenses (transport, food, accommodation);
- Ensure court facilities are designed or modified to provide disability access (see Quick Reference Guide for further detail); and
- Provide child care, child-friendly space and private places for breast-feeding at courts.

4.4.3 BARRIER 3: Lack of access to legal assistance and support through the legal process

CAUSES

- Few lawyers, paralegals or lay advocates provide free or cheap legal or advocacy assistance. Without this help, many people, especially vulnerable groups, may find it impossible to put their cases forward and maintain their involvement in their case; and
- Advocates can also play an important role in prompting police, prosecutors, and court staff to perform their roles efficiently, and improve the overall responsiveness of the justice system.

POSSIBLE SOLUTIONS

- Expand and develop the range of legal aid services provided by the court, including free duty lawyers at the court, and lawyers to provide ongoing legal aid assistance (through cooperation with qualified Bar Association pro bono or 'low-fee' lawyers). Ensure female lawyers are also available;
- Undertake community outreach programs as suggested above, and promote legal aid/paralegalservices. Ensure judges and court officers visit communities, and also involve legal aid organisationswho can provide individualised advice to participants afterwards;

  NB It is important that judges do not provide advice themselves as they may have to disqualify themselves later from hearing this or other similar cases.
- Encourage legal aid organisations to provide services in locations and at times women, children,people with disabilities can comfortably and discreetly attend;
- Routinely check if victims of violent crime cases before the courts have someone to advocate and accompany them through the process, to reduce pressure on victims to withdraw their complaints. Provide referral to legal aid/other services where necessary;
- Lobby/encourage Government to expand state-funded legal aid services including mobile paralegaland legal aid services (equipped with female staff trained in family and criminal law);
- Lobby/encourage Bar Association to develop a pro bono scheme (e.g. lawyers be encouraged/ required to provide some free assistance to re-register for practicing certificates each year (e.g. one or two cases per year);
- Encourage universities with law schools to establish legal aid clinics for senior students to provide free legal advice under supervision of a qualified lawyer; and
- Ensure Court staff are trained and in sufficient numbers to provide basic assistance at the court with form filling, navigation around the court and its services, able to arrange relevant support services for persons with disabilities etc.

4.4.4 BARRIER 4: Discriminatory laws, processes and decisions

CAUSES

- Laws may be outdated or contain discriminatory provisions;
- Courts may prioritise hearing criminal cases over civil cases, resulting in most women's cases being deprioritised (because they are mainly involved in family/civil law cases);
- Judges and court staff may unconsciously display bias or think in stereotypes in relation to women parties, people with disabilities, or others, in the processes used by courts; and
- Judgments may not reflect non-discriminatory human rights principles as required by law.

POSSIBLE SOLUTIONS

- Train and support judges to apply constitutional and convention human rights standards to the maximum extent possible and to strike out discriminatory laws/provisions;
- Ensure dedicated times and court rooms are provided for hearing family and civil cases to prevent them being 'bumped off' by criminal cases;
- Provide training on unconscious judicial and court-staff bias and develop standard monitoring tools for cases involving vulnerable persons (covering for example how judges explain processes including to victims of Gender Based Violence (GBV), persons with disabilities, children and protect them from intimidation/insult during hearings etc.);
- Monitor sentencing decisions in GBV cases, including their rationale and any trend of reliance on customary practices to mitigate sentences. Provide guidance note if a trend or indication of judicial leniency in sentencing emerges;
- Ensure court staffs are trained in how to help women, children, and people with disabilities navigate court visits, including importance of handling confidential information;
- Ensure victims/witnesses in cases involving violent crime have suitable witness protection measures in place, and that the court adheres to these by, for example, providing them with separate entrances and waiting areas from other court users, by strictly adhering to confidentiality of information/identity best practices; and
- Ensure good signage in court and help services (e.g. providing information and assistance, systemsfor reimbursing expenses, arranging interpreters, aides etc.).

4.4.5 BARRIER 5: Pressure from family/community & risk of stigma and high social, economic, cultural costs

CAUSES

- Dominant community attitudes can reflect the idea that women and children should tolerate or hide issues of family or sexual violence. This can make the victim feel they are to blame for the abuse; and
- Many in the community think that family or informal reconciliation approaches should be used to deal with family and sexual violence cases, rather than victims reporting to the police and courts. Victims whose cases do go through the courts can face stigma and lose other life opportunities, making the victim feel they are to blame for the abuse.

POSSIBLE SOLUTIONS

- Work with other institutions to make sure legal aid services are available to provide ongoing assistance to victims of family and sexual violence and other vulnerable groups;
- Ensure independent counselling and advice is provided to victims/other vulnerable parties who say they wish to withdraw their complaints because they do not want to give evidence against family members or others;
- Ensure adequate security is in place at courts so that parties are less likely to feel threatened or intimidated, especially by others involved in their case;
- Have procedures & staff trained on handling security breaches or incidents in or around the court;
- Conduct community outreach and awareness sessions to discuss the courts' responsibility to make families stronger and safer for everyone by intervening in violence, ensuring victims are protected and supported and rehabilitating perpetrators; and
- Work with other service providers to ensure that a quality, reliable 'safety net' of services are available to all victims of family violence and in other kinds of cases that involve women, children and people with disabilities (see also Gender and Family Violence Toolkit 2017).

5 Quick Reference Guide to Implementing Procedural Justice (A Fair Process)

(See also Human Rights Checklist 1: Minimising pre-trial detention, Annex E, A-1)

To achieve a just outcome in any case, not only must the law be correctly applied to the facts of the case, but the *process* of justice must also be fair to all parties. The obligation to provide a fair process applies right from the beginning of a case – for example, when it is reported to police or a claim is lodged, until the end of a case when a court decides on a sentence or other remedy.

This section briefly outlines the human rights standards that courts must follow in order to ensure the process is fair. These are often called 'fair trial standards', which have generally been developed with criminal cases in mind, but many similar principles apply to civil cases too. The most important fair trial standards are found in the International Covenant on Civil and Political Rights (ICCPR). These same standards are also reflected in many national constitutions (See Annex B1 for definitions, more details of procedural justice standards and Pacific case law applying fair trial standards).

See also the 'Enabling Rights and Unrepresented Litigants Toolkit 2015' and the Quick Reference Guides in this toolkit for particular standards of procedural justice that apply in cases involving children, women and people with disabilities.

5.1 Key Fair Trial Standards for Accused Persons

1. Represent themselves or be represented by a lawyer they choose, provided for free if need be(Art 14 (3) (d) ICCPR) (see box below);
2. Only be charged with offences that were against the law at that time (Art 15 ICCPR);
3. Not be detained without a valid reason or mistreated or tortured in detention (Art 9 & Art 7ICCPR);
4. A fair and public hearing by a competent, independent and impartial tribunal established by law. Art 14(1) ICCPR) (See PJDP Enabling Rights and Unrepresented Litigants Toolkit 2015, for further detailed guidance);
5. Be presumed innocent until proved guilty according to law (Art 14(2) ICCPR);
6. Be informed promptly of any charge against them (Art 14(3) (a) ICCPR);
7. Have adequate time and facilities to prepare a defence (Art 14(3) (b) ICCPR);
8. Be tried without undue delay, (see Reducing Backlog and Delay Toolkit) (Art14 (3) (c) ICCPR);
9. Call witnesses and examine witnesses against them (Art 14(3) (e ICCPR);
10. Be provided with an interpreter if required (Art 14(3) (f) ICCPR);
11. Not be compelled to testify against his/herself or to confess guilt - 'right to remain silent'(Art 14 (3) (g) ICCPR);
12. Special protection if they are juveniles (children), have disabilities or are vulnerable for other reasons (Art 14(4), 10(2) (b) ICCPR, see also CRoC, CEDAW, CRPD);
13. Not be tried twice for the same offence (Art 14(7) ICCPR); and
14. The right to appeal the court verdict or the sentence (Art 14(5) ICCPR).

5.2 Key Points Regarding Right to Legal Advice and Representation

One key aspect of fairness is ensuring that a person going through a legal process understands the relevant laws, including the rules of the process, and has the assistance they need to make the best decisions for their interests throughout their case. This is why an important focus of fair trial standards relates to the right to legal representation, the minimum standards for which are set out below.

Minimum Standards for Legal Representation

- Courts should make sure a lawyer or paralegal adviser is always appointed to cases where it is needed to ensure 'the interests of justice';
- This means that **at a minimum**, anyone charged with a **criminal offence punishable by a term of imprisonment or the death penalty** is entitled **to legal aid at all stages** of the criminal justice process. (United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 3(20);
- Where a case **involves a person who may be more vulnerable** (e.g. woman, child, or person with a disability), access to legal aid should be wider and provided also **in all criminal cases, whether the person is suspect or a victim, and in any civil cases involving basic rights**, such as family law cases or cases involving discrimination (e.g. female property rights, access to services for persons with disabilities); and
- This support is necessary because **basic human rights are often also at stake in many family and other civil law applications**. Many victims of family violence do not want to report their cases to the police but may still need a practical remedy from a family court likecustody of their children, maintenance, or a property division. This is why the right to legal aid in civil cases is increasingly recognised in international law. See the 'Enabling Rights and Unrepresented Litigants Toolkit 2015', for further guidance.

The criminal law system, especially in common law countries, is built on the assumption that defendants have access to legal representation to ensure protection of their legal rights in the process. It is very difficult for judges and magistrates to conduct fair trials, especially in serious indictable matters, where a person does not have legal representation. In these situations, every effort should be made to appoint legal representation to a person. The common difficulty is that in most Pacific jurisdictions there is a much higher demand for free legal assistance (legal aid) than the available supply of legal services. In some countries courts can directly appoint legal representatives to assist individuals who cannot receive a fair trial without this help.

Where a person appears before the court without legal representation, and there are no options available to the Court to appoint legal representation, then the Court will need to provide additional assistance to unrepresented litigants to help them to understand the legal process, and their rights and role within it, so that they can make informed decisions about how they will engage with the process. For further guidance on how courts can provide assistance to unrepresented persons, see PJSI Enabling Rights and Unrepresented Litigants Toolkit. Some courts have developed their own information resources for unrepresented litigants, such as the guide produced by the Supreme Court of Tonga *Information for Self-Represented Defendants on the Criminal Trial Process*.

6 Quick Reference Guide for Cases Involving Children

(See also Human Rights Checklist 2: When children come to court, Annex E, A-13)

6.1 International Standards: Convention on the Rights of the Child (CRoC)

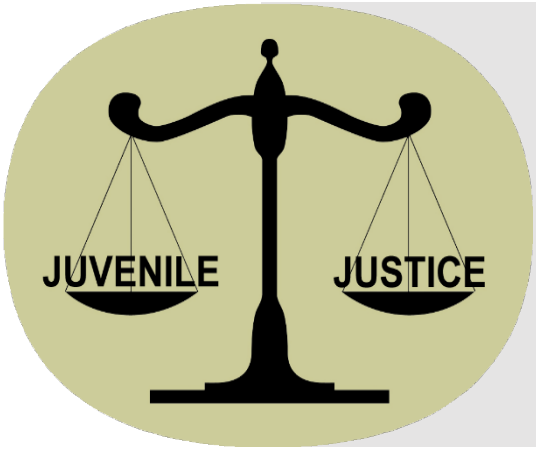
All Pacific countries have ratified the CRoC, which contains key principles and standards for dealing with all kinds of cases involving children. Some of the most important ones are:

A 'child' is defined as any person **under the age of 18 years** (Article 1 CroC).

In all actions concerning children, whether undertaken by public or private social welfare institutions, **courts of law**, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration** (Article 3 CRoC).

What is in the 'best interests' of any given child will vary according to the child's individual situation, including their cultural background. It will also require consideration of who is taking the action, on what basis, for whose benefit and how it affects children generally or particular groups of children. What does not vary across cultures is the requirement that the child's best interests should be a **primary consideration**, in other words, the child's interests must be elevated above the 'rights' or interests of others, who may include the child's parents, community, the state, or others.

'Right of child to be consulted': This principle requires that in any kind of case affecting a child, the views of the child have to be sought and taken into consideration, according to their age and maturity (Article 12 (1)(2) CRoC).



Other important justice standards for children:

- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (*'The Beijing Rules'*);
- The United Nations Guidelines for the Prevention ofJuvenile Delinquency (*'The Riyadh Guidelines'*) and;
- The United Nations Rules for the Protection of JuvenilesDeprived of their Liberty or *'The JDLs'*, 1990; and

See also Family Violence & Youth Justice Project Toolkit 2014.

6.2 Why we need to have different justice standards for children?

Everyone knows from their own experience that children differ from adults in their physical and psychological development and in their emotional and educational needs. Advances in neuroscience also show that the parts of the brain responsible for decision-making and impulse control are still developing during a person's teens, even later in boys, which affects their capacities to understand consequences and to exercise judgement.

For these reasons, all legal systems should be based on the idea that children beneath a certain age should not be charged or prosecuted in criminal justice systems. This is known as the 'age of criminal responsibility' and is usually found in each country's penal code.

The CRoC Committee recommends that the 'age of criminal responsibility' be set for between 14-16 years old. The global average age of criminal responsibility is 12 and this is considered the minimum acceptable to the UN Committee on the Rights of the Child. Many countries, including in the Pacific, do not currently meet this standard.

Even when children are over the age of criminal responsibility, most Pacific countries have additional requirements that must be met before children aged 10-14 years can be charged and prosecuted. They also often have special sentencing rules to reflect the lower responsibility for crimes by children and try to avoid or minimise imprisonment to give the child the best opportunities for rehabilitation and getting 'back on track'.

Age of Criminal Responsibility

- Solomon Islands: 8 years
- Papua New Guinea: 7 years
- Tonga: 7 years
- Kiribati: 10 years
- Fiji: 10 years
- Most Pacific countries also require evidence a child aged between 10-14 years was 'capable of knowing they did wrong'.

These standards also apply to older adolescents in the 15-17 age group, who are the children most frequently in trouble with the law. International standard say that **all children under 18 years old should only be detained or imprisoned as an absolute 'last resort'**. If they are imprisoned, it must be for the shortest length of time possible and in facilities separated from adults and that cater to their physical, educational and other special needs as children (CRoC Article 37(b)).

6.3 Checklist for Judges in Deciding What Law to Apply in Criminal Cases involving Children

- Know the exact age of the child at the time of the alleged offence, based on birth certificate or other documents where possible. If none are available, determine age based on statements ofparents, other relatives and the child;
- Based on the law, decide if the child can be legally charged or prosecuted: that is, you must be satisfied the child is above the criminal age of responsibility and (typically) if aged between 10-14, make a finding as to whether the particular child is capable of knowing they did wrong;
- Find out if there is a special system of justice for children in your country. If yes, then applythose standards consistently with the CRoC, and Constitutional standards; and
- If no, then strictly apply minimum CRoC standards (see 6.4). Also apply any special Constitutional or other laws. Finally, modify the process as much as you can to make it child-friendly (see 6.5).

6.4 Minimum Standards for Criminal Cases Involving Children

Some Pacific countries already have specialist criminal justice processes for children, as recommended by the CRoC. These typically involve having judges with special training, different criminal justice procedures and laws and different penalties with a greater focus on rehabilitation and reintegration of children in the community.

Whether a specialised child justice system exists or not, all courts need to work in close coordination with other key actors across the justice chain in dealing with cases involving children. These include the police, the prosecution, the public solicitor/other legal aid service, government social services/ child welfare authorities, correctional services, as well as probation officers, youth support workers, community and religious leaders, parents, teachers and other important adults in children's lives.

Whether or not specialist justice streams exist for children in your country, these are the minimum standards that all courts should always apply in cases involving children.

Arrest:

- Both the child and parents or guardian must be informed of charge as soon as possible(CRoC Article 40(2)(b)(ii));
- A child should not be questioned/investigated without a parent/guardian or lawyer beingpresent during the interview (CRoC Article 40(2)(b)(ii)); and
- Police and prosecutors should try to divert children from criminal prosecution where possible (CRoC Article 40(3)(b)).

Detention:

- Only to be used for any child under age of 18 as an absolute last resort and for the shortestperiod possible (CRoC Article 37(b));
- All children under 18 years must always be held in separate facilities from adults and be able to maintain contact with their family and be given access to age-appropriate health,recreational, educational and other relevant facilities (CRoC Article 37(c));
- All children in detention should have access to legal assistance to challenge their detentionand be brought before a court as soon as possible (CRoC Article (37(d)); and
- Children must never be mistreated, forced to confess, tortured or treated in a cruel or degrading way (CRoC Article 37(a)).

During Trial:

- Courts should actively take steps to assist children and reduce any stigma children may facedue to any aspect of having a case in court;
- All children should have access to legal advice and representation in any kind of case.(CRoC Article 40(2)(b)(ii) & (iii));
- The privacy of children must be specially protected (CRoC Article 40(2)(b)(vii)). Cases involving children should be held in closed court. Court listings, judgments, other public records shouldnot identify children by name (See also Rules 8 and 21 of the *Beijing Rules*); and
- Ensure children fully receive all their 'fair trial' rights such as: to be treated as innocent unless proven guilty (CRoC Article 40(2)(b)(i)); to have a fair hearing before a competent, independent and impartial judge (CRoC Article 40(2)(b)(iii)); to have legal representation, to examine witnesses (CRoC Article 40(2)(b)(iv)); and to appeal the verdict or the sentence(CRoC Article 40(2)(b)(v)).

Sentencing:

- Sentences must take into account the child's age and aim at promoting social reintegration andthe child's constructive role in society.' (CRoC Article 40(1));
- Imprisonment must be used 'only as a measure of last resort and for the shortest appropriateperiod of time'. (CROC Article 37(b)). Alternatives to imprisonment should be provided (CRoC Article 40(3)(b)) examples include providing probation, supervision orders, educational/vocational programs;
- No death penalty or life imprisonment without the possibility of release for anyone under theage of 18 at the time of the offence (CRoC Article 37(a);
- Right to appeal sentence (CRoC Article 40 (2)(b)(v));
- As with detention, imprisonment of children must be separate from adults and be able tomaintain contact with their family (CRoC Article 37(c)); and
- Criminal records should be cleared when a child turns 18.

6.5 Measures to Make Court Processes Fairer to Children

Below are some measures judges and court staff should take to make justice processes more responsive to the needs of children (under 18 years old) who are 'in trouble' with the law. Use these as a guide for completing your own assessment of how 'child-responsive' your court is.

6.5.1 Pre-court Processes

Ensure an on-call judge is readily available 24/7 hours by telephone to hear applications regarding whether a child can be detained or not.

Work with the police/prosecution to develop a set of Standard Operating Procedures (SOPs) that cover:

- The investigation of alleged offences by youth/children (under age 18) including the need for a lawyer and parent/guardian to be present during any questioning;
- Instructions to avoid detaining children, except as a last resort;
- Where detention is used as a last resort, instructions that the child be brought before a judge within a strict and short time limit. If this is not done, (for whatever reason), instructions that the child must be immediately released;
- Guidance for diverting cases involving children from the criminal justice system including (at minimum) the options of: on the spot warning; caution; mediation; community conferences; and
- Adopt a different colour court file to alert anyone dealing with the case to the fact that it concerns a child and that child standards must be applied to all aspects of handling the case.

Work with The Public Solicitor to develop a roster of lawyers who can be contacted by the police both during and out of working hours to assist youth/child suspects being interviewed or investigated by the police.

Work with the prosecutor to develop a SOP for cases involving children, including ensuring every charge sheet includes a clear statement highlighting that the charges relate to a youth/child, and providing their date of birth.

6.5.2 In Court Processes

Allocate separate court hearing days to deal with cases involving children more efficiently, discreetly and using a more informal layout for court room furniture.

Strict guidelines should be issued that judges can only order pre-trial detention (for any period) of a child for the most serious cases of violent crimes against the person and never for property offences.

Ensure any children being brought from prison to the court are transported separately from adultsand held at the court separately from adults and special attention is given to them (to provide information, food/water, access to bathroom etc.).

Use a faster case management system that prioritises cases involving children, especially those in detention.

Set and enforce strict standards for how quickly cases involving children must be heard and finally dealt with by the court. Especially for those in pre-trial detention, strict time limits should be applied which requires children to be released on bail.

Ensure court staff confirm in advance the attendance of all those needed for cases involving children to proceed (to avoid delays and adjournments).

Ensure court sittings for children are held in private court (closed and not open to the public) and that their name is not publicly displayed anywhere (e.g. in court listings) and is removed from any public court report or judgment.

Ensure that every child has a lawyer present at every hearing. They can be appointed by the Public Solicitors Office, another legal aid provider or appointed by the court.

Ensure there is a group of judges in each court who have received special training for handling cases involving children, and make sure one of these judges is appointed to all cases involving children.

Provide judges the opportunity to receive training in 1. International standards relating to juvenile justice, constitutional standards and any special laws that apply to children and 2. how to engage with children, such as by adopting a more informal manner, providing explanations that are clear and age appropriate, encouraging the child's participation in the court process and taking the child's views into account in all the issues before the court.

Encourage judges to always consider referring relevant issues in child cases to a 'Community Conference' comprised of the child, his/her family, the victim, police, lawyer, conference convener and any other interested and relevant party (e.g. customary chiefs/pastor). Ensure that the court considers any recommendations made by the Community Conference in deciding any sentence.

Ensure judges are aware that sentences must take account of the child's age and should focus on rehabilitation more than punishment. Prison should only be used in the most serious cases as a last resort and be for the shortest possible period in a facility separated from adults. Custodial sentence can always be supplemented with other community-based rehabilitation activities.

6.5.3 After Appearance in Court

Work with the correction authorities to oversee and ensure that:

- Children in custody (including while in pre-trial detention) are kept separate from adults and have age appropriate health, recreation and education facilities, access to their families etc.; and
- Community-based alternatives to custodial sentences are supported and encouraged.

Work with the police/prosecution to ensure that (at minimum) the following data is collected: the child's exact age at the time of the offence; gender; home island; whether diverted/charged; type of charge; outcome; reoffending rates.

Notwithstanding any other law, ensure that the details relating to a conviction of young offenders be cleaned from there record when they turn 18 years old.

7 Quick Reference Guide for Cases Involving Women, Girls and Family/Sexual Violence

(See also Human Rights Checklist 4: When victims of family and sexual violence come to court, Annex E, A-41)

7.1 International Standards: Convention for the Elimination of All Forms of Discrimination against Women (CEDAW)

All countries in the Pacific region (except for Tonga and Palau), have ratified CEDAW, which provides a framework for countries to address gender inequality, and discrimination against women. These have emerged as big issues that Pacific societies are grappling with.

7.1.1 Key International Standards Involving Discrimination (including violence) Against Women

Key Provisions of CEDAW

Article 2 condemns discrimination against women in all forms (political, economic, social, cultural, civil or any other field) and require States to:

- Introduce new laws to protect women from discrimination (Art 2(b));
- Change existing laws that discriminate against women (Art 2(f)(g));
- Ensure legal protection from discrimination for women in court decisions (Art 2c);
- Ensure equality before the law (Art 15);
- Ensure public institutions (including courts) do not discriminate against women (Art 2(d));
- Change social and cultural patterns to address customary and other practices based on sex discrimination or gender stereotypes (Art 5(a)); and
- Provide equality in education (Art 10), health (Art 12), employment (Art. 11), participation inpublic life (Art 7), nationality (Art 9), marriage, divorce, family relations, right to custody of children, to own marital property (all in Art. 16).

While CEDAW does not explicitly mention violence against women and girls, General Recommendation 19 clarifies that violence against women is a form of discrimination against women and is therefore covered by the Convention sections that ban discrimination against women. 'Violence' includes different forms such as physical, mental, economic or sexual violence as well as threats, or other ways of controlling the lives of others.

Declaration on the Elimination of Violence Against Women (1993)

- As with any Declaration, it is not legally binding or enforceable, but does set out national andinternational standards and a plan of action for combating violence against women; and
- Provides definition of 'violence against women': any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women including threatsof such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

The World Conference on Human Rights (1993)

- Recognised violence against women as a human rights violation; and
- Called for the appointment of a Special Rapporteur on violence against women to follow up and monitor women's rights.

The Beijing Platform for Action (1995)

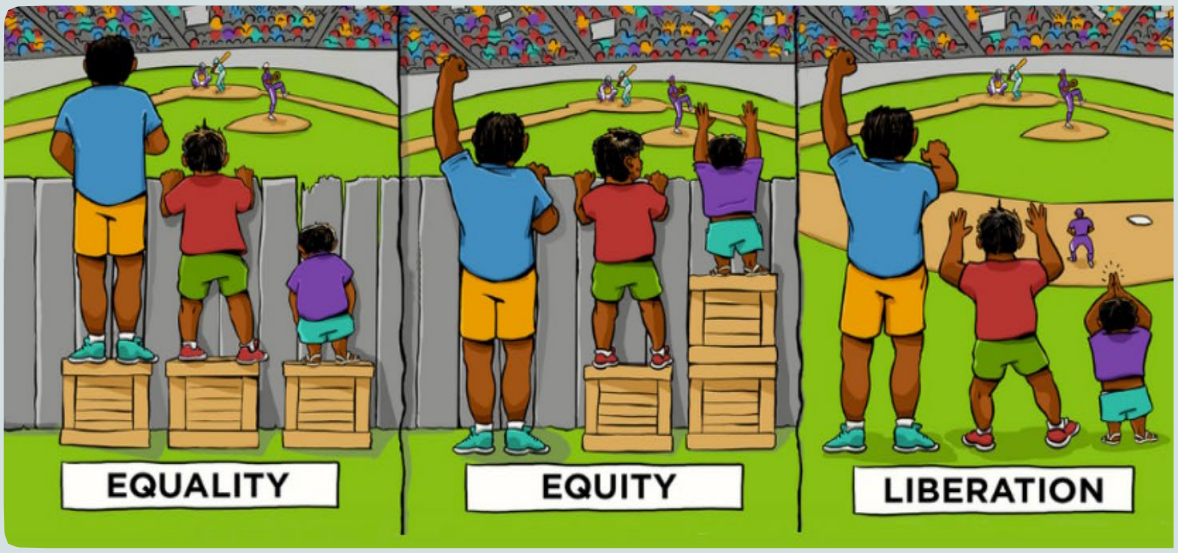
- Identified specific actions Governments must take to prevent and respond to violence againstwomen and girls;
- Identified ending violence as one of 12 key areas for priority action; and
- Used an expanded definition of forms of violence

7.1.2 Formal vs Substantive Equality

'Formal equality': Means everyone should be treated the same, whatever their circumstances. As shown in the left hand picture, formal equality, (as found in many Pacific constitutions), will not always achieve fair (equitable) outcomes.

'Substantive equality' = Equity: Takes into account that not everyone starts at the same level and that some groups may need extra help to access rights and opportunities on the same footing as others.

'Liberation': The third picture shows how the removal of systemic barriers (such as to access justice) helps everyone enjoy their rights and have the same opportunities.



7.2 Regional Standards

While there are no binding regional standards, there has been regional attention paid to gender equality and women's rights (see Annex C.2 for details).

7.3 Domestic Standards

Awareness of the problem of violence against women has increased since national studies showed that some Pacific societies have amongst the highest rates of violence against women in the world. Many Pacific nations have responded with:

7.3.1 New Laws

Between 2009 and 2015, nine Pacific countries passed family protection and domestic violence legislation aimed at better protecting women and children from family violence. Many of these have been based on standards established in CEDAW and other international instruments.[4]

7.3.2 Community-Based Campaigns

Aimed at changing deeply-held values that support attitudes of acceptance and normalisation of violence against women and other family members. These campaign approaches recognise that preventing violence requires coordinated efforts at all levels of society to change dominant community attitudes while also increasing women's status in society.

[4] Vanuatu Family Protection Act 2009; Fiji Domestic Violence Decree 2009; Marshall Islands Domestic Violence Prevention and Protection Act 2011; Palau Family Protection Act 2012; Samoa Family Safety Act 2013; Kiribati Te Rau n Te Mweenga Act 2013; Tonga Family Protection Act 2013; Solomon Islands Family Protection Act 2014; Kosrae State Family Protection Act 2014.

7.3.3 Courts

Decisions of Pacific courts increasingly reflect and reinforce growing community rejection of violence against women and other family members by prioritising principles of equality and non-discrimination, including in cases where these conflict with cultural or customary practices. However, there are signs there is still some way to go. For example, a recent study by International Center for Advocates Against Discrimination (ICAAD)[5] of sentencing decisions in sexual assault and domestic violence cases in seven Pacific countries found that judges continue to give heavy mitigating weight to gender stereotypes, cultural practices (such as customary reconciliation) and other 'contentious factors' to reduce the likelihood and length of custodial sentences in sexual violence and domestic violence cases. This was despite legislation in some countries explicitly prohibiting judges from taking such factors into account. This study shows how values that undermine women's right to equal protection of the law can also be ingrained in judicial thinking, suggesting that this might be an area where specific judicial training and guidance could be helpful.

7.4 Step 1: Understanding the Barriers Faced by Victims and Court's Roles to Address Them

Women and children subject to family violence typically face strong social, cultural and economic pressure to 'live with' or try to manage family violenceon their own, despite the damage and harm it causes them and theirfamilies. When victims do seek help, it is often in desperate situations whenthe violence has been going on for some time and often already reached very high, even life-threatening levels. Therefore, the quality of response tovictims' that do come forward to report violence is very critical.

> Many victims lack trust in the system or take a calculated view that the likely economic, social and cultural costs to them of making or continuing with a criminal complaint, outweigh the potential benefitsof stopping the violence or their family member being heldaccountable for his violence.

Family violence is a crime, but is also much more complicated than many other crimes because the people involved often have ongoing relationships of love and affection. Victims often also have relations of economic dependenceon perpetrators and lower levels of social and cultural power than them. These factors can make many victims feel very conflicted when they finally seek help from the police. On one hand they know they need protection and that what has been done to them is wrong, but on the other, they may feel fear, shame (especially in cases of sexual violence), and torn about bringing a complaint against someone they may love and need. They also often face strong pressure from other family members, community or religious leaders to try to solve the problem privately and outside of the criminal justice system.

Given all these pressures, it is hardly surprising that many victims who seek protection from the police during a crisis later withdraw their complaints. This is not because victims are undecided or weak, but often because victims lack trust in the system. This is understandable given the variable experiences they can have in their interactions with different law enforcement/justice actors and the lack of reliability and limited range of 'safety net' services and supports for victims.

It is the job of all actors involved in family violence cases to help change this balance and help create a more victim-supportive approach: one that recognises and respects the autonomy and decisions of victims, at the same time as reliably helps them to overcome the barriers that victims usually face when they bring or are part of cases involving family violence.

Police, prosecutors and judges must themselves be wholly convinced of the criminal nature of family violence and the 'rightness' of victims bringing forward their complaints, if they are to provide effective support to victims and be persuasive 'ambassadors' for the justice system. If justice actors themselves think that family violence is excusable, understandable or should be tolerated by victims, (which they

[5] ICAAD 'An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence Cases in the Pacific Island Region', 2015. http://www.paclii.org/other/general-materials/ICAAD-Analysis-of-Judicial-Sentencing-Practices-in-SGBV-Cases.pdf.

often may do, because they have also grown up in communities where these are dominant beliefs), then there is little chance victims will receive proper support and protection. So it is key that court actors support victims of family violence wholeheartedly and take as much pressure off victims as possible by demonstrating behaviours and attitudes supportive of victims.

Family violence cases require that all parts of the justice system work in a coordinated way together: police, prosecution, public solicitor/legal aid providers, courts and corrections. The responses of these bodies must also be closely coordinated with health services, shelters, and social services (both government and non-government), to provide support to victims at all stages of the process. It is crucial that the process also provides appropriate and effective opportunities and encouragement for perpetrators (usually men) to learn how to change their behaviour so that violence in the family does not continue. In addition to assisting in individual cases, courts also have an important role to play in prevention of family violence, by conducting outreach and conveying clear messages to communities that violence within families is no longer acceptable and will be dealt with firmly by the courts.

7.5 Measures to Make Court Processes Fairer to Women and Child Victims of Family Violence

Many Pacific countries have already introduced family protection laws that include specialised services and coordinate the roles and responsibilities of relevant actors. Notwithstanding any specific laws, use these suggestions below to start planning actions to make your court more responsive to the needs of women and child victims of family violence (See Gender and Family Violence Toolkit 2017 for more guidance).

7.5.1 Prior to Court Trial Processes

Ensure protection orders are readily available 24 hours by telephone through having an on-call judge available at all times.
Where suspects are not detained, consider use of orders that suspects must reside away from the family home until the case is determined, rather than victims and children having to leave their home and support network.

Work with police to develop SOPs for protocols to respond to complaints of family violence including:

- Ensuring that female police also attend crime scenes to take statements from female victims, witnesses and children;
- All police are adequately trained in preserving crime scene evidence;
- SOPs/training have been provided to all police on conducting family violence risk assessments and clear guidance is provided on pro-arrest and detention policies regarding family violence suspects, and prohibiting police from informally resolving complaints of family violence; and
- All victims to receive independent legal advice and support at police stations during initial processing of a complaint and compulsory independent advice/counselling before withdrawing a complaint.

Work with prosecution services to ensure SOPs are in place that:

- Provide clear guidance on exercise of prosecutorial discretion not to lay charges;
- Prohibit informal resolution of family/sexual violence complaints;
- Provide time frames within which investigations must be finalised and indictments filed and take all possible steps to reduce delay (e.g. carefully assess whether there is a need for forensic evidence, especially where it will take a long time to procure);
- Ensure adequate interim protection orders are in place for victims and witnesses and that they are enforced including orders for payments of maintenance to victims (from joint assets if necessary);
- Provide guidance on laying appropriate charges in cases of family/sexual violence;
- Allocate women prosecutors (wherever possible) to take statements from victims of family/sexual violence;

- Provide guidance on collecting evidence for cases of criminal damages (in legal systems where this is also the responsibility of the prosecutor and dealt with concurrently with criminal charges) and material needed for victim impact statements for sentencing hearings; and
- Keep victims regularly updated on all case developments and consult them on issues of dropping or reducing charges, and sentencing sought.

Judges to ensure interim victim protection orders and witness protection measures are adequate, in place and oversee their enforcement where necessary.

7.5.2 During Trial Process

Use accelerated case management to make sure cases involving family violence are prioritised and heard quickly. Set and enforce standards in SOPs for how quickly they must be heard and finally dealt with.
Ensure court staff confirm in advance the attendance of all those needed for the case to proceed (to avoid adjournments).
Only grant adjournments if they are strictly necessary and take other measures to reduce delay (e.g. if suspect does not appear, issue warrants for their arrest and direct they be presented to the court).
Demand high standards of professionalism from prosecutors and defence lawyers. I.e. do not readily grant adjournments if prosecutors or defence lawyers are poorly prepared or organised. Make complaints of unprofessional conduct to professional bodies if necessary.
Ensure sufficient security is in place and that no weapons are brought into the court house.
Wherever possible, ensure courts have separate entrances for victims of family violence and always have separate waiting areas for victims and prosecution witnesses.
Provide child-care, child-friendly space, private place for breast feeding for court parties.
Ensure court reimburses victim/prosecution witness transportation costs and provides food during waiting periods and secure accommodation where victims/witnesses are not local and hearings last several days.
Provide necessary supports to victims/witnesses/suspects suffering from any disabilities (see section below).
Provide training to judges hearing family violence cases including how to use CEDAW/CRoC/ constitutional rights of women and children and any special laws that apply to family violence cases. Also provide training on how judges can support the participation of victims, (including children), in court processes, such as by adopting a more informal manner, providing clear non-judgmental explanations, being sensitive to any fear or trauma of victims by providing encouragement, regular breaks etc. and allowing victims' representatives/support persons to make submissions if they wish.
Consider ordering that court proceedings, especially those involving sexual violence and children, be held in closed court and that the victims and witnesses' names be suppressed.
Ensure that suspects are offered legal representation (to ensure fair trial) but also to discourage suspects from directly cross-examining victims. If the suspect insists on their right to represent themselves, strictly exclude any improper, gender-biased or intimidating lines of questioning directed at victims or prosecution witnesses.
Consider ordering the removal from the court room of any person, (including the suspect if necessary), who fails to observe warnings regarding their conduct, intimidates or threatens the victim or any witnesses, or otherwise obstructs the hearing.
Consider creating a more informal setting for child victims to give their evidence, including the option of giving pre-recorded evidence or giving evidence in the court room but not in direct view of the suspect.
Consider giving the opportunity for the prosecution to present a victim impact statement in any sentencing hearing.
Consider developing and implementing sentencing guidelines for cases of sexual and family violence to ensure sentencing decisions consistently reflect the seriousness of crimes, including aggravating factors (i.e. abuse of trust or power, child victims, victims with disabilities etc.) and do not give weight to inappropriate mitigation factors including gender stereotypes and customary/cultural factors such as reconciliation.

7.5.2 During Trial Process

Work with the police and prosecution to ensure complete data sets are collected on all family/sexual violence cases including: charges laid, age/gender of victim and suspect, relationship between victim and suspect, interim measures ordered to protect victim or witness, legal representation of victim and suspect, final verdict, sentence (including aggravating or mitigation factors taken into account), any parole/early release granted, any repeated offending noted.

8 Quick Reference Guide for Handling Cases Involving Persons with Disabilities

(See also Human Rights Checklist 5: When people with disabilities come to court, Annex E, A-53)

According to the UN, persons with disabilities represent an estimated 17 percent of the Pacific's population, so they are a very large group of society whose needs must be taken into account.

People with disabilities are statistically poorer than others in their communities and generally have reduced opportunities for economic and social life. They are commonly excluded from basic public services including education, health and public transport services. This may be due to institutional barriers, such as the failure of service providers to adapt their processes and infrastructure to enable people with disabilities to gain access. People with disabilities often face discriminatory attitudes and stereotypes, which also work to prevent their participation in public life and their access to services, creating many levels of disadvantage for them.

Ofeina Leka's Story, from Tonga

31-year-old Ofeina Leka was born healthy, but an accident at the age of 11 left him totally blind. He wasexcluded from the education system and his community, when no school in the country would accept him. He attended the School Society for the Blind for some time in Fiji but his family could not afford for him to continue so he returned to Tonga. Following many rejections and through his persistence, he was eventually accepted into a university. Using a tape recorder, a screen reader, a laptop and braille hefound his own way of learning at University and after four years of studying, he graduated with a degreein Business Administration.

Mr Leka is now the only blind person in the country who can read Braille and use a computer. He also lives independently, cooks his own food, does his own washing and is now training other young blind children in how to read Braille and live independently. He founded Tonga's National Visual Impairment organisation.

> *I never forget about how hard that I came. How hard, how difficult that I came through. So I havethat vision, I should establish the Blind Association here in Tonga to gather the people with visual impairment so we can make a change. That's how important that we need the convention to be ratified because people with disabilities have a right to educate, have a right to employ, have a rights to have their own family, have a right to make a choice.*
>
> **Transcript from Tonga Disability Convention*

8.1 International Standards: Convention on the Rights persons with Disabilities (CRPD)

Already ten Pacific nations have ratified and five have signed (see Annex A.5.1) the CRDP, making it the third most ratified Convention in the Pacific, after CRoC and CEDAW.

8.1.1 General Obligations of CRPD

Parties to CRPD must take measures, with the active involvement of people with disabilities, to:

- Ensure and promote human rights and fundamental freedoms for all personswith disabilities without discrimination (Art 4 CRPD); and
- Raise awareness of the rights, capabilities and contributions of people with disabilities and challenge stereotypes and prejudices towards people with disabilities (Art 4 CRPD).

8.1.2 Key Definitions

***'Disabilities'*:** Long-term conditions can be physical, mental, intellectual or sensory impairments, which may prevent participation/access to opportunities, along with barriers such as discriminatory attitudes and policies, and inaccessible infrastructure and services.
***Disability Discrimination*:** Any distinction, exclusion or **restriction on the basis of disability**, including denial of 'reasonable accommodation', **which restricts enjoyment of any human rights** (political, economic, social and cultural) on an equal basis as others.
***'Reasonable accommodation'*:** Necessary and appropriate **modifications and adjustments** that do not impose a **disproportionate or undue burden** and are needed **in a particular case**, to ensure that person with disabilities can **exercise their human rights and freedoms on an equal basis to** others. Note: The obligation to 'reasonably accommodate' is only triggered when the measure is requested by the individual and it must be considered a reasonable request, from the perspective of an outsider to the case.

8.1.3 CRPD Recognition of Special Groups

Women & girls with disabilities as they experience multiple discriminations (gender & disability).

Children with disabilities have the same rights as other children, to have their 'best interests' prioritised and to participate in any decision that affects them (Art 7) Children with disabilities have the right to a name and to know and be cared for by their parents (Art 19) and to alternative care where the immediate family is unable to care for them (Art 23).

8.2 Key CRPD Rights and Standards

- Equality before the law & non-discrimination (Art 5) including access to public services & thephysical environment (Art 9);
- Right to life (Art 10), liberty & security of person (Art 14), freedom from torture or degradingtreatment - including medical experimentation without free consent (Art 15);
- Freedom from exploitation, violence & abuse, including GBV in/outside the home (Art 16);
- Protection and safety in & humanitarian emergencies (Art 11);
- Equality before the law (Art 12), access to justice (Art 13);
- Respect for physical & mental integrity of the person (Art 17);
- Freedom of movement & nationality (Art 18);
- Right to live independently & be included in the community (Art 19), right to personal mobility(Art 20), mobility aids, assistive technologies & aides at affordable cost;
- Right to freedom of expression & opinion, access to information (Art 21) including throughaccessible formats and technologies, sign languages, Braille, augmentative & alternative communication;
- Respect for privacy (Art 22) including personal & health information;
- Respect for home & family (Art 23) including the right to marry, found a family &support tobring up children;
- Education (Art 24) Right to quality & free primary & secondary education withoutdiscrimination to maximise academic & social development;
- Right to highest attainable standard of health without discrimination, gender-sensitive, & closeto people's own communities (Art 25) & right to rehabilitation (Art 26);
- Right to work in open, inclusive & accessible environments &obligation for countries topromote employment opportunities & career advancement for people with disabilities;
- Adequate standard of living and social protection (Art 28), participation in political & public life(Art 29) including to vote, be elected, & in cultural life, recreation, leisure & sport (Art 30); and
- Statistics and data collection (Art 31) Obligation to collect information about people with disabilities to better understand & address the barriers they experience.

8.3 Barriers Faced by Persons with Physical, Mental or Sensory Disabilities in Courts

Courts are legally obliged to reduce and remove any disadvantage faced by persons with disabilities in the justice system. Best practice is for courts to have in place an implemented disability policy which recognises the human rights of people with disabilities, including prohibitions on discrimination, and sets out how the court will apply these to court users, and also to court staff, with disabilities. See for example the Tongan Supreme Court *Disability Policy*, (available at http://www.justice.gov.to/wp-content/uploads/2020/06/Tonga-Supreme-Court-Disability-Policy.pdf) People with disabilities should not be denied justice simply because supporting them may be perceived to be difficult or require special attention or services. These are some of the problems courts sometimes face in handling cases involving people with disabilities.

8.3.1 Identification

Sometimes people with disabilities may not be identified by courts as being in need of assistance. This isoften because courts do not have the knowledge, experience or resources to detect disabilities. This can result in courts simply proceeding with cases without taking account of the person's disability. This, in turn, can result in unfair trial processes or outcomes. For example, the result will not be fair if statements are taken from a deaf person without an interpreter present and are relied on by courts; or if a person with an intellectual disability pleads guilty but without understanding what this means or what the consequences might be.

8.3.2 Attitudinal

Sometimes court staff and judges do not know how to assist people with disabilities or mistakenly assume they cannot fully participate in the justice system. Judges may wrongly assume that because a person needs assistance to give evidence, their evidence is less reliable or that evidence from someone else as well, may be needed. This can result in people with disabilities receiving less protection under the law than others, as often happens to women or girls with disabilities who are victims of sexual violence. In all cases involving people with disabilities, judges need to take special care to check their own attitudes and assumptions towards the person due to their disability. They also need to make sure that no one else involved in the case is permitted to influence the outcome of the case based on wrong assumptions or stereotypes about the person, due to their disability.

8.3.3 Communication

Courts need to identify and meet the communication needs of people with disabilities, wherever possible. Sometimes courts may need to allow the use of communication devices or show some flexibility regarding the rules of evidence to accommodate needs of people with disabilities, for example by permitting the use of audio-visual evidence, either in real-time or pre-recorded.

8.3.4 Informational

Often people with disabilities are not aware of services the court could provide to support them. If courts do not provide public information about what help can be organised, people with disabilities may miss out on securing important rights in their cases. Information about how the court can assist people with disabilities should be easy to find and displayed in posters/pamphlets at the court and in other public locations. The list of services courts can provide should gradually expand as courts gain experience in accommodating the needs of people with disabilities.

8.3.5 Organisational

Court staff needs to actively search for ways to assist people with disabilities, such as by helping fill in forms or escorting them to where they need to go. Court staff also need to be highly organised and make sure they book and confirm interpreters or other aides needed to ensure cases involving people with disabilities can go ahead without being adjourned or delayed.

8.3.6 Physical and Sensory

Physical barriers may prevent persons with physical disabilities from accessing the courthouse or moving to or inside the courtrooms themselves. Sensory barriers may prevent people with vision or hearing impairments from being able to understand, follow and fully participate in proceedings.

8.4 Creating Disability-Inclusive Courts

The first step to making courts more disability-inclusive is to ensure that court staffs are able to identify people with disabilities and know how to find out what assistance they may need. In the table below are some of the factors to consider as you develop your plan to make your court more disability-inclusive.

8.4.1 Ability of persons with disabilities to enter and move within courts and navigate proceedings	
Disability Type	**Factors to Consider**
Mobility impairments	• Is the court room on the ground floor or accessible by a lift? • If the courtroom is on the ground floor – are there still any steps to enter the court room, or a ramp? • Is the court door wide enough to accommodate wheelchairs? • Is there space for wheelchair users to move around the courtroom? • Where will a person in a wheelchair sit in the courtroom when theyare giving evidence? • Are court hallways wide and clear of furniture or debris? • Is there a wheelchair accessible toilet available?
Visual impairments	• Do all court staff know that a guide dog may enter the courtroom? • Will court staff assist with directions and/or or walk with the clientto the courtroom? • Do elevators have braille buttons or a sound system to announce thefloors? • For reading documents, can the document be emailed to the clientas one that can be “read” by someone with a visual impairment, using appropriate software?
Any kind of disability	• Is courtroom signage clear? • Are staffs available and trained to help users to navigate their way around the court?
8.4.2 Ability of persons with disabilities to prepare for, and participate in proceedings	
Any kind of disability	• Is disability-inclusive information available: By phone? Email? Inperson at the registry? Via the court website? – Does it includeinformation about the law, the process and the help available? (From court, legal aid, other specialised services?)
Hearing impairments	• Is there a sign interpreter available or a ‘hearing loop’ in court? • Is there someone available to answer any questions on what willhappen on the day through a text phone, email, skype or some other message service?

Intellectual impairments	• Is a trained support person available to explain processes in ways the person is able to understand and to help them participate to themaximum degree possible?
8.4.3 Court processes to keep records and data on assistance provided	
For Court Staff	• Is there a registry checklist of questions for each case file, which includes questions regarding individual client disability needs? • Is there a case management system in place to make sure preparatory arrangements, bookings or other follow up is doneto ensure cases of persons with disabilities are not delayed or adjourned? • Is a colour-coded filing system used to enable ready identification ofcases involving persons with disabilities so special care can be takenwith managing these files? • Have the staffs been trained to assist people with disabilities? • Is data kept on the numbers and types of court services needed forpeople with disabilities and the types of cases and results of cases involving persons with disabilities?

9 Quick Reference Guide for Reconciling Human Rights and Customary Practices

9.1 The Roles of Courts to Bridge Human Rights & Customary Practice Including byEngaging Communities in Dialogue

Some people say that human rights standards and Pacific customary practices clash because human rights focus on individual rights, whereas Pacific cultures and customary practices prioritise communal values. In reality, there are important shared values between human rights and Pacific cultures, even if different words are used to describe each. For example, both share core concern for respecting the dignity of others, caring for the wellbeing of families, ensuring social goods such as health and education are fairly shared, and ensuring that everyone is able to live in security.

There are also often examples that can be found from traditional cultural practices that can help increase acceptance of the need for special protections for particular groups. For example, in many Pacific societies special protection has always been afforded to women and children that they not be killed or attacked in traditional warfare. This concept can, by analogy, be applied to explain the need for special laws and community approaches to protecting women and children from family violence.

It is one of the roles of Courts to localise the application of human rights ideas in the way it applies the law and to demonstrate to communities the benefits of how blended understandings of human rights and customary values can keep both communities and individuals safe and strong. This blending is possible because human rights and Pacific cultural practices both absorb change. Human rights standards evolve as courts interpret and apply human rights standards in Pacific contexts. Pacific customary practices evolve as they adapt to factors such as globalisation, urbanisation, migration and climate change. In combination, human rights standards and customary value can more effectively respond to current needs and support communities as they go through periods of change. For example, human rights standards can help provide social safety-nets for individuals or groups if traditional forms of support become less reliable or available.

Customary values and practices can also be powerful motivators for positive change. For example, while there may be some customary practices that undermine women's empowerment, there are also likely others that support and help protect women. In the case of family violence, which is usually perpetrated by men, effective judicial sentencing involves understanding and using these cultural elements to help men to change, alongside strategies to use community pressure, for example by encouraging influential community leaders to condemn violence while helping perpetrators accept the need for them to change and support their rehabilitation.

Courts also have broader roles to build public understanding and trust in their work including by having dialogue with communities about how human rights principles and customary values can co-exist and are reflected in the justice provided by the courts, for the benefit of all members of society. Below are some ideas for actions courts can take to develop this aspect of their work (See also the PJDP 'Toolkit for Public Information Projects' 2015).

- Design a general 'human rights and custom together' pamphlet and posters explaining some of the core messages concerning how courts apply both human rights standards and respect customary values. Also design separate ones showing how human rights and custom can improve the lives of women, children and persons with disabilities;

- Conduct awareness-raising sessions in schools and arrange a school poster competition for design ofimages for the pamphlets and posters showing how combining human rights and customary valuescan improve life for everyone. Use the winning images for your posters/pamphlets design;
- Disseminate the posters and pamphlets widely and have them on display in schools, courts, community/health/youth/sports/women's centres, police stations, other public places; and
- Design and implement a series of community dialogues on customary practices and human rights(See below 'step by step' suggested guide).

9.1.1 Tips/Steps for Conducting Community Dialogues on Customary Practices and Human Rights

Step 1 Decide on the aim and target audience of the forum:

- Is it for the 'general public' or for women, children, community leaders or other groups?

Step 2 Decide who will facilitate, make presentations, take notes and organise the exchange

- Try to have gender balance and people in your team who are good at making different groups feel at ease and willing to participate.

Step 3 Decide who should be invited and the size of forum

- Bear in mind that larger groups will cover more people but generally be more formal and smaller groups will be more informal and conversational.
- Consider conducting separate discussions with women, youth, and people with disabilities to achieve strong participation of these groups.

Step 4 Decide on the format and agenda of the exchange

- Ensure you leave plenty/most of the time for questions and discussions with participants.

Step 5 Prepare presentations and other materials for the exchange

- Make sure that legal ideas or court processes are explained using simple language, pictures, clear steps, and examples or situations participants will relate to.

Step 6 Organise logistics:

- Consider dates, venues, transportation, food, equipment, materials etc.

Step 7 Conduct Forum

- Make sure you arrive early and test beforehand any equipment you plan to use.
- Spend time mingling with participants afterwards to build rapport.

Step 8 Conduct a team review of each forum

- To assess overall results of each forum and identify improvements for the next.

Step 9 Write up the forums to share knowledge for next steps

- Include a breakdown of numbers/groups present, the main questions or issues discussed and points of agreement and disagreement that emerged. Feel free to add some recommendations for next steps.

9.2 Resolving Legal Conflicts between Human Rights Standards and Customary Law

Most PICs' national constitutions contain 'Bills of Rights' setting out a list of constitutionally protected human rights, which judges must always apply in their decisions. These same constitutions frequently provide recognition of customary law as a source of law. Sometimes there are genuine tensions between constitutionally recognised human rights and customary practices and courts are often tasked to adjudicate these. Pacific judges, as 'members' of legal/rights cultures and local customary cultures, are perfectly placed to give effect to human rights as required by law, in ways that find common ground with customary values to the maximum extent possible.

Distinguishing between **customary values** - those deep and constant community beliefs that underpin cultural identity - and **customary practices**, which are less enduring, more changeable habits, is one way that can help courts to order priorities. Courts can play a very positive role in ensuring that customary values are upheld and strengthened, while supporting change to those customary practices now understood to be harmful and by also suggesting their replacement by other practices that can perform a similar function but in a non-harmful way.

The flow-chart below describes the steps that can be taken by courts in those (relatively infrequent) situations when human rights standards and customary practices cannot both be applied without ultimately prioritising one over the other.

See also Annex D.5 'Solomon Islands Case Law and Case Study on Application of Human Rights and Customary Law.'

Step 1
- Analyse facts of the case.
- Does it concern a customary value or a customary practice?
- What is it? Define it as specifically as possible.

Step 2
- Does it concern a human rights issue?
- What is it? Define it as specifically as possible.

Step 3
- Can the human right and the customary practice be read to mutually reinforce each other?
- To what extent can they harmoniously co-exist or at what particular point do they clash?
- Narrow the extent of the clash as far as possible.

Step 4
- Legal analysis: What human rights standards apply and via what laws?
- eg. What relevant rights are protected in Conventions? Constitution? Other legislation?/case law? See flow chart p 6.

Step 5
- Does the constitution recognise customary law? Is there a clause giving primacy to human rights over customary law?
- Does it say how clashes with conventions or between constitutional rights should be resolved?
- What does the caselaw say?

Step 6
- Form legal analysis of priorities. Apply law to facts. Remember to apply human rights to the maximum degree possible.
- Reflect your analysis of how human rights and custom principles co-exist.
- Refer to and discuss all the legal sources relied on to inform your conclusions.

10 Introducing the 6 Human Rights Checklists: From theory to practice

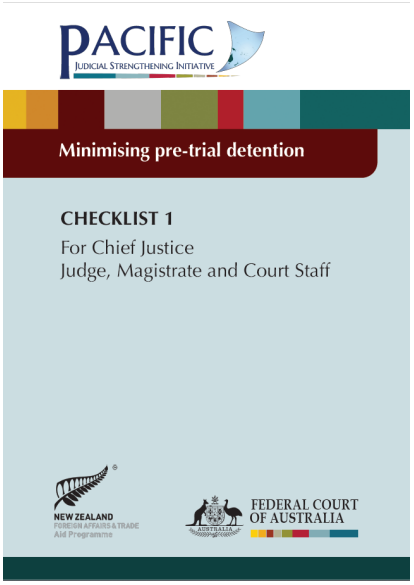
(See Annex E for all six 6 Human Rights Checklists)

Recognising that human rights standards can be quite abstract and not always easy to directly apply in practice, the Pacific Judicial Strengthening Initiative (PJSI) developed six Human Rights Checklists. The Checklists are designed to be used alongside this Toolkit and provide practical step-by-step guidance for applying relevant human rights standards to respond to the needs of particular groups of court users, and for generally making courts more inclusive and welcoming.

The Checklists provide targeted guidance for court leaders, judicial officers, and court staff, recognising that each have important and distinctive roles to play in strengthening court implementation of human rights. They recommend that coordinated actions to be taken across all court actors, being the approach needed to work towards achieving best practice. The guidance is broken down into common stages of court cases; pre-hearing, during hearing and post hearing, so that court actors can readily follow them step by step and check off the steps they have taken, as they go. The Checklists were piloted in several Pacific countries and then refined based on the feedback received. The full series of Human Rights Checklists include:

- Checklist 1: Minimising Pre-Trial Detention
- Checklist 2: When juveniles/children come to court
- Checklist 3: Judicial visits to places of detention
- Checklist 4: When victims of family or sexual violence come to court
- Checklist 5: When people with disabilities come to court
- Checklist 6: Creating welcoming, inclusive courts.

LOOK INSIDE!



The content of the Checklists is based on three key sources:

- Key Human Rights Treaties: ICCPR, CAT, CRC, CEDAW, CRPD, CAT, UN Declarations, Rules, Minimum Standards (treatment of victims of gender based violence, prisoners, juveniles)
- Common provisions of national constitutions (Bills of Rights)
- Common provisions of national laws (eg Police Laws, Civil Procedure Laws, Family Protection, Juvenile Justice laws)

The Human Rights Checklists also include a table containing *Standard Recommended Court Form Disaggregated Data Fields* setting out the key human rights-related data fields that courts need to be able to capture and track to strengthen the human rights work and performance of courts, including regarding issues of gender, age, disability, outcomes regarding gender based violence, access to legal aid and court fee waivers, amongst other human rights indicators.

Human Rights Toolkit
Additional Documentation

Human Rights in the Practice of Pacific Courts: A Toolkit

Annex A: Introduction to Human Rights

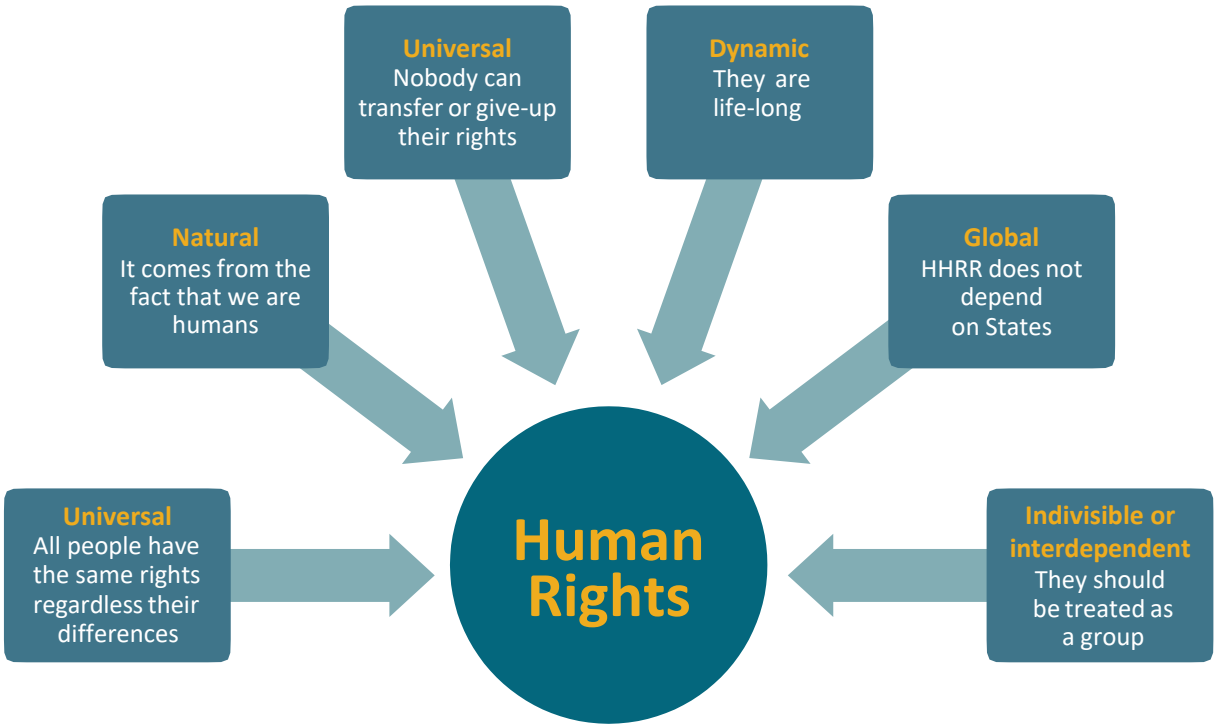
A.1 What are human rights?

- Human rights are rights which are universal and inherent to all human beings, whatever their nationality, sex, national or ethnic origin, race, religion, language, or any other status. All people are equally entitled to enjoy their human rights without discrimination;
- Human rights include civil, political, economic, social and cultural rights;
- Human rights are all interrelated, interdependent and indivisible,meaning:
  - they cannot be granted or taken away, except in specific situations and according to due process. For example, everyone has the right to liberty but it may be restricted if a person is found guilty of a crime by a court of law; and
  - the enjoyment of one right affects the enjoyment of others and; they must all be respected.

Why Human Rights are important

Human rights:

- Reflect the minimum standards necessary for people to live with dignity
- Guarantee life, liberty, equality, and security
- Protect people against abuse by thosewho are more powerful including governments.
- Guarantee people the means necessaryto satisfy their basic needs, such as food, housing, and education.



A.2 Sources of Human Rights Law

The Universal Declaration of Human Rights adopted in 1948, is generally agreed to be the foundation of international human rights law. It contains the following 30 key human rights.

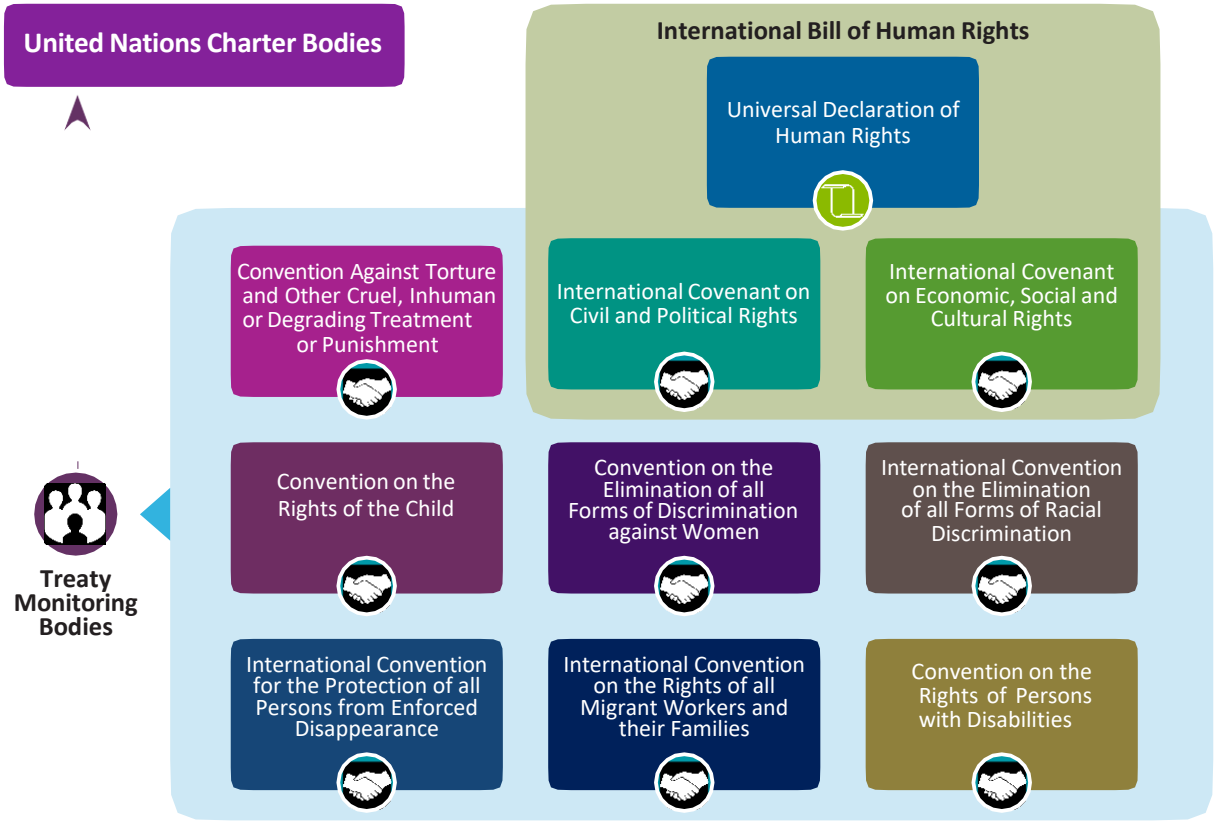
Article 1	**Right to Equality**
Article 2	Freedom from Discrimination
Article 3	Right to Life, Liberty, Personal Security
Article 4	Freedom from Slavery
Article 5	Freedom from Torture and Degrading Treatment
Article 6	Right to Recognition as a Person before the Law
Article 7	Right to Equality before the Law
Article 8	Right to Remedy by Competent Tribunal
Article 9	Freedom from Arbitrary Arrest and Exile
Article 10	Right to Fair Public Hearing
Article 11	Right to be Considered Innocent until Proven Guilty
Article 12	Freedom from Interference with Privacy, Family, Home and Correspondence
Article 13	Right to Free Movement in and out of the Country
Article 14	Right to Asylum in other Countries from Persecution
Article 15	Right to a Nationality and the Freedom to Change It
Article 16	Right to Marriage and Family
Article 17	Right to Own Property
Article 18	Freedom of Belief and Religion
Article 19	Freedom of Opinion and Information
Article 20	Right of Peaceful Assembly and Association
Article 21	Right to Participate in Government and in Free Elections
Article 22	Right to Social Security
Article 23	Right to Desirable Work and to Join Trade Unions
Article 24	Right to Rest and Leisure
Article 25	Right to Adequate Living Standard
Article 26	Right to Education
Article 27	Right to Participate in the Cultural Life of Community
Article 28	Right to a Social Order that Articulates this Document
Article 29	Community Duties Essential to Free and Full Development
Article 30	Freedom from State or Personal Interference in the above Rights

While not legally binding or enforceable (because it is a Declaration[6]), the *UDHR* has inspired a rich body of legally binding human rights law comprised of both customary international law and international *human rights* treaties.

Customary International Law	General and consistent practice of states followed because of sense of legal obligation
Treaty Law, including 9 core human rights treaties	UN Charter, Geneva Conventions (International Humanitarian Law) and nine core human rights treaties: ICCPR & Protocols, ICESCR, Convention Against Torture, Conventions on Rights of the Child, (CRC), Rights of Persons with Disabilities,(CRPD), Migrant Workers (CMW), Discrimination Against Race (CERD), Women (CEDAW) & Enforced Disappearance

[6] See key terms below. A Declaration is by definition a non-binding agreement between states.

Introduction to the United Nations Human Rights Treaty

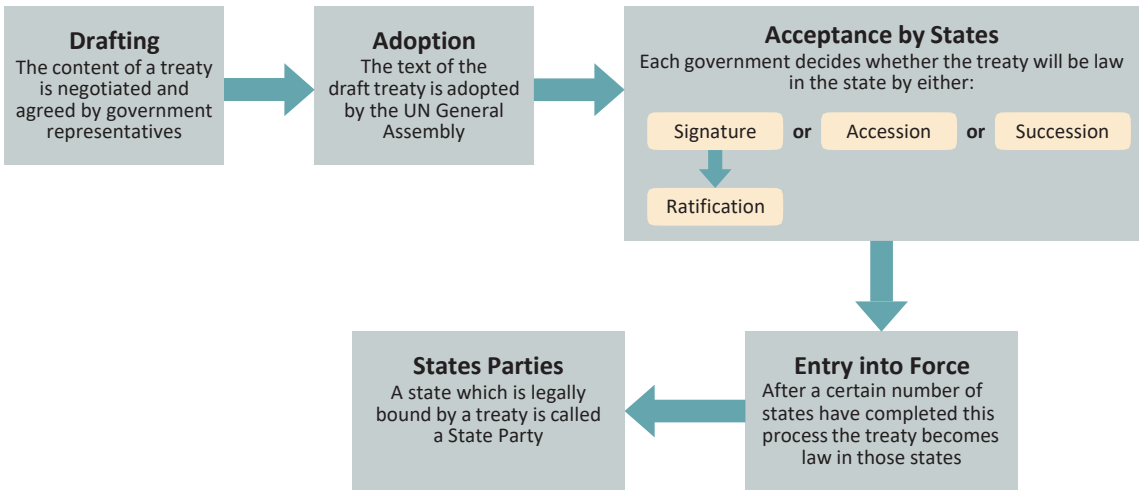


A.3 How are Treaties Made?

The key standards in each of the core human rights treaties are annexed to this document. Particular attention in this toolkit is paid to the application of standards for fair trial (ICCPR), and human rights standards relating to women, especially violence against women (CEDAW), children (CRoC), and persons with disabilities (CRPD).

The Treaty Process

The Vienna Convention on the Law of Treaties 1969 establishes the rules for making treaties



The key standards in each of the core human rights treaties are annexed to this document. Particular attention in this toolkit is paid to the application of standards for fair trial (ICCPR[7]), and human rights standards relating to women, especially violence against women (CEDAW[8]), children (CRoC[9]), and persons with disabilities (CRPD[10]).

A.4 Key terms: Human Rights Treaties (most terms defined in Vienna Convention on the Law of Treaties 1969)

Accede/Accession: This is the act by which a country that has not previously signed a treaty already in force between other countries becomes a party to that treaty.

Adopt/adoption: This is the act by which the proposed text of a treaty is formally accepted by the General Assembly.

Covenant: A formal binding agreement between countries. It has the same meaning as 'treaty' and 'convention.'

Convention: A formal binding agreement between countries. It has the same meaning as 'covenant' and 'treaty.'

Declaration: A non-binding agreement between countries.

Entry into force: The point at which treaty becomes legally binding for a country that has ratified or acceded to the treaty.

Ratify/Ratification: This is the act by which a country that has signed a treaty agrees to be formally bound by its obligations.

Reservations: A formal statement lodged by a country with the United Nations at the time it ratifies or accedes to a treaty stating that it does not accept one or more of the obligations of the treaty.

Sign/Signature: This is an act by which a country indicates its intention to be bound by a treaty at some point in the future.

State Party/State Parties: A term used to describe a country that has agreed to be bound by a treaty (that is, the country has ratified or acceded to the treaty).

Treaty: A formal binding agreement between countries. It has the same meaning as 'covenant' and 'convention.'

A.5 Pacific Ratification of Human Rights Treaties

All PICS have ratified the CRoC, all but two have ratified CEDAW and ten have already ratified the CRPD. However, ratification of so-called first and second generation core human rights treaties, (relating to civil and political, and social, economic and cultural rights, including the ICCPR, ICESCR[11] and CAT[12]), remains relatively low in the Pacific compared to other regions. See the chart on the following page.

[7] International Covenant on Civil and Political Rights.
[8] Convention on the Elimination of All Forms of Discrimination Against Women.
[9] Convention on the Rights of the Child.
[10] Convention on the Rights of Persons with Disabilities.
[11] International Covenant on Economic, Social and Cultural Rights.
[12] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment.

A.5.1 Pacific Island Table of Treaty Ratification as of May 2016[13]

Office of the United Nations High Commissioner for Human Rights-Regional Office for the Pacific

	Australia	Cook Islands	Fiji	Kiribati	Marshall Islands	Micronesia	Nauru	New Zealand
ICESCR	R 10/12/75							R 28/12/78
ICCPR	R 13/08/80						S 12/11/01	R 28/12/78
ICERD	R 30/09/75		R 11/01/73				S 12/11/01	R 22/11/72
CEDAW	R 28/07/83	A 11/08/06	A 28/08/95	A 17/03/04	A 2/03/06	A 01/09/04	A 23/06/11	R 10/01/85
CAT	R 08/08/89		R 14/3/16			S 15/09/15	R 26/09/12	R 10/12/89
CRC	R 17/12/90	A 06/06/97	R 13/08/93	A 11/12/95	R 04/10/93	A 05/05/93	A 27/07/94	R 06/04/93
ICMW								
CRPD	R 17/07/08	A 08/05/09	S 02/06/10	A 27/9/13	A 17/03/15	S 23/09/11	A 27/06/12	R 25/09/08
CPED								
ICCPR-OP1	A 25/09/91						S 12/11/01	A 26/05/89
ICCPR-OP2	A 02/10/90							R 22/02/90
OP-ICESCR								
OP-CAT	S 19/05/09						A 24/01/13	R 14/03/07
OP-CEDAW	A 04/12/08	A 27/11/07						R 07/09/00
OP-CRC-IC								
OP-CRC-AC	R 26/09/06		S 16/09/05	A 16/09/15		R 26/10/15	S 08/09/00	R 12/11/01
OP-CRC-SC	R 08/01/07		S 16/09/05	A 16/09/15		R 23/04/12	S 08/09/00	R 20/09/11
OP-CRPD	A 21/08/09	A 08/05/09	S 02/06/10					

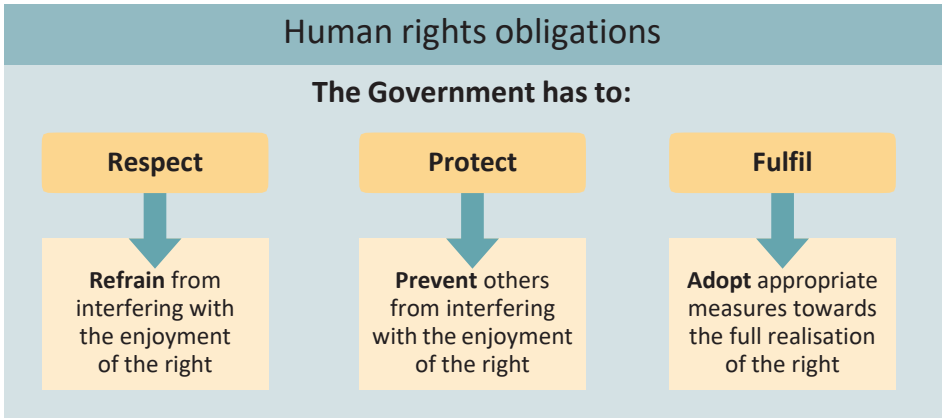
	Niue	Palau	Papua New Guinea	Samoa	Solomon Island	Tonga	Tuvalu	Vanuatu
ICESCR	R 28/12/78	S 20/09/11	A 21/07/08		R 17/03/82			
ICCPR	R 28/12/78	S 20/09/11	A 21/07/08	A 15/02/08				R 21/11/08
ICERD	R 22/11/72	S 20/09/11	A 27/01/82		R 17/03/82	A 16/02/72		
CEDAW	A 10/01/85	S 20/09/11	A 12/01/95	A 25/09/92	A 06/05/02		A 06/10/99	A 08/09/95
CAT		S 20/09/11						A 12/07/11
CRC	A 20/12/95	A 04/08/95	R 02/03/93	R 29/11/94	A 10/04/95	A 06/11/95	A 22/09/95	R 07/07/93
ICMW		S 20/09/11						
CRPD		R/11/06/13	R/26/09/13	S 24/09/14	S 23/09/08	S 15/11/07	A/18/12/13	R 23/10/08
CPED		S 20/09/11		R 27/11/12				S 06/02/07
ICCPR-OP1								
ICCPR-OP2								
OP-ICESCR					S 24/09/09			
OP-CAT								
OP-CEDAW					A 06/05/02			A 17/05/07
OP-CRC-IC				A 29/04/16				
OP-CRC-AC				A 17/05/16	S 24/09/09			R 26/09/07
OP-CRC-SC				A 29/04/16	S 24/09/09			R 17/05/07
OP-CRPD		A 11/06/13			S 24/09/09			

[13] Reproduced from 'Human Rights in the Pacific: A Situational Analysis' Pacific Community/OHCHR (2016), p4.

- **International Covenant on Civil and Political Rights** (**ICCPR**) (entered into force 1966);
- **International Covenant on Economic, Social and Cultural Rights** (**ICESCR**), (entered into force 1966) (Together with ICCPR constitutes The International Bill of Human Rights;
- **Convention on the Elimination of All Forms of Racial Discrimination** (**ICERD**) (adopted in 1965 and entered into force in 1969);
- **Convention on the Elimination of All Forms of Discrimination Against Women** (**CEDAW**) (entered into force in 1981);
- **United Nations Convention Against Torture** (**CAT**) (adopted in 1984 and entered into force in 1987);
- **Convention on the Rights of the Child** (**CRC**) (adopted in 1989 and entered into force in 1990);
- **International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families** (**ICRMW**) (adopted in 1990 and entered into force in 2003);
- **Convention on the Rights of People with Disabilities**(**CRPD**) (entered into force on 3 May 2008);
- **International Convention for the Protection of All People from Enforced Disappearance** (adopted in 2006 and entered into force in 2010).
- OP1 Optional Protocol to the International Covenant on Civil and Political Rights;
- OP2-DP Second Optional Protocol to the International Covenant on Civil and Political Rights, aimedat the Abolition of the Death Penalty;
- OP-ICESCR Optional Protocol to the **International Covenant on Economic, Social and Cultural Rights**;
- OP-CAT Optional Protocol to the Convention against Torture;
- OP-CEDAW Optional Protocol to the **Convention on the Elimination of All Forms of Discrimination Against Women**;
- P-CRC IC Optional Protocol to the Convention on the Rights of the Child on a communications procedure;
- OP-CRC AC Optional Protocol to the Convention on the Rights of the Child on the Involvement ofChildren in Armed Conflict;
- OP-CRC SC Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;
- OP-CRPD Optional Protocol to the Convention on the Rights of Persons with Disabilities.

A.6 Effect of Ratification in International Law

Through ratifying international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. The domestic legal system, therefore, provides the principal legal protection of human rights guaranteed under international law. This is why national courts have such an important role in protecting human rights.



Signature of a treaty alone does not impose on the State obligations under the treaty. Through ratification, States becomeparties to international treaties, and then assume obligations and duties under international law to respect, protect and fulfil human rights.

Courts, an independent branch of the state, are therefore 'duty-bearers' responsible for respecting, protecting and fulfilling human rights, in accordance with the law. This is done through court decisions and court processes, but also through providing accessible justice to everyone in the community.

Courts also play a crucial 'watchdog' or review role in ensuring that the other two branches of the state, the Executive and the Legislature are also meeting their obligations to respect, protect and fulfil human rights. Courts do this by ruling on the lawfulness of acts of the Executive that may breach human rights, and ensuring that the laws passed by the legislature are consistent with human rights protected by law. Some courts have declaratory powers to strike out laws in whole or in part if they are inconsistent with human rights. All courts are responsible for interpreting laws as consistently as possible with human rights standards (as discussed further below).

A.7 Treaty Bodies, Monitoring and Reporting

All of the core human rights treaties (except for the International Convention for the Protection of All Persons from Forced Disappearance) have treaty bodies to monitor state party implementation of each treaty.

State parties must submit an initial, and then, periodic, reports every two to five years (depending on the treaty) on the country's progress on implementing rights contained in the treaties. These reports are examined by the relevant treaty body, which can make comments or issue recommendations in the form of Concluding Observations, in response to any human rights concerns that they examine or find.

Aside from the treaties, there are also Special Procedures established under the Human Rights Council, (either individual Special Rapporteurs, Representatives, Independent Experts or working groups), who hold a mandate to examine, monitor, advise and publicly report on the human rights situations in a specific country, or on a specific theme. Special Procedures may respond to individual complaints, conduct studies, provide advice at the country level, and engage in the promotion of any human rights issue within their mandate.

In the Pacific, Vanuatu, Nauru, Marshall Islands, Palau and Papua New Guinea have all issued standing invitations to Special Procedures, meaning that they are welcome any time. For example, the UN Special Rapporteur on Torture visited Papua New Guinea in 2010 and made several recommendations which include that PNG ratify the Torture Convention, include a crime of torture in its penal code and establish an accessible and effective complaints mechanism for members of the public who allege mistreatment.

Another human rights monitoring mechanism is the **Universal Periodic Review** (UPR): a cooperative mechanism of The Human Rights Council which assesses the human rights situations of all 192 UN Member States on a 4-year rotation basis. The UPR does not depend on state consent but states are encouraged to engage with the interactive dialogue process to tell their 'human rights story' and to accept the recommendations of the UPR (see **https://www.upr-info.org/en/upr-process/what-is-it** for further information). It is commendable that all PICs have actively engaged in both cycles of the UPR held to date.

A.8 Effect of Ratification in Domestic Law

State constitutions usually clarify whether ratification of a treaty has the effect of automatically incorporating its articles into the country's domestic legal system (as in 'monist' states), or whether domestic legislation is first required before effect can be given to the articles of the treaty (as in 'dualist' states).

All PICs that participate in the PJSI (except for the Marshall Islands) are based on British-style legal systems, which are generally dualist. This means that before the terms of a treaty can be directly applied by courts, they must first be supported by domestic legislation to give them domestic legal effect.

However, the absence of domestic legislation does not mean that courts can simply ignore ratified treaties. Rather, often constitutions require or explicitly allow for the content of treaties to be considered, such as is provided for in the Constitutions of Fiji, Tuvalu, and Papua New Guinea. Yet even if the country has not ratified the convention and there is no explicit constitutional provision, it is still possible for courts to consider human rights treaties, at least to resolve ambiguity or fill a gap in interpreting domestic law.[14] Alternatively, common law precedent or customary international law may require the court to consider or give effect to the standard articulated in the treaty.

> *"Even though Samoa is not a signatory or party to The Hague Convention of Civil Aspects of International Child Abduction of 1980, the court must have regard to the principle and philosophy of the Convention in applying common law principles to the case …and…as a tool to guide and aid the court, it could use the Conventions."*
>
> Chief Justice of Samoa [1997] WSSC 2.

A.8.1 Monist systems: Direct application

The treaty articles can be directly applied and used as the legal standard or test to be met. Any law or part of law inconsistent with the treaty standard can be:

1. Struck out in its entirety;
2. Struck out in part, to the extent that it is inconsistent with the treaty standard; and
3. Retained but interpreted consistently with treaty standard.

A.8.2 Use in Dualist Systems: Indirect Application

Dualist systems are a little more complicated because enacting domestic legislation is required to make the treaty standard directly applicable. However, human rights treaty standards can still nearly always be used but to different degrees, depending on the legal 'set up' of each country, as shown below.

There are at least six ways in which a court can use international conventions in dualist systems:

1. As a precedent—much as if it were the ruling in an earlier case—helping the court to interpret andapply the common law, Constitutional law or statutory law;
2. As an interpretive aid when there is ambiguity in a national law;
3. To fill a gap or omission in a national law;
4. As an authority for making changes in the common law;
5. As an authority for courts to make declarations that statutes or custom containing provisions ornorms that conflict with the convention, no longer have effect; and
6. In limited circumstances, (such as where no other law applies), courts can apply Conventions asthough they were domestic laws.[15]

[14] E.g. As in *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* [1995] HCA 20.

[15] For example, in *Joli v. Joli* [2003] VUSC 63, (Vanuatu), the case involved the divorce of two French foreign nationals to which no law of custom or any Vanuatu statute or common law rule applied. The judge decided not to apply the 1882 British statute, which discriminates against women, and instead applied CEDAW directly, informing the court's decision to divide the couple's marital property equally.

A.8.3 Domestication of Human Rights Treaties: The Solomon Islands

Solomon Islands is a dualist state, its 1978 Constitution does not make provision for automatic incorporation of international law into domestic law. These two cases demonstrate how Court can in practice use human rights treaties even when they have not been given specific effect in domestic law.

In *Kelly v Regina* the Court of Appeal considered the application of the Convention on the Rights of the Child (CRC) in an appeal from a conviction and sentence to life imprisonment of a 14-year-old convicted of murder. While the Appeal Court stated that international treaties and conventions relating to the treatment of children "may provide interpretive assistance in applying local law" it restricted this to situations where there was ambiguity in the domestic law. However, on appeal the High Court considered the provisions of the CRC, noting:

> "[T]he guidelines set out in the Convention on the Rights of the Child regarding how young persons' ought to be treated. That the best interests of the child should be the central concern in any sentencing process and that care and rehabilitation should be the main focus of any order of the courts on conviction."

In Regina v Gua, the High Court was asked to rule on whether, as a matter of law, a man could be found guilty of raping his wife. In finding that he could, (contrary to the existing common law rule), the Court relied on the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW), referring to Articles 15 and 16 of CEDAW as reasons for the decision and holding that:

> "[I]n this modern time, marriage is now regarded as a partnership of equals and this principle of equality has been reflected, not only in international conventions to which Solomon Islands is a party, but also in the entrenched provisions of the Constitution."

Annex B: Templates and Tools For Developing Human Rights Strategy/Action Plan

B.1 Example of Template: Development of One Goal

Goal	Current	Actions	Indicator	Target	Time	Resources	Who
More poor women use family courts to claim their rights.	Cite (or generate) evidence few poor women using family courts Cite (or generate) evidence poor women deterred from using family court due to application fee.	**Main Action:** Create fee waiver processfor financial hardship *Break down of further subsidiary actions needed to support main action:* • collect data showingevidence of low use/ deterrence of poor women from using family court; • assess if any laws/ regulations would need to be changed, obtain national poverty data to create financial eligibility criteria; • develop policy and SOP for court staff on administering waiverprocess; • develop and disseminate public information materials publicizing the policy change.	% of women family law applicants below income threshold to receive fee waiver at time of application	80%	>1 year	Staff time $x court staff training $x promotion policy (poster, pamphlet, TV ad) $x fee waiver application form administration staff time	* Civil Court staff; * Court services Dept; *Communicatio nstaff.

B.2 Example of Priority Area/Possible Indicators for Implementing Human Rights Standards re Children

Substantive Justice Standards Normative	Procedural Justice Standards Including Access	Access to Justice	Accountability and Transparency
No. legally trained/ lay judges trained in international human rightsstandards relating to children, including juvenilejustice	No. court staff trained inhelping children in court	% criminal cases where child suspect was legallyrepresented	Age-disaggregated data kept for across all case types concerning children?(criminal (Y/N), family (Y/N), other civil (Y/N)
No. cases involving child party where CRC or constitutional human rights standards referred to/discussed/applied in judgment	% criminal cases before the court involving child, where child had been detained by police	% criminal cases where child suspect received legal aid representation (state funded/Bar pro bono/NGO)	Annual Report includes data (Y/N) and trend analysis section (Y/N) oncases involving children
No. cases where 'best interests of the child' considered and applied as'primary consideration'	Of those children detained, %brought before court within 24 hours of detention? % released by the court?	Existence of court fee waiverprocess (Y/N)	% cases involving childrenpublished on PacLII
Existence of child-specificcriminal law standards? (Y/N)	% cases involving children where names were suppressedin court records	% cases involving children when court application feewaived	
Age of Criminal Responsibility 12+ Y/N)	% cases involving children where hearings held in closedcourt		
% criminal cases involvingchild aged between 10-14where judge considers and finds child capable of understanding wrongdoing	% cases involving children where court room formalitieswere modified to create less intimidating environment		
Prohibition of death penalty or life imprisonment of children(Y/N)	% cases involving child suspectwhen judge proactively inquired regarding treatment of child		
	% cases involving child party where judge sought views of the child		

For templates and guidance in relation to developing an action plan regarding family and gender-based violence, see Gender and Family Violence Toolkit Annex A 'Court Family Violence Self-Assessment Tool' and Annex B 'Court Family Violence Plan Template'.

Annex C: Quick Reference Guides Annexes

C.1 Procedural Justice Definitions

- **Natural Justice:** 'common law' rule against bias and the right to a fair trial;
- **Procedural Justice = Due Process:** General duty to act fairly; and
- **Fair Trial Standards:** Initially developed mainly to guarantee fairness of criminal law cases, most arealso applicable to civil (including family) law cases too.

C.2 Regional Support for Gender Equality and Women's Human Rights

- The *Pacific Gender Equality Leaders Declaration* (2012),[16] renewing the commitment of Pacific leaders to lift the status of women and empower them in economic, political and social life;
- The *Denauru Declaration on Human Rights and Good Governance* (2015),[17] specifically recognising the standing of CEDAW and urging parliamentarians and governments to 'to act boldly to ensure that women's human rights are realised through laws, policies, social and community norms and values that reject all forms of discrimination.'; and
- The *Pacific Island Judges Declaration on Gender Equality* (1997), at which: '*Judges recognised that many opportunities exist for judges to draw on CEDAW and CRC and other international human rights instruments so as to interpret and apply creatively constitutional provisions, legislation, common law and customary law.* ***No law, custom, tradition, culture or religious consideration should be invoked to excuse discrimination against women***.'[18] (Emphasis added).

C.3 Optional Protocol to CRPD (Pacific parties limited to Palau, Cook Islands and Australia)

- Creates an individual complaints mechanism;
- Individual complaints must meet admissibility criteria, including exhaustion of domestic remedies;
- Committee of experts receives arguments and submission from complainant and state party, then makes decision re admissibility and substance of complaint; and
- Decisions not directly enforceable but highly persuasive/pressure for state party to comply.

C.4 Types of Rights under CRDP

Civil life
Denial of legal capacity
Forced institutionalization
Forced sterilization

Social and Cultural life
Segregated education
Forced medical treatment
Exclusion from the community
Inaccessible environments
Negative attitudes

Economic life
Denial of reasonable accommodation
Denial of property rights

Political life
Denial of the right to vote
or to be voted for

[16] Full policy is available at http://www.forumsec.org/pages.cfm/newsroom/press-statements/2013/2012/forum-leaders- gender-equality-declarationcelebrated.html. [Accessed:29/12/2016] http://rrrt.spc.int/publications-media/publications/item/599-denarau-2015-declaration-on-human -rights-and-good-governance.

[17] http://rrrt.spc.int/publications-media/publications/item/599-denarau-2015-declaration-on-human -rights-and-good- governance

[18] Pacific Human Rights Law Digest, Volume 1; 2005; p.10-11. http://www.spc.int/rrrt/publications-media/publications/item/63-pacific-human-rights-law-digestvol-1.

Annex D: Relevant Case Law All Areas/Themes

D.1 Case Law Relating to Fair Trial Standards, Detention, Police Brutality and Death Penalty

In Re Application of Enforcement of Human Rights, in Re Jacob Okimbari [2013] PGNC 166 (Papua New Guinea): Plaintiff was accused of bank robbery. At the time he was arrested, he was told to lie on the floor, was shot in both legs by police, transferred unconscious to hospital, discharged against advice of medics and taken back to the police station where he was beaten until he confessed. The Court found the plaintiff was denied full protection of the law, subjected to inhumane treatment, denied the right of detained persons to contact family members and a lawyer, and the right to be treated with humanity and respect. The plaintiff was awarded constitutional remedies of reasonable and exemplary damages.

Lome v Sele [2017] PGNC 184(Papua New Guinea). An off duty police officer assaulted a person. The victim alleged that his constitution rights to protection of the law and protection against inhuman treatment, had been breached. The court rejected the State's submission that the state was not vicariously liability as the police officer was acting beyond the scope of his duty and also not on duty.

In Re Application of Enforcement of Human Rights, in Re Namson Lamaning [2013] [2013] PGNC 165 (Papua New Guinea): Plaintiff was accused of robbery. On his arrest he was assaulted, denied medical treatment, denied access to a lawyer, detained without charge and not taken before a court for 10 days. He was detained for a further five months before he was granted bail. Although there was no medical evidence to corroborate the alleged facts, the court determined that on the balance of probabilities the plaintiff's evidence was sufficiently credible. The court awarded the plaintiff constitutional remedies ofreasonable and exemplary damages.

State v Dhamendra [2016] FJHC 386 (Fiji) The High Court considered whether a magistrate's decision was constitutional to grant an extension of detention beyond the 48 hour limit, applied for by police and granted ex parte. The court considered the Fijian constitutional framework, ICCPR clauses and jurisprudence in several other countries, concluding that the constitution did not permit detention beyond the 48 hour limit merely so that investigations could continue.

Bau v Bine [2016] PGNC 137 A prisoner was refused medical treatment on multiple occasions and died six months later in hospital. His family brought a claim of breach of duty of care (negligence) and breach of constitutional human rights. The Court considered relevant constitutional provisions relating to the right to be treated humanely when in custody and upheld both claims for negligence and breach of human rights.

Re Enforcement of Basic Rights under s. 57 of the Constitution of the Independent State of PNG [2017] PGNC 266 This proceeding for a human rights inquiry was initiated by the court under s. 57(1) of the constitution. The purpose of the inquiry was to consider the human rights of prisoners sentenced to death in PNG, as while PNG revived the death penalty in 1991, it had never carried it out and many prisoners were held in protracted detention in poor conditions on death row. The court concluded that the constitutional rights of 14 prisoners had been breached due to the delay in the implementation of their sentences and because of the dysfunction of the Advisory Committee on the Power of Mercy (members had not been appointed), meaning that the prisoners had no effective opportunity to invoke their right to the full protection of the law by applying for consideration of the power of mercy. The Court ordered the National Executive Council to facilitate the appointment of members of the Advisory Committee on the Power of Mercy and to ensure staff arrangements were made by 1 January 2018. Failure on the part of the National Executive Council to act accordingly would enliven a stay order on the execution of any prisoner who had been sentenced to death.

D.2 Cases Involving Children and Application of Convention on the Rights of the Child (CRC) in Pacific Jurisdictions

D.2.1 Criminal Law and Sentencing Decisions Involving Children

State v K.R.A.K [2013] FJHC 339 (Fiji) 'Generally, when a juvenile is the subject of sentencing, the sentencing court should be mindful that, while the juvenile bears the responsibility for their own actions or offences committed, they are in need of guidance, assistance and protection because of their state of dependency, vulnerability and immaturity.' In this case, the Court convicted the 10-year-old of manslaughter and imposed a fine and bond on his parents. However, (notably), the CRC Committee has discouraged the imposition of penalties on parents as it may deter parents from playing a positive role in the child's rehabilitation.

Kelly v Regina [2006] SBCA 21 **http://www.paclii.org**. (Solomon Islands) The Court of Appeal overturned on appeal a conviction and sentence to life imprisonment of 14-year-old murder convict. The Court referred to CRC and substituted life imprisonment for an eight-year sentence, reduced to four, taking into account the three years the child had already spent in custody. The Court of Appeal then ordered that instead of spending the four remaining years in prison, the defendant could serve out the remainder in the community in the case of a relative or other fit person.

Fo'oka v Regina [2014] SBCA 10 (Solomon Islands). The court varied the nine-year sentence for manslaughter to allow the last two years to be served extramurally under the supervision of a guardian. The appellant was 17 and a half when he fatally struck his wife in the head with an axe following a dispute.

Public Prosecutor v Tiobang [2013] VUSC 206 (Vanuatu): A 13-year-old boy sexually assaulted a5-year-old girl and the court sentenced him to a two year suspended sentence based on condition of good behaviour. Sentencing in cases where children are both the offender and the victim are very difficult due to the need to uphold the rights of both parties. It may have been open to a court on appealto impose a heavier sentence that included a supervisory aspect to reflect the gravity of the offence.

State v SS (the Juvenile) [2017] FJMC 128 (Fiji) A child charge with raped was interviewed by police under caution with his father present, but then taken to a reconstructed crime scene, without his father, where he confessed to the rape. The Court found that the confession was not admissible in court as it was considered part of the police interview and the legal requirement that a parent be present had not been met. The Court referred to the Convention on the Rights of the Child (Article 37(a)) and the ICCPR (Article 14(3)(g)).

D.2.2 Children as Victims of Corporal Punishment

The CRC is clear that all forms of corporal punishment of children by parents or teachers are contrary to international standards, although some Pacific courts have struggled to apply this principle.

Dakai v The State (Fiji) [2015] FJHC 129; HAA04.2015 (27 February 2015) (5 PHRLD 38) a parent whipped his 10-year-old son with an extension cord causing serious injuries and was found guilty of assault. The sentence of two years in prison (with parole only after 18 months) was reduced on appeal to one year and 9 months (suspended for three years).

R v Rose SILR [1987] 45 Criminal Appeal (Solomon Islands). The original court acquitted a school headmaster who had administered four strokes of the cane to two 10-year-old boys during school assembly. The Court of Appeal found that the punishment was not inherently unlawful but a question of degree, but that the public nature of the punishment and the emotional trauma suffered by the boys rendered it degrading treatment and thus unconstitutional.

Regina v Ludawane [2010] SBHC 128; HCSI-CRC 233 of 2008 (5 October 2010), in which the so-called common right of parental disciplinary corporal punishment of children was discussed.

D.2.3 Use of Degrading Punishments on Children

Have also been found to be contrary to law: *Chief Education Officer v Gibbon*, (Fiji) An 11-year-old student was punished for talking in class by having his pants pulled down by an older student in front ofthe class. The court found against the education department and awarded damages against the state. The decision was upheld on appeal.

D.2.4 Children as Witnesses/Victims of Crimes

Kumar v The State: [2015] FJCA 32; AAU0049.2012 (4 March 2015) (5 PHRLD 36) Appellant tried to argue the conviction was flawed because it was based on uncorroborated evidence of children. The Court found corroboration of child evidence was not necessary and based on outdated stereotypes.

People of Guam v Mendola: Offence required evidence of penetration. The Court was willing to infer 'penetration'. Even though no direct evidence was given by the 10-year-old victim, the language that she used when combined with evidence of the examining nurse, supported a reasonable inference of penetration.

D.2.5 Adoption Cases

Adoption cases, many with inter-country adoption dimensions, seem to come quite often before the courts. The CRC specifically states that in adoption cases the 'best interests of the child' must be the primary consideration (Article 21 CRC). The meaning of this in the context of adoption was considered below:

Saavedra v Solicitor General (Tonga). The Court found in an adoption case that the 'best interests of the child' were not confined to material wellbeing and educational advantages but also included love, family support and the wishes of the child.

re Adoption of BR (Nauru) The Supreme Court of Nauru (2013) held that the provision of the Nauruan Adoption Law stating that the ethnicity of the adoptive parent and child must match, was upheld as valid, not applying CRC or the CERD (Convention Against Racial Discrimination).

Sing v Singh (Fiji) In which the court – while citing the CRC and the provisions of art. 21 – nevertheless made an adoption order contrary to the provisions of the Adoption of Infants Act (by allowing the adoption of a girl by a single non-resident male).

D.2.6 Custody Cases

Prakash v. Narayan (Fiji) [2000] FJHC 145 The case concerned a custody dispute between a divorcing couple. The appellate court held that it could use the CRC to interpret the domestic law, even though it had not been adopted into Fijian domestic law, and cited the High Court of Australia case of *Teoh*, 'If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes … then that construction should prevail.'[19]

Conversely, *In Tepulolo v. Pou* [2005] TVHC 1 the Court found that local law which gave custody to the father for children over the age of two, was not ambiguous and therefore there was no scope to apply either the CRC or CEDAW despite the local law having a discriminatory effect against the mother, and resulting in largely severing contact with the child, as the father was moving overseas.

[19] *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* [1995] HCA 20.

D.3 Cases Involving Women and the Application of CEDAW

As noted earlier, Pacific judges (especially those from the country they work in) are uniquely well-placed to translate global human rights standards into meaningful local norms, having had the benefit of being socialised into a legal culture as well as often being members of local indigenous cultures. They are therefore well positioned to decipher how to best harness aspects of local cultural flexibility to give effect to non-discrimination principles reflected in CEDAW. In the words of Zorn:

> *The recognition that gender violence is not only wrong but unlawful, presents such a moment for judges in Pacific Islands nations: a moment when it might be up to them to reinterpret or reapply old common law doctrines in new ways, perhaps even to make new common law. CEDAW gives judges both a reason to do so and support for doing it.*[20]

Most cases concerning violence against women continue to be dealt with through local customary justice mechanisms. When women do seek and, despite the heavy pressures to withdraw their cases, persist, in demanding the protection of the state through state courts, it is critical that they reliably receive it, and have positive experiences of the justice system. Aside from providing effective justice to individuals, ensuring reliable and fair processes will also magnify the social effects of judicial decisions including on community norms. Changes to the law, (including through judge-made law), and reliable, fair enforcement of those laws, does over time (although to greater or lesser extents), shape community expectations of behaviour to match what the law will allow them.

Study of Sentencing in S-GBV and 'Culture' Cases in 7 Pacific Countries

A study by ICAAD of nearly 1000 cases across 7 Pacific countries between 2005-2014 found that gender stereotypes and 'cultural' factors, especially the fact of customary reconciliation between the parties, continue to be given heavymitigation weight in sentencing decisions in domestic violenceand sexual assault cases.

This was despite some countries' laws banning consideration of these factors and many judges citing these provisions, showing how ingrained these factors can be in judicial reasoning.
The study found that these gender stereotype and 'cultural' mitigation factors resulted in:

- **A reduction in sentences in 60% of domestic violence cases(from an average of 2.48 years to .93 years); and**
- **A reduction in sentences in 40% sexual assault cases (from an average of 8.71 years to 5.19 years).**

The report concluded that the discriminatory nature of genderstereotypes and customary reconciliation means that victims of domestic violence and sexual assault are often being deniedequal protection under the law.

The following cases look at how Pacific Court judges are using CEDAW and integrating principles of gender equality in domestic legal systems, and thus contributing to gradual societal change to combat discrimination and violence against women and girls.

D.3.1 Sentencing Cases Involving Violence Against Women/Girls

Pacific courts have generally shown greater reluctance to applying principles of gender equality in sentencing (than some other human rights principles), when they involve clashes with customary practices. This was highlighted in a recent study of sentencing decisions in Fiji Courts, which found that heavy weight was placed on customary defences (including reconciliation with the victim), to reduce sentences in cases of sexual and gender-based violence (S-GBV).(See box on page A-15).

While sexual violence is generally thought to be very under-reported in the Pacific (as it is in most other countries), many of the sexual violence cases that make it to the courts concern young children,[21] and

[20] Zorn, J.G 'Translating and Internalising International Human Rights Law: The Courts of Melanesia Confront Gendered Violence' in A Biersack, M Jolly & M Macintyre (eds) Gender Violence & Human Rights: Seeking Justice in Fiji, Papua New Guinea and Vanuatu (ANU Press) 2016, p 243.

[21] Likely due to greater community consensus that sexual abuse of young children (as opposed to adolescent girls or women) is criminal behavior.

typically involve family members or other persons known to the victim. There appearsto be increasing willingness of higher courts to correct lower court leniency in sentencing in these cases, also in response to new legislation introduced in some jurisdictions to toughen penalties. Forexample, PNG enacted the *Sexual Offences and Crimes Against Children Act* (2013), which provides for increased penalties for sexual assault of children, and additional penalties where the perpetratoris related to, or trusted by, the victim.[22]

Rex v VP [2020] TOSC 26 (Tonga) The defendant was convicted of rape against his wife, as well as causing serious bodily harm and domestic violence. In convicting the defendant the court stated that: "in Tonga, the *Criminal Offences Act* does not distinguish between rape of a stranger or of a spouse or other relational partner. In short, rape is rape. The essential characteristics are sexual violation without consent, regardless of any relationship between the perpetrator and the victim. The introduction of the *Family Protection Act* in 2014 seeks to reinforce and accentuate that all persons in the Kingdom are entitled to be free and protected from domestic violence in any form. Section 29 expressly provides for additional prosecution under the *Criminal Offences Act* in cases such as the present. The message therefore ought to be clear: in any civilized society, there are no circumstances in which resort to unwanted sexual violence can be justified or tolerated."

The court then went on to examine relevant authorities regarding sentencing, using five years imprisonment as the starting point for the rape count, adding an additional year for the violence inflicted, and a further year for the breach of trust against his wife, and then subtracting one quarter of 7 years to take account of mitigating factors (first offence, early cooperation in guilty plea and genuine expressions of remorse resulting in the victim forgiving him).The court also sentenced him to an additional two years for the other offences, to be served concurrently, with 21 months of the head sentence conditionally suspended for 2 years.

Regina v Bonuga (Solomon Islands) The defendant was convicted of three counts of rape of his adopted daughter when she was 12, 13 and 15-years-old. The court overturned a three-year sentence for each count to be served concurrently and imposed a 10-year sentence for each of the offences to beserved concurrently, reflecting the seriousness of the crimes, including the abuse of trust involved.

State v. Narakavi [2009] PGNC 109 (Papua New Guinea) a man, was sentenced to five years jail and a compensation payment for sexual touching a 14-year-old girl who was his 'de facto' daughter. TheCourt increased the sentence due to the abuse of trust involved in the offence, as well as referred to the integration of CEDAW into the underlying law of PNG.

State v. William Patangala [2006] PGNC 43; N3027. (Papua New Guinea) the defendant who admittedto sexually touching his 14-year-old niece, was sentenced to three years jail, with only the first to be served in prison and the remainder on parole subject to good behaviour. It may have been open to an appeal court to increase this sentence.

In R v Gua (Solomon Islands) the court recognised the crime of rape within marriage and increased the sentence in this case from four years to seven years.

Latu v Rex (Tonga) the court upheld an appeal against a sentence for rape, reducing the 14-year sentence to eight years, and leaving unchanged the 14 months for 2 additional counts of indecent assault to be served concurrently.

Vao'omotou v Rex (Tonga) the Court of Appeal reduced a 16-year manslaughter sentence to 10 years with the last two years suspended. According to the facts stated in the judgment, the victim was the estranged wife of the suspect: they had separated and she had commenced another relationship. The original court accepted the suspect's defence of provocation (being the victim commencing a new relationship) to murder notwithstanding the defendant stabbed the victim 23 times while she slept.

[22] Sexual Offences and Crimes Against Children Act 2013 (Papua New Guinea).

The manslaughter sentence was then reduced on appeal.

D.3.2 Other Cases Involving Violence Against Women

State v. Bechu [1999] FJMC 3, (Fiji) The defendant admitted that the victim had struggled, said she did not want sex with him and that he had punched her to get her to give in, and raped her. The judge sentenced the defendant to five years imprisonment, emphasising:

'Women are your equal and therefore must not be discriminated on the basis of gender. Men should be aware of the provision of 'Convention on the Elimination of all forms of Discrimination Against Women' (CEDAW), which our country had ratified in 1981 … The old school of thoughts, that women were inferior to men; or part of your personal property, that can be discarded or treated unfairly at will, is now obsolete and no longer accepted by our society.'[23] *Keoa v Keoa* [2017] PGNC 263 12 October 2017 (PNG) In this civil case, a former wife sought compensation from her ex-husband for abuse of her constitutional rights due to four years of family violence alleged under affidavit, which had not previously been the subject of criminal or other legal proceedings. The Court found that the abuse had occurred based on the civil law burden of proof and found that the plaintiff's human rights under Article 36 of the Constitution, relating to torture and ill-treatment, had been breached, and ordered that he pay compensation to the victim.

Balelala v. State [2004] FJCA 49 (Fiji) found that no corroboration of a rape victim's evidence was necessary. The Court relied on both the provision of the Fiji Constitution prohibiting gender discrimination, as well as the provision requiring courts to interpret the constitution with 'regard to public international law', thus establishing the basis for also relying on CEDAW.

State v. S.N.M. (Fiji) [2011] FJHC 26. The Fiji High Court was asked to issue a restraining order, prohibiting a husband convicted of wife-beating, from approaching his de facto wife. In granting the order, the court referred to the objectives of the Domestic Violence Decree law, which included the aim 'to implement the Convention on the Elimination of All Forms of Discrimination against Women'. The judge used this as the basis for concluding he was authorised to issue the order.

Allegations of Sorcery are another justice concern in some parts of the Pacific, and can motivate very serious crimes, in some cases amounting to violation of the right to life. Victims facing witchcraft allegations are frequently vulnerable individuals who lack protection. The number of women victims is reportedly higher and increasing, and in many cases also involve sexual-GBV.[24] Those few cases involving witchcraft allegations that do come before the courts generally involve male victims and are generally dealt with at local or village court levels.[25] Responses by police to protect individuals at threat of being seriously harmed or killed have been found to be inadequate in some instances, partly because of lack ofresources and limited presence, but also because of widespread perceptions that attacks or killings arejustified and should remain a community matter. Magistrates report that they find sorcery-related

[23] *State v. Bechu* [1999] FJMC 3, p. 9.

[24] See JP. Taylor & N.G. Araújo 'Sorcery Talk, Gender Violence and the Law in Vanuatu' in A Biersack, M Jolly & M Macintyre(eds) Gender Violence & Human Rights: Seeking Justice in Fiji, Papua New Guinea and Vanuatu (ANU) 2016, 197. See also the following two articles highlighting the gendered nature of some sorcery allegations. The Guardian 'PNG women accused of sorcery saved from murder in remote village', 23 January 2015 (accessed on 15 Jan 2017 at https://www. theguardian.com/world/2015/jan/24/png-women-accused-of-sorcery-saved-from-murder-in-remote-village); and The Guardian 'Papua New Guinea students share video appearing to show women tortured for 'witchcraft'', 23 October 2015, accessed on 15 Jan 2017 at https://www.theguardian.com/world/2015/oct/23/witchcraft-papua-new-guinea- students-share-video-appearing-show-torture.

[25] For an excellent analysis of how PNG courts have dealt with the few sorcery cases before it, see Ravunamu Auka, BarbaraGore and Pealiwan Rebecca Koralyo 'Sorcery- and Witchcraft-Related Killings in Papua New Guinea: The Criminal Justice System Response', http://press-files.anu.edu.au/downloads/press/p316611/pdf/13.-Sorcery-and-Witchcraft-Related-Killings-in-Papua-New-Guinea-The-Criminal-Justice-System-Response.pdf. See also M. Demian 'Sorcery Cases in Papua New Guinea's Village Courts' ANU Press In Brief 2015/27.

cases amongst the most difficult cases to deal with as they are left to improvise in the absence of any clear legal framework to deal with the particular legal and evidential dimensions of sorcery-related crime.[26]

The challenge that witchcraft/sorcery-related cases present to state justice processes reveal a real legal protection gap. Sorcery is a sociological reality for many in the Pacific and an abiding problem that generates strong community fears. For example, according to a national study of the status of women in Vanuatu, 'violence due to sorcery' was of greater concern to women (at 49 per cent) than any other type of violence.[27] As with any effort to change underlying community beliefs or values, combating sorcery-related violence will require a broad-based strategy led by community and religious leaders but well supported by a coordinated approach across the justice system to demonstrate that sorcery-related violence will not be tolerated.

D.3.3 Cases Involving Discrimination Against Women/Discussion of CEDAW

Womens' right to inherit land/administer property:
Awop v. Lapemal [2007] VUIC 2 (Vanuatu) One of several Vanuatu cases where male disputants have argued that customary law prohibits women from inheriting land. In this case, while the Court made some strong comments, it limited its finding to allowing women to inherit only where no male heirs existed, stopping short of recognising women's right to inherit on the same terms as men.

Lapenmal v Awop [2016] VUSC 8 July 2016 (Vanuatu) The primary court found in favour of the sole direct (female) descendant to be the custom owner and relevant parties to continue to have rights to use the land subject to the authority of the declared owners. Some original claimants appealed to the Supreme Court making several claims including that the primary court had erred in custom law in allowing a woman, and her family by marriage, hereditary rights to land by succession, which is contrary to the patrilineal custom. The Court considered the relevant provisions in the constitution, case law and relevant clauses of CEDAW and dismissed the appeal, upholding the primary decision, which included an exceptional right of succession of the surviving daughter in the absence of any surviving sons. Notably the court found that customary law must not be in conflict with any written law and considered the constitutional provisions and as well as CEDAW . The provision that the rules of custom shall form the basis of ownership and use of land provided under article 74 of the constitution was to be considered alongside CEDAW and article 5 (equality) of the constitution.

Noel v Toto [Case No 18 of 1994 (19 April 1995), (Vanuatu) Referred to the non-discrimination provision in the Constitution as well as Vanuatu's ratification of CEDAW to enforce women's economic rights. The court held that custom used as the basis of ownership of land is subject to the constitutional provision on non-discrimination. The court accordingly ruled that female family members had equal customary rights with regards to land ownership and were entitled to an equal share of income deriving from the land.

Joli v. Joli [2003] VUSC 63, (Vanuatu). The Court applied CEDAW directly as though it were domestic law. The case involved the divorce of two French foreign nationals to which no law of custom or any Vanuatu statute or common law rule applied. The judge decided not to apply the 1882 British statute, containing discriminatory provisions against women, and instead applied CEDAW directly, using the principle of gender equality to divide the couple's marital property equally.

Estate of Chinsami Reddy [2000] FJHC 134, the Fiji High Court referenced CEDAW as authority to change the discriminatory British common law rule which preferred the appointment of male to female administrators of deceased estates. In this case, the Court changed Fiji's common law, voiding the rule that dis-favoured women. The Court stated:

[26] The colonial era PNG Sorcery Act (1971) was repealed in 2013, and aside from introduction of the death penalty for sorcery related cases in 2013, no legal framework for dealing with such cases exists.
[27] Vanuatu Women's Centre/Vanuatu National Statistics Office, 2011, Vanuatu National Survey on Women's Lives andFamily Relationships, Port Vila: Vanuatu Women's Centre, p. 54.

Formerly, males were preferred over females … Fortunately, the law no longer gives effect to such a negative inference about the ability of women to administer an estate, and with the widespread ratification of international human rights instruments such as the United Nations Convention Against the Elimination of Discrimination Against Women, this last principle is of no persuasive value at all.[28]

Arranged Marriage:

In several Fijian cases,[29] Indian Fijian women have sought annulment (as opposed to divorce) of arranged marriages on the basis of coercion. The Fijian High Court has consistently granted annulments on the basis that arranged marriages are null and void because they lack the consent of both parties. The Court has found that the custom of arranged marriage common in Indian Fijian families is itself coercive and that no additional evidence of physical violence or threat of violence was necessary.

D.4 Cases Involving Persons with Disabilities and application of CRPD

D.4.1 Cases in the Pacific

The State v George Joshua: CR 1064 of 2010, (Papua New Guinea). In this case the victim (who alleged rape) was found by the court to have an intellectual disability. On the basis of her oral evidence the court concluded that she was an unreliable witness. The court's consideration of the veracity of the victim's evidence included comments that she had appeared to have been coached in her use of the word 'rape'. As the case rested mainly on her evidence, the suspect was acquitted. The Court concluded that it could not consider the victim's capacity to consent due to her disability because this particular ground had not been put forward by the prosecution at the time the suspect was initially charged. In light of the many complexities of this fact situation, it may have been open to an appeal court to either order a retrial on the issue of consent or to reverse the decision on a question of law arising from the overarching community interest for the courts to provide protection for the human rights of victim.

Haraksin v Murray Australia Limited [2013] FAC 217] The Federal Court of Australia found that the private coach company providing public transportation services from Sydney to Canberra had directly discriminated against the applicant by refusing to provide a wheelchair accessible service. The Court rejected the respondent's 'unjustifiable hardship' defence and ordered the respondent to provide wheelchair accessible services between Sydney to Canberra for at least two years (It is not clear why the Court considered it appropriate to place this time limit on the order).

D.4.2 CRPD Committee

As noted in 6.1.4, the CRPD Committee is mandated to receive and consider individual complaints made by persons from signatory countries where they have exhausted domestic remedies. Here are some examples of complaints considered so far by the Committee.

Communication No. 12/2013 against Australia: The complainant, a person with a hearing disability, complained that he would be excluded from jury duty due to refusal to allow sign language interpreters and stenographers to assist deaf jurors in the court and jury deliberations. As the complainant had not been selected for jury duty but was putting forward a hypothetical situation, he had not already actually faced discrimination, and therefore the Committee found it did not have standing to decide the complaint, so no substantive decision was given.

Communication No. 21/2014 against Austria: The Complainant, a person with a visual impairment, brought a complaint against the public transport tram service for failing to install digital audio systems

[28] *In the Estate of Chinsami Reddy* [2000] FJHC 134 (22 December 2000] p. 8–9.

[29] *FJN and MRK* [2009] FJHC 94. LK and JVR [2009] FJHC 60. NK and ZMR [2009] FJHC 95. PP and RP [2009] FJHC 72. RPN v.SPP [2008] FJHC 166. TZS and FSB [2009] FJHC 97. VDC and VNS [2009] FJHC 69.

in a new section of the track, as it had already done on other tram services since 2004. The Committee found that the digital audio system was an integral part of the transportation service provided and could have been installed at a limited cost at the time of the construction of the new line. The State party was found to be under an obligation to remedy the lack of accessibility to information for visually impaired passengers to the same as that available for all lines of the tram network and ordered the State to provide compensation to the complainant for his legal costs.

D.5 Solomon Islands Case Law and Case Study on Application of Human Rights and Customary Law

In most cases where customary practices and human rights have clashed, the Courts have usually prioritised and applied the Constitutional provisions protecting human rights. For example:

- In *Sukutaona v Houanihou*, and *Kelly v Regina*, the courts applied the Convention on the Rights ofthe Child 'best interests of the child' test, in the former granting custody to the mother (againstcustomary law) and in the latter, relating to the sentencing of a minor;
- In *R v Loumia and Others*: The Court of Appeal upheld a conviction for murder on the basis that the Bill of Rights in the Constitution operated in both private and public fields and that the customary duty to kill in retaliation was inconsistent with s 4 of the Constitution, which protects the right to life;
- In *Remisio Pusi v James Leni and Others*, in obiter, the court relied on the preamble and schedule3 and commented that constitutional provisions would not necessarily be applied in preference to customary law but that it depends on the circumstances of the case. However subsequent decisionssuch as The Minister for Provincial Government v Guadalcanal Provincial Assembly have challenged this approach and found that the preamble cannot be relied on to found a whole legal principle,especially one in conflict with more specific articles (such as in the Bill of Rights) of the Constitution;
- In *Punitia v Tutuila* (Samoa), the court upheld the decision and increased the damages awarded by the court of first instance against the village fonos for banishing the applicant and her family from the village and damaging their property. The court found that the applicants' constitutional rights had been breached.

D.5.1 Case Study on Application of Human Rights and Customary Law

Constitution: *The Solomon Islands Constitution recognises customary law as a source of law. Schedule 3 contains the most important provision: "Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands." *Customary law also emphasized in Constitution preamble, requires Parliament to make laws for applying customary law and take it into account in drafting legislation ((s 75) and paragraph 3.

Yet, Schedule 3(2) also clearly strikes out any customary law that is inconsistent with the Constitution or any legislation. "**The preceding subparagraph shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament.**"

* This is emphasised also in s 2 of the Constitution, which provides: "This Constitution is the supreme law of Solomon Islands and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."

* While the Constitution does not explicitly protect the right to gender equality, it does prohibit discrimination in any law including on the grounds of sex (s 15), (although it may be necessary to also address s 15(5)(d) which could arguably allow discriminatory customary laws, however any doubt or ambiguity should also be read in light of CEDAW).

Legislation: Customs Recognition Act 2000 (passed in 2000 but not yet brought into operation)

* This law further clarifies how constitutional recognition of custom as a source of law is to operate and clarifies it will always be second to 'the interests of justice' and other provisions of the constitution. It creates particular requirements before a customary law can be taken into account or relied on by the Court. It requires:

  1. That the existence of a customary law must be proven as a matter of fact (i.e. pleaded and proved like any other fact by bringing witnesses etc.). (s 3);
  2. Even if 'proven', a customary law would not be recognized if, in the opinion of the court, it causes 'an injustice or is 'against the public interest', or is 'inconsistent with the Constitution' (s 6) and;
  3. Places limits on how customary law can be used in criminal cases (s 7); and
  4. Limits application of customary law to certain civil cases concerning: customary land (including inheritance) and sea rights, fishing rights, animal trespass, and matters arising out of customary marriage (marriage, divorce or the right to the custody or guardianship of infants).

D.6 Cases involving Asylum Seekers, Migrants and Citizenship Issues

Namah v Pato [2016] PGSC 13 (Papua New Guinea). The court had to decide whether the detention of asylum seekers at the relocation centre on Manus Island was contrary to their constitutional rights guaranteed by s. 42 of the PNG constitution. The court also had to decide upon the validity of a constitutional amendment, purporting to create an exception to asylum seekers' rights to freedom and liberty. The court unanimously held that while the constitutional amendment satisfied the formal requirements for a constitutional amendment, it failed to satisfy the specific considerations that laws seeking to restrict guaranteed rights must specify the public purpose for the restriction, which must be "reasonably justifiable in a democratic society" as required under the constitution. The court found that the detention of the asylum seekers was unconstitutional and unlawful.

Tomscoll v Mataio [2016] PNGC 58 The applicant was born in PNG prior to Independence Day but then lost her PNG citizenship when she turned 19 years of age by operation of the constitution due to her dual nationality. She had lived in PNG most of her life and was earlier married to a PNG citizen. Her mother and three children were all PNG citizens. At the age of 40, soon after she was released from prison after serving a sentence for receiving stolen property, the relevant authority directed her to leave the country under the Migration Act. She sought a declaration that she was a PNG citizen and also an injunction to restrain the authority from removing her from PNG. The National Court found that she had lost her PNG citizenship when she turned 19 years old, however held that the applicant was protected under the constitution and that in her circumstances, removing her would be harsh and oppressive, contrary to s. 41 of the constitution, which prohibits any act that is done under a valid law but that is, in the particular case, harsh or oppressive or fails to satisfy the proportionality test applicable in a democratic society, having a proper regard for people's rights and dignity. A declaration and detailed orders were made by the NC requiring the authority to reconsider the applicant's citizenship application expeditiously.

Arorangi Timberland Limited and others (appellants) v Minister of the Cook Islands National Superannuation Fund (respondent) (Cook Islands) [2016] UKPC 32 (United Kingdom for the Cook Islands) **T**his case concerned a challenge to the constitutionality of the state superannuation scheme in relation to discrimination against migrant workers**.** The first instance court upheld the constitutional challenge on the basis that it impermissibly infringed a personal right to own property protected under article 64 of the constitution. The Court of Appeal reversed that finding and the appellants took the matter to the Privy Council (PC). The majority held that the provisions in relation to migrant workers, in which migrant workers would be disentitled to the refund of their employers' contributions on their departure from the Cook Islands, were discriminatory and constitutionally invalid. It referred to the ICESCR and also then came to the conclusion that such discriminatory treatment of migrant workers was both an anomaly and unfair and that the State had failed to justify why the disadvantaged migrant workers should be further discriminated against.

D.7 Eviction cases

Proceedings Commissioner v Kant [2017] FJHC 407 (Fiji) The tenant, with her family of five children and four adults, occupied a property owned by the respondent under an agreement initially for one year from May 2015, but continued to pay rent until April 2017, although was in arrears. The respondent locked the house while the applicant was attending a funeral and the applicant's child was left alone outside the house. The tenant complained to the Human Rights Commission which wrote to the landlord informing him that the arbitrary eviction had breached section 39(1)/(2) (freedom from arbitrary eviction) of the constitution. The respondent replied saying that he had lawfully exercised his rights to collect the rent and that he was not responsible for the tenant's family being deprived of food, clothes and shelter. The applicants asked the court to intervene and sought an interim order allowing the tenants to repossess the property according to the status quo. On 5 May 2017, the court granted an interim order, unopposed, allowing the repossession and ordering a stay of any execution of purported distress for rent pending the hearing. The respondent removed items from the applicant's house nonetheless. The court found that the eviction method used was arbitrary and unlawful, contrary to constitutional prohibitions on arbitrary eviction from a person's home. The court also ordered the respondent to pay $25,000 compensation for treating a child inhumanly, stayed the purported distress for rent permanently. The orders were granted without prejudice to the respondent's right to institute an action for eviction.

Naembo v National Housing Corporation [2015] PGNC 194 The applicant moved into a property in 1981 based on a tenancy with the National Housing Corporation (NHC). He was not given a copy of the agreement. No maintenance was carried out by the NHC after the agreement commenced. In 1985, the applicant wrote to the NHC asking if he could purchase the house. The NHC responded that it did not own the land and therefore could not sell the house. In October 2000, the NHC issued the applicant with an

eviction notice. The applicant responded asking again if he could purchase the property under the government's 'give-away' scheme and asked for 15 days to settle his rent arrears. The NHC did not respond and in December 2014 engaged the police to evict the applicant and his family from the house. The applicant had moved back into the house but alleged intimidating and malicious conduct of the NHC violated their human rights. The court found that NHC, aided by the police, violated the applicant's human rights under s. 44 (freedom from arbitrary search and entry) and s. 37(1) (right to the full protection of the law) of the constitution. It gave the applicant a period in which to pay the arrears and granted orders to restrain the NHC, the police and all relevant people from taking any steps to evict the applicant without an order from the court.

Annex E: Six Human Rights Checklists: Translating Theory to Practice

Please note the Six Human Rights Checklists are available on the PJSI website: https://www.fedcourt.gov.au/__data/assets/pdf_file/0011/81668/Human-Rights-Checklists-all-combined.pdf

PACIFIC
JUDICIAL STRENGTHENING INITIATIVE

Minimising pre-trial detention

CHECKLIST 1

For Chief Justice
Judge, Magistrate and Court Staff

NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme

AUSTRALIA
FEDERAL COURT OF AUSTRALIA

Purpose Statement and User Guide

This is the 1st in a series of six Human Rights Checklists designed to support coordinated "best practice" actions to apply human rights in the daily practice of judges, magistrates and court staff. The Checklists provide practical step-by-step guidance for applying relevant human rights standards to particular groups of court users and for making courts more inclusive and welcoming.

Each checklist has separate sections containing guidance for judges/ magistrates and court staff which can be ticked off by the user as each step is taken. While not every recommended action will be attainable for all courts from the outset, Courts are encouraged to also use the checklists as an end-point for guiding ongoing reform of court processes.

The Checklists are designed to be used alongside the PJSI Human Rights Toolkit, (available here **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf**), which provides further background about the human rights standards that the recommended actions in the checklists are based upon. The Checklists are designed to provide general guidance for Pacific court actors and not specific legal advice. Court actors should always ensure that the actions they take are also consistent with national laws and in accordance with the guidance and direction provided by Chief Justices.

Full Series of Human Rights Checklists

- **Checklist 1** Minimising Pre-Trial Detention
- **Checklist 2** When juveniles/children come to court
- **Checklist 3** Judicial visits to places of detention
- **Checklist 4** When victims of family or sexual violence come to court
- **Checklist 5** When people with disabilities come to court
- **Checklist 6** Creating welcoming, inclusive courts

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For Chief Justices to consider

- The right to be treated as innocent until proven guilty is a fundamental tenet of international fair trial standards and is also enshrined in most Pacific constitutions. Yet despite these robust legal protections, protracted pre-trial detention remains a major problem across many Pacific jurisdictions. The guidance provided in this Checklist is intended to support the existing efforts of Chief Justices to adopt court-wide systems to minimise the use of pre-trial detention and to ensure that it always remains lawful.
- Consider endorsing this Checklist and encouraging or directing judges, magistrates and court staff to use this checklist in their daily practice to create an "all of court" coordinated response.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 5

RECOMMENDED ACTIONS

Chief Justices can lead efforts to minimise pre-trial detention by focusing on five main areas, to:

1. Provide and monitor implementation of a Pre-trial Detention Practice Direction applicable to all courts and judicial officers.
2. Set pre-trial detention targets for the court, and ensure regular collection and monitoring of pre-trial detention data towards meeting these targets.
3. Ensure that treatment of detainees/prisoners being transported to or held at the court meets minimum standards
4. Support or lead follow up with corrections, police and oversight bodies where issues of mistreatment or substandard conditions of detention become known to the court.
5. Ensure there is support for a regular roster of prison/detention visits by judicial officers.
6. Educate the public about the court's duty to apply the presumption of innocence and address common community misunderstanding that pre-trial release indicates the suspect has been exonerated and will not face justice.

1 Pre-trial Detention Practice Direction and Implementation

- ☑ Promulgate a pre-trial detention Practice Direction across higher and lower courts (and consider including the points set out below.
- ☑ Ensure that each file concerning a detained person includes:
  - all detention review checklists signed-off by judicial officers;
  - prominent recording of pre-trial detention period; and
  - 'red flag' at 12 months system of recording in case management system.
- ☑ Monitor individual performance of all judicial officers regarding:
  - number of cases where pre-trial detention ordered; and
  - number of cases where detainees are held for longer than 12 months.
- ☑ Conduct case review with judicial officers responsible for conduct of trials where a suspect has been detained for 12 months and conduct ongoing monitoring of these matters.

2 Set pre-trial detention targets and data monitoring:

- ☑ Appoint court staff responsible for providing judges with monthly data on pre-trial detainees and to actively monitor data. Data should include:
  - Number of charges and length of pre-trial men/women/under 18/boy/girl detainees nationally/by province;
  - Number of sentenced men/women/under 18/boy/girl detainees nationally/by province (so % of pre-trial detainees can be monitored); and
  - Length of pre-trial detention should be prominently recorded on each criminal file and in electronic case management system (including a 'red flag' at 12 months and at monthly intervals subsequently).

3 Ensure adequate conditions at court and follow up complaints of mistreatment and sub-standard detention conditions

- [x] Appoint staff member responsible for ensuring that detainees are properly treated at court including making sure they have:
  - [ ] Adequate space, separation (juveniles and women) and ventilation while being transported to court;
  - [ ] Cleanliness of holding cells and bathroom;
  - [ ] Access to food and water; and
  - [ ] Access to information about the process.
  - ▶ Raising complaints with the head of police, corrections or other oversight bodies where allegations of mistreatment or substandard conditions are raised by judicial officers on behalf of detainees.

4 Prison/detention centre visits

- [x] Prepare an ongoing roster of prison/detention centre visits;
- [x] All judicial officers should be trained and participate as a scheduled part of their regular duties;
- [x] Visits should include police cells, remand centres, prisons, ie: all places where pre-trial detainees are held;
- [x] Visits include a mix of planned visits and spot checks.

See separate checklist for judicial officers to use during visits

5 Public Education

- [x] Use annual addresses, media interviews, and issue press releases clarifying court processes/judgments in high profile cases to incrementally build community knowledge of the court's duty to ensure fair trials, including presumption of innocence.
- [x] Seek support of Minister of Justice, Attorney General and other members of the Executive to defend the role of courts in providing fair trial standards, including the presumption of innocence.

Judge and Magistrate responsibilities

Overview of responsibilities

The right to be treated as innocent until proven guilty is a fundamental tenet of international fair trial standards and is also enshrined in most Pacific constitutions. Yet despite these robust legal protections, protracted pre-trial detention remains a major problem across many Pacific jurisdictions. It is the responsibility of judges and magistrates to minimise the use of pre-trial detention and to ensure that any detention always remains lawful and tightly managed.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 5

Judges/Magistrates have responsibilities they need to proactively address in two stages:

1. First time a suspect appears before court
2. Ongoing detention review/case management hearings

The judicial officer assigned to a case is responsible for:

- ☐ Managing the pre-trial process to ensure that pre-trial detention only occurs as a last resort, for the shortest possible time, and never becomes 'unreasonable' or 'arbitrary'.
- ☐ Remaining in control of the case in all three phases to ensure that any pre-trial detention remains lawful.
- ☐ Monitoring detention conditions and treatment of detainees at each hearing.

RECOMMENDED ACTIONS

Suspect's first appearance before the Court

The decision to detain

- ☑ Judicial officer to implement the Practice Direction regarding detention.
- ☑ If there is no practice direction then only order detention if you are satisfied of each element as per below.
- ☑ Require the prosecution to disclose to the defence the case file or the principal evidence on which the charges are based, prior to the first pre-trial detention review hearing.
- ☑ Judge/magistrate to provide case-specific reasons in writing for each decision to impose pre-trial detention.
- ☑ If suspect is under 18 years old, then the threshold for detaining is even higher. Court must always hear directly from the parents/responsible adult and social services to help identify any alternatives to detention. Use Checklist for cases involving child/juvenile suspects (under 18 years old).

Detain only if you are satisfied of all of these, as a last resort:

- ☑ Person charged with serious violent crimes against the person (never for property offences or minor offences).
- ☑ Evidence has been presented which is of sufficient quality and lawfully obtained which could support a conviction.
- ☑ Charges, if proven, would result in a substantial period of imprisonment which would be longer than the period of pre-trial detention.
- ☑ There is no other way to ensure the suspect will attend court. Consider:
  - **Bail**: Set at a reasonable and feasible level;
  - **Reporting conditions**: Require evidence if it is submitted that reporting conditions would not be sufficient;
  - **Other monitoring**: Require evidence if it is submitted that undertakings of family/friends to monitor/support would not be sufficient to ensure attendance at court; check if GPS electronic monitoring is an option.
  - **Combination of these options**

Make inquiries about detention conditions/treatment

Judge/magistrate should always make inquiries to the suspect about his/her treatment and conditions of detention including:

- ☑ Explain that the court has a role and powers to ensure detention conditions are humane and that detainees are not mistreated.
- ☑ Assure detainee they are safe to disclose any issues concerning their detention or treatment without fear of retribution, including by court staff, police, guards or other detainees.
- ☑ Ask detainee if they were safely transported to the court, and have had access to water, food, and the bathroom while held at the court.
  - ▶ **If not, raise these issues with the Chief Justice.**
- ☑ Observe condition of detainee, including if they have any visible injuries and ask them how they got them.
- ☑ Ask detainee if anyone, including guards, police or other detainees has physically harmed or threatened them since being detained, including during questioning.
  - ▶ If mistreatment used during questioning/obtaining admission, this then becomes part of the case and defence will need to call police involved as witnesses.
  - ▶ In addition, judicial officer can initiate new case against guard/police officer, lodge complaint with corrections/police/Ombudsman/human rights body, to ensure the alleged mistreatment is investigated and accountability.
  - ▶ **Also raise with Chief Justice.**
- ☑ Ask detainee if he/she is held with other pre-trial detainees or with sentenced prisoners
  - ▶ If with sentenced prisoners, report to corrections service/police that separation is required.
- ☑ Ask detainee if he/she has
  - ▶ adequate space, enough light, bedding, clean water, food, essential items (like toothbrush, toothpaste, soap, sanitary items for women or if they need any of these)
  - ▶ daily opportunity to exercise outside
  - ▶ **If any of these are lacking report to correction service/police that these must be provided and also raise with Chief Justice.**
- ☑ If they are under 18 years old, additionally ask if
  - ▶ they are being detained with others under 18 years old, or with adults
  - ▶ if family have been able to visit them
  - ▶ if they are receiving any regular education, training, sport or other activities
  - ▶ **If any of these are lacking report to correction service/police that these must be provided and also raise with Chief Justice.**
- ☑ If they are female, ask if they are being detained separately from men and guarded by women, if detainee has contact with male detainees or prisoners:
  - ▶ report to corrections service/police that full separation is required and that female guards must be provided or that male guards must be accompanied by a female guard
  - ▶ **and also raise with Chief Justice.**

Ongoing Detention Review and Case Management Hearings

Judges and Magistrates to:

- ☑ Remain firmly in control of case timetabling and firm with parties who fail to meet the time frames as set down in Directions (if parties fail to comply with court directions/order, submit a complaint against them to the chief prosecutor or law society and, if necessary, warn parties you will find them in contempt).
- ☑ Monthly meaningful in-person (not 'on the papers') review of ongoing detention requiring 'sign off' on above criteria again each time AND
- ☑ Satisfaction via direct contact with prosecution and suspect's lawyer (and social services if case involves a minor) that there has been no change of circumstances which would enable release.
- ☑ Reasons for extending detention must be clear, particular to the case and in writing each time pre-trial detention is extended.
- ☑ Dismiss charges or grant conditional release where there is inadequate evidence put forward to support a conviction.
- ☑ At each hearing judge/magistrate Judicial officer to ask detainee about his/her treatment and conditions of detention and follow up appropriately (as per previous section).
- ☑ If delays are caused by difficulty in obtaining forensic evidence, prosecution requested to carefully consider if other available evidence will suffice in supporting conviction.
- ☑ Reduce adjournments by providing a 'last adjournment' warning and then if the matter was still not completed, proceed without it, including if it may result in discharge of charges.
- ☑ Include a 'red flag' period of 12 months maximum of pre-trial detention. Conduct fresh assessment and release detainee unless there is evidence that conditional release not possible (as per criteria above).
  Accelerate trial timetable. Chief Justices will conduct case reviews with judges/magistrates where detention has reached 12 months and will want to know why trial has been delayed for 12 months and why detainee should not be conditionally released or charges dropped.

Court staff responsibilities

Overview of responsibilities

Court staff make important contributions to ensuring that the rights of people who are detained are fully observed when they come to court. They also play important roles in producing data and managing cases so that pre-trial detention can be closely monitored and tightly managed by the judge or magistrate.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 5

RECOMMENDED ACTIONS

Prior to/on day of hearing

- ☑ Liaise with police/corrections to ensure adequate space, separation (juveniles and women) and ventilation while person/people are being transported to court
- ☑ Check and ensure cleanliness of holding cells and bathroom before they are used
- ☑ Be present/monitor during arrival at court and liaise with police/corrections officers
- ☑ Ensure that any child/juvenile is held separately from adult detainees while they wait at court and are given special care and attention.
- ☑ Ensure that all people detained have access to food, water and a bathroom while they wait.
- ☑ Ensure that all people detained are provided with information by court officer about:
  - What the process will be and
  - Role of judge, prosecutor and defender
  - How long they will likely need to wait
  - Court etiquette: how to address the judge, to stand and bow when they enter and leave the hearing room etc.
  - What will be expected of them during the hearing and that they should ask their lawyer/ the judge any questions they have during the hearing
  - Where bathroom/other facilities are
  - Who and how they can contact court staff if they need to communicate anything
  - Once person is in the court room, explain to person again where different court actors will be and what will happen once the hearing commences, and to ask their lawyer or the judge any questions they have during the hearing.

Case management of detainee files

- ☑ Ensure that detainees' files are colour-coded and clearly flagged in data system.
- ☑ Ensure that length of pre-trial detention is prominently recorded and updated minimum monthly on each file and in electronic case management system.
- ☑ Ensure there is a 'red flag' in the system when detention reaches 12 months.
- ☑ Inform the presiding judge/magistrate at 11 months, that the 12 month limit is approaching
- ☑ Monitor court direction dates and provide reminders to parties of upcoming court deadlines and that they will need compelling reasons to be granted any adjournments.
- ☑ Prepare monthly data for the Chief Justice including:
  - Number of charges and length of pre-trial men/women/under 18/boy/girl detainees nationally/by province; and
  - Number of sentenced men/women/under 18/boy/girl detainees nationally/by province (so % of pre-trial detainees can be monitored).

PACIFIC
JUDICIAL STRENGTHENING INITIATIVE

When children/juveniles* come to court

CHECKLIST 2

For Chief Justice
Judge, Magistrate and Court Staff

* Those under the age of 18 years old under international law; noting each country has different age-related provisions for age of criminal responsibility under domestic law

NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme

AUSTRALIA
FEDERAL COURT OF AUSTRALIA

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- **Checklist 5** When people with disabilities come to court
- **Checklist 6** Creating welcoming, inclusive courts

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For Chief Justices to consider

- Chief Justices can play a key role in providing leadership and setting into motion coordinated standards and practices to be applied across the court for when children and juveniles come to court. These are aimed at ensuring that the special human rights protections owed to children and juveniles are applied in any court process. This includes giving primary consideration to the best interests of the child/juvenile and ensuring that children/juveniles are able to understand and participate in the court process and have their views considered, to the maximum degree possible.
- Consider endorsing this Checklist and encouraging or directing judges, magistrates and court staff to use this checklist in their daily practice to create an "all of court" coordinated response.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 6

RECOMMENDED ACTIONS

If there is no specific child/juvenile justice law and procedure in your jurisdiction, issue Practice Directions for Child/Juvenile Cases binding upon all courts and judicial officers.

Guidance for content of Practice Direction

- ☑ Ensure an on-call judge is readily available 24 hours a day/7 days per week by telephone to hear applications regarding whether a child/juvenile can be detained or not.
- ☑ Cases involving people under 18 years old need to be immediately identified by the court, colour coded by registry and prioritised for allocation of a court date.
- ☑ Judges must tightly control the timing of steps leading to trial and give early warning to the parties that adjournments will only be granted in the most exceptional circumstances, and that the case will proceed or be dismissed based on the evidence available.

- ☑ Cases involving children/juveniles in the lower courts should take no more than three months to be finalised, and for higher courts, a maximum of six months.
- ☑ The Court will schedule a particular day/schedule for hearing cases involving children/juveniles, so that they do not mingle with adult offenders and so different court arrangements and measures can be made for them.

- ☑ Ensure that judges/magistrates can only order pre-trial detention (for any period) of a child/juvenile as a last resort, for the shortest possible time and only for the most serious cases of violent crimes against the person (never for property offences or minor offences).
- ☑ Judges/magistrates should be encouraged to refer cases involving children/juveniles who plead guilty to a family conferencing process to identify recommendations for the judge for dispensation of the case.

- ☑ Sentences must take into account the child/juvenile's age and focus on rehabilitation more than punishment. Prison should only be used in the most serious cases as a last resort, and be for the shortest possible period in a facility separated from adults. Custodial sentence can always be supplemented with other community-based rehabilitation activities or probation, supervision orders, or educational/vocational programs.

Request a briefing where judges order pre-trial detention of children/juveniles and monitor ongoing detention in these cases

- ☑ Ensure appropriate and separate facilities, and care of child/juveniles when they come to court, including during their transportation to court, by appointing a responsible court staff member who is trained in this role.

- ☑ Ensure there is a group of judges in each court who have received special training for handling cases involving children/juveniles, and that judges from this pool are appointed to all cases involving children/juveniles. Gradually expand this pool, as resources allow, until all judges have had training in handling cases involving children/juveniles.

- ☑ Allocate separate court hearing days to deal with cases involving children/juveniles more efficiently, discreetly and using a more informal layout for court room furniture.

- ☑ Support judicial officers with diversion approaches to the maximum degree permitted by the law.

Click here to access the Court Infrastructure checklist which considers the additional requirements of juveniles accessing the court building.

- [x] If there is no specific child /juvenile justice law and procedure in your jurisdiction, advocate for the Parliament to pass one, and for the Government to provide resources for a child/juvenile court facility and training for judges/court staff.

- [x] Work with prosecution service to ensure Standard Operating Procedure (SOP) in place guiding decision making around:

  - Ensuring compliance with criminal age of responsibility;
  - Diverting child/juveniles from prosecution;
  - Exercise of prosecutorial discretion not to lay charges;
  - Prioritising cases involving children/juveniles;
  - Ensuring children/juveniles are appointed legal representation from the outset;
  - Ensuring children/juveniles are only detained as a last resort, for the shortest possible period and only regarding serious violent charges against the person;
  - Monitoring timeframes and targets for completion of investigations, filing of indictments, reducing delay;
  - Standards for keeping child/juvenile defendants updated on progress of prosecutions.

Judge and Magistrate responsibilities

Overview of responsibilities

Judges and Magistrates are responsible for ensuring that the special human rights protections owed to children and juveniles are applied in any court process. This includes giving primary consideration to the best interests of the child/juvenile and ensuring that children/juveniles are able to understand and participate in the court process and have their views considered, to the maximum degree possible.

To meet these responsibilities, it is necessary for judges/magistrates to actively manage cases involving children/juveniles as per the recommended actions below.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter6

RECOMMENDED ACTIONS

- ☑ Are identified as early as possible and given priority.
- ☑ Always have legal representation appointed to them.
- ☑ Are diverted from criminal justice processes wherever possible. This would usually occur at police/prosecution with decisions not to charge, however judges may additionally be able to refer cases involving guilty pleas to a family conference and then consider its recommendations for dispensation of the case. This is especially for cases where the child/juvenile has been charged with low-level offences and who have little or no prior history of offending.

Family Conference Process

- A family conference will involve the child/juvenile as well as their family, victim, police, lawyer, conference convener and any other interested and relevant party.
- Family conferences provide a good opportunity for the child/juvenile to hear how their offending impacted on the victim.
- Family conferences provide recommendations to the judge for a plan for dispensing with the case. If the plan is satisfactorily completed the court will consider granting an absolute discharge so that it is as if the charge was never laid.
- Family conferences can recommend accountability measures such as: community work, meaningful apology, reparation/restitution, and counselling and working with the young offender and his/her family.
- Family conference can also recommend that probation/correctional services provide a report to the Court.

- ☑ Always follow the Practice Direction's guidance on timeframes for finalising the case and provide early warning to the parties that adjournments will not be granted, except in truly exceptional circumstances which are beyond the control of the parties.
- ☑ Strong emphasis by judge on young person's participation in the court process, and commitment to find out young person's views and as far as practicable to give effect to them.
- ☑ Are only detained as an absolute last resort, for the shortest possible period, and only for the most serious cases of violent crimes against the person and never for property offences or minor offences, and always in age-appropriate and separated facilities that meet minimum conditions (see separate 'prison/detention visits checklist).
- ☑ Understand and can participate in court processes to the maximum degree possible, including through use of their native language (through an interpreter arranged by the court, if necessary).
- ☑ If guilty, are given a sentence that focuses on rehabilitation more than punishment by minimising custodial sentences and supplementing with other community-based rehabilitation activities.
- ☑ Prison should only be used in the most serious cases as a last resort and for the shortest possible period in a facility separated from adults.

The Judge has responsibilities they need to proactively address in three stages: pre-hearing, during hearings and post hearing/sentencing.

Stage One Pre hearing

- ☑ Ensure the court contacts relevant Government department for child/juvenile welfare (eg. social services, probation officer) to ensure child/juvenile is linked in to available supports and that some assessment of the child/juvenile's circumstances is completed.
- ☑ Determine the exact age of the child/juvenile at the time of the alleged offence, based on their birth certificate or other documents, where possible. If none are available, determine age based on statements of parents, other relatives and the child/juvenile themselves. Conduct a hearing and take evidence from relevant parties regarding child's age if necessary.
- ☑ Based on your age finding, determine if the child/juvenile can be legally charged or prosecuted: that is, you must be satisfied the child/juvenile is above the criminal age of responsibility in your jurisdiction. If not, dismiss the charges.
- ☑ Apply specific child/juvenile justice law and procedure in your jurisdiction, and if there is no one, then apply the Court Practice Directions for Child/Juvenile Cases or the standards provided for in this guidance. Ensure you apply those standards consistently with the Convention on the Rights of the Child (see PJSI Human Rights Toolkit for a summary) and your National Constitution ('Bill of rights' section).
- ☑ Look for any opportunity to divert the case from the criminal justice process or to refer cases involving guilty pleas to case conferences (as outlined above in 'overarching roles' section).
- ☑ Ensure that court staff are appointed to make arrangements for the care of children/juveniles attending the court well before the day of the hearing. (See below for details of arrangements they need to make).

Stage Two First and subsequent hearings

- ☑ Cases involving children/juveniles should be held in closed court, as the privacy of children/juveniles must be specially protected.
- ☑ Make sure the court is set up in a less formal way. Ideally U-shape or horse shoe configuration to allow for participation by young person and his/her family.
- ☑ Ideally the child/juvenile will attend court on a day allocated only for hearings of young people so they do not mix with adult offenders and to make it easy for arrangement of furniture for the day.
- ☑ Adopt a more informal manner: introduce yourself, ask the child/juvenile how they are, and ask if they have anyone with them at court that day.
- ☑ Make sure the child/juvenile has a lawyer. If child/juvenile does not have a lawyer:
  - ▶ Ask police/prosecution why they have not arranged a lawyer.
  - ▶ Make an order for legal aid/appoint a lawyer to provide assistance and stand the matter down to next possible date.
  - ▶ But where child/juvenile is detained, proceed to determine the issue of release but do not progress the substantive matter until next hearing when the child/juvenile has legal representation.

☑ Explain to the child/juvenile in simple, clear language appropriate to their age and in short sentences:

- Why they are at court and the purpose of the hearing;
- That their participation in the hearing is encouraged and that you will take their views into account at all stages, to the maximum degree possible;
- If there is anything confusing or he/she cannot understand then he/she must tell the judge straight away so that problem can be fixed;
- Set out which laws the child/juvenile is accused of breaking;
- Explain the role of the judge, prosecutor and the role of their lawyer;
- Explain the sequence of the hearing. This will depend on the nature of the hearing, but for example:
  - ☐ First the prosecution will be presenting the proof they have gathered that you did this;
  - ☐ Then your lawyer will speak on your behalf to tell the court whether you will be pleading guilty or not. If you are pleading not guilty, then your lawyer will be leading evidence to show you did not do this; and
  - ☐ If you are pleading guilty then the court may agree to refer the case to a family group conference, (see pop out above), which will produce a plan for the court to consider. If the plan is satisfactorily completed the court will consider granting an absolute discharge so that it is as if the charge was never laid.
- If the child/juvenile is going to give evidence, explain that the role of the judge is to make sure the questions by the prosecution are clear, relevant and fair.
- Explain that he/should not answer any questions unless they fully understand them, and that the questions can be further clarified or simplified.
- Set out anything further expected of the child/juvenile and their lawyer that day.
- Set out the possible outcomes of the hearing (including the process for deciding whether child/juvenile will continue to be detained or released).
- Check that child/juvenile understands what you have explained to them. Ask them to explain back to you their understanding and then fill any gaps and adjust your communication style to make it easier for them to understand going forwards.
- Explain that after the hearing a court staff member (ensure you name them) will be in regular touch to provide regular updates on how the case is progressing and likely timeframes.

If child/juvenile is detained

A Inquiries into detention and treatment to date

- ☑ Explain that because they are under the age of 18, the court has a special responsibility to make sure they are being treated according to the rules and you are going to ask them some questions about their situation.
- ☑ Explain that they are safe to disclose any issues concerning their detention or treatment without fear of retribution, including by court staff, police, guards or other detainees/prisoners.
- ☑ Start with the easier questions, for example, ask the child/juvenile how they were brought to court:
  - If they were brought with other adults or separately?
  - If there was enough air in the vehicle?
  - If they had to wait a long time in the vehicle?
  - If they were handcuffed or shackled?
  - Where they have been held in the court (with adults or separately)?
  - If they have had access to water, food, bathroom while held at the court (if not, raise these issues with the Chief Justice)?
- ☑ Ask them:
  - How many hours or days they have been detained.
  - To explain the sequence of what happened from when they were arrested.
  - If any force was used during arrest (and make inquiries to help clarify if this was the minimum needed, and proportionate).
  - If the police explained to them the reason for their arrest at the time they were arrested.
  - If they were given the chance to call their parents/guardian, whether they first came to the police station, and whether parents/guardian were present during any questioning.
  - If the police arranged for a lawyer for them prior to questioning and if they had a lawyer present during any questioning.
- ☑ If they are healthy or not.
  - If not, ask if they have received any medical treatment.
- ☑ Ask them if they have any physical injuries or not.
  - Be observant. Look for any signs of physical injury.
  - If they have any visible injuries ask them how they got them.
  - Ask them if they have received any medical treatment.

- ☑ Ask them if anyone, including guards, police or other child/juveniles, has physically harmed or threatened them since being detained, including during questioning.
  - If so obtain details from the child/juvenile.
  - If mistreatment was used during questioning/obtaining admission, this then becomes part of the case and the defence will need to call police involved as witnesses.
  - In addition, the judge/magistrate can initiate a new case against the guard/police officer, and lodge a complaint with corrections/police/Ombudsman/human rights body, to ensure the alleged mistreatment is investigated.
  - Also raise with Chief Justice.
- ☑ Ask child/juvenile if he/she has been held with other pre-trial child/juveniles or with adults or sentenced prisoners
  - If with adults or sentenced prisoners, report to corrections service/police that separation is required.
- ☑ Ask if he/she has adequate space, enough light, bedding, clean water, food, essential items (like toothbrush, toothpaste, soap, sanitary items for girls or if they need any of these).
  - If any of these are lacking, report to correction service/police that these must be provided and also raise with Chief Justice.

B Deciding to release or extend pre-trial detention

Detention of a child/juvenile can only be ordered:

- ☑ As an absolute last resort; Follow the points below to make sure all alternatives are covered:
  - **Bail**: Require evidence for why bail cannot be set at a reasonable/feasible level;
  - **Reporting conditions**: Require evidence why reporting conditions/ undertakings by adults would not be sufficient to ensure attendance at court;
  - **Undertakings from parent/responsible adult**: Exhaust all safe family/ friends/social services accommodation options (court should hear directly from the parents/responsible adult and social services to help identify all options);
  - **Require evidence for why undertakings** of family/friends to monitor/ support reporting conditions/behaviour would not be sufficient to ensure attendance at court); **AND**
- ☑ Only for the most serious cases of violent crimes against the person and never for property offences or minor offences; **AND**
- ☑ Based on assessment/evidence there is an ongoing substantial risk of:
  - Harm to others; or
  - Interference with evidence/witnesses; or
  - Risk the suspect will abscond/not appear before court.
- ☑ **Only order detention if all of these conditions above are met; AND**
- ☑ Only detain for the shortest possible time (ie detention should be reviewed again in no more than one week); **AND**
- ☑ Set down a tight timetable for steps to the trial with a clear direction to the parties that extensions will not be given, and that if the parties do not comply with directions then unless there are truly exceptional circumstances, the suspect will be released or the charges dismissed.

Stage Three Prior to and at sentencing hearing

- [ ] **Sentences must be based on the child's age at the time of the offence** and aim at promoting social reintegration and the child's constructive role in society. Focus on rehabilitation not punishment.

- [ ] **Check national laws** for any other sentencing options, for example, a youth control order, where the child/juvenile can be required not to commit any further offences for its duration, attend work or study, report to the court monthly or as required, notify if they change address or leave location etc.

- [ ] **Consider other optional orders** such as that they:

  - Participate in community service
  - Undergo alcohol or drug treatment if available
  - Abstain from drinking alcohol or using drugs
  - Attend counselling
  - Reside at a specific address
  - Abide by a curfew
  - Not have contact with specified persons
  - Participate in cultural programs
  - Not go to particular places or areas, and/or
  - Not use specified social media, if this is required to protect the child/juvenile or the community.

- [ ] **Prison sentences** should only be used in the most serious cases as a last resort and be for the shortest possible period in a facility separated from adults. Custodial sentence can always be supplemented with other community-based rehabilitation activities or other measures including providing probation, supervision orders, and educational/vocational programs.

- [ ] **No death penalty or life imprisonment** without the possibility of release for anyone under the age of 18 at the time of the offence.

- [ ] **Give a fresh chance**: Permanently remove/'expunge' juvenile criminal records after person turns 18 or after a maximum of five years.

  - Juvenile records that show up on background checks can be used to deny young people a place to live, a job, admission to school/university or a line of credit.
  - This goes against the philosophy that young people who have made mistakes should be given the opportunity to 'turn over a new leaf', without the risk of them facing stigma or discrimination.

Court staff responsibilities

Overview of responsibilities

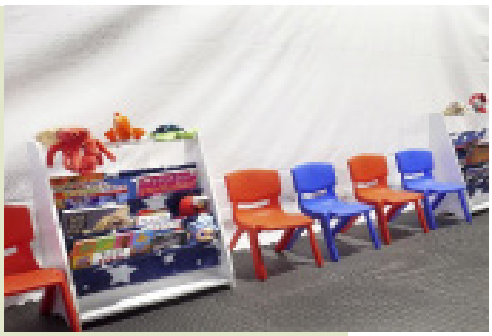
Court staff play essential roles in ensuring that the special human rights protections owed to children and juveniles are applied across all stages of any court process including before, during and after their hearings, as per the recommendations below.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 6

RECOMMENDED ACTIONS

Pre hearing Preparation

- [x] Ensure arrangements are made for child/juvenile well in advance of their hearing date.
  - How they will get to court?
  - Who will accompany them to court?
  - Explain what they need to bring (food, ID etc)?
  - Who from the court will receive them and look after them while at court (to ensure they are provided with information about what will happen including the hearing process and the details of what is expected of them, as well as food, water and safe access to bathroom while at court)?
  - Where will they wait so they are safe from seeing people connected with the case or questioned by curious people?
  - Ensure they have legal representation appointed and if not, arrange referral to legal aid if necessary.
  - Do they need an interpreter? (organise one if necessary).
  - Ensure that a pseudonym is allocated in the court data system.
  - Privacy: Make sure child's name is not included in any public listing notices, as well as in the judgement, to protect the privacy of the child/juvenile.



Day of hearing

- [ ] Make sure the court is set up in a less formal way. Ideally U-shape or horse shoe configuration to allow for participation by young person and his/her family.
- [ ] Meet child/juvenile at court as previously arranged.
- [ ] If child/juvenile is detained ensure they are held separately from adult detainees while they wait and that they have access to food, water and a bathroom.
- [ ] What information to give child/juvenile suspect when they come to court
- [ ] Provide all child/defendants at court information in simple, local language, about:
  - What the process will be and
  - Role of judge, prosecutor and defender
  - How long they will likely need to wait
  - Court etiquette: how to address the judge, to stand and bow when they enter and leave the hearing room etc.
  - What will be expected of them during the hearing and that they should ask their lawyer/ the judge any questions they have during the hearing
  - Where bathroom/other facilities are
  - Who and how they can contact court staff if they need to communicate anything
  - Once person is in the court room, explain to person again where different court actors will be and what will happen once the hearing commences, and to ask their lawyer or the judge any questions they have during the hearing.
- [ ] Accompany all child/juveniles to the court room and show them where they will sit and explain again the roles of the court actors, the process, and what will be expected of them.
- [ ] Ensure that all child/juveniles have someone to take them home/means of transport after the hearing.

After hearing

- [ ] Make sure child/juvenile safely leaves the court with an adult.
- [ ] Ensure that child/suspect and their lawyer are regularly updated on progress of the case and upcoming hearing dates.

PACIFIC
JUDICIAL STRENGTHENING INITIATIVE

Judicial visits to places of detention

CHECKLIST 3

For Chief Justice
Judge, Magistrate and Court Staff

NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme

AUSTRALIA
FEDERAL COURT OF AUSTRALIA

Purpose Statement and User Guide

This is the 3rd in a series of six Human Rights Checklists designed to support coordinated "best practice" actions to apply human rights in the daily practice of judges, magistrates and court staff. The Checklists provide practical step-by-step guidance for applying relevant human rights standards to particular groups of court users and for making courts more inclusive and welcoming.

Each checklist has separate sections containing guidance for judges/ magistrates and court staff which can be ticked off by the user as each step is taken. While not every recommended action will be attainable for all courts from the outset, Courts are encouraged to also use the checklists as an end-point for guiding ongoing reform of court processes.

The Checklists are designed to be used alongside the PJSI Human Rights Toolkit, (available here **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf**), which provides further background about the human rights standards that the recommended actions in the checklists are based upon. The Checklists are designed to provide general guidance for Pacific court actors and not specific legal advice. Court actors should always ensure that the actions they take are also consistent with national laws and in accordance with the guidance and direction provided by Chief Justices.

Full Series of Human Rights Checklists

- **Checklist 1** Minimising Pre-Trial Detention
- **Checklist 2** When juveniles/children come to court
- **Checklist 3** Judicial visits to places of detention
- **Checklist 4** When victims of family or sexual violence come to court
- **Checklist 5** When people with disabilities come to court
- **Checklist 6** Creating welcoming, inclusive courts

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For Chief Justices to consider

- Judicial inspections and visits to places of detention and imprisonment are provided for by law in most Pacific jurisdictions yet are often under utilised. Such visits provide a powerful means for supporting the transparency and accountability of detention and prison conditions and help to prevent unlawful detention and mistreatment. Judges benefit from such visits through being exposed to the realities of detention and imprisonment, while detainees and prisoners benefit from the opportunity to raise their concerns and receive redress if their complaints are made out.
- Support from Chief Justices for a roster of regular and unannounced judicial visits and follow-up of arising complaints, can be a very effective way of supporting cultural and systemic change in place of detention and imprisonment.
- Consider endorsing this Checklist and encouraging or directing judges, magistrates and court staff to use this checklist in their daily practice to create an "all of court" coordinated response.

RECOMMENDED ACTIONS

Delegate a staff member to map all places of detention, noting their location, capacity and purpose/demographic (ie for pre-trial/sentenced prisoners/for men, women, boys, girls).

Ensure a regular roster of prison/detention visits by all judges/magistrates at all places of detention/imprisonment. This should occur every two or three months, and at least every six months and more frequently in places identified as having continuing issues.

Establish a process for judges/magistrates to report back to you/other delegated senior judge any issues detected and monitoring of follow up steps regarding directing complaints/issues to relevant authorities.

Make direct representations to senior authorities as needed on individual cases and especially regarding systemic issues detected regarding conditions of, or mistreatment in detention/imprisonment environments.

Ensure establishment and maintenance of a record keeping system regarding all judicial visits and follow up complaints/steps taken arising out visits. Appoint Court staff member with responsibility for this.

Ensure all judges/magistrates receive training and regular fresher training on conducting judicial visits to places of detention/imprisonment.

Judge and Magistrate responsibilities

Overview of responsibilities

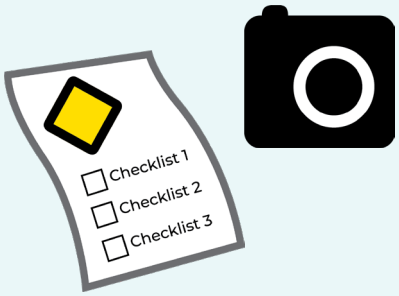
A routine program of regular and unannounced judicial visits to places of detention and prisons can be a very effective means for the court to support cultural and systemic improvements in accountability for the treatment and conditions of detention. The following actions are recommended for three stages:

1. Preparing for the visit;
2. During the visit;
3. After the visit.

RECOMMENDED ACTIONS

Preparing for the visit

- [ ] Know your mandate and powers: which law/delegation are you conducting your visit under?
- [ ] Set aside adequate time (depending on size, at least a half day or full day).
- [ ] What to take:
  - Any letter of authorisation/delegation for the visit;
  - Your Judicial Officer ID;
  - Charged telephone (camera);
  - This checklist;
  - Notebook and pen;
  - Small empty cardboard box, extra pens.



During the visit

Setting things up

☑ Introduce yourself to the police/corrections staff and explain the purpose of your visit. Always be polite and comply with all directions which do not interfere with your role. Politely resist any ones that do (ie resist requests not to take in with your telephone/ camera, not to see detainees/prisoners in a particular section etc.)

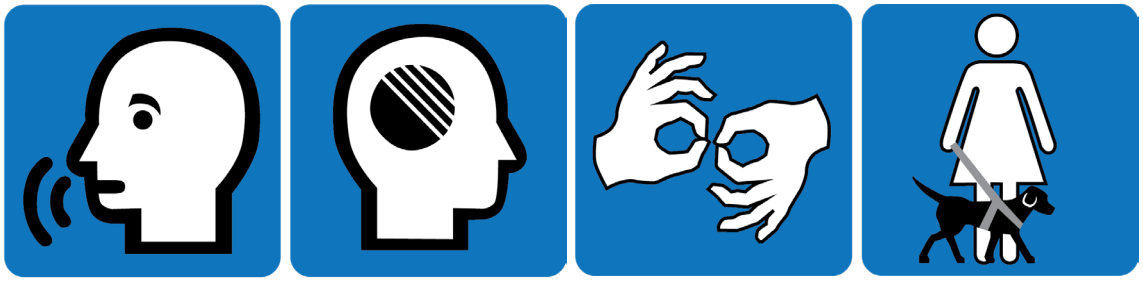
☑ Introduce yourself to the detainees/prisoners

- Explain that the court has a role and powers to ensure detention/imprisonment conditions are humane and that detainees/prisoners are not mistreated.
- Assure detainee/prisoner they are safe to disclose any issues concerning their detention or treatment without fear of retribution, including by court staff, police, guards or other detainees.
- Explain that you are available to speak to individuals on a confidential and entirely voluntary basis. Explain that you will obtain their consent (agreement or permission) before taking up any complaint they disclose to you with any authorities.
- Invite them to approach you directly to talk to them or invite them to write their name on a small note and place it in the card board box to allow them to privately indicate they would like to meet you.
- Meet with each person in a private place or at least out of earshot of others.

Conducting the investigation/making inquiries

Identify situation of detainee

- ☑ Ask the person how they are. Then take down name and date of birth of each person you speak to and telephone contact details (if they are allowed to have phone with them or landline you can call them on).
- ☑ Ask detainee if they are in pre-trial detention or a sentenced prisoner.
- ☑ Note/observe if detainee may be under 18 years of age and ask further questions re their age.
  - If under 18, ask them whether they are being detained/imprisoned only with others under 18 years old or if they are mixed in/have contact with adult detainees/prisoners
- ☑ Note/observe if detainee/prisoner is female. If so, ask whether they are being:
  - detained/imprisoned in a separate facility from men, or if within the same facility, entirely separately from men
  - guarded by only women, or male guards always accompanied by a female guard.
- ☑ Note/observe If detainees/prisoner may have a mental or disability, ask whether the centre/prison is aware of this and whether necessary facilities/treatment/equipment is being provided to support them. Physical and mental disabilities to watch out for may include:
  - Difficulty communicating or understanding/being understood;
  - Difficulty concentrating or remembering;
  - Difficulty moving around, walking or climbing steps;
  - Difficulty seeing, hearing or speaking;
  - Difficulty with self-care including washing or dressing.



Details to get: Pre-trial detentainees ask them

- ☑ If he/she is held with other pre-trial detainees or with sentenced prisoners.
- ☑ Charges faced;
- ☑ Stage of the process;
- ☑ Length of time detained;
- ☑ Whether person has legal representation;
- ☑ Time since last time taken before court;
- ☑ Note if detention reviews have occurred at relevant intervals or whether detention may be unlawful.

Details to get: Sentenced prisoners ask them

- ☑ If the prison has separate sections for different categories of prisoners and restrictions/ privileges which apply to each.
- ☑ Any issues with individual's current classification.
- ☑ If they are required to work and how they are recognised/compensated for this.

Details to get from both pre-trial detainees and sentenced prisoners

- ☑ Ask detainee/prisoner if they feel safe where they are. Get details of any factors/people making them feel unsafe.
- ☑ Ask detainee/prisoner if anyone, including guards, police or other detainees has physically harmed or threatened them since being detained, including during questioning. If so obtain:
  - ▶ Chronology and details from detainee/prisoner, exactly what physical treatment or threats occurred;
  - ▶ Who was involved (names or identifying features such as rank or position of perpetrator/s and details of any witnesses);
  - ▶ Any injuries incurred, any medical treatment provided and place of treatment, any ongoing medical needs (take photographs of any injuries with person's consent);
  - ▶ If detainee/prisoner consequently signed any statements or made admissions and if questioning/incident was audio or video recorded.
- ☑ Ask them if the guards/police treat them with dignity and respect. Get a general understanding of the dynamics between guards/police and detainees/prisoners.

Ask to see detainee/ prisoner's living quarters (sleeping, bathroom and communal areas)

- [x] Take photographs of any issues raised if possible.
- [x] Check/ask if he/she has:
  - Adequate space per person in the room;
  - Adequate natural and artificial light (sufficient for reading without strain);
  - Adequate ventilation and heating;
  - Own bed and sufficient, clean bedding;
  - Sufficient clothing suitable for climate, regularly cleaned;
  - Clean drinking water available at all times;
  - Nutritious meals three times a day, hygienically prepared and served;
  - Privacy in showering and toileting;
  - Cleanliness of facilities;
  - Well maintained and safe facilities and any safety issues addressed;
  - Access to water in bathroom facilities sufficient for showering at frequency needed to maintain hygiene; and
  - Adequate essential items (like toothbrush, toothpaste, soap, comb, means to shave/cut hair, sanitary items for women or if they need any of these).

Ask detainee/prisoner about other aspects of their detention
Do they have:

- [x] Daily opportunity to exercise in the open air for at least one hour.
- [x] Access to adequate medical treatment, medication, and dental treatment as required.
- [x] Experience of any punishments for disciplinary offences in the centre (noting any corporal punishment, punishment by placing in a dark cell, solitary confinement or in small space, reduction of food, use of restraints including handcuffs, chains, irons and strait-jackets).
- [x] Ability to immediately inform family where held, ongoing access to visits, all reasonable facilities for communication with family, others.
- [x] Anyone visiting them?
- [x] Access to religious lead and place/means to worship.
- [x] Adequate light and ventilation during transfer/transportation to other places.

- [ ] If they are a minor (under 18 years old) also ask:
  - If they have received family visits, mail, communication or contact;
  - Double check that they have legal aid or lawyer to assist them;
  - Find out if family have any capacity to post bail, where person would live if released, openness to reporting conditions; and
  - If they are receiving any regular education, training, sport or other activities.

Discussing with detainee next steps

If issues with treatment or conditions of detention arise during your visit:

- [ ] Ask detainee for their consent to raise the issue in a way that identifies them. Confirm you will respect their wishes, and explain what you plan to do with their information
- [ ] If you are not yet sure of next steps, tell them when you will contact them to discuss options
- [ ] If they do not want to be identified, ask if they consent to you raising the issues in a de-identified way and explain what you plan to do with their information.
- [ ] Manage expectations and never make promises you may not be able to keep.
- [ ] Ensure you keep dated/detailed/legible report/records of all contacts you have with detainees/prisoners. Ideally each Court will have a template report you can use.

"Do no Harm": Factors to Consider in Following up Complaints

- [ ] Always place the safety and protection of the detainee first (ie: if directly raising the issue may put them at risk of further mistreatment or abuse, then seek advice from the Chief Justice as to the best approach. Don't rush your decisions around how to proceed).
- [ ] Carefully consider the full range of options and the pros and cons of each option. Never try to address issues to junior officers, always communicate with person of your rank or higher.

Follow up options to consider

- [ ] Provide Chief Justice with a report of all issues raised (identifying and de-identifying complaints based on consent of complainant).
- [ ] Refer detainees without legal representation to legal aid, especially any minors who should all have legal representation.
- [ ] Raise general issues directly with senior police/corrections in charge of the facility (Eg: de-identified complaints relating to general conditions for multiple detainees/prisoners).

- [ ] Raise issues relating to individual prisoners where you have consent to do so and have established that this will not place personal security of the detainee/prisoner at risk.
- [ ] Consider requesting Chief Justice to raise any particularly sensitive issues (ie: physical or sexual abuse of detainee/prisoner by guard/police/other prisoner or where a person is particularly fearful of retribution from guard/police/other prisoner).
- [ ] Prepare a contemporaneous statement regarding details of any specific incidents reported to you of mistreatment/coercion/duress used to procure admissions or statements, as you may become a witness in the case.
- [ ] Consider whether to raise issues with other authorities (in consultation with Chief Justice) which may include:
  - Police oversight or internal investigations unit;
  - Corrections oversight or internal investigations unit;
  - Ombudsman;
  - National Human Rights Institution;
  - Minister of Justice;
  - Legal Aid service; and/or
  - Human rights organisations.

After the visit

- [ ] Make sure you have completed all your notes/records as soon as possible after the visit.
- [ ] Discuss with Chief Magistrate/Justice as soon as possible any follow up steps needed and agree on a plan.
- [ ] Be reliable in following up with detainees as you have committed to, including within the timeframes you said. This is key to building trust with detainees/prisoners and the integrity/reliability of the inspection process.
- [ ] Check in (by telephone) within a week of your visit to check that no negative consequences have occurred for detainee since you met with them/raised a complaint. If so, then immediately inform the Chief Justice for his/her follow up.
- [ ] Follow up in a timely way to progress follow up plan agreed with Chief Magistrate/ Justice, subject to consent/wishes of detainee
- [ ] Key detailed records of all follow up steps taken (file note all telephone conversations, correspondence, follow up visits, discussions with Chief Justice/Magistate etc.)
- [ ] Ensure that all records/notes regarding the visit/follow up steps are filed according to procedures in place.
- [ ] Ensure that detainees are kept updated/informed as to progress of any complaints/ follow up and the outcomes.

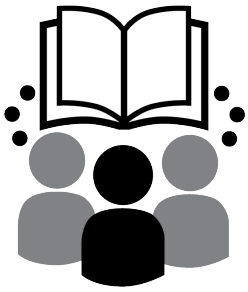
Court staff responsibilities

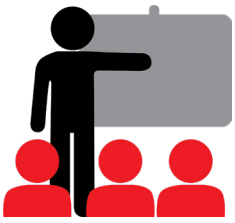
Overview of responsibilities

Court staff play an important part in supporting a program of regular and unannounced judicial visits to places of detention and prisons. These can help ensure that the basic rights of detainees and prisoners are consistently upheld and help to prevent any lapses in these standards.

RECOMMENDED ACTIONS

- ☑ Manage support for roster of visits and ensure judges/magistrates have what they need to conduct the visits including transportation, access to a phone etc.
- ☑ Establish and maintain detention visit/follow up record keeping system regarding all judicial visits and follow up complaints/steps taken arising out visits.
- ☑ Follow up with judges/magistrates:
  - Soon after their visits to ensure all documentation is completed and filed
  - Concerning documentation for ongoing follow up and complaints.
  - Ensure that outcomes of complaints are recorded and that detainees have been informed of these.
- ☑ Support arrangements for training of judges/magistrates on conducting judicial visits to places of detention/imprisonment.





PACIFIC
JUDICIAL STRENGTHENING INITIATIVE

When victims of family & sexual violence come to court

CHECKLIST 4

For Chief Justice
Judge, Magistrate and Court Staff

NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme

AUSTRALIA
FEDERAL COURT OF AUSTRALIA

Purpose Statement and User Guide

This is the 4th of a series of six Human Rights Checklists designed to support coordinated "best practice" actions to apply human rights in the daily practice of judges, magistrates and court staff. The Checklists provide practical step-by-step guidance for applying relevant human rights standards to particular groups of court users and for making courts more inclusive and welcoming.

Each checklist has separate sections containing guidance for judges/ magistrates and court staff which can be ticked off by the user as each step is taken. While not every recommended action will be attainable for all courts from the outset, Courts are encouraged to also use the checklists as an end-point for guiding ongoing reform of court processes.

The Checklists are designed to be used alongside the PJSI Human Rights Toolkit, (available here **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf**), which provides further background about the human rights standards that the recommended actions in the checklists are based upon. The Checklists are designed to provide general guidance for Pacific court actors and not specific legal advice. Court actors should always ensure that the actions they take are also consistent with national laws and in accordance with the guidance and direction provided by Chief Justices.

Full Series of Human Rights Checklists

- **Checklist 1** Minimising Pre-Trial Detention
- **Checklist 2** When juveniles/children come to court
- **Checklist 3** Judicial visits to places of detention
- **Checklist 4** When victims of family or sexual violence come to court
- **Checklist 5** When people with disabilities come to court
- **Checklist 6** Creating welcoming, inclusive courts

Published in October 2020.

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For Chief Justices to consider

- Chief Justices can play a key role in providing leadership and setting into motion coordinated standards and practices to be applied across the court for when victims of family and sexual violence come to court. These are aimed at ensuring that victims of family and sexual violence feel supported and protected by the court during the court process so that they can participate without fear, while also ensuring fairness to the defendant.
- Consider endorsing this Checklist and encouraging or directing judges, magistrates and court staff to use this checklist in their daily practice to create an '"all of court" coordinated response.

Overview of responsibilities

ACCESS: Aim to ensure an on-call judge is readily available 24 hours a day/7 days per week by telephone to hear applications for protection orders.

CASE MANAGEMENT: Establish procedures so that cases involving cases of family violence or sexual violence are identified by court staff as early as possible and then colour coded and prioritised for allocation of an early court date.

SET TARGET TIMEFRAMES for family and sexual violence cases (possibly three months for finalisation of regular cases, with up to six months for most complex cases) and ensure that timeframes are monitored by court staff. Judges to be guided to tightly control the timing of steps leading to trial and give early warning to the parties that adjournments will only be granted in the most exceptional circumstances.

SUPPORT: Appoint a senior court staff member as Vulnerable Persons Court Liaison to:

- ☑ Map local support services (including operational hours and location);
- ☑ Update referral lists and train other court staff in referral;
- ☑ Develop and implement plans to support vulnerable victims or witnesses attending the court (as per details below in Court Staff Responsibilities)
- ☑ Ensure court staff are adequately trained to confidentially assist protection order applicants and find practical solutions to provide:
  - **Separate entrance and separated waiting areas for victims and children** to prevent their intimidation by the defendant, their family, or the prying curiosity of others. Areas need safe access to bathroom facilities, adequate seating and facilities for younger children (e.g. toy box).
  - **Room or private booth right next to the registry desk for court staff** to provide confidential assistance to relevant court users (e.g. assistance completing Family Protection Applications).

COURT CAPACITY BUILDING

Ensure there is a group of judges/magistrates in each court who have received special training for handling family and sexual violence cases and that judges from this pool are appointed to all cases involving victims of family or sexual violence.

Gradually expand this pool, as resources allow, until all judges have had training in handling cases involving victims of family or sexual violence.

Take a similar approach with training for Court Staff.

COORDINATION: Appoint judge or magistrate to:

- ☑ Participate in sector referral pathway coordination meetings with police, prosecution, safe houses etc.
- ☑ Work with prosecution service to ensure coordinated Standard Operating Procedures (SOPs) are in place guiding decision making around:
  - Timeframes for completion of investigations, filing of indictments, and reducing delay;
  - Exercise of prosecutorial discretion not to lay charges;
  - Prohibition of informal resolution of family/sexual violence complaints;
  - Laying appropriate charges in cases of family/sexual violence;
  - Allocation of women prosecutors (wherever possible) to take statements from victims of family/sexual violence; and
  - Standards for keeping victims updated on progress of prosecutions.

Judge and Magistrate responsibilities

Overview of responsibilities

- The judge/magistrate is responsible for ensuring that victims and witnesses of family and sexual violence feel supported and protected by the court during the court process so that they can participate without fear, while also ensuring fairness to the defendant.
- The judge/magistrate has responsibilities they need to proactively address, working closely with court staff, in three stages: pre-hearing, during hearing and post hearing/sentencing.
- The Judge is responsible for remaining in control of the case in all three phases.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 7

Stage One Pre hearing

- ☑ Check there are interim protection orders already in place and if needed, to provide these. Consider: risk of further violence, intimidation, threats, and likelihood of interference with justice process.
- ☑ Ensure that protection orders are enforced throughout the pretrial period, including orders for payments of maintenance to victims (from joint assets if necessary).
- ☑ Decide if case will be heard in open or closed court and inform victim.
- ☑ Decide if cases involves child victims/witnesses, and where law provides, whether victim/witness will give evidence in court or via another medium (i.e.: by video from another room or a place where they may feel more comfortable).
- ☑ Tightly manage pre-trial processes and minimise adjournments.

  - ▶ Ensure that any timeframe targets set by the Chief Justice are met.
  - ▶ If none are set, then aim to finalise regular cases within three months or complex cases within six months, as a guide.
  - ▶ Work backwards from finalization targets to provide directions to the prosecution/defence regarding time frames for interlocutory steps, (finalisation of investigation, indictment filed, evidence brief provided to defence etc.)
  - ▶ Take all possible steps to reduce delay such as give early warning to the parties that adjournments will only be granted in the most exceptional circumstances and carefully assess whether there is a need for forensic evidence, especially where it will take a long time to procure.

☑ Work closely with Vulnerable Persons Liaison Officer, or if none is appointed, another court staff member, to complete the steps set out in **Court staff responsibilities** section [page 8]:

- To ensure victim/witness is currently in a safe situation.
- To ensure victim/witness is provided with regular updates on how the hearing is progressing and likely timeframes.
- To develop and manage a safety plan for the victim/witness while at court.

Stage Two Judge's role during the hearing

Before entering the court room

☑ Ensure that the victim/witnesses and the defendant have been briefed by court staff about what will happen when the court is in session, and that all parties are aware of court etiquette rules including, that the judge will not allow anyone to be present who interjects or attempts to intimidate witnesses etc.

☑ Ensure that any screening is in place so the victim/witness not intimidated by eye contact with suspect.

Once hearing in session

☑ Introduce the hearing: explain the purpose of the hearing, the roles of the judge, prosecutor, defender, and set out the sequence of what will happen.

☑ Judge to reiterate that the victim/witnesses are safe to tell the truth, and that the court will protect them from any threats or intimidation, including after the hearing, and reminding all that harsh penalties apply for anyone obstructing justice or interfering with a witness.

☑ Judge to remain in control of hearing at all times.

☑ Judge to ensure that defence lawyer/defendant questions are allowable, that questions to victims/witnesses are relevant and appropriate, and to intervene and prevent questions if the prosecution does not raise valid objections.

☑ Judge to ensure that an unrepresented defendant never directly questions a victim or vulnerable witness. Judge should ask the unrepresented defendant to direct their questions to the judge and then the judge will ask the question to the victim/witness, or guide the defendant to reframe the question so that it is a relevant/appropriate question.

☑ Judge to ensure any protection orders necessary remain in place.

Stage Three After the hearing

Ensure that court staff complete their responsibilities to

- ☑ Implement the plan for the victim/witness' safe departure from the court; and
- ☑ Check in with the victim/witness to ensure they are safe/okay.
- ☑ Ensure that judge/magistrate is informed and police respond to any report of intimidation/threat/harm to the victim/witness after the hearing.

Ensure that prior to and at sentencing hearing

- ☑ The prosecution are prepared to present the victim impact statement.
- ☑ The prosecution are prepared to provide evidence of harm/loss to victim for criminal compensation (where this is the responsibility of the prosecutor and dealt with concurrently with criminal charges).
- ☑ Court staff have a victim/witness safety plan in place (as per below) if they are attending the sentencing hearing.
- ☑ The sentence fits the crime and is not impacted by gender myths or stereotypes including reductions based on transferring blame to the victim, or discriminatory customary practices.
- ☑ Protection orders remain in place for safety of the victim/witness, if necessary.
- ☑ Criminal compensation orders are made if laws allow for this to be rolled into finalisation of a criminal matter.
- ☑ An order is made, directed to the Corrections Service, that the victim be notified at least two week prior to release of the defendant from custody, whether upon completion of their sentence or on parole.

Court staff responsibilities

Court staff share responsibility with the judge/magistrate to ensure that victims and witnesses of family and sexual violence feel supported and safe (physically and psychologically) to participate in the court process without fear.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 7

Preparation for the hearing

- **Treat confidentiality of the victim/witness very carefully** (especially when having any contact with the suspect, victim or suspects' family members or other communit members).

Checking victim/witness is in a safe situation

- ☑ If they are still in home environment, carefully consider how to contact the witness/victim safely. (i.e. call them on their telephone and check first if it is safe/ good time for them to talk).
- ☑ Find out where the victim/witness is currently living and whether they are in a safe situation. Ask them:
  - ☐ Are they are feeling safe from the suspect/anyone else around them
  - ☐ Has anyone used to threatened violence against them since they made a complaint to the police/court?
  - ☐ Discuss with person their options for being in a safer place or how to make their current situation safer. (see guidance below on making a safety plan)

If they are not in a safe situation, then seek the consent of the victim/witness to:

- ☑ Call the police and later follow up to check that the police do respond to any report of intimidation/threat/harm to the victim/witness after the hearing and repeat steps
- ☑ Contact the court and advise victim/witness needs urgent protection orders
- ☑ Refer them to shelter or relevant women's organisation for protection, support and assistance if one is available
- ☑ If they are going to stay where they are, provide advice about preparing a safety plan (following)

Advice you can provide to victim/witness about making a safety plan

- ☑ Remove or secure any items in the house that could be weapons like knives, garden tools
- ☑ Speak to neighbours you know and trust. Ask them to call the police if they hear violence or abuse
- ☑ Have an escape plan ready for when you feel that it's not safe to stay where you are. Plan where you will go and how you will get there in case you need to leave in a hurry.
- ☑ Plan and practice (with your children) how you might escape from your home safely and quickly
- ☑ Teach children that in a dangerous situation, their responsibility is their own safety, not to protect you.
- ☑ Have a code word or phrase that you can use with someone you trust by phone or text so they know you are in danger and need help from them or the police, even if the perpetrator can hear you.
- ☑ Pack an escape bag in case you need to leave the house quickly ready with phone, charger, keys, money, important papers, medication, any essential items for you and children

Once victim/witness is in a safe situation

- ☑ Explain to the witness/victim the steps of the court process, what is expected of them during each step of the process and how to contact the court if they have any concerns or questions (a script should be developed for this to ensure consistency).
- ☑ Provide regular updates to the witness/victim on how the hearing is progressing and likely timeframes.

Preparing a safety plan for while victim/witness is at court

Court staff should liaise with the victim/witness well before the day of the court hearing to discuss how they will get to court, what they need to bring (food etc.) and to outline details of what will happen when they come to court, including:

- ☑ How will they enter the court compound safely? (Is there a back entrance or private way for them to enter the court building?
- ☑ Who from the court will receive them and look after them while at court (ensuring they have food, water and safe access to bathroom while at court)?
- ☑ What measures are in place to ensure they are not harmed, threatened or intimidated while at court?
  - Where will they wait so they are safe from seeing people connected with the case or feeling intimidated, threatened or questioned by curious people?
  - Who will check none of the witnesses/community members are armed and to manage their behavior while in court or waiting?
  - How will they be protected during the hearing?
    - Any screen/physical barrier so victim/witness does not have eye contact with defendant in the court room?
    - Any arrangement for victim/witness to give evidence by video/another location?
- ☑ Who will provide them with information about what will happen, including the hearing process and the details of what is expected of them including:
  - Roles of the judge, (to ensure process is fair to everyone and no one is intimidated or fearful in their role), prosecutor (to bring the case on behalf of the state and also to ensure process is fair to victim/ prosecution witnesses) and defender (to ensure the process is fair to the defendant, defendant witnesses).
  - Where they will stand/sit in the court room?
  - Who will be present in the court room?
  - Is it an open or closed hearing?
  - Will they see the suspect or will there be a screen in place?
  - Who will question them? Will the suspect question them directly? Judge's role in ensuring the questions are fair etc.
- ☑ How will they safely leave the court, where will they go and with who?
- ☑ Do they know what to do/who to contact if anyone threatens or harms them, following the hearing?

On the day of the hearing

- ☑ Meet the victim/witness as planned and accompany them to the private waiting area.
- ☑ Brief them about what will happen when the court is in session, and that all parties are aware of court etiquette rules including, that the judge will not allow anyone to be present who interjects or attempts to intimidate witnesses etc.
- ☑ If there is time/opportunity, take them to the court hearing room before the hearing and show them where they will be sitting/standing as well as the suspect, judge, prosecutor, defence lawyer.
- ☑ Ensure that any screening is in place so the victim/witness not intimidated by eye contact with suspect.
- ☑ Accompany the victim/witness to the hearing room and get them settled in. If they have no one with them, stay with them during the hearing. Provide assurance and support.

After the hearing

- $ Make sure that the victim/witness safely departs from the court and has money for transport and somewhere to go.
- ☎ The next day check in with the victim/witness by telephone to ensure they are safe and ok. Follow steps above Check victim/witness is in a safe situation and If they are not in a safe situation.

Prior to and at sentencing hearing

- ☑ Follow directions of judge/magistrate to liaise/prompt prosecution to provide a victim impact statement and any evidence regarding harm/loss to the victim.
- ☑ Ensure the victim/witness will be accompanied by someone to the court if they are attending the sentencing hearing and that a safety plan is in place (as per above).

PACIFIC
JUDICIAL STRENGTHENING INITIATIVE

When people with disabilities come to court

CHECKLIST 5

For Chief Justice
Judge, Magistrate and Court Staff

NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme

AUSTRALIA

FEDERAL COURT OF AUSTRALIA

Purpose Statement and User Guide

This is the 3rd in a series of six Human Rights Checklists designed to support coordinated "best practice" actions to apply human rights in the daily practice of judges, magistrates and court staff. The Checklists provide practical step-by-step guidance for applying relevant human rights standards to particular groups of court users and for making courts more inclusive and welcoming.

Each checklist has separate sections containing guidance for judges/ magistrates and court staff which can be ticked off by the user as each step is taken. While not every recommended action will be attainable for all courts from the outset, Courts are encouraged to also use the checklists as an end-point for guiding ongoing reform of court processes.

The Checklists are designed to be used alongside the PJSI Human Rights Toolkit, (available here **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf**), which provides further background about the human rights standards that the recommended actions in the checklists are based upon. The Checklists are designed to provide general guidance for Pacific court actors and not specific legal advice. Court actors should always ensure that the actions they take are also consistent with national laws and in accordance with the guidance and direction provided by Chief Justices.

Full Series of Human Rights Checklists

- **Checklist 1** Minimising Pre-Trial Detention
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- **Checklist 5** When people with disabilities come to court
- **Checklist 6** Creating welcoming, inclusive courts

Published in October 2020.

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For Chief Justices to consider

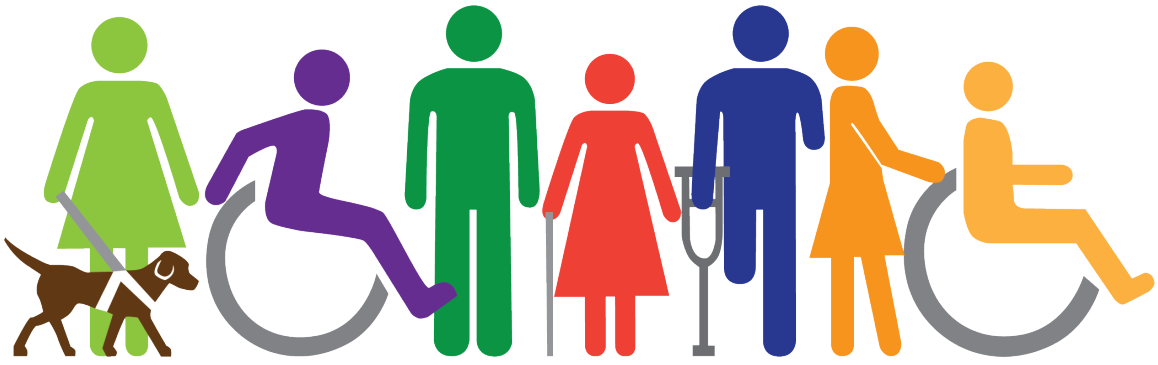
- Chief Justices can play a key role in providing leadership and setting into motion coordinated standards and practices to be applied across all aspects of court functions when people with disabilities come to court. These are aimed at ensuring that the human rights of people with disabilities are fully observed by the court. This includes ensuring that court actors know how to manage cases involving people with disabilities so that they do not experience any discrimination in either the process or the outcome of any court cases they are involved in. This may require the court to make reasonable accommodations to ensure that people with disabilities can fully participate in court processes.
- Consider endorsing this Checklist and encouraging or directing judges, magistrates and court staff to use this checklist in their daily practice to create an "all of court" coordinated response.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 8

RECOMMENDED ACTIONS

Develop a court **Disability Policy** setting out basic principles and rights concerning people with disabilities including:

- Equality before the law;
- Non-discrimination;
- Access to justice;
- Obligation to make 'reasonable adjustments' to provide equal opportunity/access to court facilities and processes;
- Other legal protections provided by national laws for people with disabilities; and
- Treatment of all people with disabilities equitably and respectfully, including in relation to their rights to confidentiality and privacy.



The policy should:

- [x] Apply to all judicial officers and staff working in all of the courts, all contracted service providers to the Court as well as all court users.
- [x] Include obligations for the court to:
  - Ensure that responsibilities for implementation of the policy are assigned and resourced, and all court actors are trained and aware of their responsibilities;
  - Take all reasonable steps to identify and eliminate discrimination against people with disabilities including in their ability to access court services/functions;
  - Develop processes and systems for responding and making reasonable adjustments to court procedures and existing facilities (to the maximum extent possible) to meet the needs of people with disabilities;
  - Ensure court public information is also accessible to people with disabilities; and
  - Ensure there is a system of feedback and complaints, and regular (minimum annual) review of implementation of the policy across all levels of the court.
- [x] Appoint
  - a senior judicial officer and
  - a senior court staff member as disability liaison officers

  responsible for implementation of the policy amongst judicial officers and court staff who report directly to the Chief Justice.
- [x] Ensure that court data systems include disaggregation of people with disabilities and that the Chief Justice monitors application of the disability policy in these cases. Systems need to be in place so that disability liaison officers have data to answer the following six questions:
  - **How many** people with disabilities do we currently have engaged with the court?
  - **Which** cases are they involved in?
  - **What** disabilities do they have?
  - **How** is the court responding to their needs?
  - **What further assistance** is needed from the court?
  - **What result/outcome** did they receive from their engagement with the court?

- ☑ Ensure an annual budget line is included in the court budget for supports for people with disabilities.
- ☑ Ensure that court public information is produced in formats/medium accessible to people with disabilities. In addition, ensure and that such information makes people with disabilities feel welcome and accepted in the Court: that it is their place too and that they have the same right to be protected by the law and to bring their cases and to participate, as anyone else.
- ☑ Ensure all members of the court receive training on identifying, communicating with and supporting the needs of people with disabilities, including treating people with disabilities and their families with dignity and respect, and how to implement their responsibilities under the Disability Policy.
- ☑ Ensure that all court response capacities/services developed for people with disabilities are documented and go through a review process to continuously improve and establish best practices in court disability services.
- ☑ Ensure that public information is provided inside and outside of the court advertising/promoting the services/supports available to people with disabilities at the court.
- ☑ Ensure that existing court infrastructure and scheduling is adapted to meet the needs of people with disabilities to the maximum extent possible and that all new infrastructure takes these needs into account in the planning stage.

Judge and Magistrate responsibilities

Overview of responsibilities

Judges and Magistrates are responsible for ensuring that the special human rights protections owed to people with disabilities are are fully observed by the court in any court processes. This includes ensuring that people with disabilities do not experience any discrimination in either the process or the outcome of any court cases they are involved in. This requires the court to make reasonable accommodations to ensure that people with disabilities can fully participate in court processes.

To meet these responsibilities, it is necessary for judges/magistrates to actively manage cases involving people with disabilities as per the recommended actions below.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 8

RECOMMENDED ACTIONS

- ☑ Be aware of any cases in your docket involving people with disabilities, including the nature of their disability and their needs to engage with their case.
- ☑ Manage all aspects of the person's participation in the case to ensure their disability is taken into consideration so they receive both a fair outcome in the case and a fair, non-discriminatory process from the court.
- ☑ Ensure a court staff member is appointed as the 'point of contact' for the case and work closely with them to help you meet your responsibilities to manage all aspects of the case. Use the court staff checklist below to make sure that the 'point of contact' has provided all relevant support including taking all steps necessary to ensure their case is not adjourned due to lack of court preparedness.
- ☑ Take a practical and flexible approach (eg: allow processes such as family members to help those with disabilities so they can participate and understand the process).
- ☑ Adjust your style of communication according to what is relevant and needed. Do not make assumptions or inappropriate adjustments, for example:
  - ▶ do not speak loudly to a person who is blind
  - ▶ or assume that a person with a physical disability cannot understand or participate and speak to their carer instead of them, etc.

  Work out what is needed and then act accordingly.
- ☑ Where needed, take special care and time to explain things more simply, or repeatedly, or in different ways. Keep testing that the person has understood and checking with them if they would like you to explain it again. Make sure that time is taken throughout the hearing to continuously explain what is happening now, its significance, what is happening next etc and not only at the beginning of the case. Make sure that you also explain or summarise what other court actors have done or said. Allow regular breaks for the person or their interpreter/supporter as needed.

- Consider how the person's disability may interact with the substance or relevant legal tests concerning their case. If the person with a disability is a suspect in a criminal matter, their disability may have bearing on their capacity to stand trial, or their guilt or their level of culpability in sentencing.
- If the person may have an undiagnosed intellectual disability, mental illness or has not been recently assessed, then order that an assessment be conducted by a psychologist/ forensic or other psychiatrist or other relevant expert and filed with the court as early as possible.
- If your jurisdiction does not have capacity to undertake such assessments, you will need to seek other evidence. This could be evidence from regular doctors, other health providers or from family members, neighbours, teachers, or friends who have knowledge of the person and how they have responded in analogous life situations. You will have to decide how much weight to place upon the evidence based on your assessment of the level of expertise, independence and credibility of those who provide it.

Where suspect may have an intellectual disability or mental illness

- [x] A person cannot be tried if they lack sufficient mental or intellectual capacity to understand the proceedings and to make an adequate defence. For some charges the person's capacity to form the requisite level of intent or to engage in decision making will also be relevant. Some questions to consider in assessing competence to stand trial are, does the person have the ability to:
  - form a layperson's understanding of the nature of the charges and the court proceedings;
  - challenge jurors and understand the evidence;
  - decide what defence to offer; and
  - explain his or her version of the facts to counsel and the court.
- [x] If you determine the person does not have capacity to be tried then refer to relevant domestic law on alternative process/care/diversion of people lacking capacity to stand trial. Bear in mind that depending on the laws that apply in your jurisdiction, this can in practice, lead to adverse outcomes for the individuals concerned, who may be subject to detention, for an uncertain period, in prison or in secure hospital facilities—although hopefully most jurisdictions have legislated to divert such people away from the criminal justice system. The risk is that incentives may exist for innocent people to plead (or be advised to plead) guilty, in order to avoid the consequences of unfitness to stand trial.
- [x] Even where the person has legal capacity, faces trial and is found guilty, then evidence of their intellectual disability or mental illness will still be very important in sentencing.

Where victim has intellectual disability or mental illness

- [x] If the person with a disability is a victim, then their disability may also impact on application of relevant legal tests. For example, you may need an expert opinion to help you decide whether a victim had capacity to consent and wider evidence regarding whether or not they did/did not consent to sexual contact in relation to allegations of sexual offences.
- [x] It is important not to make any assumptions which result in excluding, dismissing or reducing the weight given to the evidence provided by people with disabilities unless there is clear medical, expert or other credible evidence for doing so.

Court staff responsibilities

Overview of responsibilities

Court staff make vital contributions towards ensuring that the special human rights protections owed to people with disabilities are are fully observed by the court in any court processes. This includes ensuring that people with disabilities do not experience any discrimination in either the process or the outcome of any court cases they are involved in.

This requires the court to make reasonable accommodations to ensure that people with disabilities can fully participate in court processes as per the recommended actions below.

For further background and guidance see PJST Human Rights Toolkit
https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf
especially Chapter 8

RECOMMENDED ACTIONS

Case Management

- [ ] Ensure that court registry and case management processes are in place to identify people with disabilities at the earliest possible stage, capture data on their cases and then to provide them consistent, reliable, quality support.

- [ ] Ensure there are fields on forms for recording disability needs on standard registry case file documents regarding all case types (civil and criminal):

  - Do any parties in this case have a disability?
    ☐ Yes ☐ No ☐ Don't know
  - What kind of disability/ies?
    ☐ Mobility ☐ Visual ☐ Hearing/Intellectual
  - What kind of special assistance will they need from the court?

    _____

    _____

    _____

- [ ] Ensure there is a colour-coded or other system in place in registry to enable ready identification of cases involving persons with disabilities so special care can be taken with managing these files.

- [ ] Record the person's needs and your responses on the case file.

Planning and Preparation

☑ Ensure that court users with disabilities are given a specific 'point of contact' so they have a consistent person to deal with in liaising with the court and who is responsible for making necessary arrangements for them in advance of their cases to ensure they are not delayed or adjourned due to the court's lack of preparedness. Necessary arrangements may include things like:

- Arranging for a family member/support person to accompany them to court;
- Arranging for person's transportation to and arrival at the court;
- Liaising with the judge/magistrate to make sure they are aware of the person's disability/ies and all arrangements;

For people with hearing or speech impairments

What is needed to enable them to understand and participate in the hearing?

- Do any bookings need to be made for a sign interpreter or other aides?
- Does there need to be permission given by the judge/magistrate for a family member to assist the person with communication?

For people with visual impairments

Ensuring that information about the process has been provided to them beforehand, including reading and explaining to them all relevant written documents beforehand;

- On the day/s of the hearing, accompany them to the courtroom and remain with them throughout the hearing to read to them any relevant documents and to explain who is present, and provide a commentary on what is occurring.
- If a guide dog is coming to court, ensure court staff are aware that guide dogs are permitted.

For people with intellectual impairments

- Checking if they have legal representation and if not, make a referral to legal aid or private lawyer.
- Ensuring all aspects of the process are explained beforehand and throughout the hearing in a way they understand.
- Ensuring that the judge/magistrate is aware of their intellectual disability in advance of the hearing.
- Supporting provision/collection of any medical reports/information requested by the judge/magistrate.

For people with mobility impairments

Ensuring that planning is done regarding allocation of hearing room:

- Is it the closest and easiest one for them to get to?
- Is it accessible to the person? (ie will they be able to manage any stairs?)
- If they are in a wheelchair, is there a ramp?
- Is the court door wide enough to accommodate wheelchairs?
- Is there space for wheelchair users to move around the courtroom?
- Where will a person in a wheelchair sit in the courtroom when they are giving evidence?
- Are court hallways wide and clear of furniture or debris?
- Arranging for bathroom access for the person (this may require creative practical thinking if depending on court infrastructure).

Improve services as your court gains experience

- ☑ **Share your knowledge with other staff**. Work with others to develop court services, systems and information for people with disabilities.
- ☑ **Ask people with disabilities for their feedback** on their experience in court and what the court could do to further improve it and use this feedback to continuously improve court responses.
- ☑ **Develop public information** about the work/processes of the court in formats/medium accessible to people with disabilities. Ensure that such information makes people with disabilities feel welcome and accepted in the Court: that it is their place too and that they have the same right to be protected by the law and to bring their cases and to participate, as anyone else.
- ☑ **All Court staff to be trained** in being able to implement the above checklist and being (more generally) friendly, welcoming and how to offer proactive respectful assistance to people with disabilities and their families.

PACIFIC
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Creating welcoming, inclusive courts

CHECKLIST 6

For Chief Justice
Judge, Magistrate and Court Staff

NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme

AUSTRALIA
FEDERAL COURT OF AUSTRALIA

Purpose Statement and User Guide

This is the last in a series of six Human Rights Checklists designed to support coordinated "best practice" actions to apply human rights in the daily practice of judges, magistrates and court staff. The Checklists provide practical step-by-step guidance for applying relevant human rights standards to particular groups of court users and for making courts more inclusive and welcoming.

Each checklist has separate sections containing guidance for judges/ magistrates and court staff which can be ticked off by the user as each step is taken. While not every recommended action will be attainable for all courts from the outset, Courts are encouraged to also use the checklists as an end-point for guiding ongoing reform of court processes.

The Checklists are designed to be used alongside the PJSI Human Rights Toolkit, (available here **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf**), which provides further background about the human rights standards that the recommended actions in the checklists are based upon. The Checklists are designed to provide general guidance for Pacific court actors and not specific legal advice. Court actors should always ensure that the actions they take are also consistent with national laws and in accordance with the guidance and direction provided by Chief Justices.

Full Series of Human Rights Checklists

- **Checklist 1** Minimising Pre-Trial Detention
- **Checklist 2** When juveniles/children come to court
- **Checklist 3** Judicial visits to places of detention
- **Checklist 4** When victims of family or sexual violence come to court
- **Checklist 5** When people with disabilities come to court
- **Checklist 6** Creating welcoming, inclusive courts

Published in October 2020.

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For Chief Justices to consider

- A court's physical environment conveys strong messages to the public regarding the institution of justice. A well maintained, secured and clean court environment conveys a message of respect and care for the institution of providing justice. When careful thought goes into the functionality and amenity of the facilities for court users, courts can better serve the purpose of providing access to justice, especially for court users who may be particularly vulnerable or have special needs.
- Creating welcoming, inclusive courts is also about making sure that court users feel that the court is 'living its values' of justice, equality and fairness in the way that it operates in practices, including the way people are treated when they come to court.
- All court users should experience a court environment which treats them with respect, dignity, fairness and equality, no matter their background. The work culture and attitudes of all court actors in being helpful, proactive and patient, can go a long way towards creating a welcoming and inclusive environment in the court.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 4

RECOMMENDED ACTIONS

This guide provides recommendations for how create welcoming, inclusive, user-friendly courts in:

1. Planning new/renovated court infrastructure and court environment
2. Maintaining systems for maximising amenity of existing infrastructure.

1 Considerations for planning new/renovated court infrastructure

- ☑ Consult as widely as possible both internally (judges, magistrates, court staff) and externally with diverse court users, (including men, women, people with disabilities, people from remote areas), civil society organisations and police, prosecution and lawyers to ensure a wide range of experiences and suggestions are taken into account.
- ☑ Separate entrance and separated waiting areas for victims and children to prevent their intimidation by the defendant, their family, or the prying curiosity of others. Areas need safe access to bathroom facilities, adequate seating and facilities for younger children (eg. toy box).
- ☑ At least two rooms or private booths right next to the registry desk for court staff to provide confidential assistance to relevant court users (eg. assistance completing Family Protection Applications).

- ☑ Ensure any court holding cell is built with adequate space, ventilation, lighting, accessible bathroom and drinking water facilities, and emergency alert, and close to the separate court entrance and court hearing rooms to minimise public viewing of detainees and minimise the need to move them a lot within the court.
- ☑ Ensure there is a separate, lockable waiting room (but not a cell, and not a facility mixed with adults) for juvenile suspects, with access to bathroom and drinking water.
- ☑ Provide furniture that can be readily re-arranged for a less formal setting for when the court hears cases involving juveniles.
- ☑ At least 3-4 small, sound-proof rooms for lawyers to confidentiality take instructions from their clients.
- ☑ Ensure court room layout is not intimidating to court users: ensure court rooms do not overly elevate or distance the decision maker, ensure witness box is not elevated or intimidating, ensure there is no 'cage' or other enclosure in the court room that by its nature suggests the suspect is guilty.
- ☑ Adequate perimeter fencing and security.
- ☑ Adequate public male and female separated bathrooms and regular cleaning roster/ inspection and supplies of soap, toilet paper etc.
- ☑ Adequate shade, seating, device charging facilities, fixed drinking water fountains and rubbish bins in public areas of the court.
- ☑ Disability access (considering the width of doorways and existence of ramps), and adequate space for wheelchairs to move around in at least some courts, with at least one disability accessible bathroom.

See separate checklist for supporting court users with a disability

- ☑ Information booth located close to the public entrance of the court with space for relevant information court orientation leaflets and pamphlets advertising the support services of relevant organisations (eg. Family Violence Legal Aid Centre, Ombudsman leaflet and complaint form).

- ☑ Good 'info graphic' signage including for court listings, a large sign showing a map of the court facility and highlighting the different locations, and facilities and plenty of notice boards for court information regarding, for example: process for making family protection applications (including the fact that it is free), court waiver criteria and process, posters advertising services the court offers to people with disabilities, posters encouraging people to ask the friendly court staff for assistance, etc.
- ☑ Adequate seating in the registry waiting area with queuing system (can be electronic or as simple as laminated numbers) to ensure users are served in order of arrival not in order of social status.
- ☑ Suggestions and complaints devices/boxes with forms and posters inviting court user feedback and ratings on their experience using the court.

2 Considerations for maintaining systems to enhance experience of court users and customer service systems

As per Court Staff Responsibilities below, appoint senior court staff member with responsibility and modest budget to:

- ☑ Manage small infrastructure projects;
- ☑ Manage public information/feedback projects:
- ☑ Conduct daily inspection of court environment prior to court opening;
- ☑ Manage special arrangements for particular groups of court users (children/juveniles, vulnerable victims/witnesses, people with disabilities etc).

Judge and Magistrate responsibilities

Overview of responsibilities

Judges and Magistrates play vital roles in creating welcoming and inclusive court environments. Checking that the court's physical environment is clean and well maintained for hearings helps to conveys strong messages to the public of respect and care for the institution of providing justice.

Creating welcoming, inclusive courts is about making sure that court users feel that the court is 'living its values' of justice, equality and fairness in the way that it operates in practices, including the way people are treated when they come to court.

All court users should experience a court environment which treats them with respect, dignity, fairness and equality, no matter their background. The work culture and attitudes of judges and magistrates and their roles in supervising court staff to ensure they helpful, proactive and patient in the performance of their duties, can go a long way towards creating a welcoming and inclusive environment in the court.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 4

RECOMMENDED ACTIONS

- ☑ Leading by example with the attitudes and behaviours set out in **Court staff responsibilities**.
- ☑ Be aware of and support court staff in performing their responsibilities below.
- ☑ Being proactive in managing court staff to ensure that the services needed by people in your cases (such as vulnerable victims/witnesses, child/juvenile court users, people with disabilities, people from remote areas etc are planned for in advance, and in place when needed.
- ☑ Following up with senior court staff/Chief Justice if court rooms or facilities require attention
- ☑ Participating in court user feedback system, to achieve continuous improvement in justice services to the public.

Court staff responsibilities

Overview of responsibilities

Court staff play critical roles in creating a welcome, inclusive and dignified court environment.

This involves more than just looking after the physical environment of the court. It's also about making sure that court users feel that the court is 'living its values' of justice, equality and fairness in the way that it operates in practices, including the way people are treated when they come to court.

All court users should experience a court environment which treats them with respect, dignity, fairness and equality, no matter their background. The work culture and attitudes of court staff in offering assistance, being proactive and demonstrating patience in their contact with court users can go a long way towards creating a welcoming and inclusive environment in the court.

For further background and guidance see PJST Human Rights Toolkit **https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf** especially Chapter 4

RECOMMENDED ACTIONS

Court approach to equality and fairness

- ☑ Making everyone in the court house feel of equal importance and value;
- ☑ Treating all court users with dignity, respect and patience in customer service;
- ☑ Not showing favoritism to people staff know/relatives/those with have power or wealth;
- ☑ Making sure people are served in turn and not according to their social status.

Proactively offering assistance

- ☑ Helping with form filling including applications for protection visas;
- ☑ Providing information detailed information in simple, clear language.
- ☑ Providing referral to other available services (like legal aid, women's shelters, etc)
- ☑ Assisting with offering and completing court fee waivers,
- ☑ Attitude of staff: motivated and committed to high quality public service, friendliness, humility and patience.

Observing professional standards

Especially:

- ☑ Confidentiality of court user information;
- ☑ Punctuality and reliability;
- ☑ Consistently maintaining accurate court data and documentation.

Preparing in advance

- ☑ Identifying special needs in cases and preparing in advance to avoid adjournments (eg for women, children, people with disabilities, elderly, people from remote locations, other).

Responsive

- ☑ Seek and act on court user feedback to make improvements,
- ☑ Advertise improved services;
- ☑ Think about impact of court processes on disadvantaged groups and take initiative to help these groups.

Court physical environment

Need for the court environment to be:

- ☑ Safe;
- ☑ Accessible to all;
- ☑ Functional; (ie furniture and equipment);
- ☑ Clean, (including cells, bathrooms, court rooms, waiting areas);
- ☑ Easy to navigate facilities (clear, infographic signage);
- ☑ Public information available (posters, fliers and friendly, helpful staff offering help and answering questions).

Court staff should be allocated responsibility to:

- ☑ Manage small infrastructure projects, such as developing infographic signage, information booth/court information posters, feedback box and collection system;
- ☑ Manage public information/feedback projects:
  - Develop posters/fliers explaining court services,(eg help with completing protection applications, help for people with disabilities, fee waivers, contact details for legal aid etc.);
  - Regular collection of court user feedback (from feedback box or simple survey provided in person).
- ☑ Conduct daily inspection of court environment prior to court opening and ensure that:
  - All courts, waiting areas, cells and bathrooms are clean;
  - Court security in place;
  - Re-arrangement of furniture prior to day when child/juvenile cases are scheduled.
- ☑ Implement practical solutions for court users needing:
  - Private way to enter court precinct;
  - Private place to wait for their case to be heard.

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Human Rights Toolkit

PJSI Toolkits are available on: http://www.fedcourt.gov.au/pjsi/resources/toolkits

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Gender and Family Violence Toolkit

Revised June 2021

NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme

AUSTRALIA

FEDERAL COURT OF AUSTRALIA

Toolkits are evolving and changes may be made in future versions. For the latest version of the Toolkits refer to the website - **http://www.fedcourt.gov.au/pjsi/resources/toolkits**

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstances.

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PJSI Toolkits

Introduction

The Pacific Judicial Strengthening Initiative (PJSI) was launched in June 2016 in support of developing more accessible, just, efficient and responsive court services in Pacific Island Countries (PICs). These activities follow on from the Pacific Judicial Development Program (PJDP) and endeavour to build fairer societies across the Pacific.

Toolkits

PJSI aims to continue ongoing development of courts in the region beyond the toolkits already launched under PJDP. These toolkits provide support to partner courts to help aid implementation of their development activities at a local level, by providing information and practical guidance. Toolkits produced to date include:

- Access to Justice Assessment Toolkit
- Annual Court Reporting Toolkit
- Enabling Rights and Unrepresented Litigants Toolkit
- Family Violence/Youth Justice Workshops Toolkit
- Gender and Family Violence Toolkit
- Human Rights Toolkit
- Judges' Orientation Toolkit
- Judicial Complaints Handling Toolkit
- Judicial Conduct Toolkit
- Judicial Decision-making Toolkit
- Judicial Mentoring Toolkit
- Judicial Orientation Session Planning Toolkit
- National Judicial Development Committees Toolkit
- Project Management Toolkit
- Public Information Toolkit
- Reducing Backlog and Delay Toolkit
- Remote Court Proceedings Toolkit
- Training of Trainers
- Time Goals Toolkit
- Efficiency Toolkit

These toolkits are designed to support change by promoting the local use, management, ownership and sustainability of judicial development in PICs across the region. By developing and making available these resources, PJSI aims to build local capacity to enable partner courts to address local needs and reduce reliance on external donor and adviser support.

In response to evolving priorities of partner courts, the PJSI has expanded its areas of activities to include gender and family rights focused areas. The addition of this new toolkit: **Gender and Family Violence Toolkit** aims to address the responsibility of the Court in the community regarding family violence and in particular physical and sexual violence. This toolkit provides practical suggestions and methods to assist partner courts in assessing how accessible and responsive their court services are and how to improve efforts and track progress through implementing action plans. Beyond practicalities, this toolkit highlights the importance of community awareness, the need for accountability of perpetrators and the importance of appropriate response to victims of violence.

Use and Support

These toolkits are available online for the use of partner courts. We hope that partner courts will use these toolkits as/when required. Should you need any additional assistance, please contact us at: **pjsi@fedcourt.gov.au**

Your feedback

We also invite partner courts to provide feedback and suggestions for continual improvement.

Dr. Livingston Armytage

Technical Director, Pacific Judicial Strengthening Initiative, June 2021

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Additional Documentation

Abbreviations

ADB	Asian Development Bank
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CJs	Chief Justices
CRoC	Covenant on the Rights of the Child
CSOs	Civil Society Organisations
EPPSO	Economic Policy Planning and Statistics Office
FCA	Federal Court of Australia
FGDs	Focus Group Discussions
FSM	Federated States of Micronesia
GBV	Gender Based Violence
GFV	Gender and Family Violence
HIES	Household Income and Expenditure Survey
HIV	Human Immunodeficiency Virus
ICAAD	International Center for Advocates Against Discrimination
JDLs	Juveniles Deprived of their Liberty
LJF	Law and Justice Foundation
NGOs	Non-government Organisations
NSW	New South Wales
NZ MFAT	New Zealand Ministry of Foreign Affairs and Trade
PACLII	Pacific Islands Legal Information Institute
PIC	Pacific Island Country
PJDP	Pacific Judicial Development Programme
PJSI	Pacific Judicial Strengthening Initiative ('Initiative')
PNG	Papua New Guinea
RAMSIs	Regional Assistance Mission to Solomon Islands
RRRT	Regional Rights Resource Team
SOPs	Standard Operating Procedures
UNDP	United Nationals Development Programme
UNFPA	United Nations Population Fund
UNIFEM	United Nationals Development Fund for Women
US	United States
VAW	Violence Against Women

1 Introduction

1.1 Violence against women: Why does it matter?

Violence against women, both in and outside of the home, is a global problem. Although the most obvious forms of violence against women are physical and sexual violence, violence against women can also involve psychological (such as controlling, humiliating or isolating a woman) or economic (denying access to or control over resources) abuse. Many types of violence against women also affect girls. Throughout the world, the most common form of violence against women is intimate partner violence (coercive acts performed without a woman's consent by a current or former intimate partner), which is usually referred to as family or domestic violence in the Pacific.

Violence against women is both a cause and consequence of gender inequality. It is sometimes referred to as gender-based violence because the acts of violence are committed against women *expressly because they are women.* Because family violence is gendered in nature, the overwhelming majority of victims are women and children, and the majority of perpetrators are men. The gendered nature of domestic violence is evident in police statistics and national prevalence surveys across the Pacific. Acts of gender-based violence and family violence are also committed against men and boys but at far lower rates than violence against women and girls. However, the perpetrators of this violence against men and boy are also most commonly men.

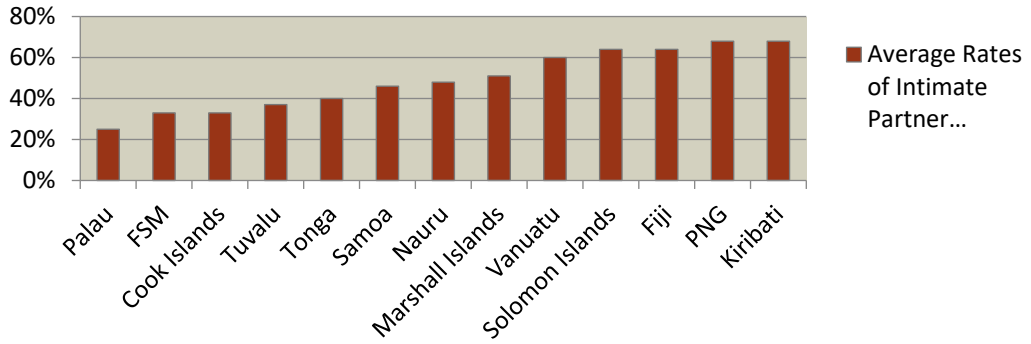
Family violence is one of the most common forms of violence against women. Family violence is caused by gender inequality which results from unequal power relations between men and women across all aspects of society, including in intimate partner relationships. When there are unequal power relations between a man and a woman is it highly likely for a man to use violence against his partner. The use of violence is a choice made by the perpetrator. Therefore, victims cannot be blamed for causing family violence in any situation.

Surveys show that in some Pacific Islands' countries women experience more family violence than women in any other part of the world. Globally, nearly one third (30%) of all women who have been in a relationship have experienced physical and/or sexual violence by their intimate partner.[1] The only country in the Pacific with a lower lifetime prevalence rate than the global average is Palau (25%), with all other Pacific Islands countries reporting higher than average rates of intimate partner violence (FSM and Cook Islands report only slightly higher than average rates, being 33% in each country), including Tuvalu (37%), Tonga (40%), Samoa (46%), Nauru (48%), Marshall Islands (51%), Vanuatu (60%), and, Solomon Islands and Fiji (64%). Alarmingly, PNG and Kiribati have the highest lifetime prevalence rates in the world, with 68% of women in each country having experienced physical or sexual violence by an intimate partner in their lifetime.[2]

[1] WHO, 2013, *Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence*, available online at: http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/

[2] UNFPA, kNOwVAWdata, *2016 Regional Snapshot*. Bangkok, UNFPA.

Average Rates of Intimate Partner Violence



This has many consequences. At a country level, violence against women costs the government money (mainly for legal and health services) and stops women from doing paid-work, which prevents them from contributing to the economy. A recent study undertaken in Fiji, for example, found that domestic violence costs Fiji approximately $498 million per year.[3] It also stops women from participating in political life, from getting involved in community activities and sends a message to children that it is ok to use violence against their mothers, aunties, grandmothers and sisters. But the consequences are greatest at the family and individual level. Families are torn apart by men's use of violence against women. Women are physically and emotionally damaged. Sometimes children are physically harmed too, but even when they are not, seeing their father hurt or control their mother destroys their sense of safety, makes them feel upset and models behaviour that they may copy later in their own lives.

Violence against women is a form of discrimination but not all women experience it in the same way. Other forms of discrimination or types of disadvantage can make certain groups of women more likely to experience violence, or make it harder for such women to access services. For example, women with a disability experience higher rates of violence than women without a disability and they find it harder to access support services. Similarly, older women, girls and women living in rural areas face specific challenges when attempting to interact with the formal justice system.

Violence against women is a human rights violation and a crime under many local laws.[4] Under international law, states have clear obligations to address violence against women, including obligations to "exercise due diligence to prevent acts of violence against women; to investigate such acts and prosecute and punish perpetrators; and to provide redress and relief to victims."[5] Most countries in the Pacific have ratified the *Convention on the Elimination of All forms of Discrimination Against Women* (CEDAW)[6], and a number of regional standards show that Pacific Islands leaders are committed to acting in accordance with international laws that support women's human rights. These include the *Denauru Declaration on Human Rights and Good Governance* (2015) and the earlier *Pacific Island Judges Declaration on Gender Equality* (1997). In recent years, many countries have developed or amended legislation to offer better protection to women and children who have experienced family or sexual violence, which makes it clear to people that violence against women is against the law.

Despite increasingly strong local legal frameworks, however, violence against women continues to be viewed as acceptable by many people in the Pacific. Perhaps more than any other crime, violence against women (particularly when enacted in a domestic context) poses a significant tension between

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3 Riwali, L., 2016, 'Domestic violence impacts economy', *The Fiji Times Online*, 16 June, available online at: http://www.fijitimes.com/story.aspx?id=358233

4 For a detailed explanation of human rights, including women's human rights, please refer to the PJSI Toolkit, *Human Rights in the Practice of Pacific Courts: A Toolkit*, 2017

5 UN, 2012, *Handbook for National Action Plans on Violence Against Women*, pg. 1, available online at: http://www.un.org/womenwatch/daw/vaw/handbook-for-nap-on-vaw.pdf

6 With the exception of Tonga and Palau

customary/traditional values, religious beliefs and the law, largely because it is so deeply founded in long-held ideas about the roles of men and women and the behaviours that are expected of them.

Yet we know that societies and their traditions change. Because change is possible, we know that communities can replace values and behaviours that no longer serve them well with values that will help them grow, such as non-acceptance of violence and gender equality. With the authority of the law behind them, judicial officers – be they law-trained or lay – are amongst the most powerful champions of progressive change. You therefore play a pivotal role in shaping attitudes to violence against women in your communities, your countries and the region as a whole.

1.2 What is the role of the courts in addressing violence against women?

To stop or lessen violence against women, we need to address it from different angles. First, we need to try to prevent it from occurring in the first place. Second, we need to make sure that when it does happen, we respond to it appropriately. All members of society have a role to play in addressing violence against women, although people working in the justice system have both informal (as members of society) and formal (as judicial officers or court officers) responsibilities, which means they play a powerful role in tackling the problem.

In collaboration with other government agencies, civil society, the church and communities, the court plays an important role in preventing violence against women, in addition to its more obvious role as a responder to violence against women. These two roles are interrelated.

Some important ways in which the court can contribute to the prevention of violence against women include:

- community awareness raising – public education about the law and the consequences of breaking it, which can be done through community forums and meetings, school visits, radio and television, plays, and written information (e.g. in the newspaper, signs and pamphlets); and
- holding perpetrators accountable – issuing sentences and articulating sentencings remarks which clearly demonstrate that there are harsh consequences for violence against women, which will deter others from offending (and recommending rehabilitation where appropriate).

As a responder to violence against women, the court has a responsibility to make its services accessible, safe and fair. There are many ways of fulfilling this duty, including by:

- analysing the barriers to court accessibility (which will be different for different groups of people, such as women, rural people, people with a disability) and doing things that remove or minimize those barriers (e.g. awareness raising so that people understand the law and their rights, court fee waivers, increased circuits outside of urban centres);

- assessing the safety (both physical and psychological) of courts and doing things to make them as safe as possible for victims,[7] for example by having secure waiting rooms, security guards, and different ways of providing evidence so that victims don't need to interact with offenders;
- working collaboratively with other service providers (government and non-government) so that victims receive proper information and support; and
- providing refresher judicial reasoning training to judicial officers, which explores the role of bias in decision making, so that judges and magistrates are champions of equality and less inclined to allow gender stereotypes and discriminatory cultural and religious beliefs to negatively impact outcomes for victims.

Collecting data is an important part of both preventing and responding to violence against women, as it allows us to understand what is going on at a given point in time (for example how many victims are using the court system, what kind of sentences offenders are receiving) and to monitor trends, which helps continual improvement efforts. Publicly providing court data on violence against women, through for example, annual court reports, is an effective way of demonstrating not only a commitment to improvement, but also a commitment to public accountability and transparency.

1.3 What is the purpose of this toolkit?

As the majority of Pacific Islands Constitutions prohibit discrimination on the grounds of factors such as race, sex and age, and international human rights treaties emphasise the right of all people to be treated equally, improved court responses to violence against women are integral to broader court efforts to uphold (and hopefully enliven) constitutional equality.

This toolkit is designed to help courts to measurably improve the accessibility and responsiveness of their services to the victims of violence against women, resulting in improved victim satisfaction with court and justice outcomes according to law.

The toolkit will help courts to achieve this goal in four ways:

1. It outlines good practice in the provision of court services to the victims of violence against women;
2. It provides courts with a simple method to assess how accessible and responsive they are to the victims of violence against women;
3. It describes how to develop a violence against women action plan to help courts focus their improvement efforts and demonstrate progress over time;
4. It suggests a range of practical things that courts can do to make their services more accessible and responsive to the victims of violence against women, for inclusion in their plans.

[7] Contemporary good practice refers to victims as victim/survivors because many victim/survivors reject their categorisation as victims. For ease of reading the term victim is used throughout this toolkit, although it should be taken to read victim/survivor in recognition of the strength and resilience shown by women who have suffered from violence.

The usefulness of this toolkit will only be realised if a concerted effort is made to enhance data collection (as outlined in Section 5), as this will enable you to understand what is and isn't working.

While recognising that different forms of violence against women are interrelated, due to the alarming prevalence of domestic/family violence throughout the region, this toolkit focusses primarily upon family violence. More specifically, it focusses upon family violence involving physical and sexual violence, as it is these cases (rather than cases involving only economic or psychological abuse) that are most likely to come before the courts. This does not suggest that other forms of violence against women are of lesser concern, but rather, it is intended to ensure that our efforts are focussed upon the most prevalent form of violence against women in our region. It is, however, anticipated that improvements arising from implementation of this toolkit will benefit women court users more broadly, including women who experience other forms of violence from men.

Use of the term victim throughout this toolkit is consistent with international good practice in the provision of services, including court services, to the victims of family violence. It does not imply that a case has been decided, nor that a pro-victim bias ought to influence judicial decision making.

When using this toolkit, it will be useful to refer to other PJSI toolkits to gain a more detailed understanding of specific information and processes. Where relevant, these toolkits will be referred to throughout. However, for general purposes, the most relevant toolkits to which you can refer are the: *Family Violence and Youth Justice Project Workshop Toolkit* (2014); *Access to Justice Assessment Toolkit* (2014); *Annual Court Reporting Toolkit* (2014); and, the *Human Rights Toolkit* (2017).

1.4 Who should use it and how?

To improve the accessibility and responsiveness of your court to the victims of family violence, all court officers must be involved. However, it is suggested that you start the journey towards improvements in this area with a series of meetings and/or small workshops led by the Chief Justice and select senior staff. It is important that all relevant internal stakeholders are involved in these meetings/workshops so that a sense of shared ownership is developed and people with direct responsibility for implementing initiatives can provide a realistic sense of opportunities and challenges.

It may be useful to:

- host an initial meeting with judicial and court officers, explaining the importance of improving services for the victims of family violence, outlining what good practice looks like and explaining the process your court will use to improve its services (this discussion can be guided by sections 1 – 2 of this toolkit);
- allocate a full day for the self-assessment activity (section 3 of this toolkit), circulating the self-assessment tool beforehand so that participants can gather any necessary data before the activity;
- conduct a full day follow-up activity to discuss the findings of the self-assessment and the relevance of suggested initiatives for improvement, as outlined in section 4 of this toolkit; and
- spend a day commencing work on your court's family violence plan so that key stakeholders are able to jointly develop objectives, discuss resource issues and commit to implementation and monitoring.

It is suggested that these activities be conducted within a maximum timeframe of one month so that momentum is not lost and the journey towards improvement can begin as soon as possible.

It is strongly recommended that prior to implementation of this toolkit, judicial and court officers be exposed to contemporary thinking about gender-based violence. Ideally, such exposure would involve training that not only familiarises them with basic concepts about gender equality and violence against women, but more specifically, training which challenges their beliefs about the roles of men and women in society and the dynamics underpinning violence against women. It is important that this

training be provided by trainers with a deep understanding of gender inequality and gender-based violence, and a strong personal belief that violence against women is unacceptable. Training to address and challenge mindsets on gender inequality and violence against women are critical to strengthening the courts understanding of family violence, including analysis on the root cause and common excuses that allow impunity for family violence. There is a wide network of such trainers across the Pacific, most typically working within non-government organisations such as women's crisis centres. Careful consideration should be made prior to selecting trainers and organisations who can provide this training, as it requires specific technical skills and expertise.

2 What does a good court response to violence against women look like?

A number of important documents help us to understand what a good court response to family violence should look like. These documents range from international human rights treaties through to practical guidance tools.[8] Collectively, such documents provide us with guidance on both the general principles underlying the provision of court services to all users, as well as more specific guidance on the particular needs of court users who have experienced family and other forms of violence against women. The Quick Reference Guide for Cases Involving Women, Girls and Family/Sexual Violence from the PJSI Human Rights Toolkit (2017) summarises relevant international, regional and domestic standards, and is reproduced for your convenience at Annexe A.

Based upon tested international practices, good court responses to the victims of family violence share a number of characteristics, namely:

- they contribute to harm prevention efforts;
- they are victim-centred, with a specific focus upon accessibility, safety and fairness;
- they hold perpetrators accountable; and
- they are collaborative.

These characteristics are explored below and will form the basis of your self-assessment.

[8] See for example: Universal Declaration on Human Rights, available online at: http://www.un.org/en/universal-declaration-human-rights/index.html; International Covenant on Civil and Political Rights, available online at: http://legal.un.org/avl/ha/iccpr/iccpr.html; Convention on the Elimination on All Forms of Discrimination Against Women, available online at: http://www.un.org/womenwatch/daw/cedaw/; International Framework for Court Excellence, available online at: http://www.courtexcellence.com/Resources/The-Framework.aspx; UN Handbook for National Action Plans on Violence Against Women, available online at: http://www.un.org/womenwatch/daw/vaw/handbook-for-nap-on-vaw.pdf; Essential Services Package for Women and Girls Subject to Violence: Core Elements and Quality Guidelines, available online at: http://www.unwomen.org/en/digital-library/publications/2015/12/essential-services-package-for-women-and-girls-subject-to-violence; UNODC, Strengthening Crime Prevention and Criminal Justice Responses to Violence Against Women, available online at: https://www.unodc.org/documents/justice-and-prison-reform/Strengthening_Crime_Prevention_and_Criminal_Justice_Responses_to_Violence_against_Women.pdf

2.1 Contributing to harm prevention efforts (prevention)

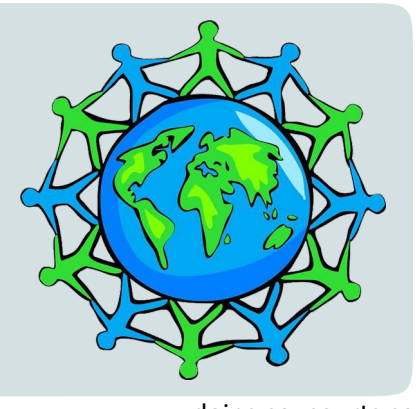
While the court is usually a responder to family violence, it also plays an important role in prevention.

Efforts to prevent violence against women are generally categorized into three areas: primary prevention, secondary prevention, and tertiary prevention. Often these three categories are used interchangeably, which often means that the terms primary prevention or prevention is used to define prevention work more broadly. Knowing the different types of prevention work in the Pacific will assist the courts to understand their role in preventing violence against women.

Primary prevention is working with groups and communities in general, where the majority of individuals have not witnessed, experienced or perpetrated family violence, to prevent the underlying cause of violence before it happens. This means understanding and addressing gender inequality as the root cause of family violence. Primary prevention strategies aim to challenge the attitudes, practices and behaviours that perpetuate gender inequality and family violence, directly targeting different groups of people. Given the complexities of family violence, it is important that primary prevention strategies involve a broad range of stakeholders, not only from government but also from civil society, the churches and the community. However, given the national prevalence for family violence is higher than the global average, it is rare that communities in the Pacific have not had prior exposure to family violence, this means opportunities for primary prevention interventions are also rare.

Secondary prevention works with what are considered high-risk groups that are likely to be exposed to or perpetrate family violence. For example, highly masculine groups like male dominated sports, boys' schools or the disciplined forces. In Pacific communities where the majority of people are likely to have been exposed to family violence in some way, most generalised prevention strategies need to adopt secondary prevention techniques which take this into account.

Tertiary prevention responds to family violence after it has occurred to reduce the harm towards victims and the likelihood of offenders reoffending. This includes how the Courts hear cases of family violence and hold perpetrators accountable for committing violence against women. Courts play an important role in shaping community attitudes and practices relating to family violence. They play a strong *normative role* in declaring the correct way of doing things, in keeping with the values and rules embodied in both local and international law. Because of this role, courts are amongst the most powerful drivers of social change – because they act with the authority of the law, they can publicly challenge attitudes and behaviours that are inconsistent with gender equality and women's right to live free from violence. This normative role is played not only when making judgements, but also when engaging with the media and the community more broadly (through for example awareness raising activities undertaken in collaboration with civil society organisations and other government agencies, and court user forums), noting that members of the judiciary need to avoid public perceptions of bias. Tertiary prevention also involves the effective implementation of the law, which contributes to changing social norms that excuse violence against women. In doing so, courts contribute to the broader work to prevent violence against women.



Courts can also be positive role models by addressing the attitudes and behaviours towards women of their own staff, ensuring that employment decisions are not made in a discriminatory way and making sure that inclusive language is used both verbally and in writing.

Engaging men and boys in efforts to prevent violence against women is becoming an increasing focus of prevention. Globally, men and boys are being encouraged to examine their assumptions about gender roles and masculinity through training and long-term behavioural change programs, which are being implemented in a variety of settings ranging from schools through to sporting clubs.

Engaging men as public "agents of change", through initiatives such as the Pacific Regional Network Against Violence Against Women, Male Advocacy for Women's Human Rights, is a powerful means of starting a conversation with the community about gender roles, gender equality and non-violent ways of being masculine, although it is important to ensure that such programs adopt a women's rights perspective. Men in powerful positions, such as Chief Justices, judges and magistrates, have a particularly significant role to play in challenging gender stereotypes by publically condemning violence against women, role-modelling positive behaviours (e.g. respect for women, equal treatment of their own staff), by encouraging others to speak out too, and ultimately, through their judgements on cases involving violence against women.

2.2 Focussing on the victim

Best practice responses to violence against women are victim-centred, with a focus upon victim rights and victim empowerment. They are *accessible*, *safe* and *fair*.

Groups of people interact with the legal system in different ways, depending on a variety of factors such as: knowledge of the law and their rights; geographic location; physical ability; economic capacity; and, fear of negative repercussions. As a group, collectively women– as compared to men - are disadvantaged when attempting to engage with the legal system, due to the fact that they have: lower levels of literacy (less knowledge of their rights and find court processes, such as filling out forms, more difficult); less control over material resources and lower levels of participation in the paid workforce (less ability to pay court fees); limited access to decision making; and, lower levels of mobility and specific safety needs due to the widespread prevalence of violence against them. Yet not all women are the same, with some facing additional burdens (due to factors such as age, socio-economic status and geographic location), when compared to other women. Unless such barriers are addressed, women will continue to have inadequate and unequal access to the legal system.

Access to courts services is impacted during emergencies, humanitarian crisis, disasters, pandemics and political upheavals. During these events', allocation of government resources and government priorities are often redirected. There may be temporary restrictions placed on freedom of movement and services, like courts or health services, may be limited. A good court response should ensure that it has protocols established where victims of family violence can continue to access its services should these situations arise. Undue socio-economic hardship, forced relocation, residing in temporary shelters, loss of employment, stress and anxiety are often used as excuses by perpetrators to further acts of violence against women. Restrictions to freedom of movement are also used by offenders to further control victims. For these reasons, it is important for the courts to remain accessible during these situations, especially for family violence protection orders and breaches. It is important to understand the dynamics of family violence in these situations and offenders' behaviours and controlling tactics while acknowledging the root cause of family violence remains unchanged.

It is important that courts help victims feel safe throughout the legal process. Victims often hold on to fear as a result of violence against them. Furthermore, women who have experienced family violence frequently fear that their husbands/partners will subject them to further violence because they are angry that legal action has been taken against them or because their partners have attempted to end the abusive relationship. In cases of family violence, "…it is particularly important that the safety of women is prioritized over perceived social or cultural concerns, such as maintenance of marriage or the family unit, and that any children in the care of women escaping violence are similarly protected and supported."[9]

The courts can help women to feel safe by providing court security, special safe rooms for them to wait in before court and in some cases, different ways of providing evidence (e.g. via video or from behind a screen/curtain) so that they don't have to encounter the perpetrator in person. The court can also develop and implement procedures where areas around the court can be restricted to victims only. It is also important to be aware of the need to promote the victim's psychological safety, which can be done by ensuring that both judicial and court officers treat the victim with respect, by making sure that the legal process allows her to adequately tell her story and by making sure that victims have access to trained support people, or advocates, who can accompany them through the process and provide independent advice before decisions are made.

If the victim or perpetrator of family violence is a child, they will have very specific needs. A comprehensive overview of the ways in which to deal with cases involving children is provided in the Human Rights Toolkit (2017) and is reproduced for your convenience at Annexe B. It is important to recognise that children under the age of 18 are at a different stage of psychological development to adults and thus have different emotional and safety needs when interacting with the formal legal system. This makes them additionally vulnerable but it is still important to enable them to fully participate in the court process. Using age appropriate language and making proceedings as informal as possible will assist children to participate and express their views.

In addition to treating victims with respect, courts are obliged to ensure that victims (and perpetrators) receive fair treatment before the law. Fairness can be promoted by understanding the power relations between men and women and the dynamics and consequences of family violence.

For example, it is important to understand that many female victims of family violence:

- do not have an income, or might not be in control of their income;
- might not have safe shelter during court proceedings;
- are primary carers of their children;
- likely to have experienced many forms of coercive control over an extended period of time;
- do not receive support from the community.
- might be subjected to threats and intimidation by their partner's family; and
- may be stigmatised and isolated from their community or faith-based group.

[9] UN, 2012, *Handbook for National Action Plans on Violence Against Women*, pg. 44, available online at: http://www.un.org/womenwatch/daw/vaw/handbook-for-nap-on-vaw.pdf

One of the greatest barriers to fairness before the law is *bias*, which is often unconscious (sometimes called implicit bias). All human beings are biased, including judges. Bias is a result of our life experiences and the ways in which we were raised by our families. Members of the judiciary might have been exposed to family violence in their homes as children and as adults they have might have perpetrated it or suffered from it. Bias may also be embedded in prevalent cultural values or religious teachings. It is impossible to get rid of bias but recognising it helps us to ensure that we make fair decisions.

When we allow bias to play a role in our decisions, we are acting in a discriminatory way. That is, we are unjustly treating people differently because of groups that they belong to. For example, we often treat men and women differently, and discriminate against disabled people. In countries where there are strong divisions between different ethnic or religious groups, fair decision making can be compromised by treating people from one group better than those from another group. This contravenes not only international human rights treaties, but also the majority of Pacific Islands Constitutions.

Despite these legal frameworks, however, discrimination against certain groups continues, including against women. Unfortunately, women face discrimination at every step of the legal system. Women who have experienced family violence are often turned away by police, who tell them to resolve it at home, or excuse it on the basis of customary practices that characterise women as their husband's property. Once in court, women often continue to be discriminated against by decision makers who hold biased views on the rights and roles of men and women, who take factors such as "customary reconciliation" in to account to mitigate sentences, or who question why women did not take measures to prevent the violence against them, thereby blaming them.

Courts can positively influence how culture is practised by not accepting practices that tolerate violence against women. For example, some communities may think that a husband is entitled to have sex with his wife whenever he wants to. Condemning marital rape and sentencing convicted perpetrators sends a message to the community that women have the right to say no to sex, even with their husbands or partners. It is also important to recognise that cultural practices are sometimes misinterpreted. For instance, reconciliation in most traditional settings was used to heal the rift between communities or families. It did not excuse the wrong that had been committed. Most often in the past individuals were held accountable for their actions despite reconciliation. It is important to remember these dynamics.

When customs are used by perpetrators or their representatives to minimize or tolerate violence against women, the Court can refer to counter arguments that show customary non-acceptance of violence against women, including the fact that the consequences for perpetrators of violence against women were often fatal. Courts are encouraged to refer to existing case law within its jurisdiction that discourages these harmful practices. So too, while women are often blamed for sexual violence against them because of the way in which they dress, it can be highlighted that traditional dress often involved limited clothing and that this was not used as a justification for raping women.

Courts cannot uphold women's right to equality before the law without tackling the role that bias plays in decision making, including bias arising from customary beliefs and practices that conflict with the law.

2.3 Holding perpetrators accountable

Best practice responses to violence against women are victim-centred, with a focus upon victim rights and victim empowerment. They are *accessible*, *safe* and *fair*.

Most perpetrators of violence against women, particularly family violence, do not face any legal consequences. When they do, as highlighted through a recent analysis of Pacific Islands sentencing decisions undertaken by the *International Center for Advocates Against Discrimination* (ICAAD), the sanctions they receive are generally low and do not reflect the gravity of the crime committed or its impact on the victim.[10] This sends a message to society that violence against women is not taken seriously, or that a number of excuses can be provided for it. Such excuses frequently include customary beliefs or practices that discriminate against women, gender stereotypes and certain myths, for example "rape myths" that hold women accountable for violence against them (e.g. they were drunk, they were wearing a short skirt). These myths not only excuse men's choices to perpetrate violence against women, but they place blame on female victims and make them responsible for the violence they have suffered.

In addition to sanctions that don't reflect the gravity of violence against women, the reparations and remedies that victims receive rarely reflect the seriousness of the crimes committed against them. This makes it difficult for victims to move on and heal, physically, psychologically and economically. In the absence of acknowledgement that suffering has occurred, victims often struggle to overcome emotional distress, making it hard for them to parent, enjoy positive social relationships or participate in the workforce. Furthermore, inadequate financial reparation – for example for costs incurred as part of the court process or medical expenses – places an additional burden upon victims, who have already experienced harm.

Interactions with the formal legal system – including both police and the courts – are often the only point at which men who have been violent towards their partners are held accountable. The Court is often the first place in which perpetrators are directly told that what they have done is wrong and illegal. It is therefore important that messages are communicated clearly and that no blame is attributed to the victim, as this can allow perpetrators to excuse their own behaviour. Perpetrators must be clearly told that the Court takes violence against women seriously and that further abuse will not be tolerated. Where available, rehabilitation is recommended, particularly that which actively seeks to address unacceptable perpetrator beliefs and attitudes (which underpin violence against women). When making referrals to rehabilitate offenders as conditions to an order or part of sentencing, careful consideration must be made in selecting which service or organisation that can provide this intervention. In many countries in the Pacific, these interventions are not available. Perpetrator rehabilitation programs are complex and high risk requiring specific expertise on men's violence against women. Program implementer must have the technical skills to identify manipulation tactics used by perpetrators to deflect responsibility or show change of behaviours that are not genuine. The Australia Outcome Standards for programs working to rehabilitate offenders of family violence include six minimum criteria:

- Women and children's safety are prioritized.
- Perpetrators receive the correct type of intervention.
- Perpetrators face justice and legal consequences.
- Programs address behaviours and attitudes on family violence.
- Programs are based on established evidence on what works to change behaviours.
- Facilitators have significant expertise on gender inequality, discrimination against women, power relations, patriarchy and violence against women.

[10] ICAAD, 2015, *An Analysis of Judicial Sentencing Practices in Sexual and Gender-Based Violence Cases in the Pacific Island Region*, available online at: https://icaad.ngo/womens-rights/promote-access-to-justice/combating-vaw-in-pics-reports/an-analysis-of-judicial-sentencing-practices-in-sexual-gender-based-violence-sgbv-cases-in-the-pacific-island-region-pics/

A summary explaining the six minimum standards is available in the Toolkit Additional Documentation Annexure G.

While physical violence is a common form of family violence which is more visible, there are other behaviours used by perpetrators to impose power and control over victims. The Power and Control Wheel, which can be found in the Toolkit Additional Documentation Annexure H, was developed to illustrate different forms of abuse and control that perpetrators often use in addition to physical or sexual violence. These behaviours are harmful towards victims and perpetrators should be held accountable for these actions. The Equality and Respect Wheel, which can be found in the Toolkit Additional Documentation Annexure I, portrays alternative behaviours that are respectful and promote equality. These are positive attitudes and nonviolent behaviours that the courts can highlight and emphasis to perpetrators.

Good court responses to family violence actively address these common weaknesses in practice (including policies and processes), primarily through judicial education and increased scrutiny of judgements.

2.4 Collaborating with others

Good court responses to the victims of family violence are always undertaken in collaboration with others.

As victims are likely to interact with multiple service providers, as well as non-government organisations, churches and customary authorities, it is important that service providers (such as the courts, police and hospitals) record and readily share information (where appropriate victim consent/authorisation is given), co-operate in the interests of the victim, and collectively treat victims with respect and dignity.

This requires courts to:

- maintain an awareness of services and people that can offer some form of assistance to victims (be it a justice sector agency, a counselling service, a health facility or a safe place);
- keep up to date contact details of relevant services and people so that victims can be quickly referred to them;
- have formal referral processes in place (if necessary) so that responsibilities are clearly understood by all;
- have clear information sharing arrangements, which prioritise victim confidentiality; and
- facilitate dialogue with other agencies, organisations and people so that relationships are developed and collaboration occurs.

Given that many people in the Pacific rely upon customary practices to address family violence (as they are more accessible than the formal legal system), it is important that these non-legal responses also treat victims fairly. This principle is reflected in a number of Pacific Constitutions, which disallow the use of customary law where it conflicts with constitutional rights, such as the right to live free from discrimination. Some (not all) customary practices are based upon beliefs that support the dominance of men over women, or uphold the right of a man to "discipline" his wife if she doesn't fulfil certain roles. In such contexts, women are not "equal" participants in processes such as mediation, and the remedies that are offered (such as

compensation) rarely benefit them directly. Aspects of culture and interpretations of religion that promote justice, equal dignity and participation of all persons, including women can be used as a counter argument to perceptions that condone violence against women and reinforce gender inequality.

As custom and tradition change over time, the courts have an important role to play in influencing customary practices and championing changing social values, so that they more closely reflect women's human rights. This can be done in very practical ways, including by setting guidelines for customary/traditional and non-formal justice practitioners about how to deal with family violence cases.

3 Assessing current practices: What to ask and how to do it

In order to increase the accessibility and responsiveness of courts to the victims of family violence, it is important to establish a baseline so that the strengths and weaknesses of current approaches can be understood. This will enable your court to plan for improvement and over time, allow you to measure and share information about your improvements with the public. A simple way of establishing a baseline is outlined below.

3.1 Self-assessment tool

Like other self-assessment tools, such as the Court Excellence Framework, the attached self-assessment tool (Annexe C) is intended to provide the basis of a continuous improvement approach. The self-assessment tool is based upon the outline of good court responses to family violence in Section Two of this toolkit.

It will allow you to assess:

- whether you are undertaking harm prevention activities;
- how victim-centred your approach is, as demonstrated by how accessible your court is, how safe your court is and how fair the outcomes women receive are;
- whether you are holding perpetrators accountable for their wrongs via appropriate sentences and reparations for victims; and
- whether you are collaborating with others.

The self-assessment tool should be completed by a wide range of internal stakeholders so that a comprehensive view of current strengths and weaknesses can be developed. That said, it is important that the tool is used by people who have the knowledge required to provide reasonable responses, rather than personal judgements based on minimal information.

Once completed, the self-assessment tool provides you with a baseline. It will tell you where you are investing time and effort. This information is best combined with information obtained from external stakeholders, as internal and external views often differ. These findings provide a useful starting point from which to plan your journey towards measurably improved accessibility and responsiveness of your services to the victims of family violence.

4 Continuous improvement: developing a plan

The famous saying, "failing to plan is planning to fail", is particularly true when complex changes are being made, or when difficult issues are being tackled. As we have seen, good court responses to violence against women require attention to a wide range of issues. Drawing upon your self-assessment findings, you will have identified areas where your court is doing well and areas where improvement is needed. These findings form the basis of your plan.

It is important to establish a realistic plan "life" so that the plan remains relevant to the work of the court, people stay motivated and initiatives can be fully implemented, resulting in a sense of achievement. It is useful to connect your family violence plan to other relevant plans, be they court plans such as strategic or corporate plans, or broader justice sector or country plans on violence against women (or family violence more specifically), so that you approach family violence in a strategic way and don't duplicate effort. Given that women's right to live free from violence is a human rights issue, it would also make sense to connect your family violence plan to your human rights plan, if you have one.[11] Aligning your plan with your budget cycle will help to ensure that realistic resource decisions can be made.

Engage a range of internal stakeholders to participate in the planning process so that you draw upon a wide range of knowledge and expertise, people feel valued and you develop a collective sense of purpose. This will help ensure that people will do the work required to put your plan in to action.

4.1 What goes in a plan?

There are many different ways of producing a plan but good plans usually have sections that explain:

- your goal (e.g. your higher purpose/aim);
- specific outcomes you'd like to see (these will be informed by your self-assessment);
- the actions/strategies that you will use to pursue your goals (section 4.2 below provides some practical examples of actions and strategies that may help you to pursue your goals);
- roles and responsibilities nominated to specific personnel;
- timeframes for actions/strategies; and
- how you will measure progress.

A court family violence plan template is attached at Annexe D. Your plan will be most useful if all sections of the template are completed. Below are some practical examples of activities (projects) you can do to help achieve different outcomes. These are the types of actions/strategies that you can include in your plan to foster improvements in areas requiring attention, as highlighted through your self-assessment and other data gathering processes.

4.2 Common areas requiring improvement: Some practical examples of projects (actions/strategies to support achievement of outcomes)

Drawing upon international good practice in the provision of services for the victims of family violence, the elements of which formed the basis of your self-assessment, there are many things that can be done to improve the accessibility and responsiveness of courts to victims.

Common challenges faced by the victims of family violence across the region include:

- lack of awareness of their rights and legal process;
- difficulty accessing the formal legal system;
- difficulty staying involved in the formal legal system due to delays, lack of interim protection from further violence and pressure to withdraw their complaint;
- not feeling safe enough to use the formal legal system; and

[11] The PJSI Toolkit, *Human Rights in the Practice of Pacific Courts* (2017) provides guidance on how to produce a court human rights plan.

- unfair legal outcomes due to judicial bias.

Below are some practical suggestions about the ways in which courts can address these challenges. Implementing just one, or many of these strategies, will contribute to improved accessibility and responsiveness of your services to the victims of family violence.

4.2.1 Undertaking an Access to Justice Assessment

In order to improve the accessibility of courts to the victims of family violence (who are mainly women), it is necessary to understand the challenges victims face when trying to access services. Your self-assessment provides one form of data on access issues but it is important to hear the views of the people who actually use your services. In relation to family violence, this will mainly be women, although it is important to remember that not all women are the same. It is therefore necessary to gather the views of different kinds of women. For example, in addition to consulting with general groups of women, it would be useful to consult with groups of women that we know experience specific challenges such as girls, older women, rural women and women with disabilities.

There are power dynamics and sensitivities involved when interacting or consulting with women who have accessed court services. They may be reluctant to provide genuine feedback for various reasons. Due to the sensitivities required, it is recommended that feedback from women, including women from vulnerable groups are sought from service providers and women's groups who assist victims. These groups represent the experiences of women and are better placed to articulate the challenges, successes and identify areas of improvement on women's access to justice.

By gathering information on the views, experiences and needs of court users (particularly women), you will develop an understanding of: what matters women are likely to bring to court and why; women's understanding of the law and the role of court; what makes it difficult for certain groups of women to access the court (e.g. fees, transport, literacy, fear); what other options women are using to address family violence (e.g. mediation, customary resolution); how women view the delivery of court services; and, how women receive and use information on the courts.[12] While the views and experiences of women are particularly relevant (because most victims of family violence are women), it also important to gather the views and experiences of men. This will allow you to compare and contrast the views and experiences of women and men, so that you can develop an understanding of the different needs of these two groups of people. This knowledge will help you develop a plan to improve the accessibility of courts to the victims of family violence.

The *Access to Justice Assessment Toolkit* (2014) explains how to undertake a comprehensive access to justice assessment, which can be done in many ways, including through:

- stakeholder focus group discussions with different key interest groups; and
- Access to Justice Surveys.

Specific guidance on how to conduct stakeholder focus group discussions and access to justice surveys is provided in Sections 3 and 4 of the *Access to Justice Assessment Toolkit.* [13] This information is reproduced for your convenience at Annexe E.

As relationships between formal legal system personnel and communities are sometimes strained, it may be difficult to generate meaningful discussion in stakeholder focus groups facilitated by judges, magistrates or court staff. In such circumstances, the court can work with civil society organisations who can carry out consultations on their behalf, or engage directly with service providers and non-government organisations who can provide an understanding of victim needs and experiences, rather than seeking information directly from victims. This approach is highly recommended, as civil society organisations dedicated solely to addressing violence against women typically have a deep

[12] PJSI, 2014, *Access to Justice Assessment Toolkit*, pg. 2.

[13] PJSI, 2014, *Access to Justice Assessment Toolkit*, pgs. 9-20.

understanding of the dynamics underlying violence against women and an ability to use this knowledge to interpret consultation findings.

Once you have a comprehensive understanding of the barriers that women face when seeking to use the courts to pursue family violence matters – and of their experiences once engaged with the system – you can start to plan specific ways of addressing areas that require improvement. So, for example, if your analysis shows that women:

- don't understand their legal rights, you can invest in a public awareness campaign to be undertaken in collaboration with relevant civil society groups;
- lack confidence filling out forms, you can develop administrative processes to help them;
- feel scared attending court, you can invest in physical security measures to make them feel safe, including women's advocates who can accompany victims to court; or
- feel as though the courts don't treat them fairly, you can provide education to staff so that they better understand the causes and consequences of family violence and the ways in which their own bias impacts upon decisions.

These examples illustrate the way in which your assessment should inform your planning. A thorough access to justice assessment provides the foundations upon which you can build. Without undertaking this step properly, it is impossible to develop a comprehensive approach to improving the accessibility and responsiveness of courts to the victims of family violence.

4.2.2 Conducting public awareness raising campaigns

Awareness raising campaigns have proven to be critical to the prevention of violence against women, particularly when they actively challenge underlying attitudes and behaviours. [14] Awareness raising campaigns are a useful way of increasing people's knowledge of laws relating to family violence and of the services that are available to victims. They are also an important avenue for discussions about the differences between legal and customary approaches to family violence, providing an opportunity to emphasise the point that both approaches must uphold women's human rights. Awareness raising campaigns are an important way of improving women's access to justice because in order to use legal processes, women must know what their rights are, what they can do to protect their rights and what kinds of services they can access.

The court can contribute to awareness raising in many different ways. The approach that you take will depend on:

- how much you know about the knowledge, attitudes and needs of various community groups (you should have this information from your access to justice assessment);
- what you know about the way in which people like to receive information (e.g. by watching drama performances, listening to the radio or TV, reading the newspaper etc.); and
- the amount of time and money you have available to dedicate to awareness raising.

Sometimes it is useful to combine your efforts with another agency or group so that you can make your message more powerful. Civil society groups tend to be particularly powerful partners as they often have their "ear to the ground" (they know what people are thinking and feeling) and have high levels of legitimacy. Working with such groups can maximise the delivery of your messages and often saves time because you can contribute to planned or existing campaigns, such as locally organised White Ribbon Day or 16 Days of Activism Against Gender-Based Violence events, rather than organising something yourself.

[14] UN, 2012, *Handbook for National Action Plans on Violence Against Women*, pg. 34, available online at: http://www.un.org/womenwatch/daw/vaw/handbook-for-nap-on-vaw.pdf

When working collaboratively with civil society, it is recommended that the courts work with established groups, whose work is grounded in a human rights approach to violence against women. These groups are an incredibly valuable resource to the courts as they work with victims and have a solid understanding of the challenges such women face.[15] As a note of caution, it is important that the court be able to recognise groups that do not fully understand the dynamics of family violence and therefore reinforce messages that promote inequality, violence against women and the blaming of victims. This includes any groups that use customary or religious justifications for violence against women or gender inequality.

Before planning your awareness raising campaign, it is important to think about what you are trying to achieve, as this will influence the type of campaign that you should run and how you should measure its impact (see Section 5).

If you are aiming to communicate specific information about the law and legal processes, it might be best to run a campaign that uses both print (as it allows you to record detail) and radio (as many people access it and can be referred to printed material).

If you are aiming to communicate information about the harm that family violence causes, you might consider an image (photos or pictures) based campaign, or if you aim to show the community that the court won't condone family violence, you may launch a campaign using senior court officials who are willing to speak out strongly against family violence in accessible public places.

Below are some examples of different approaches to awareness raising:

Wan Smolbag Theatre is a non-government organisation based in Vanuatu. It operates throughout the Pacific with the aim of creating awareness about challenging issues, such as family violence and HIV. The group has produced over 100 travelling plays, a radio serial, over 20 films and a popular TV series. Wan Smolbag is the largest grassroots organisation in the Pacific. Its success is an example of the power of theatre to engage with difficult issues and challenge gender stereotypes. It is accessible and entertaining and does a great job of getting people to think about things differently.

Public Speeches are a powerful means of reaching large audiences. Following a recent circuit, one of the CJs spoke publicly at a local market place about the unacceptability of family violence. Having respected and powerful people deliver such messages is a very compelling way of shifting beliefs about the acceptability of family violence. When CJs and judges speak out against family violence, it also sends a strong message that the law will not tolerate it.

Whether running a campaign involving only court officials or working collaboratively with civil society, it is important to remember that the intent of a campaign is to raise awareness of the law as it relates to family violence and send a strong message to society that violence against women is unacceptable. It is therefore important that people who have perpetrated family violence, or who clearly hold views that

[15] Examples of strong women's rights organisations that work from a victims centred approach is the Fiji Women's Crisis Centre, the Tonga Women's Centre for Women and Children, the Vanuatu Women's Centre, Family Support Centre (Solomon Islands)and Nazareth Centre for Rehabilitation (PNG). Some examples of organisations that are growing to become strong organisations are Kiribati Women and Children's Support Centre, Women United Together Marshall Islands, Chuuk Women's Council (FSM), Samoa Victim Support Group and Highlands Women Human Rights Defenders Network(PNG).

either excuse family violence or blame women for its occurrence, are not involved in these campaigns. If they are, your campaign will be undermined and their involvement will perpetuate the beliefs that you are trying to challenge.

4.2.3 Enhancing court safety

Governments have a duty to protect people who work in or visit courts. If your self-assessment and access to justice assessment showed a need to increase the safety of your court, there are a number of things that you can do. As with the access to justice assessment process, it is important to clearly identify where your strengths and weaknesses lie before taking action. Court safety, both physical and psychological, can be enhanced by addressing the physical court environment, the way in which you manage people and your court processes.

Your ability to structure your physical court environment may be limited, particularly if your court is a single room building. If you have a larger court you may have options to change the way in which spaces are used to enhance victim safety. Some basic practical suggestions include ensuring that your court has a separate entry and exit, separate waiting area for victims, and if possible, a separate room for victims who want to rest or deal with difficult emotions. Ideally this room would be a welcoming space and be safe for children too.

Large courts often have a range of other physical security measures, such as closed-circuit television, metal detectors and scanners, although these are expensive to purchase and costly to maintain. At a minimum, it is important to undertake basic security checks of all people that enter the court house, to ensure that they are not carrying anything (e.g. guns, knives, other dangerous implements) that may be used to cause harm. Many courts have a visible roaming security presence, often provided by private security contractors, which makes people using the courts feel safer and enables a rapid response if safety concerns arise.

In addition to making changes to the physical court environment, addressing staff (knowledge, attitudes, behaviours) and process issues can also improve victims' safety. For example, it is well known that long waiting times can exacerbate stress (for both victims and offenders), which heightens both physical and psychological safety risks. This can be particularly risky if separate spaces are not provided in which victims and offenders can wait. If separate spaces are not available, at a minimum it may be helpful to stagger arrival times.

Best practice emphasises that civil cases involving protection orders and family law matters should be held in closed court settings. This means that only the parties involved, and their legal representatives or support person(s) should be in the court room. Often while a 'closed court' is sitting there are legal representatives for other civil matters, or family law cases, present at the back of the court room awaiting their hearings. This contradicts the purpose of closed court hearings. Consideration should be granted when a victim or their legal representative requests a closed court ensuring that everyone who is not a party to the proceeding leaves the court room.

Going to court is a stressful process for both victims and offenders. Research shows that the way in which court staff interact with court users has a major impact on their feelings of psychological safety.[16] It is important that court staff are approachable, friendly, and treat people with dignity and respect. This is proven to make court users feel calmer and less nervous about the court process. It could be useful to run a basic training course (even if it is a refresher course) for court staff on respectful communication, including information about the ways in which they can deal with confrontational behaviours respectfully and safely.

Another way that you can promote the psychological safety of court users is by making the process as easy to understand as possible. Basic signs are an easy way of helping people to physically navigate the

[16] Sarre, R. & Vernon, A., 2013, "Access to Safe Justice in Australian Courts: Some Reflections upon Intelligence, Design and Process", *International Journal for Crime, Justice and Social Democracy*, 2(2), 133-147.

courts, although the presence of court assistants is also beneficial as it is well known that people don't tend to read signs when they are nervous or traumatised. Anything you can do to demystify the process will promote psychological safety. It is important that the court process is fully explained to victims so they don't feel frightened or overwhelmed. Easy to read pamphlets are one way of doing this and can be shared with other services (such as police, health or non-government support services) so that they can be read before court attendance. This, however, doesn't replace the value of court assistants who can sit down with victims to provide information and human reassurance.

Many of these suggestions can be implemented easily and are likely to involve only small changes to existing practices. It is important to put yourself in the shoes of victims and imagine what is going through their minds when they interact with the legal system. Small changes such as these can have a big impact on victim experiences of the court process and are likely to measurably improve family violence victims' perceptions about the accessibility and responsiveness of your court.

4.2.4 Training staff to recognise and minimise the impact of bias

It is important that staff who work directly with the victims of family violence understand not only relevant laws, processes and procedures, but also the causes and consequences of family violence. All too often, gender bias and discriminatory attitudes (often justified as custom or religious teachings), shape the ways in which we view the victims of family violence and we blame them for the violence perpetrated against them. Very few family violence perpetrators face legal consequences and when they do, they are often not in proportion with the gravity of the offense.

While many factors influence the rate at which the perpetrators of family violence are prosecuted, there is little doubt that the judiciary (be it law trained or lay) plays a role. Training judges, magistrates and staff about the root cause, the excuses and consequences of family violence is a positive step towards promoting fair outcomes for the victims of family violence. However, it is important that this training, when provided to judges and magistrates, is complemented by unconscious bias training, specifically designed to raise personal awareness of the fact that bias is pervasive and requires management so that fair decisions can be made.

In addition to locally designed and delivered training programs, which many courts find challenging to deliver, a range of non-government organisations – both regional and national – provide training on the causes and consequences of family violence. Regional expertise on VAW are a good place to start and it is often useful to conduct general (not specific to the legal role of the courts) training in partnership with others, such as police, so that a shared understanding of the issues is developed at the sector level. If you wish to conduct your own training, the *Family Violence and Youth Justice Project Workshop Toolkit* (2014) will provide you with some useful ideas.

Although training is a useful way of improving people's awareness of key issues, it is important to remember that delivering a training course is not the end goal. Training will enhance knowledge and awareness but it will not automatically result in changed attitudes and behaviours. A judge who undertakes unconscious bias training will not automatically write judgements that are less discriminatory. Many extra steps are required to make that happen. These include holding judges accountable for the fairness of their judgements (which requires regular review of judgements) and holding administrative staff accountable for the ways in which they interact with court users. Some ways that you might measure progress in this (and other) areas are outlined in Chapter 5.

5 Monitoring Improvement

It is important that somebody has accountability for implementation of your court's family violence plan. Ideally, that person will have authority and the ability to influence, which makes Chief Justices a good choice. It is often useful to support the Chief Justice with a small committee or governance board (e.g. the family violence committee), which is responsible for overseeing and monitoring plan implementation, including by coordinating the efforts of various people with implementation responsibilities. Some organisations add a level of accountability to their committee by including members from other organisations, civil society or the community, which has the benefit of expanding ownership of the plan and enabling connections to be made with other activities.

5.1 Collecting relevant data

Improvement is only possible if you know where you are starting. As highlighted in the 2014 Court Trend Report, Pacific courts have worked hard in recent years to improve the collection and reporting of data, enabling the establishment of realistic and achievable performance standards.[17] It is important that this development informs efforts to improve the accessibility and responsiveness of court services to the victims of family violence, so that an understanding of both current and future dynamics can be developed. Of particular relevance, the increased collection and reporting of gender disaggregated data on both family law and family violence cases is a very positive development in the region. Trends such as these will continue to positively impact on the ability of the courts to improve their practice and be accountable to the public.

5.2 What kind of data is needed and how to collect it

The overarching goal of PJSI gender and family violence activities is to: measurably improve the accessibility and responsiveness of court services to the victims of violence against women, resulting in improved victim satisfaction with court and justice outcomes according to law.

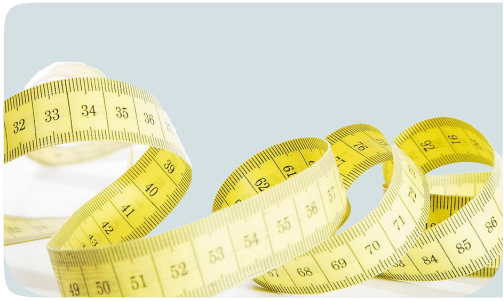
In order to determine the kind of data that is needed to measure improvements, it is important to break down exactly what it is that you're trying to measure. The practices outlined throughout this toolkit are strategies proven to improve the accessibility and responsiveness of court services to the victims of family violence, and violence against women more broadly. By making these improvements, it is hoped that such victims will be more satisfied with the courts and the outcomes that they receive.

5.2.1 Measuring accessibility

There are many measures of accessibility, some of which are already included in the 15 "Cook Island indicators."[18] Further guidance on these indicators is attached at Annexe F. It is important to ensure that the measures you choose reflect the improvement initiatives that you have outlined in your Family Violence Plans. For example, if you plan to increase fee waivers for family violence cases, a modified version of Cook Islands Indicator 5 might be "percentage of family violence cases that are granted a court fee waiver". Likewise, if you determined that transport and geography are barriers to women's court access and decided to respond to this challenge by increasing the number of family violence cases that are heard through a circuit court, a reasonable measure might be "percentage of family violence cases finalised through circuit courts".

[17] PJSI, *2014 Court Trend Report*
[18] PJSI, *2014 Court Trend Report*, pg. 12

5.2.2 Measuring responsiveness



Responsiveness is a complex concept. It can be taken to refer to the quickness and appropriateness of a response, or to the degree to which court user needs are met. If your Family Violence Plan includes a time standard within which the court aims to complete family violence cases, a good measure of responsiveness is that outlined in Cook Islands Indictor 2, namely "average duration of [family violence] cases".

Measuring the fairness of victim outcomes requires more effort than the collection of standard court data. One way to do it may be to take the ICAAD sentencing analysis (if undertaken in your country) as a baseline and undertake comparative analysis at one year periods. Lower numbers of sentencing decisions that show evidence of biased decision making, or discriminatory reliance upon customary law practices, would be one measure of improved fairness, as would lower numbers of lenient sentences for the perpetrators of family violence.

5.2.3 Victim satisfaction with court services and outcomes

The only way to measure victim satisfaction with court services and outcomes, and their knowledge of the law, is to actively engage with victims who have used your court or with groups that work with victims. This is important not only for measuring the impact of your efforts to improve court responsiveness to the victims of family violence but also to meeting the commitments made under the Regional Justice Performance Framework (2012) to include "a summary of key findings from any court stakeholder/potential court user surveys and dialogues that have taken place in the previous year" in court Annual Reports.[19]

Stakeholder/potential court user forums will provide you with different types of information to court user surveys.

5.2.3.1 Public forums

Public forums are a useful way of engaging large groups of people and are a good way of giving members of the community a chance to be heard. They allow you to collect large amounts of information in a short period of time and are not very costly. Public forums allow a two-way flow of information, thereby serving a dual educational and information gathering purpose.

A useful way of starting a forum is to ask a speaker or facilitator who has a sound understanding of violence against women and the difficulties faced by victims to provide an overview of a key issue (e.g. access to the legal system) and then seek responses from the community. It is important to facilitate the discussion so that all people have an opportunity to express their views and to keep the forum moving. Rules are needed (such as respecting other's right to talk and keeping comments short) to keep things in order and it is useful to have a series of set questions to generate discussion if things slow down. Make sure to record the discussion (either in writing or on an electronic recording device) so that it can be referred to later and properly analysed. It should be made clear that due to the sensitivities of a particular case, or due to the nature of an ongoing case, that some cases cannot be discussed in these forums.

More detailed guidance on conducting stakeholder forums is provided in the *Access to Justice Assessment Toolkit* (2014).

[19] PJSI, *2014 Court Report*, pg. 61

5.2.3.2 Court user surveys

Court user surveys consume more time than public forums but they provide more comprehensive information about people's views and experiences. Surveys can be administered either verbally (e.g. somebody stops people leaving the court house, asks them to participate and talks them through a series of questions) or in writing (people can take them away and complete them in their own time). Each approach has its strengths and weakness but they both result in valuable data. Verbal administration is more time consuming but it can help make sure that people understand the questions being asked of them. Written surveys have the advantage of being confidential, so people often provide more honest responses.

There are a range of publicly available court user surveys, which aim to gather information on court user perceptions and experiences but it is useful to develop a survey that suits your local context. A sample survey drawn from the Global Measures of Court Performance document put together in support of the International Framework for Court Excellence can be accessed online at: **https://www.courtexcellence.com/resources/global-measures**

Gender and Family Violence Toolkit

Additional Documentation

Annex A: Material from Human Rights Toolkit: Quick reference guide for cases involving women, girls and family/sexual violence

Please note the following sections 7.1 to 7.5 and annex 8 have been taken directly from the Human Rights Toolkit (2017): **http://www.fedcourt.gov.au/pjsi/resources/toolkits**

7.1 International Standards: Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)

All countries in the Pacific region (except for Tonga and Palau), have ratified CEDAW, which provides a framework for countries to address gender inequality, and discrimination against women. These have emerged as big issues that Pacific societies are grappling with.

7.1.1 Key International Standards Involving Discrimination (including violence) Against Women

Key Provisions of CEDAW

Article 2 condemns discrimination against women in all forms (political, economic, social, cultural, civil or any other field) and require States to:

- Introduce new laws to protect women from discrimination (Art 2(b));
- Change existing laws that discriminate against women (Art 2(f)(g));
- Ensure legal protection from discrimination for women in court decisions (Art 2c);
- Ensure equality before the law (Art 15);
- Ensure public institutions (including courts) do not discriminate against women (Art 2(d));
- Change social and cultural patterns to address customary and other practices based on sex discrimination or gender stereotypes (Art 5(a)); and,
- Provide equality in education (Art 10), health (Art 12), employment (Art. 11), participation in public life (Art 7), nationality (Art 9), marriage, divorce, family relations, right to custody of children, to own marital property (all in Art. 16).

While CEDAW does not explicitly mention violence against women and girls, General Recommendation 19 clarifies that violence against women is a form of discrimination against women and is therefore covered by the Convention sections that ban discrimination against women. 'Violence' includes different forms such as physical, mental, economic or sexual violence as well as threats, or other ways of controlling the lives of others.

Declaration on the Elimination of Violence Against Women (1993)

- As with any Declaration, it is not legally binding or enforceable, but does set out national and international standards and a plan of action for combating violence against women; and
- Provides definition of 'violence against women': any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

The World Conference on Human Rights (1993)

- Recognised violence against women as a human rights violation; and
- Called for the appointment of a Special Rapporteur on violence against women to follow up and monitor women's rights.

The Beijing Platform for Action (1995)

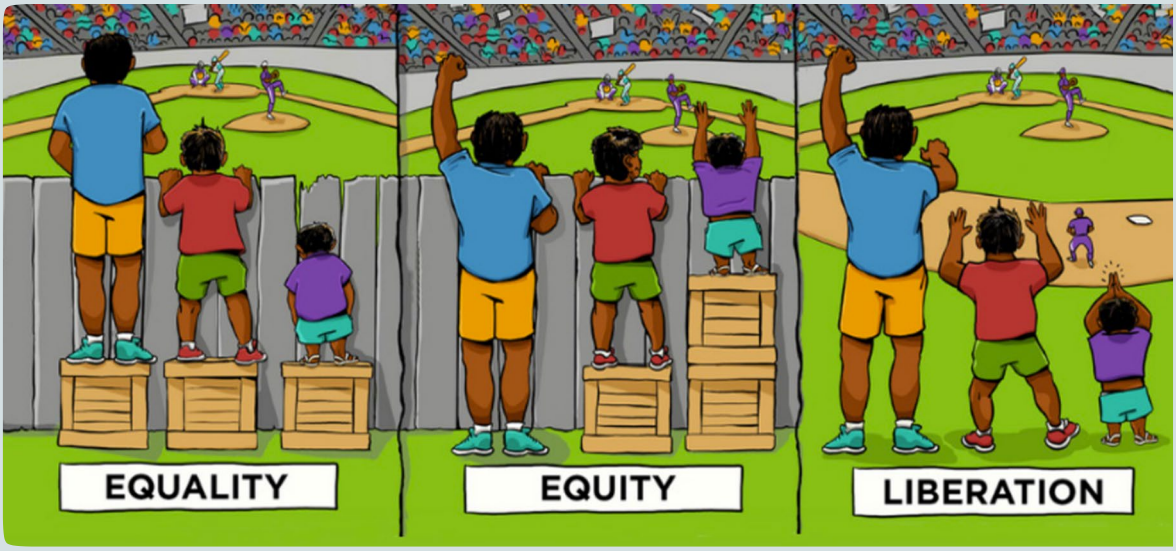
- Identified specific actions Governments must take to prevent and respond to violence against women and girls;
- Identified ending violence as one of twelve key areas for priority action; and
- Used an expanded definition of forms of violence.

7.1.2 Formal vs Substantive Equality

'Formal equality': Means everyone should be treated the same, whatever their circumstances. As shown in the left hand picture, formal equality, (as found in many Pacific constitutions), will not always achieve fair (equitable) outcomes.

'Substantive equality' = Equity: Takes into account that not everyone starts at the same level and that some groups may need extra help to access rights and opportunities on the same footing as others.

'Liberation': The third picture shows how the removal of systemic barriers (such as to access justice) helps everyone enjoy their rights and have the same opportunities.



7.2 Regional Standards

While there are no binding regional standards, there has been regional attention paid to gender equality and women's rights.

7.3 Domestic Standards

Awareness of the problem of violence against women has increased since national studies showed that some Pacific societies have amongst the highest rates of violence against women in the world. Many Pacific nations have responded with:

7.3.1 New Laws

Between 2009 and 2015, nine Pacific countries passed family protection and domestic violence legislation aimed at better protecting women and children from family violence. Many of these have been based on standards established in CEDAW and other international instruments. [1]

[1] Vanuatu Family Protection Act 2009; Fiji Domestic Violence Decree 2009; Marshall Islands Domestic Violence Prevention and Protection Act 2011; Palau Family Protection Act 2012; Samoa Family Safety Act 2013; Kiribati Te Rau n Te Mweenga Act 2013; Tonga Family Protection Act 2013; Solomon Islands Family Protection Act 2014; Kosrae State Family Protection Act 2014.

7.3.2 Community-Based Campaigns

Aimed at changing deeply-held values that support attitudes of acceptance and normalisation of violence against women and other family members. These campaign approaches recognise that preventing violence requires coordinated efforts at all levels of society to change dominant community attitudes while also increasing women's status in society.

7.3.3 Courts

Decisions of Pacific courts increasingly reflect and reinforce growing community rejection of violence against women and other family members by prioritising principles of equality and non-discrimination, including in cases where these conflict with cultural or customary practices. However, there are signs there is still some way to go. For example, a recent study by International Center for Advocates Against Discrimination (ICAAD)[2] of sentencing decisions in sexual assault and domestic violence cases in seven Pacific countries found that judges continue to give heavy mitigating weight to gender stereotypes, cultural practices (such as customary reconciliation) and other 'contentious factors' to reduce the likelihood and length of custodial sentences in sexual violence and domestic violence cases. This was despite legislation in some countries explicitly prohibiting judges from taking such factors into account. This study shows how values that undermine women's right to equal protection of the law can also be ingrained in judicial thinking, suggesting that this might be an area where specific judicial training and guidance could be helpful.

7.4 Step 1: Understanding the Barriers Faced by Victims and Court's Roles to Address Them

Women and children subject to family violence typically face strong social, cultural and economic pressure to 'live with' or try to manage family violence on their own, despite the damage and harm it causes them and their families. When victims do seek help, it is often in desperate situations when the violence has been going on for some time and often already reached very high, even life-threatening levels. Therefore, the quality of response to victims' that do come forward to report violence is very critical.

Many victims lack trust in the system or take a calculated view that the likely economic, social and cultural costs to them of making or continuing with a criminal complaint, outweigh the potential benefits of stopping the violence or their family member being held accountable for his violence.

Family violence is a crime, but is also much more complicated than many other crimes because the people involved often have ongoing relationships of love and affection. Victims often also have relations of economic dependence on perpetrators and lower levels of social and cultural power than them. These factors can make many victims feel very conflicted when they finally seek help from the police. On one hand they know they need protection and that what has been done to them is wrong, but on the other, they may feel fear, shame (especially in cases of sexual violence), and torn about bringing a complaint against someone they may love and need. They also often face strong pressure from other family members, community or religious leaders to try to solve the problem privately and outside of the criminal justice system.

Given all these pressures, it is hardly surprising that many victims who seek protection from the police during a crisis later withdraw their complaints. This is not because victims are undecided or weak, but often because victims lack trust in the system. This is understandable given the variable experiences they can have in their interactions with different law enforcement/justice actors and the lack of reliability and limited range of 'safety net' services and supports for victims.

It is the job of all actors involved in family violence cases to help change this balance and help create a more victim-supportive approach: one that recognises and respects the autonomy and decisions of

[2] ICAAD 'An Analysis of Judicial Sentencing Practices in Sexual & Gender-Based Violence Cases in the Pacific Island Region', 2015. http://www.paclii.org/other/general-materials/ICAAD-Analysis-of-Judicial-Sentencing-Practices-in-SGBV-Cases.pdf.

victims, at the same time as reliably helps them to overcome the barriers that victims usually face when they bring or are part of cases involving family violence.

Police, prosecutors and judges must themselves be wholly convinced of the criminal nature of family violence and the 'rightness' of victims bringing forward their complaints, if they are to provide effective support to victims and be persuasive 'ambassadors' for the justice system. If justice actors themselves think that family violence is excusable, understandable or should be tolerated by victims, (which they often may do, because they have also grown up in communities where these are dominant beliefs), then there is little chance victims will receive proper support and protection. So it is key that court actors support victims of family violence wholeheartedly and take as much pressure off victims as possible by demonstrating behaviours and attitudes supportive of victims.

Family violence cases require that all parts of the justice system work in a coordinated way together: police, prosecution, public solicitor/legal aid providers, courts and corrections. The responses of these bodies must also be closely coordinated with health services, shelters, and social services (both government and non-government), to provide support to victims at all stages of the process. It is crucial that the process also provides appropriate and effective opportunities and encouragement for perpetrators (usually men) to learn how to change their behaviour so that violence in the family does not continue. In addition to assisting in individual cases, courts also have an important role to play in prevention of family violence, by conducting outreach and conveying clear messages to communities that violence within families is no longer acceptable and will be dealt with firmly by the courts.

7.5 Measures to Make Court Processes Fairer to Women and Child Victims of Family Violence

Many Pacific countries have already introduced family protection laws that include specialised services and coordinate the roles and responsibilities of relevant actors. Notwithstanding any specific laws, use these suggestions below to start planning actions to make your court more responsive to the needs of women and child victims of family violence (See Gender and Family Violence Toolkit 2017 for more guidance).

7.5.1 Prior to Court Trial Processes

Ensure protection orders are readily available 24 hours by telephone through having an on-call judge available at all times.

Where suspects are not detained, consider use of orders that suspects must reside away from the family home until the case is determined, rather than victims and children having to leave their home and support network.

Work with police to develop SOPs for protocols to respond to complaints of family violence including:

- Ensuring that female police also attend crime scenes to take statements from female victims, witnesses and children;
- All police are adequately trained in preserving crime scene evidence;
- SOPS/training have been provided to all police on conducting family violence risk assessments and clear guidance is provided on pro-arrest and detention policies regarding family violence suspects, and prohibiting police from informally resolving complaints of family violence; and
- All victims to receive independent legal advice and support at police stations during initial processing of a complaint and compulsory independent advice/counselling before withdrawing a complaint.

Work with police to prepare a list of advocates able to attend police stations/prosecution offices at short notice to provide advice and support to victims and separate legal representatives for suspects.

Work with prosecution services to ensure SOPs are in place that:

- Provide clear guidance on exercise of prosecutorial discretion not to lay charges;
- Prohibit informal resolution of family/sexual violence complaints;
- Provide time frames within which investigations must be finalised and indictments filed and take all possible steps to reduce delay (e.g. carefully assess whether there is a need for forensic evidence, especially where it will take a long time to procure);
- Ensure adequate interim protection orders are in place for victims and witnesses and that they are enforced including orders for payments of maintenance to victims (from joint assets if necessary);
- Provide guidance on laying appropriate charges in cases of family/sexual violence;
- Allocate women prosecutors (wherever possible) to take statements from victims of family/sexual violence;
- Provide guidance on collecting evidence for cases of criminal damages (in legal systems where this is also the responsibility of the prosecutor and dealt with concurrently with criminal charges) and material needed for victim impact statements for sentencing hearings; and
- Keep victims regularly updated on all case developments and consult them on issues of dropping or reducing charges, and sentencing sought.

Judges to ensure interim victim protection orders and witness protection measures are adequate, in place and oversee their enforcement where necessary.

7.5.2 During Trial Process

Use accelerated case management to make sure cases involving family violence are prioritised and heard quickly. Set and enforce standards in SOPs for how quickly they must be heard and finally dealt with.

Ensure court staff confirm in advance the attendance of all those needed for the case to proceed (to avoid adjournments).

Only grant adjournments if they are strictly necessary and take other measures to reduce delay (e.g. if suspect does not appear, issue warrants for their arrest and direct they be presented to the court). Demand high standards of professionalism from prosecutors and defence lawyers. I.e. do not readily grant adjournments if prosecutors or defence lawyers are poorly prepared or organised. Make complaints of unprofessional conduct to professional bodies if necessary.
Ensure sufficient security is in place and that no weapons are brought into the court house.
Wherever possible, ensure courts have separate entrances for victims of family violence and always have separate waiting areas for victims and prosecution witnesses.

Provide child-care, child-friendly space, private place for breast feeding for court parties.
Ensure court reimburses victim/prosecution witness transportation costs and provides food during waiting periods and secure accommodation where victims/witnesses are not local and hearings last several days.

Provide necessary supports to victims/witnesses/suspects suffering from any disabilities (see section below).

Provide training to judges hearing family violence cases including how to use CEDAW/CRoC/ constitutional rights of women and children and any special laws that apply to family violence cases. Also provide training on how judges can support the participation of victims, (including children), in court processes, such as by adopting a more informal manner, providing clear non-judgmental explanations, being sensitive to any fear or trauma of victims by providing encouragement, regular breaks etc. and allowing victims' representatives/support persons to make submissions if they wish.

Consider ordering that court proceedings, especially those involving sexual violence and children, be held in closed court and that the victims and witnesses' names be suppressed.

Ensure that suspects are offered legal representation (to ensure fair trial) but also to discourage suspects from directly cross-examining victims. If the suspect insists on their right to represent themselves, strictly exclude any improper, gender-biased or intimidating lines of questioning directed at victims or prosecution witnesses.

Consider ordering the removal from the court room of any person, (including the suspect if necessary), who fails to observe warnings regarding their conduct, intimidates or threatens the victim or any witnesses, or otherwise obstructs the hearing.
Consider creating a more informal setting for child victims to give their evidence, including the option of giving pre-recorded evidence or giving evidence in the court room but not in direct view of the suspect.
Consider giving the opportunity for the prosecution to present a victim impact statement in any sentencing hearing.

Consider developing and implementing sentencing guidelines for cases of sexual and family violence to ensure sentencing decisions consistently reflect the seriousness of crimes, including aggravating factors (i.e. abuse of trust or power, child victims, victims with disabilities etc.) and do not give weight to inappropriate mitigation factors including gender stereotypes and customary/cultural factors such as reconciliation.

7.5.3 After Sentencing Processes

Work with the police and prosecution to ensure complete data sets are collected on all family/sexual violence cases including: charges laid, age/gender of victim and suspect, relationship between victim and suspect, interim measures ordered to protect victim or witness, legal representation of victim and suspect, final verdict, sentence (including aggravating or mitigation factors taken into account), any parole/early release granted, any repeated offending noted.

A.8 Effect of Ratification in Domestic Law

State constitutions usually clarify whether ratification of a treaty has the effect of automatically incorporating its articles into the country's domestic legal system (as in 'monist' states), or whether domestic legislation is first required before effect can be given to the articles of the treaty (as in 'dualist' states).

All PICs that participate in the PJSI (except for the Marshall Islands) are based on British-style legal systems, which are generally dualist. This means that before the terms of a treaty can be directly applied by courts, they must first be supported by domestic legislation to give them domestic legal effect.

However, the absence of domestic legislation does not mean that courts can simply ignore ratified treaties. Rather, often constitutions require or explicitly allow for the content of treaties to be considered, such as is provided for in the Constitutions of Fiji, Tuvalu, and Papua New Guinea. Yet even if the country has not ratified the convention and there is no explicit constitutional provision, it is still possible for courts to consider human rights treaties, at least to resolve ambiguity or fill a gap in interpreting domestic law. Alternatively, common law precedent or customary international law may require the court to consider or give effect to the standard articulated in the treaty.

Annex B: Quick Reference Guide for Cases Involving Children

6.1 International Standards: Convention on the Rights of the Child (CRoC)

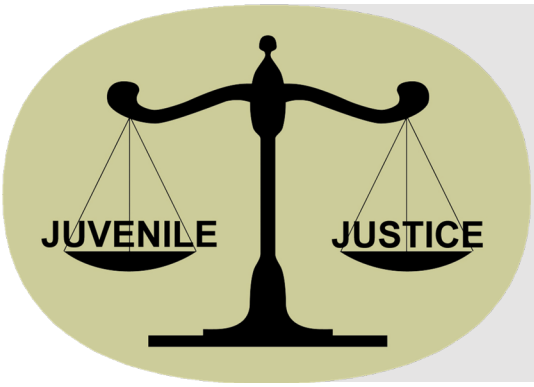
All Pacific countries have ratified the CRoC, which contains key principles and standards for dealing with all kinds of cases involving children. Some of the most important ones are:

A 'child' is defined as any person **under the age of 18 years** (Article 1 CroC).

In all actions concerning children, whether undertaken by public or private social welfare institutions, **courts of law**, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration** (Article 3 CRoC).

What is in the 'best interests' of any given child will vary according to the child's individual situation, including their cultural background. It will also require consideration of who is taking the action, on what basis, for whose benefit and how it affects children generally or particular groups of children. What does not vary across cultures is the requirement that the child's best interests should be **a primary consideration**, in other words, the child's interests must be elevated above the 'rights' or interests of others, who may include the child's parents, community, the state, or others.

'Right of child to be consulted': This principle requires that in any kind of case affecting a child, the views of the child have to be sought and taken into consideration, according to their age and maturity (Article 12 (1)(2) CRoC).



Other important justice standards for children:

- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (*'The Beijing Rules'*);
- The United Nations Guidelines for the Prevention of Juvenile Delinquency (*'The Riyadh Guidelines'*) and;
- The United Nations Rules for the Protection of Juveniles Deprived of their Liberty or *'The JDLs'*, 1990; and

See also Family Violence & Youth Justice Project Toolkit 2014.

6.2 Why we need different to have different justice standards for children?

Everyone knows from their own experience that children differ from adults in their physical and psychological development and in their emotional and educational needs. Advances in neuroscience also show that the parts of the brain responsible for decision-making and impulse control are still developing during a person's teens, even later in boys, which affects their capacities to understand consequences and to exercise judgement.

For these reasons, all legal systems should be based on the idea that children beneath a certain age should not be charged or prosecuted in criminal justice systems. This is known as the 'age of criminal responsibility' and is usually found in each country's penal code.

The CRoC Committee recommends that the 'age of criminal responsibility' be set for between 14-16 years old. The global average age of criminal responsibility is 12 and this is considered the minimum acceptable to the UN Committee on the Rights of the Child. Many countries, including in the Pacific, do not currently meet this standard.

Even when children are over the age of criminal responsibility, most Pacific countries have additional requirements that must be met before children aged 10-14 years can be charged and prosecuted. They also often have special sentencing rules to reflect the lower responsibility for crimes by children and try to avoid or minimise imprisonment to give the child the best opportunities for rehabilitation and getting 'back on track'.

Age of Criminal Responsibility

- Solomon Islands: 8 years
- Papua New Guinea: 7 years
- Tonga: 7 years
- Kiribati: 10 years
- Fiji: 10 years
- Most Pacific countries also require evidence a child aged between 10-14 years was 'capable of knowing they did wrong'.

These standards also apply to older adolescents in the 15-17 age group, who are the children most frequently in trouble with the law. International standard say that **all children under 18 years old should only be detained or imprisoned as an absolute 'last resort'.** If they are imprisoned, it must be for the shortest length of time possible and in facilities separated from adults and that cater to their physical, educational and other special needs as children (CRoC Article 37(b)).

6.3 Checklist for Judges in Deciding What Law to Apply in Criminal Cases involving Children

- Know the exact age of the child at the time of the alleged offence, based on birth certificate or other documents where possible. If none are available, determine age based on statements of parents, other relatives and the child;
- Based on the law, decide if the child can be legally charged or prosecuted: that is, you must be satisfied the child is above the criminal age of responsibility and (typically) if aged between 10-14, make a finding as to whether the particular child is capable of knowing they did wrong;
- Find out if there is a special system of justice for children in your country. If yes, then apply those standards consistently with the CRoC, and Constitutional standards; and
- If no, then strictly apply minimum CRoC standards (see 6.4). Also apply any special Constitutional or other laws. Finally, modify the process as much as you can to make it child-friendly (see 6.5).

6.4 Minimum Standards for Criminal Cases Involving Children

Some Pacific countries already have specialist criminal justice processes for children, as recommended by the CRoC. These typically involve having judges with special training, different criminal justice procedures and laws and different penalties with a greater focus on rehabilitation and reintegration of children in the community.

Whether a specialised child justice system exists or not, all courts need to work in close coordination with other key actors across the justice chain in dealing with cases involving children. These include the police, the prosecution, the public solicitor/other legal aid service, government social services/child welfare authorities, correctional services, as well as probation officers, youth support workers, community and religious leaders, parents, teachers and other important adults in children's lives.

Whether or not specialist justice streams exist for children in your country, these are the minimum standards that all courts should always apply in cases involving children.

Arrest:

- Both the child and parents or guardian must be informed of charge as soon as possible (CRoC Article 40(2)(b)(ii));
- A child should not be questioned/investigated without a parent/guardian or lawyer being present during the interview (CRoC Article 40(2)(b)(ii)); and
- Police and prosecutors should try to divert children from criminal prosecution where possible (CRoC Article 40(3)(b)).

Detention:

- Only to be used for any child under age of 18 as an absolute last resort and for the shortest period possible (CRoC Article 37(b));
- All children under 18 years must always be held in separate facilities from adults and be able to maintain contact with their family and be given access to age-appropriate health, recreational, educational and other relevant facilities (CRoC Article 37(c));
- All children in detention should have access to legal assistance to challenge their detention and be brought before a court as soon as possible (CRoC Article (37(d)); and
- Children must never be mistreated, forced to confess, tortured or treated in a cruel or degrading way (CRoC Article 37(a)).

During Trial:

- Courts should actively take steps to assist children and reduce any stigma children may face due to any aspect of having a case in court;
- All children should have access to legal advice and representation in any kind of case. (CRoC Article 40(2)(b)(ii) & (iii));
- The privacy of children must be specially protected (CRoC Article 40(2)(b)(vii)). Cases involving children should be held in closed court. Court listings, judgments, other public records should not identify children by name (See also Rules 8 and 21 of *the Beijing Rules*); and
- Ensure children fully receive all their 'fair trial' rights such as: to be treated as innocent unless proven guilty (CRoC Article 40(2)(b)(i)); to have a fair hearing before a competent, independent and impartial judge (CRoC Article 40(2)(b)(iii)); to have legal representation, to examine witnesses (CRoC Article 40(2)(b)(iv)); and to appeal the verdict or the sentence (CRoC Article 40(2)(b)(v)).

Sentencing:

- Sentences must take into account the child's age and aim at promoting social reintegration and the child's constructive role in society.' (CRoC Article 40(1));
- Imprisonment must be used 'only as a measure of last resort and for the shortest appropriate period of time'. (CROC Article 37(b)). Alternatives to imprisonment should be provided (CRoC Article 40(3)(b)) examples include providing probation, supervision orders, educational/vocational programs;
- No death penalty or life imprisonment without the possibility of release for anyone under the age of 18 at the time of the offence (CRoC Article 37(a);
- Right to appeal sentence (CRoC Article 40 (2)(b)(v));
- As with detention, imprisonment of children must be separate from adults and be able to maintain contact with their family (CRoC Article 37(c)); and
- Criminal records should be cleared when a child turns 18.

6.5 Measures to Make Court Processes Fairer to Children

Below are some measures judges and court staff should take to make justice processes more responsive to the needs of children (under 18 years old) who are 'in trouble' with the law. Use these as a guide for completing your own assessment of how 'child-responsive' your court is.

6.5.1 Pre-court Processes

Ensure an on-call judge is readily available 24/7 hours by telephone to hear applications regarding whether a child can be detained or not.

Work with the police/prosecution to develop a set of Standard Operating Procedures (SOPs) that cover:

- The investigation of alleged offences by youth/children (under age 18) including the need for a lawyer and parent/guardian to be present during any questioning;
- Instructions to avoid detaining children, except as a last resort;
- Where detention is used as a last resort, instructions that the child be brought before a judge within a strict and short time limit. If this is not done, (for whatever reason), instructions that the child must be immediately released;
- Guidance for diverting cases involving children from the criminal justice system including (at minimum) the options of: on the spot warning; caution; mediation; community conferences; and
- Adopt a different colour court file to alert anyone dealing with the case to the fact that it concerns a child and that child standards must be applied to all aspects of handling the case.

Work with The Public Solicitor to develop a roster of lawyers who can be contacted by the police both during and out of working hours to assist youth/child suspects being interviewed or investigated by the police.

Work with the prosecutor to develop a SOP for cases involving children, including ensuring every charge sheet includes a clear statement highlighting that the charges relate to a youth/child, and providing their date of birth.

6.5.2 In Court Processes

Allocate separate court hearing days to deal with cases involving children more efficiently, discreetly and using a more informal layout for court room furniture.

Strict guidelines should be issued that judges can only order pre-trial detention (for any period) of a child for the most serious cases of violent crimes against the person and never for property offences. Ensure any children being brought from prison to the court are transported separately from adults and held at the court separately from adults and special attention is given to them (to provide information, food/water, access to bathroom etc.).

Use a faster case management system that prioritizes cases involving children, especially those in detention.

Set and enforce strict standards for how quickly cases involving children must be heard and finally dealt with by the court. Especially for those in pre-trial detention, strict time limits should be applied which requires children to be released on bail.

Ensure court staff confirm in advance the attendance of all those needed for cases involving children to proceed (to avoid delays and adjournments).

Ensure court sittings for children are held in private court (closed and not open to the public) and that their name is not publicly displayed anywhere (e.g. in court listings) and is removed from any public court report or judgment.

Ensure that every child has a lawyer present at every hearing (They can be appointed by the Public Solicitors Office, another legal aid provider or appointed by the court.)

Ensure there is a group of judges in each court who have received special training for handling cases involving children, and make sure one of these judges is appointed to all cases involving children.

Provide judges the opportunity to receive training in 1. International standards relating to juvenile justice, constitutional standards and any special laws that apply to children and 2. how to engage with children, such as by adopting a more informal manner, providing explanations that are clear and age appropriate, encouraging the child's participation in the court process and taking the child's views into account in all the issues before the court.

Encourage judges to always consider referring relevant issues in child cases to a 'Community Conference' comprised of the child, his/her family, the victim, police, lawyer, conference convener and any other interested and relevant party (e.g. customary chiefs/pastor). Ensure that the court considers any recommendations made by the Community Conference in deciding any sentence.

Ensure judges are aware that sentences must take account of the child's age and should focus on rehabilitation more than punishment. Prison should only be used in the most serious cases as a last resort and be for the shortest possible period in a facility separated from adults. Custodial sentence can always be supplemented with other community-based rehabilitation activities.

6.5.3 After Appearance in Court

Work with the correction authorities to oversee and ensure that:

- Children in custody (including while in pre-trial detention) are kept separate from adults and have age appropriate health, recreation and education facilities, access to their families etc.; and
- Community-based alternatives to custodial sentences are supported and encouraged.

Work with the police/prosecution to ensure that (at minimum) the following data is collected: the child's exact age at the time of the offence; gender; home island; whether diverted/charged; type of charge; outcome; reoffending rates.

Notwithstanding any other law, ensure that the details relating to a conviction of young offenders be cleaned from there record when they turn eighteen years old.

Annex C: Court Family Violence Self-Assessment Tool

The Court Family Violence Self-Assessment Tool is designed to help you understand how well you are doing in each of the "good practice" areas outlined in this toolkit, namely: prevention; victim focus (access, safety, fairness); perpetrator accountability; and, collaboration.

It uses a simple sliding scale (no, can improve, yes), which will help you determine where your strengths and weaknesses are. Simply tallying the number of no/can improve responses in each section will provide you with an insight into where there is greatest room for improvement. This information, combined with other sources of information such as access to justice assessments (if you haven't done one it is recommended) and court data, should inform the decisions you make about strategies that will enable improvement. These strategies should be outlined in your Court Family Violence Plan (see Annex D).

It is recommended that the self-assessment tool be completed in the first instance by individuals and that a one day workshop be held to discuss the findings. The more individuals that complete the form, the more you will understand how well you are doing. It is important that people complete the questionnaire as honestly as possible, remembering that the aim of the exercise is to measurably improve the accessibility and responsiveness of your services to the victims of family violence.

Focus Area 1: PREVENTION	**No**	**Can Improve**	**Yes**
Understanding family violence			
Have judicial officers received training on the cause and consequences of family violence?			
Have court officers received training on the cause and consequences of family violence?			
If training has been provided, did it actively challenge the attitudes, practices and behaviours that perpetuate family violence?			
Public engagement			
When engaging with the media, do judicial officers consistently send a message that family violence is against the law?			
Does your court provide anonymised family violence judgments and sentencing decisions to the media to highlight the courts decisions on family violence?			
Do judicial officers deliver public speeches condemning family violence?			
Does your court do awareness raising about laws relating to family violence?			
Does your court have printed materials about the laws relating to family violence?			

Focus Area 2: VICTIM FOCUS	No	Can Improve	Yes
Access			
Have you undertaken an Access to Justice Assessment?			
Do you have an understanding of the specific needs of different groups of court users (e.g. women, men, girls, boys, older people, disabled people, rural people, etc.)?			
Does your court have a clear policy on court fee waivers for people experiencing financial hardship?			
Does your court display/provide clear information on court fee waivers for people experiencing financial hardship?			
Does your court record the types of cases that court fee waivers are granted for, including the gender of the applicant?			
If your court administers protection orders, can applicants lodge an application orally (by phone or in person), rather than in writing?			
Is there a fee for protection orders?			
Are protection orders issued on the same day?			
Does your court have a procedure to react quickly if a protection order is breached?			
Does your court have an accelerated/prioritised hearing process for GFV cases?			
Have you established protocols to ensure that courts are accessible during emergencies, humanitarian crisis, post disaster periods, pandemics and political upheavals?			
Safety – physical			
Does your courthouse have a private room that victims can go to in order to rest/relax?			
Does your courthouse use guards for security?			
Do you have a security screening process for all people that enter your courthouse?			
Does your court record security incidents?			
Does your court analyse security incident information so that similar incidents can be prevented?			
Does your courthouse have facilities that enable victims to give evidence via video-link (so that they needn't be confronted by the offender)?			
Can your court put witness protection measures in place?			

Can your court order the perpetrator to live outside the family home (so the victim can stay home) during the pre-trial and trial period?			
Safety – psychological			
Have your judicial officers been trained in client service (so that they know how to treat people respectfully)?			
Have your court officers been trained in client service (so that they know how to treat people respectfully)?			
Does your court provide information (verbally or in writing) to victims/offenders so that they understand the court process?			
Does your courthouse have easy to read signs so that people understand where to go?			
Does your court have closed hearings for protection orders?			
Fairness			
Does your court record sex disaggregated data on filing, finalisation and clearance rates for family violence cases?			
Can your court state the average length of time to determine family violence cases?			
Does your court review family violence case outcomes, with a view to analysing whether or not women are receiving fair outcomes?			
Have judicial officers received training on bias/gender stereotypes and their impact on judicial reasoning?			

Focus Area 3: PERPETRATOR ACCOUNTABILITY	**No**	**Can Improve**	**Yes**
Does your court publish anonymised family violence judgments and sentencing decisions on PACLII?			
Does your court record sex disaggregated data on victims and offenders in family violence cases?			
Does your court record family violence case sentencing outcomes?			
Are domestic violence offenders being sentenced?			
Are offenders who breach protection orders being sentenced?			

Does your court have sentencing guidelines for family violence cases, which prohibit the application of gender myths and stereotypes?			
Does your court record recidivism statistics?			
Have judicial officers received training on bias/gender stereotypes and their impact on judicial reasoning?			
Have judicial officers received training on perpetrator manipulative behaviours and minimum standards for perpetrator rehabilitation?			
Does your court review sentencing outcomes to ensure that family violence sentences are not too lenient?			

Focus Area 4: COLLABORATION	**No**	**Can Improve**	**Yes**
Does your court maintain an up to date contact list of key partners (justice, health, non-government organisations)?			
Does your court have a clear referral process for court officers to use (e.g. where to direct clients for information/support)?			
Does your court document referrals (frequency and to whom)?			
Does your court record whether the women who access your court are assisted to do so (e.g. by a women's support service or legal aid)?			
Does your court have information sharing arrangements with key partners?			
Do you meet regularly with key partners to ensure court users receive a coordinated service?			
Where a woman is killed, is there a compulsory critical case review process in place whereby all relevant actors review what happened, what each agency did, and what more could have been done to prevent her death so that all actors across the justice chain can 'learn lessons'?			

Annex D: Court Family Violence Plan Template

Drawing upon your Court Family Violence Self-Assessment and your Access to Justice Assessment, your Court Family Violence Plan provides a roadmap that will assist you to measurably improve the accessibility and responsiveness of your services to the victims of family violence. It is recommended that your plan span a maximum of three years and that progress be reviewed twice yearly.

It is good to start your plan with an introduction, which tells the reader why you are writing a plan and what you are hoping to achieve. The overarching goal of PJSI gender and family violence activities is to: measurably improve the accessibility and responsiveness of court services to the victims of family violence, resulting in improved victim satisfaction with court and justice outcomes. You may like to borrow this goal for your court's family violence plan.

You can then step through a basic story about the specific outcomes you'd like see, how you will achieve them, who will be responsible for each action and within what time frame. You also need to outline how you will measure progress. While you don't necessarily need to include it in your plan (but many organisations do), it is important to consider the resource (both money and people) requirements of your strategies so that they are realistic and achievable.

After a brief introduction, many organisations choose to display the rest of this information in table form. Below are some templates to help you start planning. A small number of suggested outcomes and actions are included but these are ideas only. You can borrow these ideas but it is important that your plan responds specifically to the needs you have identified and that it makes sense to you.

Focus Area 1: PREVENTION			
Outcome 1: Increase court engagement in prevention activities			
Action: What?	**Rationale: Why?**	**Responsibility & Resourcing: Who and how?**	**Progress indicators**
Example: Conduct a public awareness campaign on family violence via radio.	To educate the public about their rights (to live free from family violence) and the ways in which they can access help.	To be undertaken collaboratively with other government agencies and key civil society organisations. Key court representative: Technical assistance:	Campaign conducted Could undertake a survey of attitudes/ knowledge of rights prior to and following campaign

Focus Area 2: VICTIM FOCUS			
Outcome 1: Improved access to justice for the victims of family violence			
Action: What?	**Rationale: Why?**	**Responsibility & Resourcing: Who and how?**	**Progress indicators**
Example: Establish a private room for victims to wait with their families before family violence court hearings.	Victims often feel afraid to wait with offenders before court. This would promote their psychological safety.	Key court representative: Technical assistance:	Room utilised by women (and their families) prior to court.

Outcome 2: Improved safety for family violence victims using the courts			
Action: What?	**Rationale: Why?**	**Responsibility & Resourcing: Who and how?**	**Progress indicators**
Example: Establish a private room for victims to wait with their families before family violence court hearings.	Victims often feel afraid to wait with offenders before court. This would promote their psychological safety.	Key court representative: Technical assistance:	Room utilised by women (and their families) prior to court.

Outcome 3: Improved fairness for family violence victims using the courts			
Action: What?	**Rationale: Why?**	**Responsibility & Resourcing: Who and how?**	**Progress indicators**
Example: Provide unconscious bias training for judges and magistrates.	We all have unconscious bias but it is important it doesn't impact on judicial decision making.	Key court representative: Technical assistance:	Number of judges and magistrates who have received unconscious bias training.

Focus Area 3: PERPETRATOR ACCOUNTABILITY			
Outcome 1: Less inappropriately lenient sentences for the perpetrators of family violence			
Action: What?	**Rationale: Why?**	**Responsibility & Resourcing: Who and how?**	**Progress indicators**
Example: Sentencing guidelines for family violence cases to be developed.	Clear guidelines for sentencing will promote fairness, consistency and sentences that reflect the gravity of crimes committed.	Key court representative: Technical assistance:	Sentencing guidelines developed Judges and magistrates utilising sentencing guidelines and report finding them useful (determined by a follow up questionnaire)

Focus Area 4: COLLABORATION			
Outcome 1: Ensure that basic administrative processes/information facilitate collaboration			
Action: What?	**Rationale: Why?**	**Responsibility & Resourcing: Who and how?**	**Progress indicators**
Example: Update contact lists for key partner agency and non-government service providers.	Good service provision requires collaboration.	Key court representative: Technical assistance:	List updated

Annex E: Material from Access to Justice Toolkit: Stakeholder Focus Group Discussions and Access to Justice Surveys

Please note the following sections 3 to 4 have been taken directly from the Access to Justice Assessment Toolkit (2014): **https://www.fedcourt.gov.au/pjsi/resources/toolkits/access-to-justice/Access-To-Justice-Toolkit-v2.pdf**

3 Stakeholder Focus Group Discussions

Many courts in the Pacific have not yet been involved in any form of Access to Justice Assessment. An appropriate starting point in this instance is to conduct a range of stakeholder focus group discussions with representatives of different interest groups. This will enable courts to commence engagement on the issue and determine the need for on-going or additional assistance.

This section outlines how to plan, implement and use information gathered from these focus group discussions.

3.1 What are Stakeholder Focus Group Discussions?

> *"A focus group brings together individuals sharing certain key characteristics to discuss a particular topic. A moderator asks the group a set of questions in a conversational manner that allows them to respond to, and elaborate on, the comments of others. This can result in a deeper, more thoughtful discussion than an interview, as the comments of research participants trigger thoughts and ideas among others."*[3]

Stakeholder Focus Group Discussions are meetings (ideally held on a routine basis) with people who represent the views of different groups within the community, including vulnerable groups. The meetings are semi-structured. That is they aim to receive feedback on a range of pre-determined issues but also allow enough flexibility to enable participants to raise other issues.

Feedback should be used by the courts to inform planning processes. This can include identifying priority areas that require attention and developing concrete plans to address those areas.

Stakeholder Focus Group Discussions should be undertaken periodically, for example either every year or in the lead up to preparation of strategic plans. This form of dialogue can be used to discuss progress and build public confidence in courts and justice institutions more broadly. If undertaken periodically, these discussions can also inform the annual reporting processes of courts.

It is important to note that the objective of these discussions is to focus on policy issues and not on the results of individual cases.

3.2 Objective of Stakeholder Focus Group Discussions

It is important for courts to obtain feedback periodically from representatives of the community they represent. This feedback should cover both the quality of services they are providing and whether or not there are areas that should be addressed by courts that are currently not being addressed. That is to say, are there people who face challenges accessing justice?

Focus Group Discussions will assist courts in their planning processes and in determining how to best use their resources. It does this by ensuring community input into these processes, helping to target allocation of resources with identified needs.

[3] ABA Rule of Law Initiative, "Access to Justice Assessment Tool: A Guide to Analyzing Access to Justice for Civil Society Organizations", New York, 2012.

3.3 How to Identify Issues for Discussion?

Section 2 identified the range of issues that courts could potentially examine in Access to Justice Assessments. It is important that assessments remain focused and prioritise some of these issues. Priorities will vary from country to country. A key first step involves deciding on what issues should become the focus of the assessments.

Courts should seek to limit the number of issues to a maximum of five specific areas of priority.

There are a number of sources of information courts can use to determine what issues to focus on:

- **Internal Consultations:** This can include discussions with judges and registrars. Reviewing annual reports or trends in cases being filed or pending in court should also assist in determining priorities. Although this is a starting point, priorities identified by courts should be cross-checked with other sources;
- **Informal external consultations:** court staff should seek the views of external observers to either confirm priorities identified by courts or provide alternative priorities. This can include other justice sector agencies, civil society organisations or off the record discussions with journalists.
- **Secondary sources:** a range of secondary sources can also be used to cross-check identified priorities. These can include reports from local organisations like human rights commissions or ombudsman. Other examples include the US State Department annual country assessments or reports from development agencies (e.g.: UNDP, UNIFEM) or organisations such as Human Rights Watch.

The box below provides an example of how this was done in Tuvalu.

Using initial interviews to define topics to include in an Assessment

The Access to Justice Assessment in Tuvalu started with a series of meetings with stakeholders with an interest in the justice sector. The following categories of people were interviewed:

i. **Justice Sector Agencies**: courts, People's Lawyer, Attorney General's office, private solicitors;

ii. **Government:** police, local government representatives, members of parliament and Ministry of Home Affairs; and

iii. **Civil Society**: umbrella organisation of NGOs, Tuvalu Family Health Association.

These interviews were used to identify the key topics included in the assessment. Based on discussions with these partners a Focus Group Discussion guide was drafted that included sections on: legal knowledge and access to information; access to legal services (in particular court services); and social order and family law issues.

3.4 Identifying Appropriate Stakeholders

The stakeholders to invite for discussions will vary from country to country and will depend also on the priority issues identified. The courts should identify between three-five different categories of stakeholders and hold separate focus group discussions for each category of stakeholder.

Potential stakeholders will include the following:

- Representatives from women's interests;
- Representatives from youth interests;
- Customary leaders and/or lay officers from local level courts;
- Religious leaders;
- Representatives from different minority ethnic or religious groups;
- Representatives from rural or remote communities;
- Members of civil society organisations with an interest in justice issues; and

- Representatives from other vulnerable groups such as intellectual or physical disabilities, HIV/AIDS positive or vulnerable employee groups.

For the reasons discussed in the box above, when a particular target group is identified, it is important to speak to actual members of that group and not only people who represent the group.

Are Representatives really 'Representative'?

In selecting the interest groups you wish to target it is important to be clear about the type of people you wish to receive information from. Sometimes there will be a significant difference in information obtained between an organisation that represents particular groups and people that come directly from that group.

Two examples:

i. In Tuvalu, we wanted to ask youth about their experiences with the law. This was in particular because people had identified alcohol and related social order problems affecting youth as a significant issue. A discussion was organised with the Tuvalu National Youth Council. All the participants were well educated, to quote one of the participants, 'law-abiding citizens'. They had limited personal experience with courts and as a result were not able to speak on behalf of youth who face difficulties with the law.

ii. Asking the most marginalized members of a village about their access to legal services is very different to asking a village leader how people in his village access legal services. In some instances the main reason why people do not access legal services is because they are afraid of their village chief. You won't find this out if you only speak to the village chief and assume they speak on behalf of everyone in the village.

3.5 Who to Involve – Court Staff

The Stakeholder Focus Group Discussion process will require human resource from judges and court staff at three levels:

i. **Leadership:** ownership and leadership from the most senior members of the judiciary is required. This includes commitment from the Chief Justice and other senior members of the management team. In most cases the Chief Justice or another senior judge, should open focus group discussions.

ii. **Implementation:** the court will need to dedicate some staff resources to the stakeholder focus group discussion process. Courts can either facilitate focus group discussions themselves or identify a skilled facilitator. Both have advantages and disadvantages. A facilitator from the court will add increased legitimacy to the process. However, people may feel more comfortable speaking to a trained facilitator, especially if providing constructive criticism of the court. If court staff facilitate the discussions this should be done by senior members of the court registry staff. Irrespective, court registry staff will need to be involved in the design and preparation of the focus group discussions.

iii. **Support:** judicial officers across all levels should be made aware of the process and the objectives of the focus group discussions. It is important to obtain their support for the discussions and also to reassure judicial officers that the purpose is to strengthen service delivery rather than assess the performance of particular judges.

Where possible, judicial officers should not conduct focus group discussions themselves. If judges are involved it will limit the amount of objective feedback from participants on quality of legal services. Participants might also become too focused on individual court cases rather than on broader policy issues. The best practice is for a judge to be present at the opening and introduce the discussion, then leave and allow the participants to continue the discussion with the facilitator.

3.6 Preparing the Discussions and Drafting a Questionnaire

The Stakeholder Focus Group Discussion process involves courts hosting three to five detailed discussions with representatives from different interest groups. There are two aspects to this: the substantive content and the logistical arrangements.

3.6.1 Preparing the Substance

Focus Group Discussions are semi-structured discussions. This means that the objective will be to obtain responses across a number of key issues. However, the discussions should be open and should not follow a rigid format.

Prior to the Focus Group Discussions the court will want to draft a broader outline of a questionnaire for the discussions. A draft questionnaire was prepared for the assessment in Tuvalu.

It is best to test the Questionnaire Guide through several 'pilot' discussions. In Tuvalu, the field guide was tested with discussions with Island Court judges and Land Court judges prior to being used for community consultations. On each occasion it was updated and questions were amended or deleted following the tests.

Testing the Questionnaire Guide also provides the facilitator with an opportunity to become familiar with the approach and the questions they will be asking. This is crucial to ensure the facilitator is comfortable with implementing the Guide.

3.6.2 Preparing the Logistics

A Focus Group Discussion should be held for each Stakeholder Group identified. Ideally, this would bring together representatives from more than one organisation.

The ideal number of participants for each focus group discussion is between five to ten people. Any more than ten people and the session will become difficult to facilitate. It will also limit the opportunity for everyone to participate.

Invitations to participants should be sent in advance. The invitation should include some explanation of the objective of the discussion, providing participants with time beforehand to consider the issues and prepare for the meeting.

As Focus Group Discussions will generally last approximately two to three hours, they should be held in a location that is comfortable and convenient to the participants. The location should encourage open discussion. In many instances, the court will have facilities that can be used for the discussion. In some countries, where budgets exist, it will be more appropriate to hire seminar or workshop facilities.

The actual resource costs involved in hosting the focus group discussions will vary depending on the jurisdiction. It may be possible to minimize costs by using court facilities. Costs involved could include:

- Hire of seminar / workshop facilities to host focus group discussions;
- Travel or per diem costs for participants involved in the discussions, although this is not generally recommended as it creates an incentive for groups to participate; and
- In some instances it may be useful to recruit a consultant to assist in the facilitation of the focus group discussions.

Compensating Participants?

Should participants be paid? Providing payments to participants has two negative aspects. First, it affects objectiveness. They are more likely to provide answers the facilitator is after because they are receiving remuneration. Second, it can lead to expectations that programmes should only operate if they are associated with payments. This reduces community commitment to the results.

On the other hand, there is a need to acknowledge that people are taking time out of their busy schedules to participate. In some countries in the region, it has also become common practise to provide allowances for participation.

This issue arose in the course of organising Focus Group Discussions (FGDs) in Tuvalu. For meetings with Island Court and Land Court judges it was agreed that they would be reimbursed equivalent to their sitting fees. For FGDs with community groups a contribution was made to the community group organisation. Another preferred approach is to provide an allocation for lunch and a transport allowance if required. This can be done in recognition of their participation in the meeting.

3.7 Conducting the Focus Group Discussion

The agenda should include the following aspects:

i. An opening by either the Chief Justice or a senior judge explaining the purpose of the Focus Group Discussions;
ii. An introductory session that allows participants to introduce themselves and make preliminary opening comments;
iii. Facilitated questioning across the key priority areas identified by the Court;
iv. An opportunity for participants to raise issues that may not have been covered; and
v. Closing remarks including summary on how information will be used.

At least two court staff will be required to participate through the whole Focus Group Discussion: a facilitator and a note-taker. Focus Group Discussions will ideally be no shorter than one hour and no longer than three hours. In Tuvalu, two hours was allocated for each Focus Group Discussion.

It is important to try and encourage all participants to share their opinions throughout the session. The facilitator plays an important role in providing everyone with an opportunity to contribute equally.

It is important also to ensure that the discussion does not become focused on individual cases. It is fine to use cases as an example of particular issues. However, the Focus Group Discussions cannot review case decisions or assess performance on particular cases. It is important to emphasize this at the beginning of the session and to remind participants if too much time is spent discussing individual cases.

Tips for Conducting Successful Focus Group Discussions

There are a number of useful tricks to facilitating Focus Group Discussions. Facilitators should:

i. Be well prepared and familiar with the questionnaire. This encourages a more free flowing conversation;
ii. Encourage an open conversation. This includes ensuring a comfortable setting and also opening the discussion in a way that encourages informality and a relaxed atmosphere;
iii. View the questionnaire as a tool that is not set in stone. Flexibility is required, allowing the conversation to take its course; and
iv. At the same time, the facilitator needs to balance a listening role with a guiding role. If a few people are dominating the conversation or too much time is spent on certain issues the facilitator needs to take control of the discussion and guide it forward.

It can be useful to set guidelines at the beginning of the conversation. In Tuvalu the following guidelines were introduced to participants:

i. The FGD aimed to receive feedback on different issues, NOT to discuss the merits of individual cases;
ii. Everyone was encouraged to participate and have an equal say;
iii. The information would be treated in confidence. Notes were taken but names would not be used in reports; and
iv. There were no right or wrong answers. Everyone's views are equally important and should be respected.

Finally, the process of conducting a Focus Group Discussion can also be a useful exercise for educating the public about the work of the judiciary. Experience from Tuvalu, as shown in the box below, highlighted that people are keen to obtain more information on the court system and used the focus group discussions to raise their own questions.

Two-Way Sharing of Information in Tuvalu

In February 2013, a Focus Group Discussion was held with community members from a village at the northern end of Funafuti. Thirteen people turned up to the discussion, held in the church.

As the facilitator worked his way through the questions, the participants were keen to ask a few themselves. A lady wanted to know how a case involving reckless driving causing death did not go to court and was asking if it was now possible to negotiate resolutions to these cases. A man asked for an explanation of the difference between the Island Court and the Land Court. Another woman had a few questions to ask about the adoption process.

The difficulty comes in trying to balance these general questions with specific advice about particular cases. At the close of the discussion, one of the participants used the opportunity to seek advice on a land case, involving payment of rent for the land the church was on.

3.8 Documenting Findings

Detailed notes should be made for each of the Focus Group Discussions. Notes should preferably be typed and saved accordingly so they can be referred to again in the future.

At the completion of all of the Focus Group Discussions, it will be necessary to compare the findings from each discussion. Courts should document these in the form of a summary report that can be circulated for comment within the court. Some courts may also feel comfortable sharing this summary with the groups who participated in the Stakeholder Focus Group Discussion.

4 Access to Justice Surveys

This section will describe the benefits of Access to Justice surveys and provide some introductory comments on planning and conducting Access to Justice surveys. The section covers the following areas:

- What is an Access to Justice survey?
- What Approaches exist to conducting surveys
- Planning and Implementing an Access to Justice survey

The section will use several examples of surveys that have been conducted in the region to guide this discussion.

4.1 What is an Access to Justice Survey?

An Access to Justice survey collects information from a broad range of respondents to assist justice sector agencies plan and deliver their services based on actual need.

The most rigorous (and expensive) type of survey is a randomly selected, representative sample of the population based on a mathematical formula. The information obtained can then be viewed as being representative of the population. Other survey approaches randomly select respondents from the population or target groups. These approaches also provide important information, often at a much cheaper cost.

As opposed to Focus Group Discussions, a survey is generally quantitative in nature. Information that is collected is in response to fixed questions. In most cases, respondents will need to choose responses from a number of possible options. This allows the responses to be compiled and provides an overall picture. If the survey is broad enough it also allows for responses to be compared between different groups of people. This can be particularly important because it highlights areas where people may be missing out on justice services.

Strengths and Weaknesses of Access to Justice Surveys

Access to Justice surveys are not recommended for all countries in the Pacific. The list below identifies some benefits and weaknesses of using a survey-type approach.	
Benefits	**Weaknesses**
• Greater ability to capture views of broad section of population, including marginalised groups;	• Is expensive and time consuming to implement;
• Allows for analysis between groups or types of users;	• Requires specialized expertise and detailed attention in designing tools;
• More empirically rigorous – provides more reliable data;	• Doesn't explain *why* particular findings occur, only documents that they do occur;
• Can allow for cross-reference to broader data sources; and	• Interpretation of results subject to bias; and
• Provides data on a broad range of issues.	• To be representative in small populations requires a large sample, in proportion to population size.

4.2 Approaches to Conducting Access to Justice Surveys

There are a broad range of options available for conducting Access to Justice surveys. This toolkit outlines three categories of approaches that have been taken and includes examples for each category.

More detailed information about the different tools available, along with links to examples mentioned below, are provided in the Annex.

4.2.1 Inclusion of Justice Issues in Broader Social/Economic Surveys

There are a number of examples, including examples in the region, where access to justice issues have been covered in broader social or economic surveys. Governments, often with the support of donors, conduct household surveys to measure progress on economic and/or social indicators. Over the last decade, the surveys are increasingly including sections that cover dispute resolution, access to legal services or related issues. The box below provides three examples:

Three Examples of Justice Issues Covered by Broader Surveys:

i. **Papua New Guinea's Household Income & Expenditure Survey (HIES), 2009**

In 2009, PNG's National Statistical Office conducted a nation-wide HIES Survey, with support from the World Bank. This survey is statistically representative of the population. The substantive part of the survey covered 10 sections including: income and expenditure, access to health and education and housing. One section was focused on dispute resolution. The section asked respondents to identify (against a list) actual disputes experienced in the past 12 months, who was involved in the dispute and its impact. Respondents were asked more detailed questions on the most serious dispute they had experienced. This included: who they asked for advice (and why), how they sought to resolve the dispute, the cost of resolution and their satisfaction with the resolution process.

ii. **People's Survey in Solomon Islands, 2011**

Introduced under RAMSI's engagement in Solomon Islands, the People's Survey is an annual stocktake of progress across a range of issues. The 2011 survey gathered people's perceptions on a range of economic, public service delivery, governance and law and justice issues. Of the nine substantive sections in 2011, two focused specifically on justice issues: Section D (Safety) and Section I (Resolution of Disputes). Topics include perceptions of justice sector actors; causes of conflict; frequency of disputes; dispute resolution processes; and costs of resolving disputes. The survey uses both quantitative and qualitative tools. It gathers data primarily on perceptions rather than actual experience (with the exception of several questions on disputes in Section I). The survey is driven by RAMSI and it is unclear to what extent Justice Sector agencies use the results.

iii. **Demographic & Health Survey, Marshall Islands, 2007**

The Republic of Marshall Islands was one of four countries to conduct comprehensive demographic and health surveys in the Pacific in 2007. The surveys were supported by ADB. In the Marshall Islands the Government's Economic Policy, Planning & Statistics Office (EPPSO) implemented the survey. The survey was quantitative with a sample representative of the

As the examples above indicate, one of the challenges with sections included in broader surveys is that it reduces ownership. On justice issues, for example, courts would be less involved in the design of the survey and, as a result, less interested in the results. All of the surveys above are implemented and the results analysed by agencies outside of the justice sector. A consequence of this is that courts, and other justice sector agencies, are less involved in the design and less committed to implementing the findings.

4.2.2 Justice Sector-Wide Surveys

A number of countries undertake Access to Justice surveys at a sector-wide level. The surveys frequently cover a broad range of topics with the results of interest to the judiciary, other justice sector agencies, civil society and the legal profession more broadly. These forms of surveys are becoming increasingly common.

In the United States, the United Kingdom and Australia, sector-wide Access to Justice assessments are normally carried out by civil society organisations. The results are presented as recommendations to courts and other justice sector agencies. The box below describes the recently launched "Legal Need in Australia" survey conducted by the New South Wales Law and Justice Foundation (LJF).

Legal Australia-Wide Survey: Legal Need in Australia, 2012

In 2012, the NSW LJF published its report on legal needs in Australia. The report draws on telephone interviews with over 20,000 respondents. Results are representative for each state. Respondents were asked about their experiences relating to 129 different types of legal problems across 12 broad categories. In addition, information on the characteristics of legal problems and demographic information was collected. The demographic information allows the report to make findings specific to the needs of particular groups. Those with the most significant needs were: people with a disability, indigenous people, the unemployed, single parents, people living in disadvantaged housing and people living primarily on government payments.

The reports main key finding was the important link between legal problems and non-legal needs. This led to recommendations to increase distribution of legal information through non-legal service providers (e.g. health, welfare, housing) and to ensure legal service providers can better advise clients about other non-legal services available, including through stronger coordination between legal agencies and other human service providers.

There are numerous examples of justice-sector wide surveys conducted in developing countries, including a wide range of Access to Justice surveys. Most of these surveys are conducted for donor agencies and the findings are generally used to design donor programs. A UNDP review of 23 Access to Justice assessments that it has supported in the Asia-Pacific region, documents examples of some of these surveys. To date, none of these assessments have been conducted in countries in the Pacific.

4.2.3 Surveys focusing on Specific Issues

The final approach is to conduct surveys focusing on specific issues. There are numerous examples of this type of approach, including several from the Pacific. The Pacific surveys have been implemented by other justice sector agencies. Examples include the series of "Community Crime Victimization Surveys" conducted by the police in urban centres in PNG and discussed in the box below.

Lae Urban Community Crime Victimisation Survey, 2010

The PNG Government's Law and Justice Sector Secretariat conducted a survey on community perceptions of crime and the level, extent and type of crime in the urban centre of Lae in 2010. This included data on community views about justice sector agencies. 382 respondents were selected using the 2000 Census and previous surveys to ensure different urban areas and age-brackets were covered. Survey results showed an increase in crime across most of the categories covered.
This was the third time the survey was done in Lae. Surveys are also used in Kokopo and National Capital District. This allows the Government to compare results over time and to allocate resources to each of the areas and design strategies to target specific types of crime based on identified need.

There are very few examples of courts using targeted surveys to support their activities in the Pacific. A very small pilot was developed and tested under PJDP in the Marshall Islands in 2011. The box below describes that experience.

Piloting an Access to Justice Survey in the Marshall Islands

As part of research conducted under Phase 1 of PJDP a small survey was designed and tested in Majuro, Marshall Islands. The survey was divided into three sections: (i) demographic information; (ii) legal knowledge and access to information; and (iii) experience of actual disputes. The survey questions were designed following interviews with a number of stakeholders and incorporated requests from the judiciary to examine issues relating to land disputes. The survey was implemented primarily by a clerk of the court in Marshallese with assistance from the adviser. Respondents were selected randomly from three geographic locations in Majuro representing different socio-economic characteristics.

Several interesting findings arose from the survey. Over 60% of households who responded had no formal right to land they lived on. They were living on land at the invitation of the formal landowners and if they experienced disputes would have limited ability to bring their dispute to court. This confirmed other research on socio-economic issues in urban areas of the Marshall Islands. The main type of disputes experienced by respondents were, equally, fighting, land, domestic violence and debt problems and a number of these disputes remained unresolved or the respondents did not follow up on complaints. Respondents identified information on family issues (e.g. adoption, divorce) as being their primary need followed by land and crime. Community leaders and the radio were identified as the most effective means of distributing information.

4.3 Planning and Implementing an Access to Justice Survey – Issues for Consideration

Implementing an Access to Justice survey can be a complex undertaking. In most cases it will involve significant effort and, depending on the method adopted, financial commitment. For this reason, it is crucial upfront to determine the aim of the survey. All other aspects of preparing and conducting a survey will be influenced by the aim. This section will outline some of the issues involved in planning and implementing an Access to Justice survey.

4.3.1 Defining the Purpose of an Access to Justice Society

Access to Justice surveys can address a number of purposes for courts. For example, they can provide courts with an overall picture of service delivery and issues faced by people in accessing courts. Partnering with other justice sector agencies, they can identify key access to justice issues more broadly. They can also focus on specific issues or groups of people and assist courts in developing relevant policies to address those issues.

Initial Access to Justice surveys are generally undertaken at a sector-wide level. This allows courts to obtain an overall picture of how people view the justice system and justice needs. It also ensures that areas are not overlooked purely because questions were not asked in relation to those areas. In countries where donors support these surveys, donors also prefer overall surveys because these can be used to assist in identifying areas of support for donor programs.

Courts may wish to focus surveys on specific issues or groups of people. This approach is generally undertaken either where there are specific, identifiable issues that need to be addressed or there are donors or civil society organisations with a specific focus willing to support the court's work.

Where courts undertake Stakeholder Focus Group Discussions as a first step this will assist in both determining if they need to undertake broader Access to Justice surveys and identifying the focus of those surveys.

4.3.2 Defining the Survey Method

Defining the survey method will often depend on two main factors. First, the purpose of the survey will determine what type of survey needs to be implemented. Second, the budget available will also affect the approach that is taken.

Surveys that are representative of the population at large or specific geographic or socio-economic groups will provide the most accurate data and be most influential. However, implementing these surveys requires specific technical expertise. These types of surveys are also generally expensive and there are limited organisations in the Pacific with experience in undertaking these types of surveys.

Courts may wish to start with more targeted or less statistically valid surveys that provide a snapshot of the population without being definitive.

4.3.3 Resourcing and Access to Justice Survey

As has been noted above, implementing Access to Justice surveys, depending on the approach taken, can be expensive exercises. Courts will rarely have the technical capacity in-house to undertake the surveys and as a result will need to seek assistance from external parties.

A starting point for seeking information on surveys may be to contact government departments that frequently undertake surveys (e.g.: departments responsible for statistics or research) or university faculties with experience in this area.

As has been noted above, it may be possible to 'piggy back' on surveys that are already planned on other issues. This means, that modules on access to justice would then be added to survey questionnaires that cover a broader range of issues. This approach can be effective for a number of reasons. It means that costs can be shared between a number of parties. It also means that the court can draw on the technical expertise of other actors in developing and implementing surveys. It does however, limit ownership of the court in conducting the surveys and means that the court is dependent on other actors for timing and content.

For countries with significant donor activity, it may be possible to engage donors to support implementation of surveys. Donors are progressively seeking to develop and monitor programs based on a more reliable evidence base. Quantifiable analysis in the form of survey results can provide this evidence base and as a result donors may be interested in supporting these kinds of research. Donors already support access to justice surveys in the Solomon Islands (through the *People's Survey*) and in Papua New Guinea (where a dispute resolution section exists in a World Bank supported Households Income and Expenditure Survey).

4.3.4 Drafting a Survey Questionnaire

It is important to emphasize several key issues when designing a survey.

First, surveys must be developed to respond to the local context. This means both asking questions in a culturally appropriate manner and ensuring the substance is applicable to the local context. Generally the starting point for developing surveys is to look at other examples.
There are benefits in ensuring consistency across countries because it means results can be compared. However, this must be balanced with ensuring appropriateness in the local context. For this reason surveys must be field tested prior to implementation.

Examples of Access to Justice Surveys

Full copies of the following survey questionnaires are provided in the Annex:

- **Marshall Islands Judiciary 'pilot' survey PJDP**: this survey questionnaire was designed specifically for the High Court of the Republic of the Marshall Islands in relation to the PJDP Customary Dispute Resolution Research.
- **People's Survey, the Solomon Islands**: this survey provides an example of access to justice and dispute resolution questions inserted into a broader governance survey questionnaire.
- **Household Income and Expenditure Survey, PNG**: this survey provides an example of dispute resolution sections inserted into a broader socio-economic survey questionnaire.
- **Legal Knowledge, Attitudes and Perceptions Survey, Open Society Justice Initiative**: this survey is a civil society designed survey for measuring access to justice from a community perspective.

Second, it is a constant balancing act between wanting to gather as much information as possible and ensuring that the surveys are easy to administer. Larger scale quantitative surveys can take as long as two to three hours to administer. This places a significant burden on respondents. Except where modules are included in broader surveys, it is good practise to ensure surveys can be completed in between 30-60 minutes by respondents.

Third, people rarely enjoy talking about justice issues. If you are talking to strangers about justice issues they often link this to problems. For this reason, it is crucial that surveys are clearly explained to respondents, that information is kept confidential and that surveys are administered in a comfortable and private environmental. It can also help to commence the survey with less confronting questions prior to discussing issues like actual disputes experienced.

Fourth, it is useful to ensure that accurate socio-demographic data is collected. This allows you to compare data across categories of people when analysing results and identifying trends for specific or vulnerable groups. A good practice is to examine the background questions in other social or economic surveys conducted in your country.

Annex F: Access to Justice Overview to the Cook Island Indicators

Sex and juvenile disaggregated data

For Sexual and Gender Based Violence cases, present data on cases filed and finalised, for the last five years if available, by:

- In criminal matters (i) sex of offender (ii) sex of survivor/victim;
- In juvenile matters involving children under 18 years (i) a child is a perpetrator and (ii) a child is a victim/survivor in a criminal matter;
- In family violence matters the number of Family Protection Orders where the applicant/ survivor/victim is a woman, child or man;
- The average final sentence in violence cases in which the survivor/ victim is a woman or child (The ICAAD Track GBV research will present this information for sexual assault, murder/manslaughter and domestic violence cases).

In family law matters, present data on cases filed and finalised, for the last five years if available, by (i) sex or applicant (ii) sex of respondent.

Cook Island Indicator 5

Disaggregate cases filed by:

- Number of female applicants that are granted a court fee waiver in their civil cases; and
- Number of male applicants that are granted a court fee waiver in their civil cases.

Cook Island Indicator 6

Disaggregate cases filed by:

- Number and percentage of criminal cases disposed through a Circuit Court;
- Number and percentage of family cases disposed through a Circuit Court;
- Number and percentage of other civil cases disposed through a Circuit Court; and
- Disaggregate family and other civil cases disposed through a Circuit Court by the sex of the applicant party.

Cook Island Indicator 7

Disaggregate cases filed by:

- Number and percentage of criminal cases where the defendant receives legal aid;
- Number and percentage of family cases where the applicant party receives legal aid;
- Number and percentage of other civil cases where the applicant party receives legal aid; and
- Number and percentage of women who receive legal aid to assist them to bring their family law or civil cases.

Cook Island Indicator 8

In addition to a general selection on client complaint and feedback mechanisms related to court staff and judicial officers, include:

- Results of client satisfaction surveys and actions the court has taken in response; and
- Consider targeted court user surveys focussing on a part of the courts work where there are a significant number of applicants or victims/survivors who are women, children or people living with a disability.

Cook Island Indicator 13

Court produces or contributes to an Annual Report that is publicly available in the following year.

Present last five years of information on Court Annual Reports and how they are published.

2011 on PacLII	**2012** on PacLII	**2013** on PacLII	**2014** on PacLII	**2015** published but not on PacLII

Cook Island Indicator 14

Information on court services that is publicly available, including information on how to bring:

- Family Law Cases; and
- Family Protection Orders/ Restraining Orders.

How is this information published: on PacLII, on noticeboards, on court websites?

Cook Island Indicator 15

Court publishes judgements on the Internet (through PacLII or their own website). Include information on the publication on PacLII or a court website (from the last reporting years) on:

- The number and percentage of criminal cases finalised in 2016 that were published on PacLII or a court website;
- The number and percentage of family cases finalised in 2016 that were published on PacLII or a court website; and
- The number and percentage of civil cases finalised in 2016 that were published on PacLII or a court website.

In the Magistrates Court:

- The number and percentage of criminal cases finalised in 2016 that were published on PacLII or a court website;
- The number and percentage of family cases finalised in 2016 that were published on PacLII or a court website; and
- The number and percentage of civil cases finalised in 2016 that were published on PacLII or a court website.

Disability Inclusive Courts

Present disaggregated data on the number of clients who needed assistance:

- To locate, enter and navigate court proceedings within the court-room;
- To read a document;
- To hear what is being said in court; and
- To understand what is happening in the court hearing as well as what preparation may be required before the hearing day.

Consider including a narrative on the ways that the court engaged with CSOs working with people living with a disability to identify how to make the services of the court more disability-inclusive.

Collaborating with Others

A narrative of the specific services provided by courts for women and girls who are survivors of violence, as well as those services that are undertaken in collaboration with Government agencies and/or Civil Society Organisations.

This narrative can also highlight multi-sectoral working meetings that the court leadership has arranged on family law and violence against women and children issues with key government agencies and CSOs to seek feedback on how the current procedures are working and barriers faced by women, children and other vulnerable groups in accessing the courts for their cases.

Annex G: National Outcome Standards for Perpetrator Interventions

Please note the following is available at: https://plan4womenssafety.dss.gov.au/wp-content/uploads/2018/08/nationaloutcomestandardsreportweb.pdf

Standard 1 Women and their children's safety is the core priority of all perpetrator interventions

Women and their children's safety is the reason why our systems must intervene effectively against perpetrators. Effective perpetrator interventions must give women and their children confidence that they will be supported and protected if they report violence and must minimise any trauma women and their children experience as a result of their involvement with perpetrator interventions (for example during the court process and during the conduct of programmes and case management).

Perpetrator interventions must include elements focused on assessing, monitoring and responding to changes in the perpetrator's risk of committing further violence against the women and their children who have experienced his violence. Effective programmes for perpetrators must also have in place mechanisms that provide opportunities for victim/survivors to access ongoing partner contact, family or other support services wherever appropriate.

Perpetrator interventions must have regard to the needs of women and their children from diverse cultures, and communities and circumstances so they can help all victim/survivors get suitable support whenever they are involved with the perpetrator accountability system.

Standard 2 Perpetrators get the right interventions at the right time

Our systems and services must play an effective role in ending perpetrators' violence by working together at every opportunity to identify, keep sight of and engage with perpetrators.

It is imperative that our systems and services share relevant information about perpetrators and victims wherever possible*, including information on victim/ survivor safety and perpetrator risk. This information must be used to help the perpetrator accountability system to respond in integrated ways so that the right parts of the system can engage with the perpetrator at the most effective times to reduce the risk of him committing violence and minimise the impacts of any violence that does occur.

We must ensure that we intervene swiftly with perpetrators as soon as an instance of their violence is identified in ways that stop their violence and give the perpetrator opportunities to change his violent behaviours and attitudes.

Perpetrator interventions must be designed to respond effectively to perpetrators from diverse cultures, and communities and circumstances at all the key points of engagement with them in the perpetrator accountability system. Effective interventions with perpetrators must include specific responses suited to ending as early as possible the violence of perpetrators who are engaging with the system for the first time as well as responses suited to minimising harm from persistent re-offending.

* Sharing of information must remain consistent with all relevant legislation, including information privacy provisions and principles

Standard 3 Perpetrators face justice and legal consequences when they commit violence

Legal, civil and community justice responses to perpetrators are a powerful tool that can interrupt and address violence against women and their children.

This standard shifts the burden from women and their children to protect themselves and places that responsibility firmly back onto our justice and legal systems. It puts systems in the position of being accountable for ensuring that perpetrators face appropriate justice and legal consequences for their violence; that perpetrators understand what those consequences mean; that the victim/survivor is informed about the consequences that the perpetrator faces; and that the system responds effectively to perpetrators who do not comply with the mandatory justice and legal consequences and sanctions placed on them (for example an intervention order or an order to attend a behaviour change or other offender programme).

Justice and legal systems accountability involves making systems competent at engaging effectively with perpetrators from diverse cultures, communities and circumstances and facilitating a sense of justice for all victim/survivors.

Standard 4 Perpetrators participate in programmes and services that enable them to change their violent behaviours and attitudes

Behaviour change programmes, other offender programmes and clinical services aimed at enabling perpetrators to stop their violence can play an important role in the perpetrator accountability system.

This standard is about inviting or mandating men to engage with and complete programmes designed to enable them to take responsibility for their violence and work towards changing their violent behaviours and attitudes. Providing targeted interventions sends a message to the community that perpetrators of violence can change.

To respond effectively to all perpetrators, perpetrator programmes and services must be adaptable for perpetrators from diverse cultures, communities and circumstances, and engage effectively with perpetrators with diverse needs.

This standard also highlights the role of perpetrator programmes and services in helping to keep the perpetrator visible to the accountability system regardless of whether he achieves attitude and behaviour change. This enables the perpetrator accountability system to maintain risk and safety monitoring of the perpetrator so the system can intervene if necessary to prevent further violence.

It is important that victim/survivors are assisted to understand that the perpetrator's participation in a behaviour change programme is not guaranteed to result in him stopping his violence. It is also important to inform victim/survivors that even without behaviour change, the perpetrator programme can play an important role in maintaining their safety.

Programmes and services for perpetrators should integrate with sectors, such as the mental health, or the alcohol and other drug sector, to help perpetrators to address factors that are directly linked to their offending or to their readiness to respond to programmes and services. Perpetrator interventions must also include mechanisms for providing victim/survivors with access to ongoing partner, family or other support services wherever appropriate, particularly women and their children who have not had contact with support services before.

Standard 5 Perpetrator interventions are driven by credible evidence to continuously improve

The evidence base for perpetrator interventions is not yet comprehensive. The perpetrator accountability system and interventions are in the early stages of development with an evidence base emerging over time.

This standard supports evidence-based and evidence-building practices within the agencies, structures, services and programmes that make up the perpetrator accountability system. There is a need to ensure the consistent evaluation of programmes and services and to utilise the available Australian and international evidence base to strengthen new and existing interventions.

Evaluative processes must be built into perpetrator interventions to build the evidence base for 'what works', promote innovation based on evidence, and actively engage in continuous improvement.

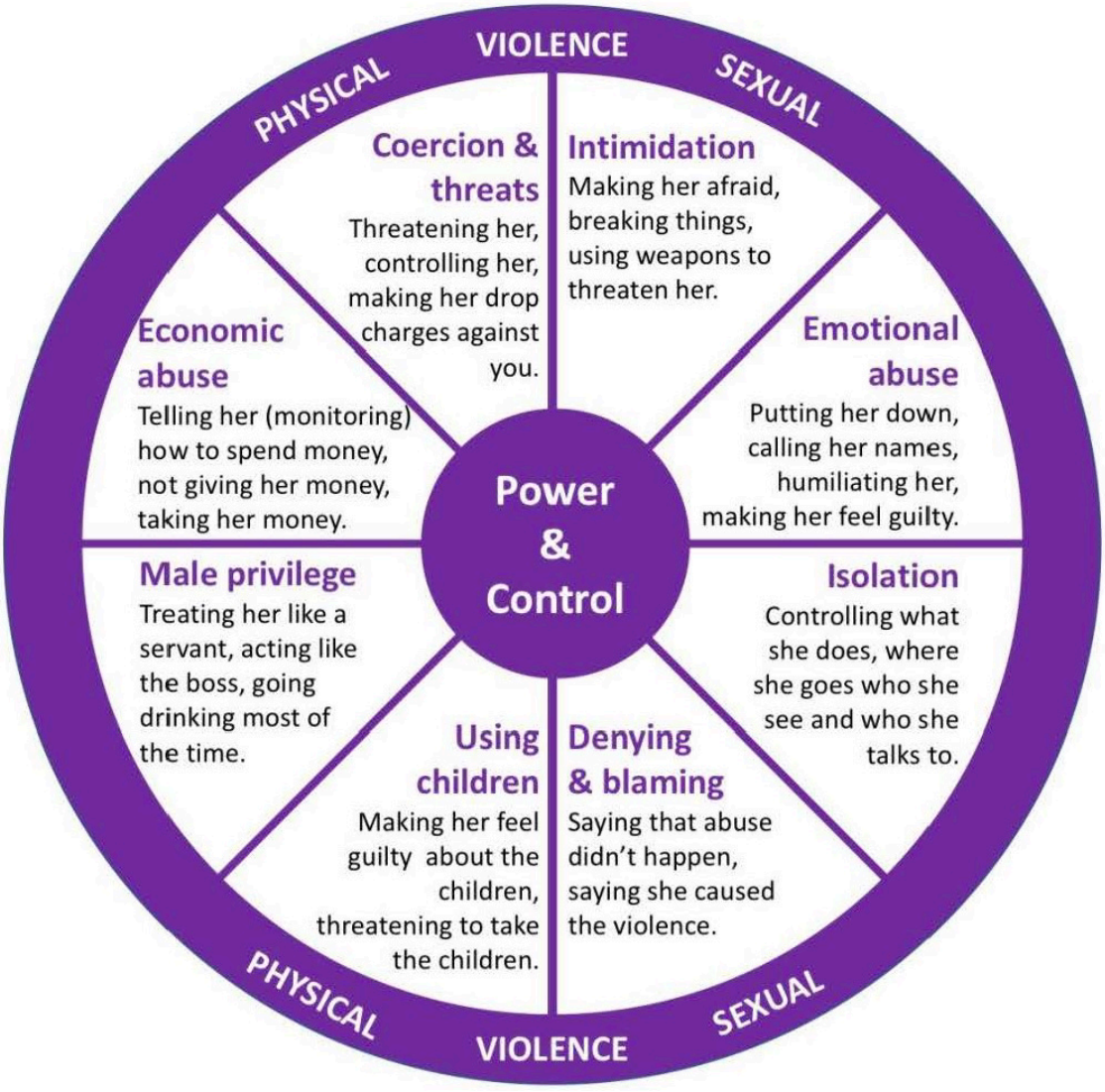
Standard 6 People working in perpetrator intervention systems are skilled in responding to the dynamics and impacts of domestic, family and sexual violence

A range of people, both generalist and specialist professionals and practitioners, can have a significant impact in addressing and reducing violence against women and their children through their interactions with perpetrators.

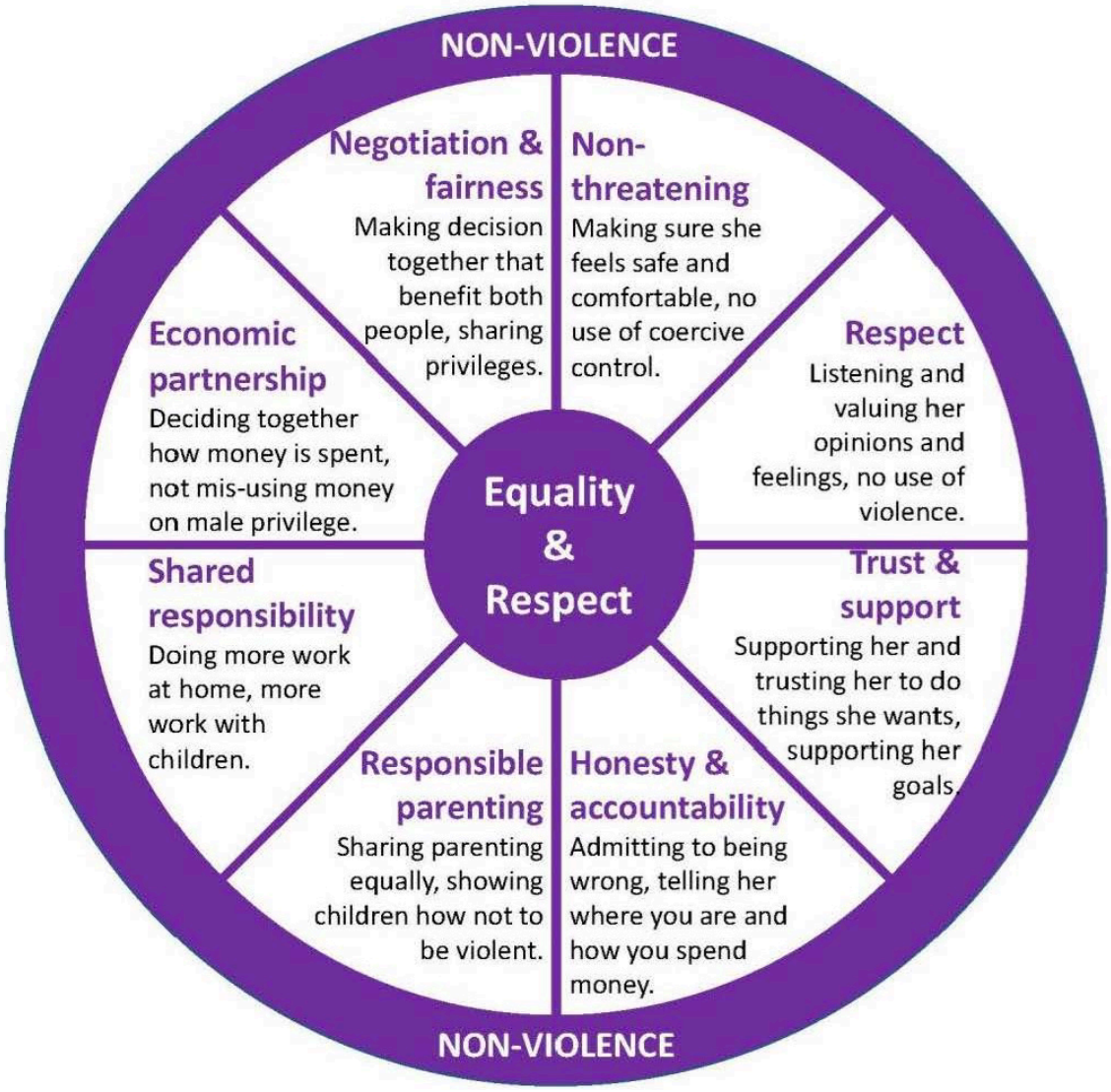
People working in the perpetrator accountability system require support and access to professional development opportunities enabling them to understand the dynamics of domestic, family or sexual violence, including gender dynamics, intervene safely and appropriately with perpetrators, and understand the impact interventions can have on women and their children who experience the perpetrator's violence.

We must build workforce (and community) capability to provide interventions that are effective with perpetrators from diverse cultural and community circumstances. This standard gives effect to the need for broad development of competencies in working with perpetrators from diverse backgrounds.

Annex H: Power & Control Wheel



Annex I: Equality & Respect Wheel



PACIFIC
JUDICIAL STRENGTHENING INITIATIVE

Gender and Family Violence Toolkit

PJSI Toolkits are available on: http://www.fedcourt.gov.au/pjsi/resources/toolkits

Pacific Judicial Development Programme

Family Violence and Youth Justice Project Workshop Toolkit

September 2014

PJDP is funded by the Government of New Zealand and managed by the Federal Court of Australia

Toolkits are evolving and changes may be made in future versions. For the latest version of the Toolkits refer to the website - http://www.fedcourt.gov.au/pjdp/pjdp-toolkits.

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstances.

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PJDP TOOLKITS

Introduction

For over a decade, the Pacific Judicial Development Programme (PJDP) has supported a range of judicial and court development activities in partner courts across the Pacific. These activities have focused on regional judicial leadership meetings and networks, capacity-building and training, and pilot projects to address the local needs of courts in Pacific Island Countries (PICs).

Toolkits

Since mid-2013, PJDP has launched a collection of toolkits for the ongoing development of courts in the region. These toolkits aim to support partner courts to implement their development activities at the local level by providing information and practical guidance on what to do. These toolkits include:

- Judges' Orientation Toolkit
- Annual Court Reporting Toolkit
- Toolkit for Review of Guidance on Judicial Conduct
- National Judicial Development Committee Toolkit
- *Family Violence and Youth Justice Project Workshop Toolkit*
- Time Goals Toolkit
- Access to Justice Assessment Toolkit
- Trainer's Toolkit: Designing, Delivering and Evaluating Training Programs

These toolkits are designed to support change by promoting the local use, management, ownership and sustainability of judicial development in PICs across the region. By developing and making available these resources, PJDP aims to build local capacity to enable partner courts to address local needs and reduce reliance on external donor and adviser support.

Use and support

These toolkits are available on-line for the use of partner courts at http://www.fedcourt.gov.au/pjdp/pjdp-toolkits . We hope that partner courts will use these toolkits as / when required. Should you need any additional assistance, please contact us at: pjdp@fedcourt.gov.au

Your feedback

We also invite partner courts to provide feedback and suggestions for continual improvement.

Dr. Livingston Armytage
Team Leader,
Pacific Judicial Development Programme

September 2014

PREFACE

Both family violence and youth justice are substantial issues in the Pacific. The occurrence of family violence is high and worrying. Although all pacific country are parties to the United Nations Convention on the Rights of the Child, much more needs to be done to promote a special way in which our young people should be treated in the justice system.

PJDP has already raised awareness and provided assistance through the running of four day workshops in Palau, Vanuatu, Tonga, Samoa, Cook Islands and Solomon Islands, and the programme is committed to continuing this assistance.

As a result of the workshops held thus far, PJDP sees as the ideal, assisting individual Pacific countries to arrive at a collaborative model so that all agencies can work together. There is a place for the Judiciary in this model too. For countries to arrive at a memorandum of understanding as to who will do what is seen as helpful. Specifically, PJDP can help by:

i. promoting sustainability through capacity-building and skill transfer;
ii. facilitating encouragement through local processes; and
iii. enabling local participants to deliver development activities and outcomes and to use such assistance from elsewhere in the Pacific or from PJDP as is required.

This toolkit is designed to give effect to this emphasis by improving judicial knowledge, skills and attitudes (i.e. competence) of judicial and court officers relating to family violence and youth issues, law, contemporary practice and procedure, with reference to appropriate approaches to associated issues in the courtroom.

This toolkit will continue to be refined as it is put into effect and as feedback is received. In time, the object will be to have an electronic toolkit which is interactive and electronically user-friendly.

TABLE OF CONTENTS

ABBREVIATIONS

MFAT	-	New Zealand Ministry of Foreign Affairs and Trade
MoU	-	Memorandum of Understanding
MSC	-	Managing Services Contractor - Federal Court of Australia
NGO	-	Non-Government Organisation
PIC	-	Pacific Island Country
PJDP	-	Pacific Judicial Development Programme ('Programme')
UNCROC	-	United Nations Convention on the Rights of the Child
UNESCAP	-	United Nations Economic and Social Commission for Asia and the Pacific
WHO	-	World Health Organization

1 INTRODUCTION

1.1 WHY WORKSHOPS AND WHY A TOOLKIT?

Family violence is destructive of families and of societies. Such is the prevalence of domestic (or family) violence against women and children that a judicial and broader response is called for. It is important to recognise that family violence is complex and includes psychological abuse such as verbal abuse, harassment and economic violence as well as physical and sexual assaults. And with children, the violence may not necessarily be directly on them. Being present and hearing violence can itself be very destructive.

These statistics make the point.

The prevalence of family violence against women in selected Pacific countries		
Country	Prevalence rate %	Source
Kiribati	68	Kiribati Family Health and Support Study on Violence against Women and Children 2010
Papua New Guinea	67	UNESCAP: Economic Social Survey of Asia and the Pacific 2007
Solomon Islands	64	Solomon Island Family Health and Safety Study – a study on Violence against Women and Children 2009
Samoa	47	WHO Multi country study on Women's Health and Domestic Violence 200-2003 published in 2007

By working collaboratively within your country, judiciaries, law enforcement agencies, NGOs and other important people such as village chiefs can bring about change.

So also with youth justice, focus needs to occur on the special needs of young people who offend and they need to be treated quite differently to adults.

Even when countries do not have special youth justice legislation, by working collaboratively, in the same way as achieving a response to family violence, much can be done to better promote the UNCROC.

1.2 WHAT DO WE MEAN BY A TOOLKIT?

It is helpful to have a template to work from when bringing people together to discuss these issues with a view to effecting change.

The toolkit sets out everything you will need to stage a workshop and the object is to ensure that workshop time is well used, has the right people attending and stands the best chance of achieving real change.

1.3 HOW TO USE THIS TOOLKIT?

Once a Pacific country has decided to stage a workshop, the contents and resource material in this toolkit should enable you to conduct all of your planning and run the workshop through to a successful conclusion. We have assembled the material in a helpful chronological order or what needs to be done at the very outset through to implementing the outcomes that you reach.

By way of examples we have included a standard programme, a list of who should be invited, actual material that you will want to use such as PowerPoints and video clips, and examples of evaluations that might be used both before and after the workshop so that you can check on what has been learnt and what attitude shifts there might have been.

As we become more and more electronic, this toolkit will have hyperlinks, enabling you, upon the click of the mouse or the touch of the screen, to access directly the material you are most interested in. We see this as a developing process and the toolkit will change as it is used.

You will see that the toolkit covers both family violence and youth justice and that the proposed workshop programme suggests that there should be two days of family violence followed by two days of youth justice. However you need not necessarily adopt this format. For instance, you may wish to stage a workshop on family violence alone and the toolkit should enable you to do this. The same is so for the youth justice part. We have included both subjects in the one toolkit because often, Pacific countries wish to deal with both and those who might be invited to each part are very similar. But the two parts can stand alone if you wish.

Every country and need will be different. Adapt and apply this toolkit to meet your local needs - *two suggested approaches:*

The toolkit is a suggested approach as to content and style. But because each PIC presents differently, just how the toolkit will be used will need to be considered and discussed with PJDP.

Two areas in particular spring to mind. The first is that if new legislation is being contemplated or has been passed, you may benefit from outside experience and expertise from another country. If on the other hand the prime wish of the workshop is to up-skill on practice locally, you may have less of a need for outside expertise. The second area relates to your own infrastructure. Sometimes judicial officers are so busy with their work that there is no capacity to spend any great deal of time on the setting up and running of a workshop such as this. But if your country does have a dedicated national trainer whose task relates to the running of judicial training, you may be able to use this toolkit without any outside assistance at all.

And so, use PJDP as you wish. This could be on the obtaining of advice on how you wish to customise the toolkit and provision of further materials. Beyond that you may have your own internal resources to run the workshop entirely.

If for whatever reason you need in-country support from PJDP and the presence of a subject matter expert, ask for them but try and do as much as you can yourselves. PJDP exists to encourage and support. But a lot of that can occur by providing administration and advice. If your subject matter calls for the presence of an outside expert, PJDP can make sure that that happens.

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2 FAMILY VIOLENCE

2.1 WHAT ARE THE COMPONENTS OF A TRAINING PROGRAMME?

You have two days for both aspects of this workshop. And so, how do we approach family violence?

Obviously an important question to ask is what needs to be covered. The answer to this may depend on whether or not you currently have, or are contemplating having, specific Family Violence legislation. But leaving that to one side the following are probably the essentials:

1. Session One – The Definition of Family Violence

   Spousal and family discipline: What is the ambit of perceived acceptable customary discipline and when does such discipline become abuse? What is acceptable and what is not? Having regard to changing social norms, what do we see our current challenges as. Achieving gender equality. Recognising that there may be discrimination, particularly against those who are marginalised. Being conscious of this and discussing how to address it.

2. Session Two – The Background and the Drivers

   What should be borne in mind when discussing family violence in the context of the Pacific? What is it that should be borne in mind when developing an approach and a model? What is being done in the Pacific to cause change to occur and how family violence is managed and perceived? In particular, what is the relevance of religion, the Old Testament and what the church teaches, colonisation in terms of pre and post colonisation standards and what is it in culture that must be understood and applied?

3. Session Three – Police Philosophy and Charging Practice

   Work continues to be undertaken by other countries with police forces in the Pacific on the subject of family violence. But how equipped are police forces in the Pacific to deal with family violence cases? What is police philosophy and charging practice? When can we expect the police to intervene and when will they not? What are the types of charges that will be laid and how soon will a charge reach a court?

4. Session Four – The First Appearance

   How will the judicial officer determine that there is a family violence case in the list for the day which will carry with it, special risks and tensions? What safety factors should be borne in mind for the victim? We shall discuss the family and cultural tension that will be at work when a domestic case reaches the public arena? Having discussed the victim's position and ongoing safety, we shall turn to the defendant, the person who is alleged to have been violent and discuss the taking of a plea and bail options.

   [The first role play will occur as to the taking of a plea, the reading of facts and discussing bail and safety.]

5. Session Five – Defended Hearings

   This will be the longest of the sessions and the time we take will be customised by how much time is thought to be needed in the other components of the workshop. All participants will be invited to take part in role plays. In the defended hearing, the following will be taught and discussed:

i. withdrawal of "complaint" and wish of the victim to recant;
ii. the cultural and family pressures that will be at work and how this will be played out;
iii. personal and family disgrace - how that will be recognised and addressed;
iv. courtroom organisation; and
v. the components of evidence and how these components are best applied.

[The role play here will involve the use of a courtroom, selected fact situations and the testing of situations that will frequently arise.]

6. Session Six – The Guilty Plea or Finding of Guilt after a Defended Hearing

There are three components to this part of the workshop. The first is to discuss when and how a restorative justice meeting might be invoked and held. What are the advantages and disadvantages of restorative justice. What must be particularly considered in a family violence case. Secondly, the Pacific constitutional imperative of reconciliation will be addressed and applied. The third component is to discuss with judicial officers what to do pending sentence. What counselling or other programmes might be put in place pending sentence. What are the ongoing safety issues and where should the defendant live.

7. Session Seven – Sentence

What are the available sentencing options. A look at the legislation of specific Pacific countries is vital to this part of the workshop. Sentencing philosophy will be looked at, together with precedent, that is looking to see what superior courts have said in order to apply the law. When will imprisonment be inevitable or appropriate. Finally, what is the relevance and importance of reconciliation or a restorative justice meeting on sentencing outcome.

[This session will involve role plays wherein course participants will be asked to sentence in actual factual situations.]

8. Session Eight – The Role of the Judicial Officer

What are the messages and leadership initiatives that a judicial officer, when sentencing, should consider and apply? What part does a judicial officer play in the community and what leadership role should be taken both in the court and outside the court?

9. Session Nine – The Future: Setting Goals

This will be the conclusion of the workshop and will aim to engage all participants on their individual attitudes and philosophy. All of the tools that a judicial officer should ideally have to undertake a family violence case from start to finish will be assembled and once again discussed.

The workshop will conclude by a statement of our vision. What is the legacy we would like to leave as judicial officers when it comes to the handling of family violence cases.

2.2 WHO SHOULD BE INVITED?

Our experience so far has been that a truly collaborative workshop achieves the best outcomes. While you may wish some parts of training to be for judicial officers alone, for the most part, having everyone who plays a part in addressing family violence present, is best. It seems to us that judicial officers have welcomed discussing the work they do with other agencies and that in turn those agencies have gained a better appreciation of how the judicial process works. Keep your invitation list as broad as you can and include as many players in the family / justice system as possible.

Special to the Pacific is the place of the church and chiefs. In the February 2013 Vanuatu Family Violence Workshop, the Council of Chiefs presented in a very powerful fashion on the relationship between custom and family violence. We see the invitees to a workshop as being one of the single most important doors to success.

Examples of who you may wish to invite are set out in *Annex 1*.

2.3 WHAT SHOULD BE THE PROGRAMME DESIGN?

To give effect to the components already referred to above, a standard programme might look like what we have attached as *Annex 2*. You will see that this includes youth justice as well.

However the position is a little different in each country and so you will want to customise your programme to reflect this. For instance Vanuatu has its own anti-violence legislation in the form of the Family Protection Act since 2008. The real and ongoing issue for Vanuatu is implementation. Much more recently legislation has been passed in Pohnpei State in the Federated States of Micronesia, the Marshall Islands, Samoa, Solomon Islands, Tonga and Fiji and draft Bills are before the Parliaments of Kiribati and the Cook Islands. It follows that what that country might regard as important might be quite different to another country. Our recommendation is that you take the draft attached but discuss it with proposed invitees before you settle on a final version of the programme.

Our experience has been that workshop attendees prefer to commence each day at 9.00am and to have finished by 4.30pm. This enables judicial officers to undertake some other work each day if needed. It pays to be sensitive to what the requirements of each judiciary are and particularly what view the Chief Justice has as to appropriate workshop times.

In 2.7 we refer to outcomes. To some extent, what you are looking for is an outcome that will of course influence your programme design. And so, looking to see what other countries have achieved and what you may wish to similarly achieve may influence your approach. It is often the case that some “settling down” within a workshop needs to occur and that engagement amongst participants slowly gathers momentum. It may be good for your planning if you concentrate the initial sessions on presentations by others and work towards interactive discussions and more engagement as time goes on.

2.4 HOW DO WE PLAN THIS WORKSHOP?

PJDP has developed a *National Judicial Development Committee Toolkit* and that has the most detailed information necessary to plan this workshop from start to finish.
The following are the essentials:

i. Fix the date well in advance so that judicial officers can be rostered out of normal duties in sufficient time.
ii. Obtaining the early support of your Chief Justice or other chief judicial officer is crucial because support at this level can make a world of difference to the potency of outcomes.
iii. Settle your list of intended invitees and double check this with others in the community. Quite unintentionally, you may miss someone really important. And then, get your invitations out with a draft of the programme well before the date given for the workshop. At least a month sounds right.
iv. You are going to be together as a group, for both parts of the workshop, for four days. And so, your venue needs to be comfortable. There may be a wish to use a court facility. Just bear in mind that judicial officers can sometimes be tempted to work in the court instead of

coming to the workshop. Perhaps a neutral venue away from the court stands the best chance of keeping people focused on the workshop.

v. Who will you have to lead and facilitate? It is really important to select people who can communicate well and who know the subject matter. You may have everyone you need in-country, but do not be afraid to ask for a trainer from another Pacific country or through PJDP. Use of a national trainer or one from another country through the regional training team is a very good starting point.

vi. You will want to produce a booklet for all attendees and much of the content of that can simply be downloaded from this toolkit. But allow yourself time and resource to assemble the booklets.

vii. You will see from the programme that a variety of activities works best and so does variety in forms of presentation. Our experience has been that PowerPoint is used often and effectively. And so, have PowerPoint available to use.

viii. Finally, someone needs to be in charge. This might be your National Coordinator or in-country trainer. Communication, if it is good, can make the workshop work really well. If it is not good you risk embarrassing lapses in the programme which might reduce its credibility and impact.

2.5 PRE-WORKSHOP ASSESSMENTS

When you start the workshop it is probably helpful to know how much those present know about family violence. Not only does this give you good information so that your focus is clear for the workshop itself, but it also enables you, at the end of the workshop, to assess what sort of an impact the workshop has had.

PJDP has used a pre-workshop evaluation as set out in Annex 3. This was used for our workshop in Vanuatu but for Tonga we used a simpler question and answer / multiple choice format. This is also included in ***Annex 3***. You may wish to use either of these models or customise so that you achieve the pre workshop evaluation that you find most helpful.

As a matter of practicality you may not be able to have the pre workshop assessments filled out until the morning of the first day of the workshop however there is obviously merit in having this information before you complete detailed planning and so, if you are able to send out the pre workshop assessment for attendees to fill out beforehand, then so much the better. You decide whether this is practical. It may be better to wait until the commencement of the workshop.

2.6 USE OF MATERIALS

In our workshops so far we have used material to good effect. In addition, we have included examples of presentations made by police and other agencies to give you a guide as to what you might ask for your particular workshop. All of this is attached for you in ***Annex 4***.

i. Background reading: Family violence - some Pacific considerations (pgs A-11-15)
ii. Cultural Considerations - a PowerPoint prepared by the Vanuatu Women's Crisis Centre (pg A-16)
iii. PowerPoint - The Drivers and Customary Considerations - Vanuatu National Council of Chiefs (pg A-17)
iv. PowerPoint: Typologies in Family Violence - prepared by Vanuatu National Council of Chiefs (pg A-18)
v. Vanuatu Police statistics illustrating cases coming into court (pg A-19)
vi. Case scenario for role play: Loane v Loane (pgs A-20-23)

vii. Case scenario for role play: Paul Jones (pgs A-24-25)
viii. A video clip of Once Were Warriors (pg A-26).

Before settling on the resources you will use, make sure that you communicate with other Pacific countries by way of checking whether they have specific family violence legislation and if so whether they have produced training material and what practices they have found to have been useful. As more and more Pacific countries pass family violence legislation, consulting with others to see what is working well or what the problem areas have been, is a practice we thoroughly recommend.

2.7 DESIRED OUTCOMES

It is easy to talk about our problems and agree that we can and should do better. The risk is that we will not do enough.

It is a good idea, at the very outset, to have in mind what you want to achieve at the end of the workshop. Of course it may change as the workshop progresses.

In workshops undertaken so far, there has been an overwhelming wish to have a firm commitment to change. In this regard, the Palau workshop resulted in a Memorandum of Understanding (MoU) which sets out a very helpful collaborative template of how agencies including the judiciary, will work together. Please refer to *Annex 5* for a copy of the Palau MOU.

In Vanuatu, where there is already specific family violence legislation, the MoU reached was more focused on in-country procedures so that the legislation could work better. This will also be relevant in the other countries who have recently enacted legislation. That is attached as *Annex 6*.

You may think it would be helpful to have a document like this agreed to, signed and circulated.

However when we undertook the Follow-Up visit to Vanuatu we learned that a mistake we had made in the first MoU was not to have agreed on and implemented a "court users group" to ensure that items agreed to and which required action, were actually attended to. It was not clear who should take the leadership role. Our suggestion is that as part of the MoU you create court users group, have the chair of that elected by the workshop and ask that group to meet before the workshop concludes in order to set up their first post workshop meeting. To meet monthly seems wise.

Most Pacific countries have Non-Government Organisations (NGO's) who are available to undertake some counselling or mediation. Forming a relationship with such groups seems crucial because they can help in so many ways in handling referrals from the court. We recommend that you identify what counselling and mediation groups are operating in your country, ensure that they form part of your training and consider forming an ongoing relationship with them. Counsellors and mediators can contribute much to stopping violence programmes for men, victim support programmes for women and in mediating in family conflicts even although family violence may be a factor.

2.8 POST-WORKSHOP ASSESSMENT

We recommended that you check at the beginning of the workshop what the level of knowledge was. You may find it helpful to check again at the end of the workshop to see what part of the workshop has worked well and what those attending have learnt.

Attached in *Annex 7* is the post-workshop questionnaire which was used in Vanuatu which is a little different to the pre-workshop questionnaire. However for Tonga we used exactly the same questionnaire for both pre

and post workshop assessment (already provided in ***Annex 3***) and simply compared the level of knowledge in order to assess what had been learnt.

2.9 FOLLOW-UP

It can be so hard to sustain change. It is not because we do not want to change, but because the ordinary demands of our every day work can make it difficult to spend the time we need to implement change.

And so, your workshop should not be seen as fulfilling the complete task. You may want to organise a follow-up meeting, though of course not a full workshop, to check on implementation. Perhaps putting aside half a day, six months away, will be seen as really important.

We recommend that the lead trainer or workshop organiser assumes responsibility for settling the follow-up procedure including setting a date at the end of the workshop, for the follow-up meeting, and then ensuring that it happens.

3 YOUTH JUSTICE

3.1 WHAT ARE THE COMPONENTS OF A TRAINING PROGRAMME?

In the programme that we have already attached you will see a suggested design for the youth justice component of the workshop.

In essence, Day 1 will be theory where participants will learn what the characteristics of young people are and what is special about youth crime.

Day 2 will be a practical day where we talk about the treatment of young people by the police, by the judiciary and those connected with the court, and of course by correctional facilities such as prisons.

3.2 WHO SHOULD BE INVITED?

The invitation list for family violence will be a good starting point for youth justice, but you may want to add in others who deal specifically with young people. These will be correctional facilities, some NGOs and others such as schools.

Our suggestion is that you make it clear to invitees that there are two distinct components to the workshop, and in this way you find out whether they wish to come for both components of just one. There is no reason why the police should not attend the whole of the workshop. But, different parts of the police may attend the first and second components.

3.3 WHAT SHOULD BE THE PROGRAMME DESIGN?

If you look at the programme that we have attached, you will see that day one deals very much with:

i. Brain development of adolescents and why this is so important.
ii. The different types of youth offenders, for instance persisters and desisters.
iii. What our international obligations are and in particular, UNCROC.
iv. What the typical 10 characteristics of a desirable youth justice system are in your country.

In Day 2 we need to move to more practical considerations and these should include:

i. Is there a standard police practice in when young people are charged and if so what is it?
ii. Is there a diversion scheme in place and if there is how does it work?
iii. How does the court process work and in particular do young people occupy a separate place in the courts schedule? Are their cases called along with adult cases?
iv. When you are dealing with young people who do you have in the courtroom?
v. How is the court set up and is it used friendly? Should the set-up be different to what it is for adults?
vi. What sort of language do we use when dealing with young people? To what extent is it different from the language we use for adults?

Once these aspects have been covered, it is useful to move into role plays in order to let participants practice the theory. You will want to appoint one of the judicial officers to act as the role of the judge / magistrate, to have a police officer ready to “prosecute”, and then to involve others to act out the parts of the young person, the young person’s parents, and other resource people. By approaching things in this way, participants will be trying out the theory and putting it into practice.

3.4 USE OF MATERIALS

Just as we have done with family violence, we have assembled some resource material which is attached and which you may find useful. All of this is attached for you in *Annex 8*. This includes:

i. Suggestions for youth justice specific justice process (pgs A-37-38)
ii. Group discussion notes (pgs A-39-41)
iii. PowerPoint: 10 Characteristics of a Good Youth Justice System (pg A-42)
iv. The South Pacific Council of Youth and Childrens Courts 15 point assessment of a youth justice system. This is a very useful "self-assessment" tool for your country (pgs A-43-52)
v. Types of youth offender (pgs A-53-58)
vi. PowerPoint: Brain development (pg A-59)
vii. PowerPoint: UNCROC (pg A-60)
viii. Best practice (pgs A-61-70).

3.5 PRE- AND POST-WORKSHOP ASSESSMENTS

Our experience has been that participants had demonstrated a very large shift in their knowledge and practice in this component of the workshop. Very similar questionnaires can be used pre and post workshop. Examples of these are attached as *Annex 9*.

3.6 DESIRED OUTCOMES

By working collaboratively, some major shifts can occur without a great deal of expenditure of resource. For instance:

i. police colour code cases coming into the court, for instance by designating young offenders cases, a specific colour file;
ii. by ensuring that when young people are charged proper details are set out as to their age;
iii. the court scheduling young offender cases at a specific time and away from adult cases;
iv. all of those people who will form part of good outcomes for young people know when the cases are going to be called and dealt with so that it is inclusive; and
v. community groups are used to achieve good outcomes particularly where diversion of young people away from conventional sentences are possible.

In an ideal world there would be specific youth justice legislation for each country. But in the absence of that, an agreed process to act collaboratively can provide a very sound foundation. As an example, a MoU reached as a result of the February 2013 Vanuatu Workshop is attached as *Annex 10*.

3.7 FOLLOW-UP

You will see that the design of this workshop is based on the two distinct components of family violence and youth justice. In the follow-up that we have suggested occurring in relation to the family violence component, it seems sensible to include in that follow-up for youth justice.

Family Violence and Youth Justice Project Workshop Toolkit -

Additional Documentation

Available at:
http://www.fedcourt.gov.au/pjdp/pjdp-toolkits/PJDP-Family-Violence-Youth-Justice-Toolkit-AD.pdf

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ANNEX 1: LIST OF PARTICIPANTS

Family Violence & Youth Justice Workshop, Vanuatu

Participants	Department/ organisations
Chief Justice Vincent Lunabek	Supreme Court
Judge Robert Spear	Supreme Court
Judge Mary Sey	Supreme Court
Judge Dudley Aru	Supreme Court
Judge Daniel Fatiaki	Supreme Court
Chief Magistrate , Stephen Felix	Magistrates Court
Senior Magistrate Nesbeth Wilson	Magistrates Court
Senior Magistrate Rita Naviti	Magistrates Court
Magistrate Peter Moses	Magistrates Court
Magistrate Hannaline Ilo Nalau	Magistrates Court
Chief Registrar John Obed Alilee	Supreme Court
Merelyn George	Child Protection Unit, Police
Davis Saravanu	Child Protection Unit, Police
James Aru Toka	Police, Department
Leias Kaltovei	Child Desk Officer, Women's affair
Brenda Nabirye	Child Protection Officer, UNICEF
Daniel Tavoa	Correctional Services
Shem Tema	Vanuatu Christian Council of Churches (VCC)
Hellen Corrigan	AusAID (Law & Justice sector)
Natalie David	Ministry of Justice
Goimel Soalo	Ministry of Justice
Beverley Kanas	Ministry of Justice/ Law Commission
Merelyn Tahi	Vanuatu Women's Crisis Centre
Vola Matas	Vanuatu Women's Crisis Centre
Jacob Kausiama	Public Solicitor Office
Viran Trief	Solicitor General
Jane Gereva	State Law Office
Frederick Gilu	Attorney General's Office
Bill Bani	Law Society
Kayleen Tavoa	Public Prosecution Office
Grey Vuke	State Prosecutor
Alikta Vuti	National Council of Chiefs
Kathy Southall	Save the Children Vanuatu

Family Violence & Youth Justice Workshop, Palau

Participants	Department/ organisations
Alan Marbou	Juvenile Justice
Alex Ngiraingas	Community Guidance Center
Carol Ngiraidis	Milad'l Dil
CID Officer	Bureau of Public Safety (Police)
Clara Rechebei	PO - Probation Officer
Cleory Cleophas	Chief PO - Probation Officer
Dave Tarimel	Court Marshals (Monitor Juvenile/Probationers)
Delanie Prescott-Tate	Olbiil era Kelulau (National Congress) / Legal Counsel
Ernestine Rengiil	Attorney General
Hedrick Kual	
Hesus Omisong	Division of Corrections
Honora E. R. Rudimch	Sr. Judge
J. Uduch S. Senior	Palau Bar Association (Attorney)
Jasmine Vergara	Behavioral Health / Ministry of Health
Jennifer Olgeriil	Bureau of Public Safety (Police)
Kathleen M. Salii	Justice
Kattery Faustino	Ministry of Health
Kazuki Topps Sungino	Palau National Olympic Committee
Kenny Reklai	Palau National Olympic Committee / Micronesian Youth Services Network
Lalii Chin Sakuma	Public Defender
Laura Mangham	Talent Search / Ministry of Education
Lorenza Pedro	Ekei - Elder Women Organization
Lue Cee Kotaro	School Health
Marhence Madrangchar	Delegate, Olbiil era Kelulau (National Congress)
Ngirakebou Roman Bedor	Member of Palau Council of Chiefs / Palau Bar Association (Attorney)
Ngiraked Yukiwo Dengokl	Member of Palau Council of Chiefs / Palau Bar Association (Attorney)
Noe Yalap	Ministry of Education
Patrol Officer	Bureau of Public Safety (Police)
Rachel Dimitruk	Palau Bar Association (Attorney)
Rebecca Koshiba	Victims of Crime Abuse
Roberta Louch	Ekei - Elder Women Organization
Romeo Reddin	Court Marshals (Monitor Juvenile/Probationers)
Shelley Ueki	Community Guidance Center -BH Worker
Siegfried Nakamura	Palau Bar Association (Attorney)
Victoria Roe	Attorney General

ANNEX 2: WORKSHOP PROGRAMME

Pacific Judicial Development Programme

Family Violence and Youth Justice Workshop

24 - 27 July, 2012 - Koror, Palau

Family Violence Workshop - Daily Programme

Workshop objective: to discuss family violence issues in the Pacific context, and to train judicial officers in the approach to and handling of a family violence case given the Pacific context and given the outcomes which are available and which are appropriate. The intention of the workshop is to mix theory and research with interactive discussion and role plays of actual cases so that the dynamics of what is being discussed and taught can be experienced and the reality tested.

Day One: Tuesday 24 July - Definitions, Theory and Community Interaction				
Time	Topic	Aims/Outcomes	Activities	Resources
8.30 - 10.30am (120 mins)	Opening of workshop Session One - The Definition of Family Violence and Police Practice What is Police Philosophy and Charging Practice	Have a clear understanding of the aims and desired outcomes of the workshop Develop a good understanding of what a Family Violence is Be informed about and understand Police practice	Lecture Lecture and use of statistics and data	• Chief Judge Peter Boshier • Inspector Samasoni Malaulau • Palau Police Director
10.30 - 10.45am	*Morning Tea*			
10.45 am - 12.15pm (90 mins)	Session Two - The Background and the Drivers	What attitudes and influences are important What is the role of religion and culture	Facilitated group discussion	• Inspector Samasoni Malaulau • Palau Police Director • Victims of Crime Abuse • Behavioral Health
12.15 - 1.30pm	*Lunch*			
1.30 - 2.45pm (75 mins)	Session Three - Theory and Typology of Family Violence	What are the types of Family Violence, and how should the different types be treated	Lecture and group discussion	• Victims of Crime Abuse • Community Guidance Center • Behavioral Health • NGO representatives
2.45 - 3.00pm	*Afternoon Tea*			

3.00 - 4.00pm (60 mins)	Session Four - Community Response and Interaction	What does the community expect of us and what are our points of interaction	Lecture and facilitated discussion	• Inspector Samasoni Malaulau • Palau Police Director • Corrections Officers • Behavioral Health • NGO representatives • Ministry of Education
4.00 - 5.00pm (60 mins)	Session Five - The Judicial Role	What we presently know and what we may need to know more of in order to handle cases in the best fashion	Facilitated group discussion	• Chief Judge Peter Boshier • Justice Salii
5.15 - 5.30pm (15 mins)	Evaluation			

Day Two: Wednesday 25 July - In the Courtroom				
Time	Topic	Aims/Outcomes	Activities	Resources
8.30 - 10.30am (120 mins)	Session One - The First Appearance	What safety factors should be borne in mind for the victim *bail and place of safety option* a request to withdraw the charge against the defendant	Lecture Group discussion	• Chief Judge Peter Boshier • Inspector Samasoni Malaulau • Justice Salii
10.30 - 10.45am	*Morning Tea*			
10.45am - 12.15pm (90 mins)	Session Two - Defended Hearings	Withdrawal of "complaint" and wish of the victim to recant i. The cultural and family pressures that will be at work and how this will be played out ii. Personal and family disgrace - how that will be recognised and addressed iii. Courtroom organisation iv. The components of evidence and how these components are best applied	Mock Court case	• Chief Judge Peter Boshier • Inspector Samasoni Malaulau • Justice Salii • Senior Judge Rudimch
12.15 - 1.30pm	*Lunch*			
1.30 - 2.45pm (75 mins)	Defended hearings continued			
2.45 - 3.00pm	*Afternoon Tea*			

3.00 - 4.15pm (75 mins)	Session Three - The Guilty Plea or Finding of Guilt After a Defended Hearing and Sentence	What are the sentencing options Hearing from the victim Custom and reconciliation	Lecture, facilitated discussion and role plays	• Chief Judge Peter Boshier • Justice Salii • Senior Judge Rudimch • Department of Corrections
4.15 - 4.45pm (30 mins)	Session Four - Conclusion and Setting Goals	What have we learnt What might we do differently, and how might we do that	Facilitated discussion	• Chief Judge Peter Boshier • Justice Salii • Jelga Emiwo
4.45 - 5.00pm (15 mins)	Evaluation			

Youth Justice Workshop - Daily Programme

Workshop objective: to discuss youth justice issues in the Pacific context, and to train judicial officers in the approach to and handling of youth justice cases given the Pacific context and given the outcomes which are available and which are appropriate. The intention of the workshop is to mix theory and research with interactive discussion and role plays of actual cases so that the dynamics of what is being discussed and taught can be experienced and the reality tested.

Day Three: Thursday 26 July				
Time	Topic	Aims/Outcomes	Activities	Resources
8.30 - 10.30am (120 mins)	Introduction & Overview Session One - Palau's Experience	To understand the present Youth Justice (YJ) process in Palau including its limitations.	Panel discussion, notes on whiteboard to record main points. Comments from the Panel	• Judge Harding
10.30 - 10.45am	*Morning Tea*			
10.45am - 12.15pm (90 mins)	Session Two - Brain Development Session Three - Types of youth offenders	1. To understand why young people deserve to be treated differently. 2. To identify the 2 main types of youth offenders.	Lecture	• Judge Harding
12.15 - 1.30pm	*Lunch*			
1.30 - 2.45pm (75 mins)	Session Four - UNCROC - 10 characteristics of a good Youth Justice System & New Zealand overview. Possible simple legislation	To identify characteristics Palau can strive for in a youth justice system, and possibly consider a simple YJ statute.	Lecture/s	• Judge Harding

2.45 - 3.00pm	*Afternoon Tea*			
3.00 - 4.45pm (125 mins)	Session Four cont. - Non-legislative change possibilities Session Five - Takeaways: steps available to different segments outside courts and legislative change	To identify possible actions to improve the position of YJ in Palau without statutory interventions.	Mixed group discussion and report back. Sectors identifying what they can do to contribute to better outcomes.	• Judge Harding
4.45 - 5.00pm (15 mins)	Evaluation			

Day Four: Friday 27 July				
Time	Topic	Aims/Outcomes	Activities	Resources
8.30 - 10.30am (120 mins)	Session Six - New Zealand practice details	Courtroom, protocols, decisions to charge, community involvement, how much practically can be used or adapted	Lecture and discussion as to what could be adopted from New Zealand	• Judge Harding and local Judiciary
10.30 - 10.45am	*Morning Tea*			
10.45am - 12.15pm (90 mins)	Session Seven - Court simulation	Practising skills and conducting child and youth court in terms of setting, language, judicial conduct, demeanour, procedure, orders and the like.	Role play /lecture /practice as to in Court setting, language, layout.	• Judge Harding and all participants
12.15 - 1.30pm	*Lunch*			
1.30 - 2.45pm (75 mins)	Session Eight - sentencing issues within present system	Remarks, language, options, adjournments, community involvement, discharges.	Lecture and discussion	• Judge Harding
2.45 - 3.00pm	*Afternoon Tea*			
3.00 - 4.45pm (125 mins)	Session Nine - Strategising progress for 12 months	Preparation of action plan, what might be achieved in the absence of legislative change?	Produce written plan for future improvement of Youth Court outcomes.	• Judge Harding, group session, reporting back
4.30 - 5.00pm (30 mins)	Workshop Wrap up; Evaluation; Certificates			

ANNEX 3: FAMILY VIOLENCE PRE-WORKSHOP ASSESSMENT

PJDP - FAMILY VIOLENCE AND YOUTH JUSTICE WORKSHOP

PORT VILA, VANUATU: 12-15 FEBRUARY, 2013

Family Violence Pre-workshop Questionnaire

Please answer the following questions. This questionnaire will help the faculty to understand your particular training needs and focus training during this orientation course. It will also help us to assess what you have learned from the training at the end of the course.

Question 1: *The Definition of Family Violence:* please define when discipline becomes abuse:

_____

_____

Question 2: What cultural / societal influences need to be understood and applied in family violence cases?

_____

_____

Question 3: Please List two cases where the police *should intervene* in family violence cases:

1. _____
2. _____

Question 4: Please List two cases where the police *should not intervene* in family violence cases:

1. _____
2. _____

Question 5: Please list three factors should be borne in mind when hearing a family violence case?

1. _____
2. _____
3. _____

Question 6: Please list two *advantages* of restorative justice:

1. _____
2. _____

Question 7: Please list two *disadvantages* of restorative justice:

1.

2.

Question 8: In family violence cases, when will imprisonment be inevitable or appropriate

Question 9: What part does a judicial officer play in the community and what leadership role should be taken both in the court and outside the court?

PACIFIC JUDICIAL DEVELOPMENT PROGRAMME
FAMILY VIOLENCE AND YOUTH JUSTICE PROJECT PRE/POST-WORKSHOP ASSESSMENT
TONGA WORKSHOP 18-20 SEPTEMBER, 2013

This brief survey has been developed to assess the knowledge and your particular training needs in the area of family violence and youth justice. We greatly value your feedback.

Q1. Which organisation you are from?

1. Judiciary ☐
2. Court Administration ☐
3. Police ☐
4. Other Government Department ☐
5. Other (such as NGO) ☐

Q2. How much do you know about the recently passed Tonga '*Family Protection Bill 2013*'?

☐ *Nothing* ☐ *Not much* ☐ *Some knowledge* ☐ *Excellent knowledge*

Q3. Should family violence cases be treated in the same way as other cases involving violence?

1. Yes ☐
2. No ☐
3. Not sure ☐

Can you please explain your reasons for answer given above.

Q4. Should victims of family violence be treated in the same way as victims of any other offences?

1. Never ☐
2. Sometimes ☐
3. No ☐

Can you please explain your reasons for the answer given above.

Q5. Is family violence in Tonga a significant concern?

1. Yes ☐
2. Perhaps ☐
3. No ☐
4. Don't know ☐

Q6. Do the Police respond adequately to family violence in Tonga?

1. Always ☐
2. Sometimes ☐
3. No ☐
4. Don't know ☐

Q7. Should community groups have a greater part to play in court outcomes dealing with family violence?

1. Yes always ☐
2. It depends ☐
3. No ☐
4. Don't know ☐

Can you please explain your reasons for the answer given above.

Q8. By law, what is the age of a juvenile or young offender in Tonga? (please state age or if you do not know, please state do not know).

Q9. Should young offenders be treated any differently to adult offenders?

1. Yes always ☐
2. It depends ☐
3. No never ☐
4. Not sure ☐

Can you please explain your reasons for the answer given above.

Q10. Should juvenile offenders always be charged and brought before the court?

1. Yes always ☐
2. Sometimes ☐

Can you please explain your reasons for the answer given above.

Q11. Is there a special procedure in Tonga for dealing with juvenile or young offenders?

1. Yes ☐
2. No ☐
3. Don't know ☐

If you answered yes, can you explain what that process is.

Thank you again for your time, and also for your assistance with completing this assessment!

ANNEX 4: FAMILY VIOLENCE WORKSHOP MATERIALS

Family Violence

i) What are the Drivers

- What is the role of cultural and familial influences on family violence in Pacific communities in New Zealand?
- What is the role of other factors ie social, educational or economic factors associated with ethnicity? In relation to Pacific communities poverty, colonisation, cultural alienation and experiences of racism.
- Are there real biases in the criminal justice system which impact the judicial outcomes for Pacific people? A recent study suggests that there is more of a likelihood for Maori and Pacific people under the Domestic Violence Act 1995.

ii) Cultural Context

- Gender relations in Pacific communities.
- Cultural norms which support or endorse violence as a solution.
- Beliefs that support parental rights and authority over children's rights.
- Collectivist cultural norms.
  http://www.justice.govt.nz/publications/global-publications/s/safer-communities-action-plan-to-reduce-community-violence-sexual-violence/reducing-violence

iii) Treatment of Victims

- Women who are culturally, linguistically or religiously distinct face additional barriers to those faced by other women. There are two separate types of barriers - those relating to accessing the justice system and those barriers experienced when women go through the justice system

- *In Touch Team (2010), I lived in fear because I knew nothing: Barriers to the Justice System Faced by CALD Women Experiencing Family Violence. Victoria Law Foundation.*
- Barriers in Courtroom include language difficulties and inadequate interpreting services. Cultural concepts relating to gender roles, modesty, and upholding respect for community and family may all also play a significant role.

iv) Gathering Information: Who to Consult?

- Effective community consultation may involve using both formal organisations and structures as well as consulting with relevant individuals and interest groups. A multifaceted approach to consultation is more likely to ensure that all voices are heard.

- As part of the Family Violence Taskforce work a number of Pacific fono were held.

- http://www.msd.govt.nz/about-msd-and-our-work/work-programmes/initiatives/action-family-violence/taskforce-work.html

v) Restorative Justice and Sentencing

- Alternative Dispute Resolution (ADR) is not the panacea for all problems but it is frequently viewed as a face saving way of dealing with disputes and may be more aligned with judicial processes in the home countries of ethnic minority communities.
- Most Pacific societies are familiar with the ideas of "alternative dispute resolution" without necessarily being familiar with the term. As Vanuatu Chief Justice Lunabek informed a conference on conflict resolution held in Vila in 2000: "ADR is not a new concept to Pacific Island jurisdictions and, in particular, to Vanuatu. It is, in fact, consistent with traditional methods of dispute resolution that predated the introduction of the formalised system of justice".

  http://www.paclii.org/journals/fJSPL/vol09no2/4.shtml

- Community panels sentencing - Cultural levers can be used to create effective sentencing options. Cultural levers are socio-cultural based norms which can act as effective motivators of change.

- In all cultures there are practices and traditions that facilitate male dominance and oppression of women as well as values that are protective and support men's recognition of women's self-determination. Effective practice for batterer intervention programmes involves understanding and using these cultural elements to help men to change.

- Community loss of face is a key lever for Pacific and ethnic communities. Effective sentencing could involve getting the community leaders to condemn violence and withdraw social privileges from perpetrator when family violence occurs. Use hierarchy and collectivism to create pressure as a deterrent factor.

Additional Notes:

1. CEDAW - All Pacific countries are parties to CEDAW expect for Nauru, Palau and Tonga.

    - States which are parties to CEDAW have clear obligations under international law to act in accordance with its principles.
    - All PICs are parties to the CRC.

2. Problem when International Convention not "domesticated"

    For example, whilst Kiribati is a party to the *Convention on the Elimination of all Forms of Discrimination against Women* and the *Convention on the Rights of the Child*, these international conventions and standards do not automatically become part of the laws of Kiribati. In the case of the *Republic of Kiribati v. Iaokiri (25/2004),* the High Court held that the CRC did not form part of the law of Kiribati, unless it was given the force of law there.

    - What approach should the Judiciary take? There are case examples in some Pacific countries e.g. where the Court takes note of the Convention although not "domesticated" and acts in accordance with its provisions.

        For example, the Chief Justice of Samoa applied an international convention to which Samoa was not a party in the child abduction case of *Wagner v. Radke [1997] WSSC 2.* The Chief Justice said:

        "Even though Samoa is not a signatory or party to the Hague Convention of Civil Aspects of International Child Abduction of 1980, the court must have regard to the principle and philosophy of the Convention in applying common law principles to the case ...and...as a tool to guide and aid the court, it could use the Conventions."

3. Sexual and Gender-based crime

    - The limitation in gender based crime is that the sexual offences law is only limited to vaginal - penile penetration. The various ways sexual violence is committed is now being addressed and changes to this section of the criminal offences law is taking place in a number of Pacific jurisdictions. E.g. Marshall Islands, PNG, Fiji.

    - Practical problems - women's low status in society, reconciliation, compensation. Reconciliation and compensation is part of the law in some Pacific countries and taken into account at sentencing e.g. Kiribati, Tuvalu, Solomon Is., and Vanuatu. Generally the families are involved rather than the victim. For Violence against Women, the Court needs to take safety, the protection, maintenance and accommodation of victims into account.

    - Cross-cutting issues - human rights and equality. Also look at disabilities and HIV/AIDS as cross-cutting issues.

4. Trafficking in women and children

This is a problem in the Pacific. Some provisions in the Penal Code such as abduction, kidnapping can deal with this issue but comprehensive legislation is necessary. Particular issues with respect to foreign fishing vessels and logging in some places such as Solomon Islands - issues of young girls prostituting, sale??, underage marriages.

- Need to look at such issues through the lens of the Convention on the Rights of the Child and CEDAW.

5. Laws relating to Children

- Countries which are parties to the CRC would also need to look at the 2 Protocols (children's involvement in armed conflict and the other, the sale, prostitution and child pornography) and apply the CRC principles.

6. Legal pluralism

Legal pluralism poses many challenges. E.g.

- Courts in the Pacific have made inroads in correcting discrimination against women in situations where customary law only benefits those of patrilineal descent to land ownership;
- In Kiribati and Tuvalu, the law provides for a 2 year old child to be transferred to the father in order to inherit land. Child transference happens generally without assessment as to whether the father can care for the child? Does he have other problems? Alcohol, violence etc? Courts have in cases, ordered the child remain with the mother and for the father to maintain the child. Mother fear that the child may be disinherited by the father and let the child go.

- The application of the CRC and best interest standards and CEDAW.

7. Race, Culture and Language - in my view would be better taught through Culture, Gender and the Law. It's possible the persons who drafted the Orientation programme may be referring to Art. 27 of the ICCPR which provides:

> "In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to insulate their own culture, to proof rests and practice their own religion or to use their own language."
>
> Conversely, CEDAW requires state parties to "undertake all appropriate measures, including legislation, to modify or abolish laws, regulations come up, customs and practices" that discriminate against women.

- Need to unpack the notion of culture. What is it? See Art. 15 of the ICESCR and Art. 27 of ICCPR.

How is culture defined? The practices that are defended in the name of culture and tradition are quite broad and there are many practices which have been defined or redefined as part of cultural life. There are certain practices that appear frequently:

- Marriage practices.
- Traditional practices harmful to women's health, such as ritual cleansing of widows, sorcerers.
- Property right where women cannot inherit ownership of land.
- Violence to discipline women, the principle of equality and non-discrimination must be given precedence in cases where the rights to culture and gender equality conflict.

Rather than finding that traditional practices and gender equality come into conflict, the Court can explore the ways in which traditional practices are understood and practiced. They can interpret tradition and culture that best addresses human rights in their judgments. One of the challenges for the courts is the ability to integrate the preservation of customary law notions such as those involved in marriage and inheritance rights and the human rights of women.

PowerPoint Presentation: Cultural Considerations - Vanuatu Women's Crisis Centre

VANUATU FAMILY VIOLENCE AND YOUTH JUSTICE WORKSHOP

SESSION 2:
THE BACKGROUND AND THE DRIVERS TO FAMILY VIOLENCE IN VANUATU CULTURAL CONTEXT

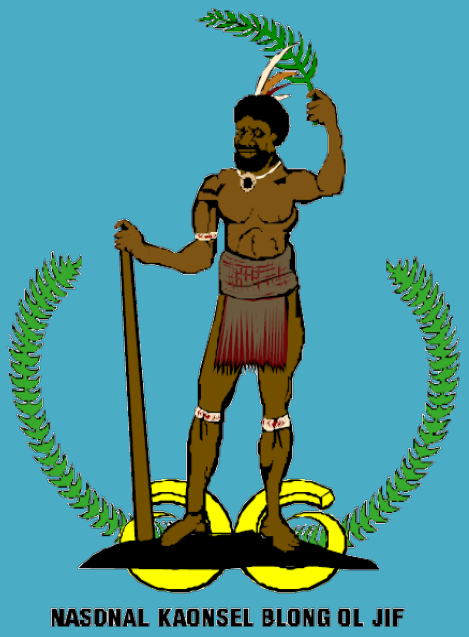
PowerPoint Presentation: The Drivers and Customary Considerations - Vanuatu National Council of Chiefs

Family Violence and Youth Justice Workshop

''The Background and the Drivers to Family Violence in Vanuatu Cultural considerations''

Perspective

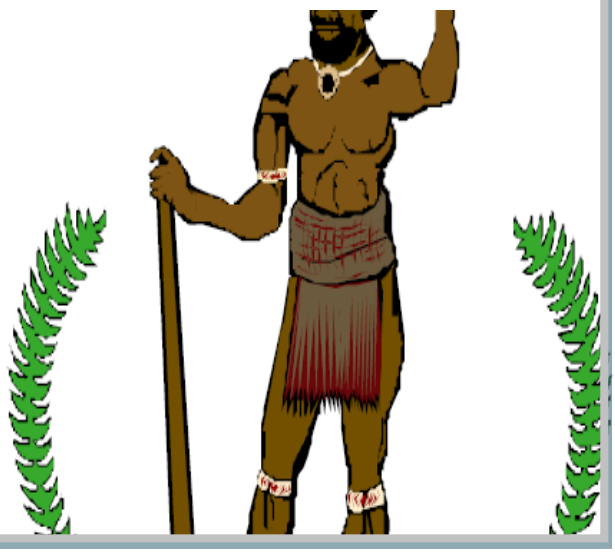
Malvatumauri
National Council of Chiefs



PowerPoint Presentation: Typologies in Family Violence - prepared by Vanuatu National Council of Chiefs

MALVATUMAURI
NATIONAL
COUNCIL OF CHIEFS,
PORT VILA

LEFTEMAP
KASTOM
GAVANANS
LONG
VANUATU



Statistics presented by Vanuatu Police

These are charges registered in Port Vila in 2011:

OFFENCE	CHARGES REGISTERED	CONVICTIONS	STILL BEFORE THE COURT	OTHER
Domestic Violence	26	4	19	2 withdrawn 1 defendant died
Breach of Protection Order	1		1	
Unlawful sexual intercourse	7	1	5	1 acquitted
Sexual intercourse without consent	29	5	14	6 withdrawn 4 acquitted
Sexual intercourse with girl under care	4		3	1 withdrawn

The following are the charges registered in Port Vila SPD for 2012:

OFFENCE	CHARGES REGISTERED	CONVICTIONS	STILL BEFORE COURT	OTHER
Domestic Violence	34		33	1 withdrawn by complainant
Unlawful sexual intercourse	11		11	
Sexual intercourse without consent	29	1	28	
Sexual intercourse with girl under care	3		3	

The following are charges registered in Port Vila SPD from 01/01/2013 to 11/02/2013:

OFFENCE	CHARGES REGISTERED	CONVICTIONS	STILL BEFORE COURT	OTHER
Domestic Violence	0			
Unlawful sexual intercourse	2		2	
Sexual intercourse without consent	4		4	
Sexual intercourse with girl under care	3		2	1 withdrawn by complainant

CAPTION SUMMARY

POLICE	V	Ioane IOANE EITA - BUOTA KIRIBATI	DOB: AGE: OCC:	14.03.60 43 Fisherman

CHARGES Male Assaults Female
Crimes Act 1961
Section 194(b)

Penalty: 2 years imprisonment

Threatens To Kill
Crimes Act 1961
Section 306(a)

Penalty: 7 years imprisonment

HEARING : Thursday the 11 September 2008 at 10 a.m.
at the Kiribati District Court

SUMMARY OF FACTS

The defendant is employed as a fisherman; he receives his pay on a regular basis on the Thursday of each week. At about 4.30pm on Thursday 5 March 2008, the defendant IOANE finished work and walked home.

The defendant lives at their home address in EITA, BOUTA with his wife who is the victim in this matter, they have 2 children aged 4 and 6 respectively.

At about 6pm that evening the defendant went to the local bar with some friends.

The defendant had consumed approximately 10 pints of beer and was drunk.

At about 10.30pm after the bar closed, the defendant decided to walk home arriving home a short time later.

While at home the defendant proceeded to smash items inside the house.

The victim had been asleep and was awoken by the noise; she then got out of bed to see what was happening.

On noticing the victim the defendant has then accused the victim of having an affair with one of their neighbours. He told her 'If I catch you two together, I will kill you'.

The defendant has then walked up to the victim and punched her twice to the right side of her head with his right fist, he has then slapped her with an open hand to the left side of her face using his left hand.

The victim has fallen to the floor and has tried to protect herself by curling into the foetal position where upon he has then proceeded to kick her repeatedly on the left side of her body, causing severe bruising. During this time the victim had her arms over her head covering her head and face areas.

The defendant has then left the house saying that he was going to get more beer. Later the victim has then gone to bed.

On Friday 6th March 2008, at approximately 8am in the morning while inside the house the defendant has again confronted the victim, accusing her of having an affair.

Before the victim could speak and without warning the defendant has then grabbed the victims head taking hold of her hair with both hands and dragged her by the hair outside onto the driveway across the sand and gravel for approximately 10 meters.

The defendant has then left the victim on the ground outside while he has gone to the toilet.

During this time the victim has attempted to hide from the defendant.

She has then used a mobile phone to call Police.

While the victim has been talking to Police the defendant has returned outside and located the victim crouching down hiding by the side of the house.

The defendant has then grabbed the cell phone from the victim and thrown it onto the gravel driveway.

He has then punched her with a closed fist twice to the left side of her face.

The defendant has then produced a knife and held it towards her face saying "I will cut you up".

A short time later police arrived and spoke with the defendant, at this time the defendant was still in possession of the knife.

After being spoken to by Police the defendant surrendered the knife.

The defendant admitted to giving the victim 'a few slaps' and stated: "she's such a liar. I didn't do anything - just gave her a few slaps, that's all. But she wouldn't shut up, the bitch - she just went on and on with her lies, so I had to stop her".

When asked if she then stopped, the defendant stated " she sure did - as soon as she saw the knife, she just shut up.

Later while being interviewed at the Police station the defendant stated that he had earlier gone out with some friends and had about 10-11 pints of alcohol.

He stated that he returned home and had an argument with his wife. When asked if the argument was over his belief that his wife was having an affair, the defendant stated "Something like that

The defendant stated that he recalled punching his wife a couple of times and to slapping her, a couple of times.

When asked to explain how the victim got a number of bruises on the left side of her body and if he had kicked her while she was on the ground. The defendant stated

That she may have sustained the bruises after he had slapped her and she fell to the floor and that he could not recall kicking the victim.

The defendant stated that he then left the house to get some more beers and ended up sleeping on the driveway.

The defendant further stated that in the morning the next day he saw the victim and again became angry and again hit her. He then said to her that he was going to get a knife and stab her.

He further stated that he obtained a knife and confronted the victim and dragged her out of the house. He stated that "I did not want her cheating on me and being in my house".

He further stated that he then left the victim on the ground and went to the toilet and when he returned he found the victim talking on the cell phone and thought she was talking to her lover. He then took the phone off her and threw it on the ground.

The defendant then refused to answer any further questions.

In explanation for his actions the defendant said that he thought that the victim was having an affair and he just got angry.

The defendant was then formally arrested and charged with male assaults Female and Threatening to Kill.

The defendant has previously appeared before the court.

PRN: 100023

02/05/08

Conviction List for:
Ioane IOANE
DOB: 14.03.60
Occupation: Fisherman.
PRN: 100023

CHARGES BY TYPE			
TYPE	Date First	Date Last	Total
DISORDER (3500)	18/11/2007	17/09/2009	3
COMMON ASSAULT	04/11/2008	09/10/2009	4
OTHER THEFTS (4310, 4320, 4350, 4360, 4370, 4380, 4390)	12/11/2006	06/12/2009	4
PROPERTY DAMAGE AND ABUSE (5100, 5200, 6100, 6200, 6300, 6500)	08/11/2006	19/05/2009	4
ALCOHOL RELATED - DISORDER(A)	24/08/2007	02/01/2009	2
MALE ASSUALTS FEMALE	22/09/2009	22/09/2009	2
DRIVING WHILE DISQUALIFIED (L112, L201, L204, L230, L231)	23/02/2007	24/08/2007	2
ASSAULTS (1400, 1500, 1600, 1700)	19/05/2009	19/05/2009	1
DISORDERLY BEHAVIOUR	02/01/2009	02/01/2009	1

Kiribati Police

PARTICULARS OF WITNESSES

WITNESSES

Name	Address and Telephone	Occupation
1. Miriam IOANE	Eita. BOUTA, Tarawa	Housewife
2. Eribwebwe TAKIRUA	C/- Betio Police. Tarawa	Sergeant
3. Robert Ellis HOSKING'S	C/- Betio Police. Tarawa	Constable
4. John LORRY	C/- Betio Police. Tarawa	Constable
5. Erin LOSE	C/- Betio Police. Tarawa	Constable
6. Haley Ryany SMITH	C/- Bouta Medical Centre, Tarawa	Doctor

EXHIBITS

Exhibit	Produced by	Exhibit number
1X Photo of knife	Ellis HOSKING'S	01
Photo booklet - victime's injuries	Ellis HOSKING'S	02
Photo booklet - Defendant's injuries	Eribwebwe TAKIRUA	03
Photo - cell phone	Ellis HOSKING'S	04
Diagram scene	Ellis HOSKING'S	05
Medical report - Victim's	Haley Ryan SMITH	06
Transcript of call	Erin LOSE	07

INFORMATION

SECTION 13 CRIMINAL PROCEDURE ACT 1980 - 81

(1)	Full Names	(1) I, Joe Bloggs
(2)	Address and Occupation	(2) of Avarua, Police Officer say on oath that I have reasonable cause to suspect and do suspect that *(within the space of 12 months last past, namely) On the 10th day of December 2010 at Arorangi (1) Paul Jones (2) Self-employed, Inave, Arorangi
(3)	Here set out substance of offence	(3) Being a male, did assault a female namely Mary Jones of Arorangi

Crimes Act 1969, Section 214[b]
(Here add Section and Statute applicable)

_____
Signature of Informant

SWORN before me at Avarua this 20th day of December 2010

_____
JUDGE
*(or Justice of the Peace) (or Registrar)
(or Deputy Registrar) (not being a Constable)
*Delete if inapplicable

COOK ISLANDS POLICE
CAPTION SHEET

POLICE:	Vs	Paul Jones Inave/Arorangi	DOB - 28/10/76 AGE - 35 years OCC - Self-employed

CHARGE: Assault on a Female
ACT/SECTION: Crimes Act 1969, Section 214(b)
PENALTY: Not exceeding 2 years imprisonment

....

SUMMARY OF FACTS

Sometime between 5.00 pm and 5.30 pm on Thursday evening, the 10th of December 2010, the defendant Paul Jones together with his wife (the victim), were at the victim's family home at Inave in Arorangi.

The defendant and the victim's uncle were working re-roofing their family house when he was approached by the victim.

The victim went to ask the defendant if she could be allowed to attend their Christmas party at her bosses place at Akaoa that Thursday evening.

But the defendant turned down the victim's request.

After being approached several times, the defendant became angry and lost his temper. The defendant then approached his wife (victim) and punched her several times on the victim's facial area and nose.

As a result, the victim received a bleeding nose and pain around her facial area. The defendant had been consuming alcohol prior to the incident.

When spoken to by the Police, the defendant frankly admitted to the facts as outlined. He stated, he turned down his wife's request because he didn't want her to leave as he and his wife's uncles were re-roofing his wife's family house that was gutted by fire sometime last week. He gave no further explanations.

On Friday morning the 11th of December 2010, the victim was referred to the Rarotonga

Hospital for medical examination.

The defendant is a married man, 35 years of age and self-employed.

He resides at Inave in Arorangi.

He has previously appeared before this Court.

Joe Bloggs, Unit 3
Date: 12/12/10

Video Clip of Once Were Warriors

If you would like to obtain a copy of this video clip, please write to the Office of the Principal Youth Court Judge in New Zealand (Steven.Bishop@justice.govt.nz) and a CD of the clip will be mailed to you.

ANNEX 5: MEMORANDUM OF UNDERSTANDING, PALAU

Family / Domestic Violence in Palau

Memorandum of Understanding

Introduction

On 24 and 25 July 2012, the Pacific Judicial Development Programme hosted a two day Family Violence workshop.

The workshop was facilitated by the Chief Judge of the New Zealand Family Court, and was widely attended by organizations, agencies both Government and non-Government, and the Judiciary.

Specifically those attending included, Supreme Court and Court of Common Pleas of the Judiciary, The Office of the Attorney General, Bureau of Public Safety (Police), Pacific Prevention of Domestic Violence Programme (PPDVP), Palau Bar Association, Behavioural Health, Community Guidance Centre, Palau Council of Chiefs, EKEI Women Organization, Milad ' l Dil Women's Organization, House of Delegates Legal Counsel, Public Defender, Palau National Olympic Committee, Probation Office, Palau Community College Adult high School / Talent Search, Victims of Crime Assistance (VOCA), Coordinator - United Nations Joint Presence, Palau Evangelical Church.

Noting that there remains still under consideration in the Olbiil Era Kelulau (OEK), a bill to address family / domestic violence, but noting that it is unclear when this proposed legislation will be prioritized and passed.

And noting that family / domestic violence in Palau is a significant issue which requires a cohesive and concerted response.

The group resolved to enter into a Memorandum of Understanding to set out a clear pathway for the response to this violence, and to acknowledge the intention of those entering into the memorandum, to work according to an agreed protocol.

Mission Statement

The signatories accept that family / domestic violence is a significant issue in Palau, and adopt the declaration entered into by the Pacific Islands Chiefs of Police of twenty Pacific nations including Palau on 11 October, 2007.

In particular

It is accepted that family / domestic violence must be seen more broadly than existing Palau law recognizes, and that family / domestic violence should be seen as a specific form of crime which covers a broad range of violence and controlling behaviours, commonly of a physical, sexual, and/or psychological nature which typically involve fear, intimidation and emotional deprivation.

Definition of terms

The group wishes family / domestic violence to be seen in terms of agreed definitions, and these are:

A person commits an act of family / domestic violence if he or she intentionally does any of the following acts against a family or household member or intimate partner:

a) Assaults one or more of the above (whether or not there is evidence of a physical injury);
b) Psychologically abuses, harasses or intimidates the one or more of the above;
c) Sexually abuses one or more of the above;

d) Stalks one or more of the above so as to cause him or her apprehension or fear;
e) Behaves in an indecent or offensive manner to one or more of the above;
f) Damages or causes damage to one or more of the above's property;
g) Threatens to do any of the acts in paragraphs (a) to (f).

To avoid doubt

a) A single act may amount to an act of family / domestic violence; and
b) A number of acts that form part of a pattern of behaviour may amount to a family / domestic violence event, though some or all of those acts when viewed in isolation may appear to be minor or trivial.

In Response

The group has agreed on the establishment of two groups to manage and implement strategies to assist victims and to hold perpetrators to greater account.
The Judiciary agrees to participate in a broad agency management group. This group recognizes the Judiciary's independence, and that the Court's fundamental purpose is to decide all case that come into before it fairly, impartially, and uninfluenced by any particular viewpoint.

Accordingly it is agreed

There shall be established the *Family / Domestic Violence Forum*.
The Forum will be convened by the Bureau of Public Safety and the Attorney General's Office and its members may include:

- The Office of the Attorney General,
- Bureau of Public Safety,
- Behavioural Health,
- Community Guidance Centre,
- Palau Council of Chiefs,
- Ministry of Education,
- Clinical and Ancillary Services (Ministry of Health), Probation Office,
- Victims of Crime Assistance,
- Palau Community College,
- Public Defender's Office,
- Palau Bar Association, and
- The Judiciary.

The Forum shall meet on the first Wednesday of each month.

The purpose of the Forum is to:

1) Define and agree on what level of response should occur on categories of all forms of family / domestic violence.
2) Set out what agencies shall be informed on the reporting or detection of an act of family / domestic violence.
3) Decide how best assessment and screening should occur, by whom, and who will be given resulting information.
4) Agree on the use to which volunteers including the church shall be engaged and for what purpose.

5) Discuss and consider whether victims of abuse advocates have a place, and if so how they are best deployed.
6) Consider monthly statistical reports from the Police and Attorney General's Office and VOCA as to reported incidents.
7) Discuss and agree on what information is provided to a Judge upon plea and sentence, and at what time, in order to ensure that a plea is received and acted upon on the best information.
8) Engage with the Judiciary to advise Judges on availability of resources promote creative sentencing options and advise on trends and success of programs and options.
9) Recognizing that checklists can be useful tools for assisting professionals working with family / domestic violence, identifying what checklists should be devised, who is responsible for devising and completing them, and whose responsibility it is to ensure that they are acted upon.
10) Publicize the options available to victims to report abuse in a way which is safe and empowering, including use of media, posters and electronic means.
11) Advocate for the establishment of a safe house(s) for victims of abuse including children, and take such action as is reasonable to secure funding for such a safe house.
12) Launch and maintain public awareness campaigns such as promotion of White Ribbon Day, use of t-shirts, advertising and meeting with public officials including elected officials.
13) Evaluate the operation of this protocol and make such changes as are deemed necessary.

There will also be established the Family Violence / Youth Services Team. This group is a combined team, convened by the Attorney General's Office, which addresses management of family / domestic violence and youth services cases.
The objective of case management meetings in relation to family / domestic violence is to ensure that upon assessment, victims of abuse including children, and perpetrators, receive the most efficient and most optimum intervention that Palau resources permit.

The purpose of this group is to:

1) Consider and assess all family / domestic violence incidents reported to the police, and to consider on a case by case basis, on the sharing of information, the level of response.
2) Be informed as to what defendants have been sentenced on family / domestic violence type offenses since the last meeting, and to receive in writing terms and conditions of probation, and whether there is any known non-compliance with such conditions.

The group may include:

- The Office of the Attorney General,
- Bureau of Public Safety,
- Behavioural Health,
- Community Guidance Centre,
- Division of Corrections,
- Ministry of Education,
- Public Defender's Office,
- Probation Office,
- VOCA, and
- Milad 'l Dil Women's Organization.

In conclusion

The group commits to working together to develop a coordinated and effective response to family / domestic violence issues in Palau. The group stresses that this memorandum should not be seen as the answer, but rather a means by which family / domestic violence can be better addressed in the future.

Signed at Koror, Palau:

Name	Title	Agency	Signature

ANNEX 6: MEMORANDUM OF UNDERSTANDING, VANUATU

Family / Domestic Violence in Vanuatu

Memorandum of Understandings and Recommendations

Introduction

On 12 and 13 February 2013 the Pacific Judicial Development Programme (PJDP) hosted a two day family violence workshop.

The workshop was requested by the Judiciary of Vanuatu and was widely attended by organisations, agencies both government and non-government and the judiciary.

Specifically those attending included; Supreme Court and Magistrates Courts, Child Protection Unit, Vanuatu Police, UNICEF, Law Commission, Vanuatu Women's Crisis Centre, State Law Office, Public Solicitor, Vanuatu Law Society, Office of the Public Prosecutor, Department of Correctional Services and National Council of Chiefs.

The workshop was convened to consider the operation of the Family Protection Act 2008 (the Act) and the objectives of the workshop were to achieve the best outcomes for victims of family violence including children.

Context

It is acknowledged that Family / Domestic Violence remains a serious issue within Vanuatu. For instance, in a recent survey commissioned by the Women's Crisis Centre sixty per cent (60%) of women said they have experienced a form of physical or sexual violence. Sixty eight per cent (68%) of women said they had suffered emotional abuse. In fifty seven per cent (57%) of incidents children were present during violence.[1]

Operation of the Act

The Act was passed in 2008 and commenced on 2 March 2009. It has accordingly been in operation for very nearly four years.

Section 52 states:

> (1) The Minister must cause an independent review of the operation of this Act to be undertaken within 3 years after the commencement of this Act.
>
> (2) The people who undertake the review must give the Minister a written report of the review.
>
> (3) The Minister must cause a copy of the report to be tabled in the Parliament within 5 sitting days of the ordinary session after its receipt by the Minister.

[1] Vanuatu National Survey on Women's Lives and Family Relationships, May 2011

(4) In this section:
independent review means a review undertaken by a team consisting of an equal number of women and men who possess appropriate qualifications and/or experience in domestic violence matters.

No independent review has as yet been commenced but the government has set up a taskforce to enquire into how well the Act has been implemented. Our understanding is that the taskforce has not yet commenced the review of the Act.

The workshop agreed that some aspects of the operation of the Act required attention. The issues discussed fall into two categories:

1) where by better agency and interagency action outcomes under the Act could be improved.
2) where further legislative intervention may be appropriate and

It was agreed that the agencies themselves including the judiciary can improve on processes without requiring ministerial or parliamentary intervention and the workshop regarded this as a priority.

Agency and interagency action outcomes under the act that could be improved

1) Offences for which offenders have been charged and brought to court do not define whether the offence is family / domestic violence or not. By means of the charge sheet or by other classification charges should be defined in this way. Family violence offences will be distinguished from other criminal offences by means such as use of a specific colour file.
2) Magistrates wish to provide both family violence offenders and also victims with counselling but in the absence of registered counsellors undertake this themselves. It is recognised that this is wrong and unacceptable, and is inconsistent with judicial function. The judiciary wishes to be able to refer people to counselling and / or mediation as provided for in Section 16. Appointment of counsellors is a court operational matter not a ministerial function and the judiciary will now ensure that qualified and appropriate counsellors / mediators are appointed.
3) Until the appointment process in Section 8 is changed, the judiciary will compile a list of suitably qualified counsellors for the purpose of Section 16(2). The judiciary acknowledges that the payment for the counsellors / mediators is an issue for further discussion.
4) When police attend a family violence incident, consultation with the victim including the victim's safety and available options, will occur with the assistance of a trained family violence worker such as a member of the Women's Crisis Centre.
5) Magistrates would be assisted if offenders are charged under Section 4, with the nature of the alleged violence clearly stated and with the reference to Section 10 being included merely as the punishment section.
6) It is accepted that a priority for use of counsellors is appropriate training in a specialised area of family violence.
7) When a protection order is made, it is an operational matter for the court to effect service on the defendant. For the most part the police are asked to undertake service. Existing service arrangements are unsatisfactory. We therefore recommend:
    a. the court decides in each case bearing in mind issues of safety who is best placed to effect service,

b. if police are asked to effect service, they will give it utmost priority. Police will immediately communicate with the court as to whether service has occurred or whether there is a problem and if so what it is,

c. the court will then direct who should serve and by what means considering the options available in Section 36(3),

d. at the regular court users group meetings the operational aspects of service of protection orders will form part of the agenda,

e. we acknowledge that in order to achieve a proper process for service there will be resource implications.

8) It is important for victims of violence that their immediate safety is given priority. If victims are forced by circumstances to return to a violent setting the objects of the Act are not being achieved. The workshop accordingly regards it as important that safety houses or safe accommodation for victims of violence are available.

Issues for legislative action or ministerial attention

1) Section 8 provides for the appointment of registered counsellors by the Minister responsible for women's affairs. Appointment of such counsellors is considered an operational concern not requiring ministerial decision. The workshop recommends the repeal of Sections 8 and 9 and the provision of a new process where in the appointment of counsellors is undertaken by the court.

2) Section 7 sets out the process for the appointment of "authorised persons". No appointments have been made to date. We also consider this an operational matter and recognising that 'authorised persons' are quasi-judicial officers we recommend that their appointments be made by the Judicial Services Commission.

Conclusions

The workshop identifies a number of issues in which the operational aspects of the Act could be improved, and recognises the importance of addressing such operational issues in a multidisciplinary manner. Where it has the power to do so, members of the workshop will achieve change in the fashion set out above.

The workshop also looks forward to the independent review of the operation of the Act noting that this now seems overdue in terms of Section 52(1).

The review comes at a very opportune time because of some of the issues that the workshop has highlighted.

The Minister may wish to consult the Chief Justice and others present at the workshop when deciding upon the members of the "independent review" as provided for in Section 52(4) so as to obtain the best advice on how the Act is operating from a police, judiciary and other agency perspective.

Dated this 13th day of February 2013 at Port Vila.

Signed at Port Vila, Vanuatu.

Name	Title	Agency	Signature
Vincent Lunabek	Chief Justice	Judiciary	
Stephen Felix	Chief Magistrate	Judiciary	
Laurent Lulu	Manager	Wan Smol Bag	
Davis Saravanu	Senior Sergeant	Family Protection Unit	
George Twomey	Chief Superintendent	Vanuatu Police	
Brenda Nabirye	Child Protection Officer	UNICEF	
Trevor Rarua	Senior Probation Officer	Correctional Services	
Beverleigh Kanas	Senior Legal Researcher	Law Commission	
Vola Matas	Legal Officer	Women's Crisis Centre	
Jacob Kausiama	Public Solicitor	Public Solicitors Office	
Jane Gereva	Principal Drafting Section	State Law Office	
Bill Bani	President	Law Society	
Kayleen Tavoa	Public Prosecutor	State Prosecutions Office	
Gray Vuke	Inspector	State Prosecutor Office	
Roselyn. Q. Tor	Research Coordinator	Malvatumauri Council of Chiefs	

ANNEX 7: FAMILY VIOLENCE POST-WORKSHOP QUESTIONNAIRE

PJDP - FAMILY VIOLENCE AND YOUTH JUSTICE WORKSHOP

PORT VILA, VANUATU: 12-15 FEBRUARY, 2013

Family Violence Post-workshop Questionnaire

Please re-answer these substantive questions asked at the start of this course. This will help us to assess your acquisition of knowledge during the course, and enable us to refine our ongoing training approach.

Question 1: *The Definition of Family Violence:* please define when discipline becomes abuse:

_____

_____

Question 2: What cultural / societal influences need to be understood and applied in family violence cases?

_____

_____

Question 3: Please List two cases where the police *should intervene* in family violence cases:

3. _____

4. _____

Question 4: Please List two cases where the police *should not intervene* in family violence cases:

3. _____

4. _____

Question 5: Please list three factors should be borne in mind when hearing a family violence case?

4. _____

5. _____

6. _____

Question 6: Please list two *advantages* of restorative justice:

3. _____

4. _____

Question 7: Please list two *disadvantages* of restorative justice:

3. _____

4. _____

Question 8: In family violence cases, when will imprisonment be inevitable or appropriate:

_____

_____

_____

Question 9: What part does a judicial officer play in the community and what leadership role should be taken both in the court and outside the court?

_____

_____

_____

_____

Thank you for your time and assistance with completing this form!

ANNEX 8: YOUTH JUSTICE WORKSHOP MATERIALS

Suggestions for a youth specific justice process for young people apprehended by the police
(in the absence of youth justice legislation)

PART 1: Out of court processes - Pre court

1) Police to consider developing and using a risk assessment tool for young people they apprehend (e.g. - a variant of the recently adopted New Zealand YORST - Youth Offending Risk Screening Tool available at the seminar - there are many in existence around the world which could be modified to suit the needs of Vanuatu).
2) Commitment by police to not charge and to divert as many young offenders as possible. What is a principle basis to establish a percentage to aim for? (Is 70% realistic?) Only charge when the public interest demands it and there is no alternative way of dealing with the offenders.
3) Police diversion programmes to address both accountability for offending and causes of offending (e.g. community work, meaningful apology, reparation / restitution; and counselling and working with young offender and his/her family).
4) Police to develop links with key community based youth programmes to which young people can be referred. These programmes directed to meet offending needs.

PART 2: In court processes

1) Police and prosecutors use a charge sheet which specifies if the alleged offender is a young person / e.g. date of birth included, heading showing the person charged is a young person; different colour charge sheet
2) Court sets a separate day for young people to appear and to plead
3) Court schedules appointments for young people charged / e.g. 15 or 30 minute appointments
4) Different layout for court room furniture e.g. U-shape or horse shoe configuration to allow for participation by young person and his/her family
5) Where possible specialist Magistrate(s) appointed to preside over separate sittings of Magistrates Court to deal with young offenders
6) Lawyer appointed by Public Solicitors Office for every young person whether or not the young person chooses to have a lawyer
7) Court sittings for young offenders in private / with media allowed but with option to suppress young offender's name?
8) Strong emphasis by Magistrates on young person's participation in the court process and commitment to find out young person's views and as far as practicable to give effect to them
9) Timely processes adopted by the Magistrates Court - consistent with the young persons sense of time
10) Magistrates Court considers referring key decision making issues to (the yet to be developed) family group conference (see Part 3 below). A form of partial delegated decision making involving young offender and family, victim, police, lawyer, conference convener and any other interested and relevant party.
11) Probation / Correctional Services and reports available for every young person appearing in court (or at the least where family group conference recommends it)

PART 3: Out of court processes - After appearance in court

1) For young people who are charged and who admit offending, the **court** agrees to refer the case to a family group conference which will produce a plan for the court to consider
2) If the plan is satisfactorily completed the **court** will consider granting and absolute discharge so that it is as if the charge was never laid
3) Family group conference coordinators to be trained and available. Who is chosen and how are they to be trained are big questions.
4) Young people sentenced by the **court** to prison (last resort) kept apart from adults
5) A good quality community based alternative to custodial sentences to be developed - by who?
6) Collection of statistics by **police** and **courts** to show;
    a. Exact age - 10, 11…. 17
    b. Gender
    c. Ethnicity
    d. Whether diverted or charged
    e. Type of charge
    f. Outcome

Group Discussion Notes
Characteristics of a good Youth Justice system

GROUP 1

Pre-court
Review of Police SOPs:

- Currently no policy for youth
- Training for police
- Caution for minor offenses
- Diversion (legislative change)?
- Juvenile police unit - police officers who have experience with kids and handling them in different way

In court
- Youth specific court day - not in the presence of adult offenders, not mixing with adult offenders
- Magistrate deals with some offenders - nominated magistrate to deal with youth on ongoing basis, keeping track of them, youth dealing with a same magistrate who knows their history, problems, background - relationship development
- Duty lawyers on kid's court day - meet with them on the first occasion, give legal advice from the onset
- Identification of youth briefs at SPD, practice direction from CJ to prioritise youth matters - identifying juvenile briefs when they first arrive = prioritisation = dealing with youth cases quicker / differently (given a court date that is suitable for the youth case, priority to give them a court date)
- Reduce formality within the court (already done in Supreme Court) - judge to sit at the same table height as a juvenile; perhaps no uniform of police present

Out of court
- Possibility of correctional services to monitor youth after sentencing - monitor their family/community participation, how well they are doing and if they are recommitting offences
- Counselling
- Try to reduce contamination at prison - separated within the prison system from adult offenders (resource driven)

GROUP 2

Pre-court
In Vanuatu Justice system begins before police - family and village to take a responsibility as well
Police available for some that are more serious

- Family meetings
- Referred to the Chief
- Pastor of the local church
- Police (Family Protection Unit)
    - Standard operation procedures
    - Review the previous occurrences before coming to Police
    - Attempt to mediate
    - If that does not work, it gets referred to court

In court
No family court but ideally would be best.

- Age
- Nature of offence
- Consider case as priority

Out of court
Rehabilitation

GROUP 3

Pre-court
Standard Operating Procedures (August 2011 document - standard throughout Vanuatu) for investigations involving children and youth (to be reviewed and extended to community leaders; specific instructions for dealing with / diversion for young people should exist - attempt to formalise & standardise it…)

- Internal training of police officers
- Child interviews
- Discuss options

In court
Separate court for young offenders:

- Different setup (more friendly to the offender)
- Language should be different (comfortable, effective); Interpretation / translation (poor education levels often in young offenders; language should be such that would allow effective communication)
- Dress code for the judge/officers, presence not to create fear and intimidation
- Issues of punishment:
    - Imprisonment? If no other option is appropriate or available
    - Supervision (sent back to the community)
    - Community service / work
    - Defended sentence

Out of court
Promotion of reconciliation - cares for the victim's interests
Supervision - Probation Services / Community Justice Supervisor (who directly monitor and report back to the service of how the offender is doing)
Counselling - Chiefs, Women Counselling Services

- Currently done through pasters/community members/Chiefs
- No qualified psychologists / counsellors (limited resources)
    - Communities resources / abilities overloaded in urban areas

GROUP 4

Pre-court

- Proper identification: age (as early as possible, i.e. at the police station) - efforts made to identify the age through the family members if the offender is not able to specify the exact age
    - Charge sheet does not have AGE on it! Could it be?
- Police Standard Procedures: guidelines for young offenders that supports & formalises the juvenile process
    - Consult parents, give warnings,
    - Arrest
    - Interview

- Separate / special room for remanding young offenders (separate cell, separate court proceedings, etc.)
- Inform of rights

In court
- Identify: birth certificates?
- Special / separate court for young offenders & special court arrangements
- Pre-sentence report in the Magistrates court to look into the background of juveniles
- Legal representation - police to inform solicitor

Out of court
Proper facilities:
- Kept separately but solitary confinement is not the solution (downsides of being kept separately as opposed to being kept with members of their community)
- Dealing with small number of juveniles in the Vanuatu context so if juveniles are to be kept separately, this would often mean that they would need to be kept alone? -> alternative??

Group activity #2: Features of a Youth Justice System / Process

GROUP 1
- Case heard separately from adults
- Family / community involvement
- Separate training and knowledge for all officials dealing with youth offenders
- Special facilities (cells, courts)
- Restriction on publishing names / use of closed courts
- Custody as last resort

GROUP 2
- First time offending - parents to deal with it, subsequent to pasters and Chiefs > police subsequent to the family/community interventions
- Police - diversion, revisit the family/community option > if that fails young offenders should be referred to a specialist (counsellors, psychologist)
- If this does not work, proceed with prosecution

GROUP 3
- Separate legislation for dealing with youth offenders
- Direction to charge youth only when in public interest -diversion to deal with the rest!
- Recognition of age in the charge sheet
- Definition of child clarified (in accordance with UNCROC)
- Sentencing different to adult offender (focus should be on rehabilitation)
- Separation from adult offenders (in court, in prison)
- No publication of children offenders' names

GROUP 4
- Separate court system ('Youth Court')
- A specific court hearing date for youth
- Strengthen current SOP to add youth focus
- Clearly specify youth sentences and options (counselling, correctional services, conditions of release…)
- Separate police officers to deal with youth offenders
- Appointment of specific judiciary officers to deal with youth offenders (lawyers, public solicitor, magistrate)

PowerPoint: 10 Characteristics of a Good Youth Justice System

South Pacific Council of Youth and Children's Courts

Fifteen Point Assessment of a Youth Justice System

A. Introduction

This document emerged following the 18th meeting of the South Pacific Council of Youth and Children's Courts (SPCYCC) in Auckland, New Zealand. The meeting identified a need for an assessment tool which could assist the Council to determine the needs and current status of the youth justice systems of countries/states in the South Pacific.

The fifteen points in this assessment result from consultation with SPCYCC members and are based on Principal Youth Court Judge of New Zealand Judge Andrew Becroft's paper "10 Characteristics of a Good Youth Justice System", created for the Pacific Judicial Development Programme, and Penal Reform International's "Ten Point Plan for Fair and Effective Criminal Justice for Children" (www.penalreform.org/resource/tenpoint-plan-fair- effective-criminal-justice-children/). We would have liked to produce a "Ten Point" plan, if only for numerical simplicity. However, we believe that there are fifteen important criteria by which any youth justice system can be assessed.

B. How Does This Work?

Please consider each question, then under "rating", tick one of the colours in the box reproduced below which best applies to your state.

Red = no compliance

Orange = partial compliance Green=

full compliance.

C. Notes

1. Many countries/states will not have formal youth justice legislation (but yet operate in respect of children in a way that is nevertheless consistent with what would be best practice legislative principles). For the purposes of this assessment, this only constitutes partial compliance. Full compliance will be achieved when there is appropriate legislation in place.

2. There is a comments box under each question. It would be helpful to get any thoughts which you think appropriate, particularly if you have ticked the orange box (partial compliance).

3. This information will then be used to:

   a) Identify which states may be a priority for receiving SPCYCC support; and b) Identify

   subject area priorities for the SPCYCC.

4. The term "child" is used at all times in the assessment (rather than "young person" or "youth"). Consistent with the United Nations Convention on the Rights of the Child, the word "child" here means anyone under the age of 18.

5. As SPCYCC is comprised of both countries and also states and territories within Australia, the assessment refers to "countries/states" to make clear the distinction.

D. The Questions

1. Is There a Whole of Government "Crime Prevention Strategy for Children"?

Does the country/state have early intervention policies which target children at risk of coming into conflict with the law (e.g. marginalised children from lower income families and those in the care system) and which aim to prevent a child ever entering the justice system?

Rating:

Comments:

2. Minimum and Maximum Ages for Jurisdiction of Children

Does the country/state have an age of criminal responsibility of 12 or higher?

Does the country/state specify for the purpose of criminal proceedings that being treated as an adult begin at 18th birthday?

Rating:

Comments:

3. Is There A Separate Criminal Justice System for Children with Trained Personnel?

Does your country/state have a separate criminal justice system for children or are children dealt with in the adult system?

Are personnel who work with children (e.g. Police, Judges, lawyers and governmental and non-governmental social service providers) specially and specifically trained in working with children?

NB: if your state has a separate criminal justice system but it was not created by legislation (i.e. informal features such as separate court hearings and a specialist Judge/Judges have been developed for children), this would amount to partial compliance (orange box).

Rating:

Comments:

4. Limitation Upon Charging Children

Is there a legislative directive not to charge children unless there are no other alternatives available?

Are the majority of children who commit crime dealt with outside of the court system; is there a diversion system in place to deal with less serious crime outside of the court system?

Is there an option to discharge a child without a formal criminal record if he or she performs well in court?

Rating:

Comments:

5. Provision for (partial) delegation of decision making to families, victims and communities

Are families, victims and communities given the opportunity to participate in and make decisions at key steps in the youth justice process? (e.g. decision to charge, custody decisions and resolution of charges including punishment).

NB: this method of decision making, exemplified for instance in New Zealand, by the FGC, is still subject to the approval and supervision of the Court.

Rating:

Comments:

6. Ensuring that children have the right to be heard and are encouraged to participate in proceedings

Are children given the opportunity and the appropriate support both to express their views and to have them taken into account in all matters affecting them?

Is participation by children in proceedings not only supported and encouraged, but is there a duty on lawyers and Judges to ensure participation?

Is there mandatory provision of legal counsel for all young people (with or without means testing)?

NB: one means of ensuring child participation in the process outside of Court is set out in point 5 above.

Rating:

Comments:

7. Prohibition and prevention of all forms of violence against children in conflict with the law

Have punishments involving physical violence against children been abolished (e.g. whipping, lashing, flogging and corporal punishment); and

Is there zero tolerance of violence against children under arrest or detained?

Is there an independent complaints procedure for children held in custody?

Rating:

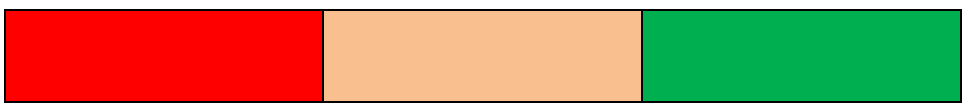
Comments:

8. Abolition of Status Offences

Has the country/state abolished status offences (i.e. the criminalisation of conduct based not upon prohibited action or inaction but on the fact that the offender is of a certain category of child or occupies a specified status)? NB: this often means acts which would not be criminal if committed by an adult but are offences if committed by a child based simply on age, e.g:

- Truancy
- Running away
- Violating curfew laws (nb: this means curfews that are placed on children universally in a state/country. It does not mean court imposed curfew orders)
- Possessing alcohol or tobacco

Rating:



Comments:

9. Timely decision making and resolution of charges

Are decisions affecting the child made and implemented within a timeframe appropriate to the child's sense of time?

If charges are not resolved within a reasonable timeframe for children, or have been unnecessarily or unduly protracted, is there provision for the Court to dismiss them?

Rating:

Comments:

10. "Evidence-based" approaches to offending?

Does the country help children to address the underlying issues relating to their offending by referring them to programmes that are "evidence-based"? (i.e. is there research to say that the programmes relied upon actually work?)

Rating:

Comments:

11. Keeping the child with their family or community

Where possible, is the child kept with, and treated within, the context of his or her family and in the community?

Rating:

Comments:

12. Ability to refer case to care and protection/welfare system where child may be in need of care and protection

If at any stage of the proceedings it appears that the child has care and protection needs, is there the ability to refer to care and protection services, and if necessary, to discharge the case from the youth justice process?

Rating:

Comments:

13. Use of Incarceration/Custodial Sentences as a Last Resort

Is there legislation in place that specifies detention as a last resort?

If there is no legislation, is there nevertheless a principle of detention as a last resort developed by appellate authority?

Is there in practice limited use of detention in juvenile facilities and in adult prisons?

Are there specialist prisons/residences for children?

Rating:

Comments:

NB: we would be interested here to know whether the principle of detention as a last resort was developed by legislation or appellate authority.

14. Development and Implementation of Reintegration and Rehabilitation Programmes for Children in Detention

Where it is appropriate to detain children, do institutions have rehabilitation and reintegration of the child as the main objective of all policies and processes from the moment the child arrives?

NB: rehabilitation will work most effectively in settings which are small enough for individual treatment to be provided, where children feel safe and secure, where adequate medical care is provided and where it is easy for children to be integrated into the social and cultural life of the community where the facility is located. Institutions should encourage contact with family and other social networks to support children; it should provide them with opportunities to obtain life skills through educational, vocational, cultural and recreational activities; and it should promote services to help with their transition back into society. The individual needs of children should be addressed such as mental health issues, substance abuse, job placement and family counselling.

Rating:

Comments:

15. Accurate Evidence and Data on the Administration of Criminal Justice for Children

Does the country have a system for separating data on children and adults and collecting specific data on children which helps it to understand offending trends and what works to prevent children from offending and to ensure that they do not re-offend? At a minimum, does the country have?

Caseload data for children (number of incidents reported to police; number of children apprehended and charged;
Police data recording the number and nature of diversionary responses; Data recording Court outcomes and nature of resolution;
Number of children detained and in which category of facilities etc; Case characteristics data (types of offences; age of offenders; gender; magnitude of sentences given; education levels etc); and
Resource data (the costs of administering the system for children)

Rating:

Comments:

Session Two

Types of Youth Offender

Principal Youth Court Judge A J Becroft and Judge C J Harding

Introduction

Significant research has been carried out into the reasons why young people offend to ensure that responses to offending are appropriate and effective for the well-being of children and young people. Being aware of the types of young person that you might see before the court is helpful with:

v) Ensuring that young people are treated appropriately and effectively in the court
vi) Planning preventive measures to stop young people appearing before the court.

The research has revealed that in broad, general terms, there are two distinct types of young offender, susceptible to different risks and having different needs, and consequently, an effective and principled approach requires different responses for these two groups.

This presentation will consider these two types of young offender: the "Desisters" (who make up the vast majority of young offenders) and the "Persisters" (who make up a much smaller group), but present the highest risk. Although some research has suggested that the two groups are not entirely clear cut,[1] there are clear trends in characteristics and risk factors that these two groups demonstrates.

[1]K L McLaren, *Tough is Not Enough - Getting Smart about Youth Crime*, n 7, 18.

Persisters and Desisters - Two Types of Youth Offender

(1) Who are "Desisters"?

Definition:

About a quarter of all young men are **Desisters**. Also called "adolescent limited" offenders,[2] they commit at least one offence during their formative years but desist from crime and go on to settle into law-abiding lifestyles by their mid-twenties, having committed only a few trivial crimes.

Characteristics of Desisters:

"Desisters" usually start offending after 13 years of age and tend to stop or age out of offending by age 24 to 28.[3] Like Persisters, they can and do commit serious offences, but the Persisters tend to commit more of them.

(2) Key Risk Factors for Desisters

The most rigorous research available shows that the following risk factors are the most powerful causes of offending and are consequently the key targets for programmes aimed at reducing offending.

Young people in the Desister group make few Court appearances and have fewer risk factors. They are particularly at risk from substance abuse and antisocial peers, and are considered by some to be the priority for intervention. The following list gives an order of priority for addressing risks with this group[4]:

- Mixing with antisocial peers;
- Substance abuse;
- Family problems - poor parental monitoring, negative parent-child relationships;
- Poor performance and attendance at school, negative feelings about school;
- Others as per the Persisters list below.

(3) Who are Persisters?

Definition:

Both in New Zealand and internationally, around 15-20% of youth offenders are "**Persisters**". Also known as "Early Onset" or "life course" offenders, they first offend at an early age and continue to offend into adulthood. "Persisters" are responsible for a large proportion of crime.[5]

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[2] Moffit T E (1993) Adolescence-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy, *Psychological Review,* 100(4): 674-701, as cited in McLaren, above n 1, 17.

[3] Moffit, above n 3, as cited in McLaren, above n 1, 16.

[4] McLaren, above n 1, 36.

[5] K L McLaren, *Tough is Not Enough - Getting Smart about Youth Crime,* available at http://www.myd.govt.nz/Publications/Justice/toughisnotenough-gettingsmartabout.aspx, (last accessed 21 June 2012), 16.

Persistent young offenders are a difficult and worrying group that requires identification and intervention as early as the preschool years. Terrie Moffitt is one researcher who has put forward the "Desister" versus "Persister" theory. She concludes that:[6]

"a substantial body of longitudinal research consistently points to a very small group of males who display high rates of antisocial behaviour across time and in diverse situations. The professional nomenclature may change, but the faces remain the same as they drift through successive systems aimed at curbing their deviance: schools, juvenile-justice program, psychiatric-treatment centres, and prisons." (1996:15).

Characteristics of Persisters:

In contrast to Desisters, *"Persisters"* start offending early, before age 14 and as early as 10 years of age,[7] offend at high rates - around 40% to 60% of youth offending in New Zealand - and continue offending into adulthood. The statistics in NZ make sobering reading:[8]

- 82% are male. However the number of young women who offend, especially violently, has been relatively increasing over the past decade.
- Many, estimated up to 70-80%, have a drug and/or alcohol problem, and a significant number are drug dependent/addicted.
- Most, estimated up to 70%, are not engaged with school - most are not even enrolled at a secondary school. Non-enrolment, rather than truancy, is the problem.
- Most experience family dysfunction and disadvantage; and most lack positive male role models.
- Many have some form of psychological disorder, especially conduct disorder, and display little remorse, let alone any victim empathy. Some will also have a disability such as fetal alcohol spectrum disorder, autism, attention deficit disorder, speech and communication disorders, a specific learning disability (eg dyslexia), or a combination of these.

[6] Moffit T E (1996) Adolescence-Limited and Life-Course Persistent Offending: A Complementary Pair of Developmental Theories, in T Thornberry (ed.) *Advances in Criminological Theory: Developmental Theories of Crime and Delinquency,* pp 11-54. London: Transaction Press, 15 as cited in McLaren, above n 1, 17.

[7] McLaren, above n 1, 16.

[8] These statistics were obtained from New Zealand Police National Annual Apprehension Statistics, Ministry of Justice "Child and Youth Prosecution Statistics" (both available on the Statistics New Zealand website) and anecdotal evidence from Youth Court Judges. Maori, our indigenous people, seem to be disproportionately represented at every stage of the youth justice process.

22% of the 14-16 year old population is Maori. However, Maori make up 51% of apprehensions of 14-16 year olds, 55% of prosecutions in the Youth Court over 90% in some areas of high Maori population). They are given 64% of supervision with residence orders (the highest Youth Court order before conviction and transfer to the District Court).

Many have a history of abuse and neglect, and previous involvement with Child, Youth and Family Services.

These characteristics appear to be universal for this small group of serious young offenders. Compare, for example, these two sets of statistics (outcomes from New Zealand research) to this third set of statistics from research in the United Kingdom.

(4) Key Risk Factors for Persisters

Persistent offenders tend to show the most severe and greatest numbers of risk factors from a relatively early age.

Persisters tend to come from multi-problem backgrounds. These young people are usually seekers of immediate gratification and give no thought to the consequences of their actions. Effective interventions with this group must tackle multiple identified risk factors.
Risk factors in order of the highest to lowest priority for Persisters are:[9]

- Having few social ties (being low in popularity, and engaging in few social activities);
- Mixing with antisocial peers;
- Having family problems, particularly poor parental monitoring of children and negative parent-child relationships;
- Experiencing barriers to treatment, whether low motivation to change, or practical problems such as difficulty in attending appointments due to lack of transport and work hours;
- Showing poor self-management, including impulsive behaviour, poor thinking skills, poor social/interpersonal skills;
- Showing aggressiveness (both verbal and physical, against people and objects) and anger;
- Performing and attending poorly at school, lacking positive involvement in and feelings about school;
- Lacking vocational skills and a job (for older offenders);
- Demonstrating antisocial attitudes that are supportive of crime, theft, drug taking, violence, truancy and unemployment;
- Abusing drugs and alcohol;
- Living in a neighbourhood that is poor, disorganised, with high rates of crime and violence, in overcrowded and/or frequently changing living conditions;
- Lacking cultural pride and positive cultural identity.

[9] Ibid.

Three Studies - Similar Conclusions

i. Auckland Youth Forensic Services Statistics 2000-2001:

- 80-85% Male
- Mäori & Pacific Island over-represented
- 70% use cannabis; 60% use alcohol
- 50% lived in 3 different placements
- 30-40% "care and protection" history
- 20% involved in gangs
- 70% unemployed or not attending school (40% reached 3rd form, 32% reached 4th form)
- History of offending: 5 - 10 offences

ii. Capital and Coast Youth Forensic Services 2000-2004:

- 83% Male
- Maori over-represented (48%)
- 70% faced cannabis and alcohol issues
- 16% drug dependent; 14% alcohol dependent
- 18% attending school: 28% attending course/training; 45% unemployed
- 45% excluded/expelled from school
- 55% attended more than one school/transient
- 60% in CYFS care at some stage
- 12% living with both parents; 28% with one parent

United Kingdom Research:

iii. An Analysis of 4,000 Young Offenders

- 83% male
- 70% from single parent families
- 41% regularly truanting
- 60% have special educational needs
- Over 50% use cannabis
- 75% smoke and drink
- 75% considered impulsive
- 25% at risk of harm as a result of their own behaviour (9% at risk of suicide)

Conclusion

As Scott (1999)[10] notes, Desisters and Persisters are at separate ends of a continuum of offending defined primarily by the number of risk factors the young person has experienced.

Taken in large part from a paper by Principal Youth Court Judge Becroft, Conference on the Rehabilitation of Youth Offenders, "A New Zealand Perspective," Singapore 20-21 November 2007

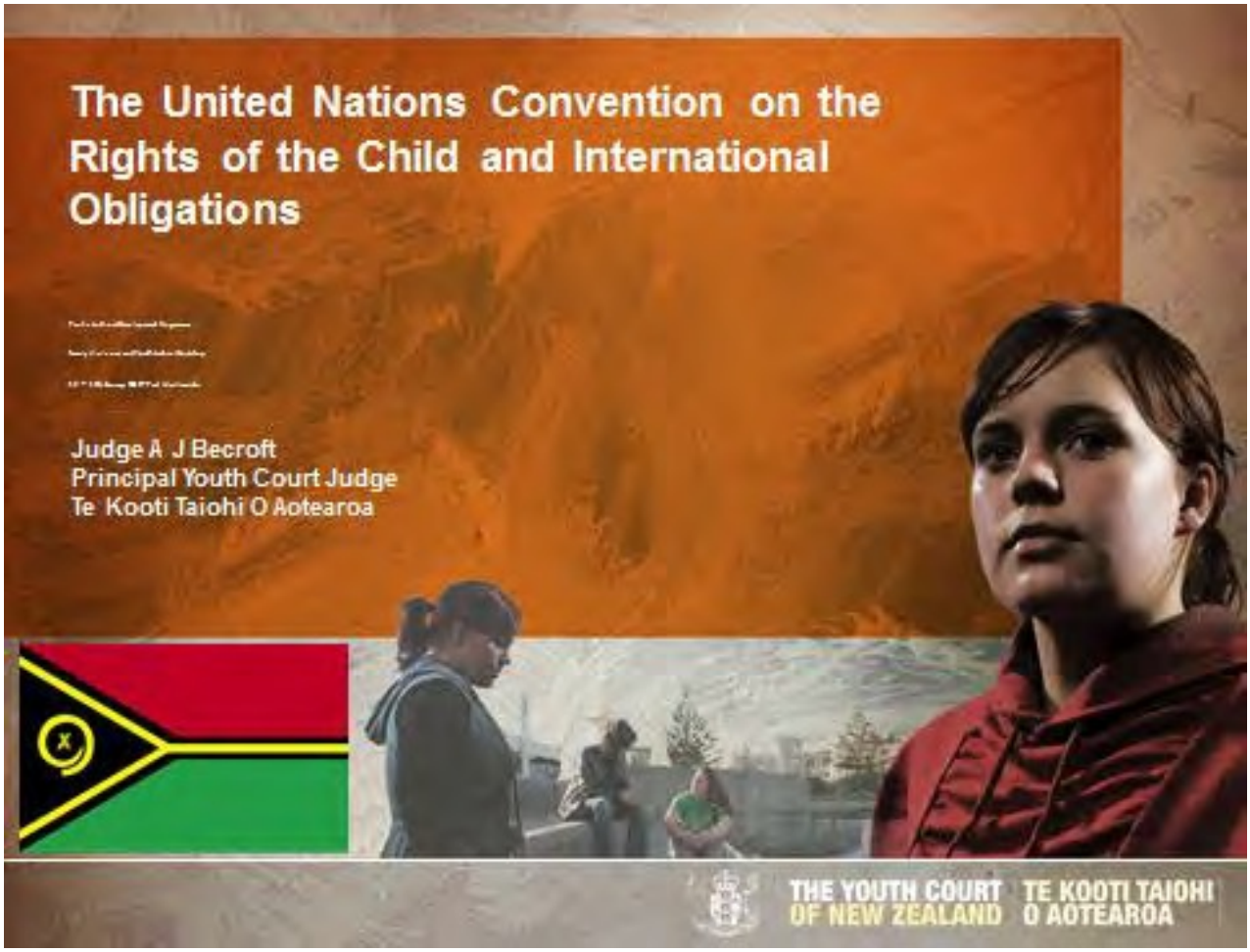
Thanks to Emily Bruce, research counsel to the Principal Youth Court Judge for her substantial assistance with this paper.

[10] Scott G (1999) *Young Offenders: Current Issues in Policy and Practice,* Wellington, NZ: Contract Policy Services, as cited in McLaren, above n 1, quoted in K L McLaren, *Tough is not Enough*, above n 1, 23.

PowerPoint: Brain Development

If you would like to obtain a copy of this video clip please write to the Office of the Principal Youth Court Judge in New Zealand (Steven.Bishop@justice.govt.nz) and a CD of the clip will be mailed to you.

Power Point: UNCROC



Description of the New Zealand Youth Justice Process

Judge Andrew Becroft, Principal Youth Court Judge of New Zealand Te Kaiwhakawa Matua Ki Te Kooti Taiohi O Aotearoa

1. INTRODUCTION

1.1 PRINCIPLES

There are a number of key statutory provisions which underpin the New Zealand youth justice process. The part of the Children, Young Persons and their Families Act devoted to youth justice begins with a statement of principles, which follows:(1)

- Unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter

- Criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whānau, or family group

- Any measures for dealing with offending by children or young persons should be designed -
  (i) To strengthen the family, whānau, hapū, iwi, and family group(2) of the child or young person concerned; and
  (ii) To foster the ability of families, whānau, hapū, iwi, and family groups to develop their own means of dealing with offending by their children and young persons

- A child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public

- A child's or young person's age is a mitigating factor in determining -
  (i) Whether or not to impose sanctions in respect of offending by a child or young person; and
  (ii) The nature of any such sanctions

- Any sanctions imposed on a child or young person who commits an offence should -
  (i) Take the form most likely to maintain and promote the development of the child or young person within his or her family, whānau, hapū, and family group; and
  (ii) Take the least restrictive form that is appropriate in the circumstances;

NB: footnotes for this paper can be found on the last page).

- Any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending

- In the determination of measures for dealing with offending by children or young persons:
  i) Consideration should be given to the interests and views of any victims of the offending (for example, by encouraging the victims to participate in the processes under this Part for dealing with offending); and
  ii) Any measures should have proper regard for the interests of any victims of the offending and the impact of the offending on them

- The vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

These principles must guide professionals' dealings with young people throughout the entire youth justice process.

1.2 THE YOUTH COURT

The Youth Court of New Zealand is a division of the New Zealand District Court established by section 433 of the Children, Young Persons and Their Families Act 1989 ("CYPFA"). It deals almost entirely with young people aged 14 to 16 years inclusive.

Child offenders – those aged 10 to 13 years inclusive – are mostly dealt with in the Family Court. This is because child offending is seen as symptomatic of care and protection issues. However, from 1 October 2010 child offenders aged 12 or 13 may also be dealt with in the Youth Court if the offence with which they are charged carries a maximum penalty of at least 14 years, (or 10 years and they have previously offended in a serious way). To date, only around 23 child offenders have been heard in the Youth Court. The Youth Court has the power under s 280A of the Children, Young Persons and their Families Act to transfer these cases out of the Youth Court and back to care and protection proceedings if required. In most of the around 23 cases that power has been used.

All children and young people charged with murder or manslaughter have their cases resolved in the High Court.

2. OPTIONS WHEN POLICE DETECT ALLEGED OFFENDING BY A YOUNG PERSON

The Youth Court process begins with Police detecting alleged offending by a young person. Where this occurs, an enforcement officer has three options:

- To give an on the spot warning or otherwise deal with the matter informally.
- To notify the Police Youth Aid division for further action.
- To arrest the young person.

2.1 FORMAL WARNING

The first consideration when Police apprehend a young offender is whether it would be sufficient to warn the young person. Police deal with around 22% (3) of youth offending by issuing a formal warning then releasing the young person. This is in keeping with the principle that young offenders should be diverted

from the formal justice system wherever possible. It also reflects the nature of much youth offending (i.e. relatively minor).

2.2 ALTERNATIVEACTION/DIVERSION

Given the statutory injunction in s208(a) Children, Young Persons and Their Families Act 1989 (CYPFA) not to issue criminal proceedings if there are alternative means of dealing with the matter and unless the public interest otherwise requires, the Police must consider a diversionary programme for the young person if a warning is insufficient or inappropriate. About 42% of all offences are dealt with in this way(4). Diversion/ alternative action is usually locally based, often involves members of the community, and is overseen by the Police Youth Aid division.

The limits of what may be used as a form of alternative action are the limits of the imaginations of those involved. The best Police Youth Aid workers spend considerable time and effort tailoring solutions that satisfy victims, prevent re-offending and re-integrate young people into their communities.

2.3 ARREST

There are significant restrictions on the right of the Police to arrest a young person where there is good cause to suspect that he or she has committed an offence. Under s214 CYPFA, a young person can only be arrested:

- to ensure the young person's appearance before Court (e.g. where the young person refuses to give name and address details); or
- to prevent the young person from committing further offending or to prevent the loss/ destruction of evidence or witness interference; and
- where a summons would not achieve the above purposes. However, where:
- an offence is a category 4 or category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years; *and*
- a Police officer believes arrest is required in the public interest, there is no such restriction, and the Police officer may make the arrest (provided he or she has good cause to suspect the young person of offending).

There are also significant limitations upon the Police questioning of young people.

Upon arrest, the Police may:

- release the young person without charge (an "intention to charge" Family Group Conference should be held if a charge is later to be laid); or
- charge the young person, in which case he or she may be released with or without conditions to appear later in the Youth Court; or
- in some situations, charge and detain the young person in custody for longer than the standard 24 hour maximum, in which case he or she must be brought before the Court as soon as practicable.

3. FAMILY GROUP CONFERENCES - GENERALLY

3.1 WHEN THEY OCCUR

Family Group Conferences are the lynchpin of the New Zealand youth justice process. They occur in several situations:

- If Police seek to lay a charge (and there is no arrest) Where charges are laid and are "not denied".

In addition:

- When Police believe a child or youth offender needs care and protection because there is serious concern for his or her wellbeing due to the number, nature and magnitude of a child offender's offending;
- When a charge is admitted or proved in the Youth Court and there has been no previous opportunity to consider the appropriate way to deal with the young offender; and
- Any other time a Youth Court considers it necessary or desirable.

3.2 ENTITLED ATTENDEES (5)

Attendees include:

- Police;
- Young person;
- Parents/guardians of the young person; Wider family of the young person;
- Youth advocate (if it is a court directed FGC) (see paragraph 5 ("Charge Laid in Youth Court" for more information);
- Often, a social worker;
- Most importantly, the victim or victims; and
- Any other person whose attendance is in accordance with the wishes of the family, whānau, or family group of the child or young person.

3.3 WHAT HAPPENS AT THE FGC

Expert reports dealing with education, health and welfare and other topics may be available at the FGC.
The FGC must first ascertain whether the offender admits the offence. If he or she admits it, the conference proceeds. If not, the case will be referred back to Court.
At the FGC the offender, together with his or her family, is required to propose a plan aimed at addressing past offending, repairing present harm and meeting future needs. A range of outcomes are available to the offender and his or her family (6). Generally, suggested outcomes must be "necessary or desirable in relation to the child or young person" and must "have regard to the [youth justice] principles set out in..[the CYPF] Act."(7) More specifically, and depending on the purpose of the Conference, the plan can make a number of recommendations.

The offender and his or her family, together with youth justice professionals who attend the conference, use the information obtained from earlier discussions in the FGC to formulate an appropriate plan. The offender's participation in its formulation is intended to create a feeling of ownership of it, thereby

increasing the likelihood of completion, and subsequent pride in completion, of the plan. The Court retains the overriding responsibility for decision-making. While the Court is required to consider the plan, it is not obliged to adopt it, although it does in the vast majority of cases.

4. "INTENTION TO CHARGE" FAMILY GROUP CONFERENCES

If the Police wish to charge a young person who has not been arrested, an "intention to charge" Family Group Conference ("FGC") must be convened to consider the matter.

Usually the first question is whether the offending is admitted. If so, usually the FGC will recommend a voluntary plan for the young person to undertake. If it is satisfactorily completed, this will usually be the end of the matter. If not, then a charge may be laid in the Youth Court. Alternatively, the FGC may recommend that a charge be laid without a plan.

It is common practice for the Police to voluntarily submit to an intention to charge FGC in a situation where a young person has been arrested, released and some days or weeks later is to be charged with an offence. Technically, as there has been no arrest, there is no statutory obligation to do this (see: s245). However, this course of action is permissible and, indeed, it is highly desirable that this best practice continues (in accordance with the principles of the CYPFA given effect by the FGC procedure).

5. CHARGE LAID IN YOUTH COURT

When a charge is laid in the Youth Court, the young person has a youth advocate assigned and paid for. The youth advocate is a lawyer with specialist knowledge of youth law appointed by the court from a panel of lawyers suitably qualified and available.

Virtually all charges across virtually all offence categories relating to young people are heard and determined in the Youth Court, with the following exceptions:

- Murder and manslaughter charges (these are heard in the High Court);
- Non-imprisonable traffic offences (unless the young person is charged with another offence, both offences arise out of the same event or series of events; and the court considers it desirable and convenient that the charges be heard together.
- Where the child or young person elects jury trial; and
- (In the case of a young person) when the Youth Court is satisfied that it is not in the interests of justice for the young person to remain in the Youth Court when a co- defendant is to have a jury trial (nb: this rule does not apply to children charged in the Youth Court).

The young person is required to indicate in the Court whether the charge is "denied" or "not denied".

The young person may elect jury trial if the charge is a charge under category 3 (offences imprisonable by life or two or more years imprisonment) or category 4 (the most serious of those offences), other than murder or manslaughter. The jury trial is held in the District Court.

5.1 CHARGES NOT DENIED: COURT-DIRECTED FGC

If the charge is "not denied", a FGC must be convened.

If the charge is "admitted" at the FGC, the Conference will usually formulate a plan for the young person to undertake. The plan should address both the "deed" and the "need"; the consequences and the causes of offending. That is, the young person should be held accountable for the offending but a comprehensive, rehabilitative plan should be formulated to prevent further offending and to allow the young person to develop in a socially beneficial way without further offending (see: s4(f)(i) and (ii)).

The plan will then be presented to the Youth Court. In about 95% of the cases, the plan is accepted and the case is adjourned for the plan to be completed.

If the plan is satisfactorily completed, the young person is often absolutely discharged under s282 CYPFA.

Sometimes the FGC may recommend formal orders being made under s283 CYPFA or, on occasions, such formal orders are necessary because of the young person's failure or inability to complete an agreed FGC plan.

A Court-ordered FGC may recommend, in addition to any other recommendations that a formal Police caution be given to the young person.

5.2 CHARGES DENIED: JUDGE ALONE TRIAL AS FOR ADULTS

If a charge is denied, the matter is the subject of a Judge alone trial, conducted in the normal adversarial manner as for adults under the provisions of the Criminal Procedure Act 2011. If the charge is dismissed, the young person is free to go. If it is proved in the Youth Court, a FGC must be convened to consider sentencing options.

The Youth Court may either accept a FGC Plan, or may impose one of the orders set out in s283 CYPFA (see paragraph 6 ("Youth Court Orders") below).

6. YOUTH COURT ORDERS

Most cases that come to Youth Court do not receive formal orders. The usual course is for a plan to be formulated at a FGC and, if this plan is successfully completed, the young person may receive a complete discharge and leave the Court with no criminal record. However, the following orders are available to the Youth Court:

6.1 LOWER-END YOUTH COURT ORDERS

- Discharge as if the charge were never laid (s 282) Discharge wit record of the discharge (s 283(a)) Admonishment (s 283(b))
- Order that the young person come before the court, if called upon within 12 months after the order is made, so that the court may take further action under this section (s 283(C))
- Fines/Costs/Reparation/Restitution (ss 283(d)-(g)): it is also possible (but not essential) when the young person is under 16, to order a parent or guardian to pay a sum of the prosecution costs, or to pay reparation costs or restitution.
- Forfeiture of property (s 283(h)
- Confiscation of property/disqualification from driving (ss 283(i)-(j)

- Orders to attend parenting, mentoring or drug and alcohol rehabilitation programmes (s 283(ja)-(jc): these are new orders, introduced to the Youth Court in October 2010. Note that the young offender's parents can be ordered to attend the parenting programme, or they themselves can be ordered to attend if they are a parent.
- Supervision order (s 283(k): this order places the young person in the care of the chief executive, or any other person or organisation, for a period of up to 6 months. Community work order (s 283(l)

6.2 TOP-END YOUTH COURT ORDERS

The following top-end orders are available to the Youth Court:

- Supervision with Activity (s283(m))

Supervision with Activity involves up to six months of supervision during which the young person must attend and undertake a specified programme or activity (8). The six months may be followed by a further period of supervision for up to six months. Plans may be detailed and tailored to fit the specific needs of a particular young person.

- Supervision with Residence (s283(n))

The Supervision with Residence order places a young person in the custody of the chief executive of Child, Youth and Family Services for 3-6 months and after this order is completed, a period of 6-12 months supervision follows (9). Young people receiving such an order are usually placed in one of three Youth Justice Residences.

Supervision with Residence is the harshest penalty available to the Youth Court and, as it deals with only the most serious youth offenders, young people on Supervision with Residence are the small but difficult group of young offenders who require intensive and careful intervention. However, Child, Youth and Family Service's *Review of the Residential Strategy* published in June 2004 stated that there was a need for a greater therapeutic focus in the residences to assist young people, rather than merely containing them.

- Convict and Transfer to the District Court for Sentence (s283(o))

The Youth Court may convict a young person and transfer them to the District Court for sentence.

- Prison

Prison is necessary for community safety and protection. It is the ultimate sanction and needs to be available for the most serious offenders. It is not lawful to impose a sentence of imprisonment in respect of an offence committed when a person is under 17 years of age, unless the offending in question was a category 4 offence, or a category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years (10).

Since the inception of the Children, Young Persons and Their Families Act 1989, relatively few young people have been dealt with through the use of convictions in the District and High Court and sentences of penal custody (11).

Imprisonment alone is a poor response to youth crime. There are numerous negative psychological and behavioural consequences for young people who are imprisoned as adults, and with adult offenders (12).

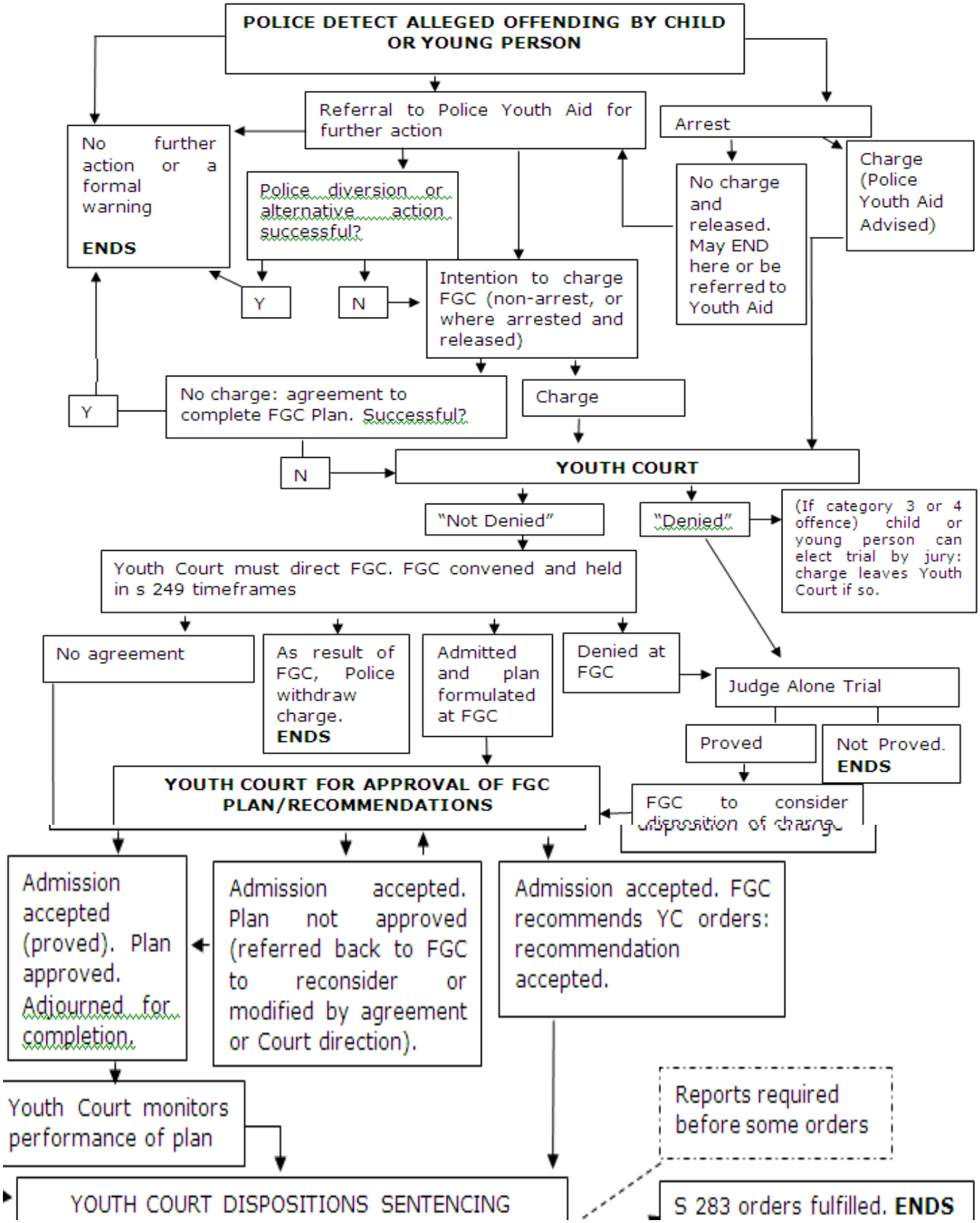
Young inmates may experience intimidation and bullying by older inmates (13). Verbal, physical, sexual and emotional abuse is particularly likely for those incarcerated for the first time, those that are small, from a middle class background, are effeminate in behaviour or lack "streetwise" knowledge (14). Further, juveniles in adult prisons are at greater risk of suicide (15).

7. CARE AND PROTECTION ISSUES

If, at any stage of the hearing of any proceedings, it appears to the court that the child or young person may be in need of care or protection (as defined in section 14), the matter may be referred to a care and protection co-ordinator and the proceedings adjourned until the matter can be resolved by use of the care and protection provisions of the CYPFA. In this case, the matter may be discharged under s282 CYPFA.

8. FLOWCHART OF YOUTH JUSTICE PROCESSES

The flowchart on the next page shows the processes of the youth justice system.


POLICE DETECT ALLEGED OFFENDING BY CHILD OR YOUNG PERSON
Referral to Police Youth Aid for further action
Arrest
No further action or a formal warning
ENDS
Police diversion or alternative action successful?
No charge and released. May END here or be referred to Youth Aid
Charge (Police Youth Aid Advised)
Y
N
Intention to charge FGC (non-arrest, or where arrested and released)
Y
No charge: agreement to complete FGC Plan. Successful?
Charge
N
YOUTH COURT
"Not Denied"
"Denied"
(If category 3 or 4 offence) child or young person can elect trial by jury: charge leaves Youth Court if so.
Youth Court must direct FGC. FGC convened and held in s 249 timeframes
No agreement
As result of FGC, Police withdraw charge.
ENDS
Admitted and plan formulated at FGC
Denied at FGC
Judge Alone Trial
Proved
Not Proved.
ENDS
YOUTH COURT FOR APPROVAL OF FGC PLAN/RECOMMENDATIONS
FGC to consider disposition of charge
Admission accepted (proved). Plan approved. Adjourned for completion.
Admission accepted. Plan not approved (referred back to FGC to reconsider or modified by agreement or Court direction).
Admission accepted. FGC recommends YC orders: recommendation accepted.
Youth Court monitors performance of plan
Reports required before some orders
YOUTH COURT DISPOSITIONS SENTENCING
S 283 orders fulfilled. ENDS

9. FOOTNOTES

(1) Children, Young Persons and their Families Act 1989, s 208
(2) Whānau" is the Māori word for family. Māori are the indigenous people of New Zealand."Hapū" is the Māori word for extended family, "Iwi" describes a Māori sub- tribe.
(3) Based on Police National Annual Apprehension Statistics (rounded up to the nearest whole number). Available at < www.stats.govt.nz/tools_and_services/tools/ TableBuilder/recorded-crime-statistics/ASOC-apprehension-calendar-year- statistics.aspx>.
(4) Also based on Police National Annual Apprehension Statistics, as above.
(5) Children, Young Persons and Their Families Act 1989 (NZ), s251.
(6) Children, Young Persons and Their Families Act 1989 (NZ), s260.
(7) Children, Young Persons and Their Families Act 1989 (NZ), s260.
(8) Children, Young Persons and their Families Act 1989 (NZ), s 307.
(9) Children, Young Persons and their Families Act 1989 (NZ), s 311.
(10) Sentencing Act 2002, s18.
(11) Maxwell, Robertson, Kingi, *Achieving the Diversion and Decarceration of Young Offenders,* Crime and Justice Research Centre, Victoria University of Wellington, 2003, 11.
(12) Adams, 1992; Bishop & Fraser, 2002; Bishop et al., 1996; Calabrese & Adams, 1990; Lane et al., 2002; Taylor, 1996; Tie & Waugh, 2001 quoted in Dr Ian Lambie (2006) *The Negative Impacts on Juvenile Offenders Incarcerated in Adult Prisons*.
(13) Department of Corrections, *Young Male Inmates (fact sheet, no longer available online), as cited in Principal Youth Court Judge A J Becroft "Youth Offending: Factors that Contribute and How the System Responds" (Symposium Child and Youth Offenders: What Works, 2006). Last accessed 2 July 2012* < www.justice.govt.nz/courts/youth/publications-and-media/speeches/youth-offending- factors-that-contribute-and-how-the-system-responds#64
(14) Maitland & Sluder (1998) quoted in Lambie, above n 12.
(15) Ibid.

ANNEX 9: YOUTH JUSTICE PRE- AND POST-WORKSHOPS QUESTIONNAIRES

PJDP - FAMILY VIOLENCE AND YOUTH JUSTICE WORKSHOP

PORT VILA, VANUATU: 12-15 FEBRUARY, 2013

Youth Justice Pre-workshop Questionnaire

Please answer the following questions. This questionnaire will help the faculty to understand your particular training needs and focus training during this orientation course. It will also help us to assess what you have learned from the training at the end of the course.

Question 10: Please list two types of youth offenders:

1. _____

2. _____

Question 11: Please list five characteristics of a good youth justice system:

1. _____

2. _____

3. _____

4. _____

5. _____

Question 12: Please list three factors should be borne in mind when hearing a youth case?

1. _____

2. _____

3. _____

Question 13: Why do young offenders need to be treated differently from adult offenders?

_____

_____

_____

Please rate your level of knowledge and understanding before the Youth Justice Sessions regarding the following matters by ticking / checking ONE square per question only:

Question 14: Understanding the characteristics of a developed Youth Justice system:

☐ *No Understanding* ☐ *Limited Understanding* ☐ *Good Understanding* ☐ *Excellent Understanding*

Question 15: Applying the need to divert young offenders form the courts in your day-to-day role:

☐ *No Understanding* ☐ *Limited Understanding* ☐ *Good Understanding* ☐ *Excellent Understanding*

Question 16: Structuring your judicial in court behaviour for young people:

☐ *No Understanding* ☐ *Limited Understanding* ☐ *Good Understanding* ☐ *Excellent Understanding*

Question 17: How courts could be arranged to better serve young people:

☐ *No Understanding* ☐ *Limited Understanding* ☐ *Good Understanding* ☐ *Excellent Understanding*

Question 18: Addressing the needs of victims of crime through conferencing:

☐ *No Understanding* ☐ *Limited Understanding* ☐ *Good Understanding* ☐ *Excellent Understanding*

Thank you for your time and assistance with completing this form!

PJDP - FAMILY VIOLENCE AND YOUTH JUSTICE WORKSHOP

PORT VILA, VANUATU: 12-15 FEBRUARY, 2013

Youth Justice Post-workshop Questionnaire

Please rate your level of knowledge and understanding *after* the Youth Justice Sessions regarding the following matters by ticking / checking ONE square per question only:

Question 1: Understanding the characteristics of a developed Youth Justice system:

☐ *No Understanding* ☐ *Limited Understanding* ☐ *Good Understanding* ☐ *Excellent Understanding*

Question 2: Applying the need to divert young offenders form the courts in your day-to-day role:

☐ *No Understanding* ☐ *Limited Understanding* ☐ *Good Understanding* ☐ *Excellent Understanding*

Question 3: Structuring your judicial in court behaviour for young people:

☐ *No Understanding* ☐ *Limited Understanding* ☐ *Good Understanding* ☐ *Excellent Understanding*

Question 4: How courts could be arranged to better serve young people:

☐ *No Understanding* ☐ *Limited Understanding* ☐ *Good Understanding* ☐ *Excellent Understanding*

Question 5: Addressing the needs of victims of crime through conferencing:

☐ *No Understanding* ☐ *Limited Understanding* ☐ *Good Understanding* ☐ *Excellent Understanding*

Please also re-answer the substantive questions asked at the start of this course. This will help us to assess your acquisition of knowledge during the course, and enable us to refine our ongoing training approach.

Question 6: Please list two types of youth offenders:

1. _____

2. _____

Question 7: Please list five characteristics of a good youth justice system:

1. _____

2. _____

3. _____

4. _____

5. _____

Question 8: Please list three factors should be borne in mind when hearing a youth case?

1. _____

2. _____

3. _____

Question 9: Why do young offenders need to be treated differently from adult offenders?

_____

_____

_____

Thank you for your time and assistance with completing this form!

ANNEX 10: MEMORANDUM OF UNDERSTANDING, VANUATU

Youth Justice in Vanuatu

Memorandum of Agreement

Introduction

On 14 and 15 February 2013 the Pacific Judicial Development Programme (PJDP) hosted a two day youth justice workshop.

The workshop was requested by the Judiciary of Vanuatu and was widely attended by organisations, agencies both government and non-government and the judiciary.

Specifically those attending included; Supreme Court and Magistrates Courts, Child Protection Unit, Vanuatu Police, UNICEF, Law Commission, Vanuatu Women's Crisis Centre, State Law Office, Public Solicitor, Vanuatu Law Society, Office of the Public Prosecutor, Department of Correctional Services, National Council of Chiefs and Wan Smol Bag Community Organisation.

The workshop was convened to consider how a criminal justice process for young people could be developed and introduced into Vanuatu, so as to improve the outcomes for young offenders, their families and victims.

Context / Preamble

Recognising that there is no youth justice legislation in Vanuatu;

and accepting that there is little in the way of a youth specific justice process in operation;

and mindful that the United Nations Convention on the Rights of the Child (UNCROC) has been ratified by Vanuatu on 7 July 1993 which defines a child as being under 18 years;

and recognising the force of the three sets of non-binding rules that deal with youth justice:

1. the UN Guidelines for the Administration of Juvenile Delinquency ("the Riyadh Guidelines")[2]
2. the UN Standard Minimum Rules for the Protection of Juvenile Justice ("the Beijing Rules")[3], and
3. the UN Rules for the Protection of Juveniles Deprived of their Liberty.[4]

Agreements

The workshop agrees as follows:

[2] United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"), G.A. res. 45/112, annex, 45 U.N. GAOR Supp. (No. 49A) at 201, U.N. Doc. A/45/49 (1990).
[3] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985).
[4] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

1. A separate Young Offenders Act that provides for a specific youth justice process for Vanuatu should be enacted as a matter of urgency to ensure compliance with Vanuatu's United Nations obligations. The signatories to this memorandum will do all that is reasonably within their power to promote the introduction of this legislation;

2. In the absence of specialist Youth Justice Legislation, the attendees and signatories to this memorandum commit themselves to developing a separate justice process for young offenders which will have at least the following agreed features (set out in the following three parts):

PART 1: Out of court processes - Pre court

i. The **Police** will introduce a set of Standard Operating Procedures (SOPs) for the investigation of alleged offences by young people and the interview and treatment of young people during investigation. These SOPs are currently in development, dated August 2011, revised June 2012.

ii. The **Public Solicitor** will provide a roster of lawyers available to be contacted by the police out of hours to advise youth suspects being investigated / interviewed by the police.

iii. The **Police** will divert as many young offenders as possible rather than charging them in court, as set out in the SOPs ((i) above and contained in the flowchart 'Options for Dealing with Young Offenders'). These diversion options will include:

   a. On the spot warning

   b. Caution

   c. Mediation

   d. Community Conferences

iv. The **Police** will adopt a different colour file for youth offenders

v. The **Public Prosecutor** will include on every charge sheet, when the alleged offender is a young person, the young person's date of birth and a clear statement that the charge relates to a young person.

PART 2: In court processes

i. The **Courts** will allocate separate days to deal with young people who are charged.

ii. **Specialist Magistrate(s)** will be specially trained and appointed to preside over separate sittings of **Magistrates Court** to deal with young offenders.

iii. A different, more informal layout for **court room** furniture will be adopted where practicable.

iv. A lawyer will be appointed by the **Public Solicitors Office** for every young person appearing in court.

v. **Court** sittings for young offenders will be held in private with the young offender's name suppressed.

vi. The **Courts** will encourage and facilitate a young person's participation in the court process and will elicit a young person's views and as far as practicable will give effect to them.

vii. The Courts will adopt timely processes for young offenders.

viii. The Courts will consider referring relevant issues to Community Conferences comprised of the young offender and family, victim, police, lawyer, conference convener and any other interested and relevant party (e.g. customary chiefs / pastor). The Court will consider any recommendations from the Community Conference in assessing penalty.

ix. Correctional Services will attend every separate sitting of the Courts dealing with young offenders and will make available reports for every young person appearing in court when directed by a Court.

x. Young people will be sentenced by the Court to a custodial sentence as a last resort.

PART 3: Out of court processes - After appearance in court

i. In order that young people in custody (including while on remand) be kept separate from adults, separate facilities for their detention will be developed.

ii. Community based alternatives to custodial sentences will be supported and encouraged.

iii. The Police and Courts will collect and circulate statistics showing at least the following information:

a. Exact age
b. Gender
c. Home island
d. Whether diverted or charged
e. Type of charge
f. Outcome
g. Reoffending rates

iv. Notwithstanding the collection of statistics participants agreed (save in exceptional circumstances) that in any relevant legislation, details relating to a conviction of young offenders be expunged upon their attaining eighteen years of age.

Review

This memorandum and its implementation is to be reviewed at least annually and for the first two years every six months. The review is to be conducted by a group including the signatories to this memorandum. The chair of the working group shall be the Chief Magistrate or his nominee.

Conclusions

Those attending this workshop are unanimous that there are considerable opportunities to develop a separate youth-friendly justice process in Vanuatu even though no appropriate legislation is now in force.

Representatives at the workshop agreed that they could each develop and change their procedures so as to ensure compliance with UN obligations so as to develop a youth specific justice process.

Dated at Port Vila, Vanuatu this 15th day of February 2013.

Signed at Port Vila, Vanuatu.

Name	Title	Agency	Signature
Vincent Lunabek	Chief Justice	Judiciary	
Stephen Felix	Chief Magistrate	Judiciary	
Laurent Lulu	Manager	Wan Smol Bag	
Davis Saravanu	Senior Sergeant	Family Protection Unit	
George Twomey	Chief Superintendent	Vanuatu Police	
Brenda Nabirye	Child Protection Officer	UNICEF	
Trevor Rarua	Senior Probation Officer	Correctional Services	
Beverleigh Kanas	Senior Legal Researcher	Law Commission	
Vola Matas	Legal Officer	Women's Crisis Centre	
Jacob Kausiama	Public Solicitor	Public Solicitors Office	
Bill Bani	President	Law Society	
Gray Vuke	Inspector	State Prosecutor Office	
Roselyn. Q. Tor	Research Coordinator	Malvatumauri Council of Chiefs	

Pacific Judicial Development Programme

FAMILY VIOLENCE AND YOUTH JUSTICE PROJECT WORKSHOP TOOLKIT

PJDP toolkits are available on: http://www.fedcourt.gov.au/pjdp/pjdp-toolkits

Pacific Judicial Development Programme

ENABLING RIGHTS & UNREPRESENTED LITIGANTS / PRO SE TOOLKIT

Revised: October 2020

PJDP is funded by the Government of New Zealand and managed by the Federal Court of Australia

Toolkits are evolving and changes may be made in future versions. For the latest version of the Toolkits refer to the website - https://www.fedcourt.gov.au/pjsi/resources/toolkits.

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstances.

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Web http://www.fedcourt.gov.au/pjsi

PJDP TOOLKITS

Introduction

For over a decade, the Pacific Judicial Development Programme (PJDP) has supported a range of judicial and court development activities in partner courts across the Pacific. These activities have focused on regional judicial leadership meetings and networks, capacity building and training, and pilot projects to address the local needs of courts in Pacific Island Countries (PICs).

Toolkits

This toolkit was developed under PJDP and revised under the Pacific Judicial Strengthening Initiative (PJSI). PJSI aims to continue ongoing development of courts in the region beyond the toolkits already launched under PJDP. These toolkits provide support to partner courts to help aid implementation of their development activities at a local level, by providing information and practical guidance.

Toolkits produced to date include:

- Access to Justice Assessment Toolkit
- Annual Court Reporting Toolkit
- Efficiency Toolkit
- Family Violence/ Youth Justice Workshops Toolkit
- Gender and Family Violence Toolkit
- Human Rights Toolkit
- Judges' Orientation Toolkit
- Judicial Complaints Handling Toolkit
- Judicial Conduct Toolkit
- Judicial Decision-Making Toolkit
- Judicial Mentoring Toolkit
- Judicial Orientation Session Planning Toolkit
- National Judicial Development Committees Toolkit
- Project Management Toolkit
- Public Information Toolkit
- Reducing Backlog and Delay Toolkit
- Training-of-Trainers Toolkit
- Time Goals Toolkit
- Remote Court Proceedings Toolkit
- ***Enabling Rights and Unrepresented Litigants / Pro Se Toolkit***

These toolkits are designed to support change by promoting the local use, management, ownership and sustainability of judicial development in PICs across the region. By developing and making available these resources, PJSI aims to build local capacity to enable partner courts to address local needs and reduce reliance on external donor and adviser support.

PJDP is now adding to the collection with this new ***Enabling Rights & Unrepresented / Pro Se Litigants Toolkit***. This toolkit was developed and piloted for the courts of Kiribati under the direction and guidance of Chief Justice Sir John Muria, with the support and assistance of Chief Registrar (ag) Sister Bernadette Mee Eberi and Senior Registrar Abuera Uruaaba of the High Court of Kiribati. It provides practical guidance on supporting courts across the region to address the rights of unrepresented litigants and also provides a methodology for enable the legal rights of others seeking justice in your communities.

Use and Support

These toolkits are available online for the use of partner courts. We hope that partner courts will use these toolkits as/when required. Should you need any additional assistance, please contact us at: pjsi@fedcourt.gov.au

Your feedback

We also invite partner courts to provide feedback and suggestions for continual improvement.

Dr. Livingston Armytage
Technical Director, Pacific Judicial Strengthening Initiative, October 2020

Chief Justice Sir John Muria, with Justice Vincent Zehurikize, opening the 'Court-Community Access to Justice Workshop', on South Tarawa

CHIEF JUSTICE'S FOREWORD

> *This is one of those rare cases in which a man has suffered from both a fundamental subversion of the rule of law and lack of any effective means of overcoming the problem through conventional procedural channels:* ***Attorney General v Mbwe [2006] KICA 3; Civil Appeal 02 of 2006 (26 July 2006)***

Self-represented or unrepresented litigants often face the problem of fundamental or procedural deprivation of their basic rights to access to justice.

Mbwe is a classic example of a situation faced by an unrepresented litigant when brought before the court. Mbwe was charged in the Magistrates Court with the offence of common nuisance and brought before the Nikunau Magistrates' Court. The case did not proceed due to the unavailability of prosecution witnesses. However, in the meantime, the Magistrates committed the accused for contempt of court and sentenced him to six months imprisonment because (as the court minute seems to suggest) the Magistrates were of the view that he was intoxicated and impertinent. He remained in police custody on Nikunau until he was brought to Tarawa more than two months later. There were no lawyers in Nikunau Island to advise Mbwe of his rights and so he had no practical means of securing his release until he came to Tarawa. Neither the Magistrate nor the court officers in Nikunau advised Mbwe of his rights to appeal and bail. It was on arrival in Tarawa that Mbwe was advised of his right of appeal and to apply for bail pending the hearing of his appeal against the Contempt order. He applied for bail and was granted pending the hearing of his appeal which was successful.

The Enabling Rights Toolkit is for the use by the Courts and their officers. This Toolkit provides the Courts and Court officers with the means of assisting litigants, more particularly, the unrepresented or self-represented litigants, to be aware of and to facilitate the exercise of their rights. With the limited supply of lawyers, the Courts in small jurisdictions across the Pacific, such as Kiribati, are constantly faced with the challenges of what to do to assist self-represented or unrepresented litigants have equal and effective access to justice.

Kiribati is privileged to host this piloted Enabling Rights Toolkit. It is our hope that this Toolkit will provide the Courts and their officers with an effective means of addressing the problems and challenges faced by self-represented or unrepresented litigants when they bring their cases to the Courts.

Sir John Muria
Chief Justice
High Court of Kiribati.

KEY MESSAGES

This toolkit helps courts to promote justice by:

(i) enabling citizens to access and exercise their unmet legal rights in court
(ii) supporting unrepresented / pro se litigants and conducting fair hearings
(iii) explaining the '*must know - must do'* fundamentals about justice.

Justice is a precious public good which is fundamental to both personal wellbeing and social stability. It protects society from anarchy by supporting an ordered community governed by the rule of law. Justice is centrally concerned with fairness and embodies the notion of rightness built on law, ethics and values, which are enshrined in the Constitution of each nation.

In the Pacific, the Constitution is often compared to the Bible. The Constitution is '*the law of the laws'* - that is, it sets out how a country wants to organise itself. The Constitution of each country invests the judiciary - that is, the courts - with the responsibility to administer justice. The courts exercise this responsibility by enabling rights and duties created by law fairly.

While the laws and procedures of any justice system are numerous and complex, there is a single pure principle at the heart of every justice system. This is the principle of fairness. This principle upholds the fundamental norm of equal treatment for all citizens who come before the courts seeking justice.

Citizens come before the courts seeking justice by exercising their legal rights, which are enshrined in the constitution and the law. These rights specify interests and duties that are protected and enforced by law. An independent judge or magistrate applies the law in the hearing of cases to decide the existence of these rights and duties.

Over recent years, concerns have arisen around the world about some courts failing to perform their responsibility to administer justice effectively. In the past, it has been generally accepted that courts should stand back from society in order to preserve their independence. Judicial independence is both proper and important. But sometimes this has led to courts losing touch with the communities that they must serve. There are concerns that the protection of independence has been at the cost of courts failing to adequately enable the rights of the poor, the vulnerable, the marginalised and the weak - that is, to protect the most needy in society. Courts are routinely criticised for being too remote, isolated, expensive and slow, and more responsive to the rich and powerful who can use these features to their advantage - that is, unfairly.

If a person is unable to access or use their legal rights, then it is not possible for the courts to perform their role of administering justice effectively. In the Pacific, as elsewhere around the world, many citizens suffer barriers to accessing and exercising their legal rights. These may vary in any situation, and commonly include:

- *geographical* (distance),
- *financial* (expense),
- *socio-cultural* (customary practices and expectations),
- *educational* (awareness and knowledge of the justice system), among others.

Community consultations in researching this toolkit identified that many people living more traditional lives in remote communities often feel uncertain, shy and unconfident in exercising their legal rights, as well as being unclear about the role of the courts and how they work. These people are unlikely to approach the court for help - however needy - they are without support.
The interests of justice require the courts to proactively ensure that citizens can access and use their legal rights effectively. The courts lose public trust when they exclude, marginalise or disable citizens from

exercising their lawful rights. While it goes beyond the responsibility or power of the courts to solve all of the problems of exclusion, they do have a significant role to ensure citizens have access to justice.

Across the Pacific, three-quarters of judicial officers (judges and magistrates) and almost all court officers are 'lay' - that is, non-law trained. Moreover, there are few qualified lawyers who regularly practise in courts, particularly on outer islands. This means that in most cases *there is no qualified legal expertise in court hearings whatsoever*. This lack of legal expertise is fundamentally problematic to the administration of justice because it may jeopardise the fairness of the hearing - either through an imbalance of adversarial power or errors of law or procedure being made.

The Chief Justice of Kiribati requested PJDP to pilot this toolkit in order to help lay (that is, non-law trained) judicial and court officers to address the particular needs of unrepresented litigants. In Kiribati, there are few qualified lawyers particularly on the outer islands, and most cases involve unrepresented litigants. While this challenge is acute in Kiribati, it extends across the Pacific region. This challenge is also increasingly common in neighbouring jurisdictions including Australia, New Zealand and the United States where funds for legal aid and public defence are shrinking. This toolkit is designed to help courts to address this challenge in administering justice across the region.

This toolkit explains the '*must know - must do'* fundamentals about justice for lay magistrates and court officers including:-

- **Function of the Constitution and the rule of law in society**
- **Role of courts to administer justice**
- **Six values of good judging: independence, impartiality, integrity, propriety, equality and competence**
- **Principles of 'natural justice', the rules of procedural fairness and the duty to ensure a fair hearing to both parties**
- **Ten 'fundamental rights' of fair trial - including the right to legal representation**
- **Differences in the 'burden' and 'standards' of proof in criminal and civil (including land) proceedings**
- **Conflict of interest - and when you must disqualify (recuse) yourself**
- **Responsibilities to protect the needy, vulnerable and disabled,** among other things.

We have written this toolkit for lay magistrates and court officers across the Pacific to help administer justice more effectively for citizens with unmet legal needs and in particular unrepresented litigants.

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KEY TERMS

For the purpose of this toolkit, some key terms are defined as follows:

- *Beneficiary* - a person(s) who derives an advantage or benefit from something - a beneficiary of reform receives benefits from that reform; the person(s) intended to benefit from the reform.
- *Claim-maker* - a person who believes s/he is a right-holder (but may not be)
- *Court service* - courts provide a variety of services to court users, including: applying the criminal and civil law; resolving disputes; and enforcing judgments, penalties and remedies
- *Formal system* - refers to the administration of codified laws by state courts.
- *Inclusion* - the opposite of exclusion (from the court system).
- *Informal system* - traditional or customary systems of dispute resolution and punishment operating in (usually more remote) communities, outside the court system.
- *Judicial leadership* - a way of judicial officers seeing their roles as extending beyond deciding cases to innovating improvements in administering justice in order to bring the principles of justice into life for court users and to improve substantive justice outcomes.
- *Judicial officer* - a judge or magistrate appointed to administer the law in a state court (may be law-trained or lay)
- *Judicial outreach* - a process to build public understanding and trust in the work of the courts through public engagement and information.
- *Lawyer* - someone qualified and admitted to practice law
- *Legal empowerment* is the use of law to specifically strengthen the disadvantaged. It is concerned with strengthening the capacity of people to exercise their rights in law, either as individuals or as members of a community. It describes processes that promote access to justice for ordinary people both in and beyond courts of law.
- *Officer of the court* - employee of the judicial branch of government, including judge, magistrate, and 'court officer' being registry and counter-staff
- *Para-legal* - a person trained at a basic practical level in some legal matters who usually works at community-level, but is not fully qualified as a lawyer
- *Right* - an interest or entitlement recognised and protected by law; and right-holder is a person who has a legal interest or entitlement
- *Stakeholders* - people who have a general interest in the justice system, usually including: the Chief Justice, judges, magistrates, court officers; court-users, lawyers; the community, and the government and non-government organisations (NGOs) acting on behalf of the community.
- *Unrepresented litigant* (also called 'pro se' or 'self-represented litigant') is a person who appears as a party in court proceedings without any legal representation, that is, without a qualified lawyer or attorney.

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ABBREVIATIONS

ADR	-	Alternative Dispute Resolution
CBO	-	Community Based Organisations
CEDAW	-	UN Convention for the Elimination of Discrimination against Women
CROC	-	UN Convention on the Rights of the Child
FCA	-	Federal Court of Australia
MFAT	-	New Zealand Ministry of Foreign Affairs and Trade
NGO	-	Non-Government Organisation
PIC	-	Pacific Island Country
PJDP	-	Pacific Judicial Development Programme
PJSI	-	Pacific Judicial Strengthening Initiative

1. PART ONE: INTRODUCTION

1.1 OBJECTIVES

The objectives of this toolkit are to help courts promote justice by:

(i) enabling citizens to access and exercise their unmet legal rights in court
(ii) supporting unrepresented litigants and conduct fair hearings
(iii) explaining the '*must know - must do'* fundamentals about justice

To accomplish these objectives, this toolkit supports courts to administer (or supply) justice more effectively and supports right-holders - particularly unrepresented litigants - to access and exercise (or demand) their legal claims more readily. By providing and integrating support to both courts and right-holders - that is, both the supply of and the demand for justice - this toolkit aims to improve substantive justice outcomes which are measurable in visible improvements to human wellbeing through improving people's access to and use of their rights in courts of law.

Right-holder → Claim-maker → Remedy → Justice

The Pacific Judicial Development Programme (PJDP) piloted this toolkit in Kiribati as a part of the '*Enabling Rights'* project. The aim of this project is to build the capacity and improve the responsiveness of courts to address the needs of marginalised beneficiaries. This project comprises the following resources (or inputs):

a) Develop a regional toolkit for promoting justice for marginalised beneficiaries.
b) Piloting the regional toolkit in one Pacific Island Country (PIC).
c) Documenting and reflecting on the experience to refine the regional toolkit.
d) Disseminating the regional toolkit to all PICs for local use.

The main output of this project is to develop and pilot a methodology to help the courts in one PIC (Kiribati) to enable those seeking justice to access available remedies by using this toolkit. The intended outcome of this project is improved access to and use of legal rights in previously unmet legal needs being brought before, and resolved by, the courts in at least one PIC by mid-2015.

The Chief Justice of Kiribati requested that this toolkit be piloted in Kiribati to address the specific needs of unrepresented litigants.[1] More specifically, this toolkit is designed primarily for magistrates and court clerks in the Magistrates Court (who are usually lay, that is, non-law-trained) to address the needs of unrepresented litigants. It is for this reason that the toolkit is divided in two parts to (a) provide a methodology for enabling rights more generally and (b) address the specific needs of unrepresented litigants across the Pacific region.

1.2 CONTEXT: COURTS IN THE PACIFIC

In Kiribati, where this toolkit is being piloted, unrepresented litigants routinely appear in most courts.[2] The community generally has very low levels of legal literacy, in terms of understanding of the justice system, the function of courts of law, the roles of judicial and court officers, and the nature of their legal rights. There is a small legal profession, and in practice it is extremely rare for lawyers to appear in courts other than on South Tarawa (the capital island) or on the annual court circuit.[3] Kiribati operates a 3-tier court hierarchy. Even on South Tarawa, legal representation is very rare in the Magistrates Court, intermittent in the intermediate High Court, and is routinely only found in the apex Court of Appeal.[4] Moreover, most magistrates are lay,[5] that is,

non-law trained.[6] Consequently, neither the bench nor the litigants have any legal training whatsoever. This means that **there is no qualified legal expertise available in most court hearings**. This shortage of expertise presents fundamental challenges for the administration of justice.

This situation may be acute in Kiribati, but it is no less characteristic of many - if not most - courts across the Pacific region. It is for this reason that the primary focus of this toolkit is on meeting the needs of unrepresented litigants, which will be of general relevance and utility across the region.

1.3 WHO SHOULD - (OR SHOULD NOT) - READ THIS TOOLKIT?

This toolkit is written for judicial or court officers who are responsible for the administration of justice in courts of law. These officers may be judges, magistrates, registrars, judicial trainers and other court officers. Many of these officers are lay actors (i.e. non-law trained) who are responsible for administering justice at community level often in remote places. This is a crucial role that requires considerable insight, skill, sensitivity and sound judgment in contextualising and applying 'modern law' in diverse local customary settings. This toolkit is *not* intended for members of the general public; nor is it intended for use as a handbook by unrepresented litigants. For those seeking a guidebook *for* unrepresented litigants see, for example: *A Handbook for Litigants in Person*, London 2013.[7] Nor is this intended to be a resource about customary or informal justice.

1.4 FRAMING THE CHALLENGE: DOES YOUR COURT NEED THIS TOOLKIT?

If unrepresented litigants appear in your court, then you will probably find this toolkit to be useful. You will also find this toolkit useful in addressing the needs of others who either may - or may not - appear in your court. These may include people who have difficulty accessing or exercising their rights effectively for a range of reasons: they may confront barriers in accessing justice such as cost or distance, or they may be unaware or uncomfortable to exercise their lawful rights. While the particular needs of people will vary from country to country, this toolkit aims to provide you with the tools and methodology to address those unmet needs more effectively.

The Pacific region is characterised by its diversity - each Pacific Island Country (PIC) is unique, as are the needs of its citizens and its courts. That being said, many PICs confront shared challenges. One of those challenges is to enable the rights of unrepresented litigants to ensure they receive a fair trial or hearing; another is to address the unmet needs of people who may have difficulty exercising their rights for any variety of reasons.

Under these circumstances, there is a potentially substantial risk of injustice occurring despite the best efforts of those appointed to judicial and court office. While this situation may be relatively acute in Kiribati, it is experienced to a lesser degree throughout the Pacific region. Additionally, as available funding for legal aid (or public defence however named) diminishes, so the challenge of ensuring justice is administered for unrepresented litigants is becoming increasingly common - and problematic - in neighbouring jurisdictions including Australia, New Zealand and the United States. It is to manage and address this risk that this toolkit is designed.

You may choose to answer the question 'Does your court need this toolkit?' in the negative. Most likely, your court is already providing the best services that it can. So it is understandable if you may be tempted to immediately answer '*no*' to this question. But if so, before doing so, take a moment to ask your community what it thinks. This is because the Constitution invests the judiciary with the responsibility to administer the law, but it is not possible for courts to be neutral in assessing the adequacy of their own services. Only the customers of those service - and, equally importantly, also the non-customers who may have legal needs but be unable to exercise them - to provide their assessment by answering this question.

If so, the first step in enabling the rights of either unrepresented litigants or the community generally is to ask them: *What do you think: are you satisfied in how you can exercise your rights?* We will return to this question in a moment. However, there are a couple of other preliminaries to address beforehand.

1.5 How this Toolkit can Help

This toolkit is designed to help you manage and mitigate the risk of injustice arising for unrepresented litigants and others with unmet legal needs in your courts.

This toolkit provides judicial and court officers with a range of tools that can help to manage this risk. These tools can help courts to identify the needs of these people and provide a range of solutions to address those needs. The toolkit first gives you the tools for addressing a variety of other potentially unmet needs and then it focuses on addressing the needs of unrepresented litigants. In doing so, it does not aim to focus on solving any particular problem but rather to provide you with a methodology that you can use which does. These solutions may include assistance to unrepresented litigants or other's needs, to help access or exercise their rights, or they may involve training for judicial and court officers. This will depend on each situation and its needs. To address these needs, courts are encouraged to develop a plan for promoting access to justice and enabling rights that may include circulating an access to justice survey, publishing public information, conducting community outreach and legal education, supporting legal empowerment, providing legal referral for legal assistance, or a range of other initiatives which are discussed in more detail below.

1.6 What is a Toolkit: Scope and Contents

This toolkit is designed to help judicial and/or court officers to plan, design, manage and conduct a local project in your PIC, which will enable unrepresented litigants specifically and other right-holders more generally to exercise their legal rights more readily.

It is designed to be a short manual, or practical guidebook, to explain how courts can enable the rights of unrepresented litigants specifically, and other right-holders more generally, to access and use their legal rights more effectively. It contains explanations, help and tools, including sample documents in the Annex to help officers of the court to perform your roles in administering justice in a manner that enables these rights to be accessed and used more readily. These rights may exist in criminal, civil or land jurisdictions that are administered by courts of law.

The challenge confronting this toolkit is to provide practical assistance that is accessible and readable. To address this challenge, the toolkit is short and quite focused: it strives to avoid repeating what can be found elsewhere in the law, court procedures or the court bench book.

This toolkit is intended to build the capacity of the courts to enable legal rights. These rights are numerous. For this reason, the toolkit is not an encyclopaedia of the law. It focuses on helping the courts to address the needs of unrepresented litigants specifically and enabling other legal rights more generally. To perform this function, it should be used with other existing resources. These resources include the relevant laws and court procedures, as well as the bench book(s) or bench guide that exist in your jurisdiction. It should be read with other PJDP toolkits which may be relevant to your situation.

1.7 Other Resources

You should read and use this toolkit together with a number of other resources:

1. First, you should read this toolkit together with the relevant **law and court procedure** for your court - these define the legal framework within which you must operate.

2. You should then consult the **bench book(s)** for your court - this will provide you with general practical guidance on using the local procedures within which you operate.

3. Third, PJDP has produced a number of **other toolkits** as part of its commitment to helping Pacific Island courts to perform their functions as effectively as possible. In particular, you may find the following toolkits to be helpful:

    - Access to Justice Assessment Toolkit
    - Training of Trainers' Toolkit
    - Public Information Toolkit
    - Project Management Toolkit

These and other toolkits are available at: https://www.fedcourt.gov.au/pjsi/resources/toolkits

2. PART TWO: COURTS, JUSTICE AND ENABLING RIGHTS

2.1 CONSTITUTION, COURTS, JUSTICE AND RIGHTS

Justice is an essential and precious public good which is enshrined in the Constitution of the Republic of Kiribati, notably in Chapters 11 and V1.[8] In the Pacific, the Constitution is often compared to the Bible. The Constitution is '*the law of the laws'* - that is, it sets out how a good society will organise itself. In every Constitution, justice is seen as being fundamental to both personal wellbeing and social stability.

Justice protects society from anarchy by embodying an ordered community governed by the rule of law. Justice is centrally concerned with fairness and equity. It embodies the notion of rightness built on law, ethics and values of fairness and equity which are foundational to human wellbeing.

Justice embodies values which societies institutionalise through their laws and courts that administer those laws. Promoting justice is concerned with enabling rights which allocate interests in a society through law. These rights are vested across the spectrum of human welfare, that is: political, civil, economic, social and cultural. Justice may be pluralistic, that is, each society and culture may have its own renditions. Hence justice can be understood to have different meanings and purposes depending on situation and circumstances. Whatever the context, it is important to stress that justice is concerned with bringing to life the rights which are primarily administered in domestic law through the state's courts.

The courts are the key agency of the state for the administration of justice. The Constitution vests responsibility for the administration of justice on the judiciary. The judiciary administers justice through the courts that adjudicate (judge) cases based on the application of law and court procedure.

While the laws and procedures of any justice system are numerous, complex and detailed, there is a single simple and pure ideal at the heart of every justice system. This is the principle of fairness. This principle upholds the fundamental norm of fair and equal treatment of all and any citizen whose rights and responsibilities come before the courts for resolution.

Justice is primarily concerned with fairness. Fairness is ensured through the equal application of law and court procedures in the hearing of cases by an independent magistrate or judge. People coming before the courts seeking justice do so by exercising their legal rights, which are enshrined in the constitution and the law. These rights specify their interests and entitlements which are protected - and enforced - by the law. Courts perform their function of administering justice by making decisions (judging) in each case based on the application of relevant law to facts which it has determined (fact finding) according to court procedures that ensure fair hearings.

The courts confront many challenges in performing their responsibility to administer justice. The specific challenge that this part of this toolkit addresses is the challenge of ensuring that all persons with legal rights or needs have a fair opportunity to access and exercise their legal rights before a court of law.

2.2 PUBLIC TRUST IN THE COURTS - YOU ARE A PUBLIC OFFICER

It is an important part of your job to behave in a manner that builds and preserves public trust in the courts. Public trust is core to the rule of law and any notion of good society. What this means is that the public has full confidence that the courts will perform their role under the Constitution to administer justice according to law. Remember that as a magistrate or court officer, you are a role-model and constantly on public display. Be aware that the public watches what you do - and don't do. People will make judgments about both you and the court that are based on your behaviour, your values and your attitudes. Once damaged, people will no longer have confidence that their rights will be administered fairly, and they be will be denied justice. It takes much work to restore public trust.

2.3 NON-COURT USERS - UNMET NEEDS FOR JUSTICE

In many parts of the region, most people live traditional lives in the informal or customary sector beyond the reach of state institutions. Even those who do live in or near state centres many never - or rarely - use the courts. It is not necessarily clear why these people do not use the courts, it may be:

(a) the preference to resolve disputes using traditional means; or

(b) it may be due to barriers arising from a lack of access, knowledge and understanding, resources or empowerment.

Where the non-use of courts arises from point (a), above, there is no need to address - or problem to solve - provided that the customary process conforms to norms and values of the Constitution. Justice is increasingly recognised as being pluralistic, that is, traditional notions of justice may be quite different to so-called 'modern' notions but still culturally appropriate for the context. But this is not necessarily the case where, for example, the rights of female victims of domestic violence may be systemically repressed by patriarchal traditions; or where traditional remedies breach constitutionally-protected human rights, for example, against banishment. In these situations the courts may still have a role to administer justice and protect rights with sensitivity - however complex that role may be.

However, where the non-use of courts arises from point (b), above, then there is a much more readily identifiable need to address - and barrier to dismantle - in order to enable the court to provide the needy with the protection of the law.

The courts have a duty to ensure that citizens are properly able to access and use their rights under law. To earn and maintain public trust, the courts must diligently and proactively exercise this duty at all times. This, then, is a role of this toolkit: to provide the courts with tools and a methodology to address the ever-existing need to ensure citizens are able to access and use their rights.

2.4 BARRIERS TO ACCESSING AND ENABLING RIGHTS

All justice systems confront the challenge of bringing into daily life the concept of fairness, which is both foundational and universally recognised.

If a person is unable to access or use their legal rights, then it is not possible for the courts to perform their role of administering justice effectively. In the Pacific, as elsewhere around the world, many citizens suffer barriers to accessing and exercising their legal rights.

There may be various barriers in any situation; the most common include:

- *geographical* (distance),
- *financial* (expense),
- *socio-cultural* (customary practices and expectations),
- *educational* (awareness and knowledge of the justice system), among others.

Community consultations in researching this toolkit identified that many people living more traditional lives in remote communities may feel uncertain, shy and unconfident in exercising their rights, as well as unclear about the role and function of the courts. These people are unlikely to approach the court for help - however needy or justified - without the support of family, friends or NGOs providing 'legal empowerment' in the form of community-based legal education.

Each of these barriers can be redressed, which is usually the aim of 'legal empowerment'. Solutions to promote access to and enable rights may comprise a range of initiatives, including: court circuits to remote

islands, legal aid schemes, para-legal support services and community legal education programs, among others.

In order to administer justice by promoting fairness, the court should ask two questions:

Question 1:

Can a court system work properly if people do not know their legal rights and how to exercise them?

Yes ☐ *No* ☐

(✓ *one only)*

If the answer to question 1 is 'no', then:

Question 2:

What actions can the court take to rectify this situation?

2.5 BALANCING JUDICIAL INDEPENDENCE WITH ENGAGEMENT/OUTREACH

In order for the courts to promote access and enable the rights of claim-makers, they must first ascertain what needs are going unmet. Getting an answer to the question: *What needs are going unmet?* - requires the courts to engage externally with the community.

The importance of preserving the independence of the judiciary and protecting the neutrality of the courts from improper influence cannot be overstressed, and has legitimately lead the courts to a withdrawal from public contract. This withdrawal is proper and necessary, but on occasion it has become isolation resulting in complaints that the courts are 'out of touch' with the needs of the community. Finding the right balance between independence and engagement is difficult but important.

This challenge for the courts to ensure right-holders can exercise their legitimate rights in court has arisen over recent years as the result of mounting concern that courts around the world are failing to perform their responsibility to administer justice effectively. In the past, it was generally accepted that courts should stand back from society in order to preserve their independence. However proper it certainly is to ensure the independence of the courts, this has sometimes resulted in the courts becoming insular and out of touch with the communities they should be serving. There are mounting concerns that the protection of independence has been at the expense of the courts failing to adequately enable to rights of the poor, the vulnerable, the marginalised and the weak - that is, to address the needs of the most needy in society. Courts are increasingly being criticised for being too remote, too isolated, too expensive, too slow and too much controlled by the rich who can afford the expense and the powerful who know how to take advantage of the rules.

A justice system fails when it excludes, marginalises, or disables citizens from accessing and exercising their lawful rights. To do nothing in the face of injustice entrenches that injustice. Of course, there are many actors in a justice system, and it goes beyond the power or responsibility of the courts to solve all the problems of exclusion. The courts do however have a significant *pro-active role* to play to ensuring access to justice by enabling lawful rights. Understanding and respecting the key role of rights is of utmost importance to the integrity of any court system that operates in the common law tradition. Rights are essential to both procedural and substantive justice. The legal philosopher, Ronald Dworkin, argues that rights are foundational to any notion of justice, fairness and procedural due process. A justice system that fails to uphold the notion of rights fails as a justice system.[9] Hence the challenge for courts to improve how they enable legitimate rights is both crucially important and ever-ongoing.[10]

In order for courts to support members of the community to be able to exercise their rights, first, the courts need to become more outward-looking and inclusive in orientation. Promoting this outlook is the subject of a separate toolkit: *Promoting Access to Justice*.

Judicial outreach by the courts requires specific activities to engage with the community. It describes a communication process to build public understanding and trust in the work of the courts through public engagement and information. Supporting public information is also the subject of a separate PJDP toolkit: *Public Information*.

Community consultations on enabling rights with women's meeting on Maiana

2.6 WHAT IS 'LEGAL EMPOWERMENT'?

Legal empowerment is a new term that describes the use of law to specifically help the disadvantaged.[11] It is concerned with strengthening the capacity of people to exercise their rights in law, either as individuals or as members of a community.

Legal empowerment sees the delivery of justice as being locally contextual, community-focused rather than court-centred, and as extending beyond the formal justice sector. It usually forms a part of initiatives taken by courts and/or non-government organisations (NGOs) to promote access to justice for ordinary people both in and beyond courts of law. This empowerment vision of justice may embrace customary or traditional mechanisms, to which extent it extends beyond the scope of this toolkit for judicial and court officers operating in courts of law.

Some common examples of legal empowerment that may be relevant to this toolkit could include legal diversion or referral to other service providers, legal aid schemes (which may be conducted by the court itself with a duty lawyer scheme), para-legal services, and conducting community outreach and legal education programs, among other initiatives.

Legal empowerment is often an initiative taken by non-court actors including NGOs - such as human rights groups - and/or community based organisations (CBOs) to create '*demand*' for improved services. Correspondingly, it can also be addressed by courts as part of the '*supply*' of improved services.

PJDP has traditionally focused on supporting courts to improve the supply of justice services - examples include judicial training, codes of conduct, court administration, time standards, delay reduction and annual reporting. In recent years, PJDP has also extended support for courts in a range of other initiatives that may be related to 'legal empowerment' which aim to support demand for improved services include:

- ***Access to Justice Assessment Toolkit*** - explains the needs for courts to understand how well they are addressing needs in the community and provides examples and the tools for finding out; it is downloadable at: https://www.fedcourt.gov.au/pjsi/resources/toolkits/Access-To-Justice-Toolkit-v2.pdf

- ***Public Information Toolkit*** - explains the needs to courts to community effectively with the public, and provides and examples and the tools for doing so; it is downloadable at: https://www.fedcourt.gov.au/pjsi/resources/toolkits/Public-Information-Toolkit.pdf

2.7 GAP ANALYSIS - ASSESSMENT OF UNMET RIGHTS

As a part of the court improving its external orientation to the community, it should undertake an assessment of unmet legal needs to identify gaps in its service delivery. This assessment raises 3 questions:

(i) Whose legal rights are going unmet?

(ii) What are the unmet rights?

(iii) Does the court have any role to enable those unmet rights?

At that point, the court can develop a plan to address its findings.

2.8 CONDUCTING COMMUNITY CONSULTATIONS & ASSESSMENT METHODOLOGY

First, an explanation about how to gather this information. Take a look at the "**Conducting Community Consultations Guidance**" (Annex 4A). This guidance explains why and how courts should conduct community consultations. It addresses the need to find the right balance between the imperative to preserve judicial independence with the competing needs for community engagement and collaboration with other justice sector actors. It frames these consultations within the broader process of planning for continuous improvement, and the value of adopting a people-centred approach. Finally, it outlines and describes a range of useful public information, community education and outreach activities that have been developed by the courts across the region to promote access to justice.

Also take a look at PJDP's *Access to Justice Assessment Toolkit* (Annex 2).

There are a range of methodologies for undertaking an assessment of unmet legal needs, most of which are consultative. Once the court has identified its stakeholder group(s), preferably at community-level, these consultations can be undertaken by (group) community meeting, (more selective) focus groups, or (individual) interviews. Data can also be gathered from other sources, for example, prisons, the media, churches, village leaders or others where stakeholders may go for help.

As part of the piloting process of this toolkit, the court conducted a Court-Community three-day Workshop, the first day of which was designed to ascertain external perceptions of court performance relating to unrepresented litigants and enabling rights generally.

- Annex 1: Court-Community 3-day Workshop *(sample for local adaptation)*

Formal consultations with the maneaba (local council), Maiana

2.9 WHOSE LEGAL RIGHTS ARE UNMET?

As local judicial and court officers, you are well positioned to address the unmet needs of local people - but before you can do so, you will need to get out of the courthouse to identify them. As explained in PJDP's *Access To Justice Assessment Toolkit*.

That toolkit explains whom to consult, and how to consult them. You will not know where any gaps exist until you consult the community and, *in particular*, reach out to hear those whose voices may normally go unheard: these may be women, children, members of minorities, the poor, excluded or marginalised people, or others who may be vulnerable or suffer disabilities.

2.10 WHAT ARE UNMET LEGAL RIGHTS?

It is not possible to nominate, or to speculate, in advance what the unmet legal needs may be; this is the purpose of the consultations. What can be indicated is that over recent years courts around the world have been criticised for failing to hear the voice of the poor, the powerless and the marginalised - arguably those for whom the protection of the law are most needy. Perhaps the best way to prepare in seeking to identify unmet needs is to expect that the vulnerable may require special consideration: that is, victims of crime, notably of family violence, women, children, members of social or ethnic minorities and others with disabilities. By focusing consideration on these groups, it is more likely that the court will listen to the, as yet unheard voices of the needy.

2.11 USING SCORECARDS

When conducting public consultations, courts can ask community stakeholders to provide their feedback anecdotally by sharing their experiences (qualitative feedback) and also by providing a rating of their perceptions of court performance using a scorecard (quantitative feedback). Combining both methods is ideal though not always possible. The advantage of using a scorecard is that it enables you to tabulate and compare feedback between different times or places in a methodical way.

Some important issues on which to obtain public perceptions include the core principles of judicial conduct outlined in your code of judicial conduct, including independence, honesty and integrity, competence, fairness and recusal, efficiency and delay, access to justice and remedies, among other issues. A sample scorecard is attached, below and at Annex 2:-

Scorecard **Community's Perceptions of Courts**		
1	**Independence**	**/ 100**
2	**Honesty and integrity**	**/ 100**
3	**Competence – knowledge of law & procedure**	**/ 100**
4	**Fairness and recusal**	**/ 100**
5	**Efficiency and delay**	**/ 100**
6	**Access to justice and remedies**	**/ 100**

2.12 How Courts Can Enable Rights

As we have already seen in part 1 of this toolkit, it is a rule of justice that all right-holders or claimants are of equal importance to the court. The court owes a fundamental duty of equality of treatment to all parties. Where however a right-holder suffer a special disadvantage arising from whatever barrier to justice - whether geographical, financial, socio-cultural or educational - there is a need to restore that party to a position of equality. This may require the court to take some special measure to avoid substantive injustice that might otherwise result.[12] What these special measures should be is a matter for the deliberation of the court.

Some examples of initiatives taken by other courts - usually working in collaboration with the local bar and/or human rights groups - in addressing this challenge include:

- Legal help/referral *desk.*
- Family and sexual violence *desk.*
- Court-based *'duty lawyer' schemes* where a qualified lawyer (usually from the private bar) provides free legal advice/representation at court hearing.
- Community *outreach* programs where judges and court officers visit communities to inform them on how the court works.
- Community legal *education* programs in collaboration with the bar.
- School *visits* program.
- Prison *visits* program, among other initiatives.

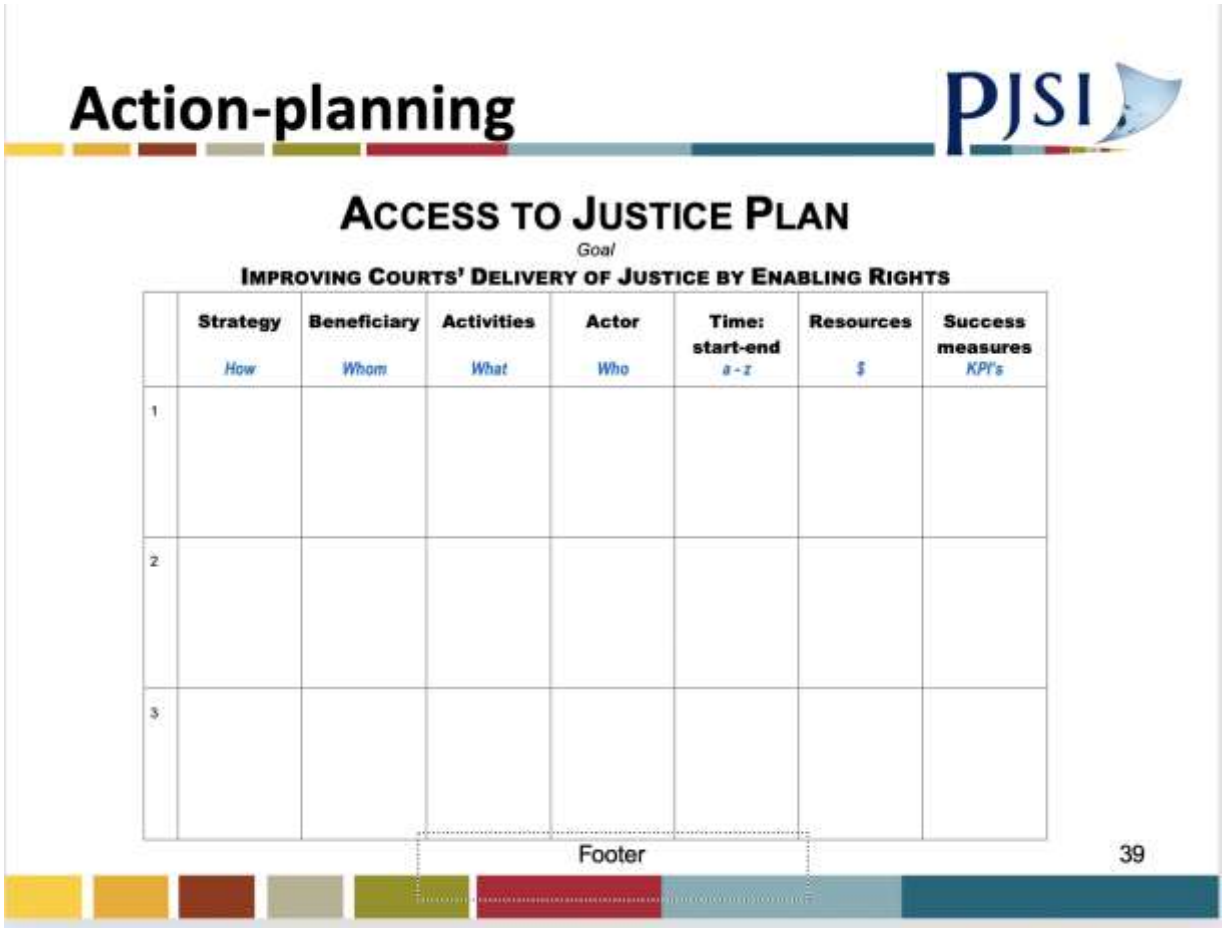
See a more detailed list of community outreach activities conducted by courts across the region (Annex 4A).

2.13 PREPARING AN 'ENABLING RIGHTS PLAN' FOR YOUR COURT

In order for the court to address effectively the challenge of unmet legal rights, it is useful to devise a plan. This *Enabling Rights Plan* will help to focus the court's attention and resources on the key steps in an orderly manner. Adopting a 'project management' cycle, this plan will generally comprise 4 key steps:

1) Define purpose/goals: *when/what.*
2) Identify unmet need(s), and set priorities for action: *who/what/which.*
3) Design implementation strategy(s): *how.*
4) Monitor outcomes/results: *what.* [13]

➢ See: Enabling Rights Plan templates, and samples, at Annex 4B.



Enabling Right / Access to Justice Planning template

2.14 ENABLING RIGHTS - COURT TRAINING NEEDS

Helping officers of the court to perform more effectively in enabling the unmet legal rights of the community may require additional training. Should this be useful, it will be timely to identify who needs what training, and how best that can be provided.

For assistance in how to identify and address these training needs, see: Annex 1
See also: PJDP's *Training of Trainer's Toolkit*.

3. UNREPRESENTED LITIGANTS

3.1 WHO IS AN UNREPRESENTED LITIGANT?

An unrepresented litigant - also called a pro se or self-represented litigant - is any person who appears in court either (i) as an accused to defend a criminal offence, or (ii) as a party to any civil proceeding, who is *not* represented by a lawyer.

Any person is entitled to come before the courts to exercise her/his legal rights either in person or through the representation of a lawyer.

3.2 DIAGNOSIS AND REFERRAL: IS THE COURT THE RIGHT FORUM?

From the outset, the court should satisfy itself that the person who may be an unrepresented litigant is in the right place - that is, that s/he has a legal case that is or should be heard by a court of law. The very first action to be taken is a preliminary inquiry to be made first by registry staff, then by the court officer, and (if necessary) finally by the judicial officer whether the court is the right place for that person to be.

It may well be that the person is in the wrong place and should be immediately referred to the appropriate service provider, for example, to:

- police
- lawyer or the People's Lawyer for advice
- relevant government office
- member of Maneaba ni Maungatabu (parliament), or village council
- church
- others (who?) …

Alternatively, the matter may be best dealt with using customary or traditional methods.

Additionally, in civil disputes, it may be that there are alternative ways of dealing with the person's need, called '*alternative dispute resolution'* (ADR), such as:

- negotiation (between the parties)
- counselling (if it is available)
- mediation or conciliation (either court-annexed or possibly through the law society)

If however the court is the right place for the unrepresented person, then there are a number of important things that the court - from (a) registry staff, to (b) court officer, and (c) judicial officer - should understand and do, which will be outlined below.

3.3 WHY ARE UNREPRESENTED LITIGANTS IMPORTANT?

Unrepresented litigants are important to the courts - no more or less important than any party. But they are important because they present a special challenge for the court in meeting its responsibility to administer justice. This special challenge arises from their lack of legal representation, which creates responsibilities for the court which otherwise would be addressed by their legal representatives. These responsibilities are outlined below.

3.4 VALUES OF JUDICIAL CONDUCT - AND COMPLAINTS PROCEDURE

The High Court of Kiribati published a ***Code of Judicial Conduct*** in 2011 to regulate the standards of judicial conduct. If you do not already have it, you should obtain a copy from the Chief Registrar of the High Court.

This Code was based on the ***Bangalore Principles of Judicial Conduct*** 2002 which prescribes six values of judicial conduct, which are of universal importance to judicial officers and all other officers of the judiciary. These values are:

1. Independence
2. Impartiality
3. Integrity
4. Propriety
5. Equality
6. Competence and diligence.[14]

All of these values are of fundamental importance to your role as a judicial officer.

The Code includes a complaints procedure for litigants, and other members of the public, who are dissatisfied with the conduct of a judicial officer. This Code should be publicly displayed in the court office and available for inspection by members of the public.

3.5 IMPARTIALITY AND PERCEIVED 'BIAS' IN SMALL COMMUNITIES - DUTY TO RECUSE

In practice, it is clear that lay magistrates sitting in small communities often have particular difficulty with values 2 (*Impartiality*) and 5 (*Equality*). Where the magistrate may know and/or be related to many people, it is often very difficult for him/her to hear cases fairly - for example, in land cases involving border disputes - when he/she (or their family) may have an actual *or perceived* interest in that land.

Community consultations conducted in researching this toolkit consistently identified that conflict of interests and bias - or the risk of bias - were a universally common complaint. Bias is unequal treatment, and perceived bias is a belief - whether right or wrong - that a party will be denied equal treatment. This complaint of bias attacks the very foundations of any justice system by eroding public trust in the fairness of the courts.

Magistrates sometimes justify their conduct in continuing to hear these cases by claiming that they have the skills to continue to conduct a fair hearing. They may also justify doing so on the basis that without proceeding, many cases would have to be adjourned causing delay pending a replacement magistrate being arranged. These are NOT legitimate justifications.

There is *only one solution*: whenever a magistrate has - or appears to have - any family interest in the subject under dispute, s/he MUST recuse, that is, disqualify himself. Failure to do so has the gravest consequences: it creates immediate grounds for appeal, and it entitles the aggrieved party to use the complaints procedure of the *Code of Conduct* to seek the dismissal of the judicial officer.

This rule has just one qualification: where a magistrate has or may appear to have any interest, s/he can declare that interest to both parties and inquire whether they wish to proceed or require recusal (disqualification of the magistrate). If both parties are fully informed and still consent to proceed, then they waive their right to disqualification, and the case may proceed.

3.6 JUDICIAL INDEPENDENCE - AND THE 'SEPARATION OF POWERS'

It is a precept of justice that the courts should be independent - that is, that the judicial function should be free of any improper influence. Improper influence may come from any source. Judges and magistrates have a solemn duty to make whatever decision they consider right having regard only to all of the facts and law before them. The 'Latimer House Principles' explain the importance of 'the separation of powers' doctrine. This doctrine enshrines the imperative for independence between the three branches of government: executive, legislature and judiciary. More particularly, these principles stress both the independence and the accountability of each branch of government for its independent operation. That is, the courts are accountable for the just treatment of unrepresented litigants, as much as those litigants represented by lawyers.[15]

3.7 ADVERSARIAL MODEL AND THE EQUALITY OF ARMS

More specifically, the challenge that the unrepresented litigant presents to courts operating in the adversarial model of justice relates, most particularly, to upholding value 6 of the *Bangalore Principles*: equality of treatment of the parties before the court.

To clarify, let's explain this challenge: the pursuit of justice under what is called our 'common law system' is provided through the '*adversarial model*.' This adversarial model is, at its essence, the pursuit of truth and fairness through the contest between rivals which is moderated by an independent judge or magistrate - who serves like the referee or umpire between two rival football teams. The adversarial model relies on each party, or team, challenging each other using shared rules of law and court procedure which determine the rules of the game. The magistrate must decide which party has the stronger case using the rules of evidence, just like the referee must determine which team wins using the rules of the game. In order for this model of justice to work effectively, it requires what is called an '*equality of arms'*. The equality of arms is fundamental to even treatment by the court and the guarantee of a fair hearing. Equality in the resources - and power - that are available to both parties provides a safeguard for fair trial and as a consequence a just outcome.[16]

As a participant in the pilot workshop said: '*Where there is no lawyer, there may be no justice*!'

3.8 YOUR DUTY TO DELIVER JUSTICE

A party coming before the courts without legal representation may be disadvantaged - it is *your* responsibility to ensure that s/he is not.

As a judicial or court officer, you carry a weighty responsibility for the delivery of justice. The courts are responsible for delivering justice according to law. This is a public service, sometimes called a public good, for which the courts are accountable to the people, ultimately through parliament (*Maneaba ni Maungatabu*). It is important to reflect a moment on how the courts perform this weighty responsibility for the community.

Pursuant to Chapter 6 of the Constitution of the Republic of Kiribati, the judiciary is mandated to protect and uphold the law, including the Constitution itself, and to exercise jurisdiction over the administration of justice. The Constitution provides the framework and specifies the 'rules of the games' for governing the people of Kiribati. Within this framework, the Executive and the Legislature enacts laws which are then administered by the Judiciary through the courts.

Judges perform the difficult role of administering justice according to the law. They manage and oversee all aspects of the hearing process to ensure that justice is delivered in two important ways: procedural fairness and an equitable outcome:

- *procedural fairness* is about ensuring each side gets a fair hearing; and

- *equitable outcome* is about ensuring that the specific application of the law is substantively just under all of the circumstances.

Sister Bernadette Mee Eberi, Chief Registrar (Ag) of the High Court, facilitates discussions

3.9 YOUR DUTY TO ADMINISTER LAW - ACTING WITHIN POWER, AND 'ULTRA VIRES'

As a judicial officer, you are responsible for administering the law. Your powers arise expressly through the existence of law, primarily the Constitution and secondarily statutes (or Acts of Parliament). You may only act using the powers provided you by the law. You cannot act beyond those powers. If you do so, your actions are 'ultra vires' - that is, without any legitimate authority. Any decision made by you that is beyond your lawful power is null and void, and will be immediately set aside in any appeal.

3.10 'NATURAL JUSTICE'

The laws and court procedures of all countries contain many fundamental requirements to ensure fair trial.

'Natural justice' describes the 'common law' rule against bias and the right to a fair trial - that is, this rule exists in addition to legislative requirements. While the term *natural justice* is usually retained as a general concept, it has now often been replaced and extended by a general duty to act fairly. This is sometimes also described as 'procedural fairness' or 'due process'.

At its heart, this rule is primarily concerned to uphold the right to a fair trial in criminal matters, though the rule also extends to the requirement of a fair hearing in civil matters. However named, this rule is primarily concerned to guarantee that each party receives a fair hearing, because this is likely to ensure a just outcome. It is the highest responsibility of the magistrate or judge to ensure this fair hearing.

3.11 JUSTICE AND ENSURING FAIRNESS

At its heart, the idea of justice is closely associated with fairness - that is, equal treatment. The great legal philosopher of the Twentieth Century, John Rawls, equated the idea of justice with fairness in what he describes as 'the difference principle.' [17] This principle places equal treatment as being the most important rule, but with one important exception; ***where a situation of inequality prevails, then priority should be***

given to the disadvantaged party. In this way, inequality is rectified through the application of equity, which restores fairness where the rigid application of law might otherwise cause perverse outcomes.

This precept of fairness is crucially important in ensuring that the needs of unrepresented litigants are adequately addressed when they appear before courts in any adversarial model of justice, that is, where there is an *imbalance of power* between the parties.

3.12 MANAGING THE RISK OF UNEQUAL RESOURCES

The magistrate or judge is the officer of the court who is responsible for administering justice. This is a weighty responsibility. This responsibility is exercised by applying the relevant law and court procedures to any given case.

This weighty responsibility becomes all the more challenging when:

- *one side has a lawyer or an experienced police prosecutor and the other does not* - because this creates the risk of uneven power, that is, an unequal contest which may become unfair for the unrepresented person; and/or
- *one side has a lawyer but the magistrate is lay*, that is non-law trained - because this creates the risk that the lawyer may present arguments that 'bend the law' in order to advantage their client and are unfair to the unrepresented litigant.

In the overarching interests of justice, the magistrate or judge must always recognise the possible existence of either, or both, of these risks and conduct the hearing in a manner that manages that risk effectively.

If you are ever in any doubt - and depending on the situation - the magistrate should adjourn the hearing and seek appropriate judicial guidance.

3.13 RIGHT TO LEGAL REPRESENTATION - AND LEGAL AID

The right to legal representation is universally recognised as being fundamental to ensuring fair trial. This right is most important in criminal trials where the liberty of the accused is at stake. In criminal cases, the court has an obligation to ensure that the unrepresented person is aware of her/his right and is making an informed decision to appear unrepresented.

Representation may be provided by a qualified lawyer who is either paid by the accused, funded by the state, or may be provided 'pro bono' (free) by the Law Society. The right to legal representation in criminal defence is so important that most countries operate legal aid schemes to ensure that the accused has legal representation. Legal aid may be provided in different forms: in Kiribati, it is generally provided by ***The People's Lawyer***, though the Law Society is also considering providing some free services. In other countries in the Pacific, the '*Public Solicitor'* or the '*Public Defender'* may provide this representation.

Unfortunately, government funding which is available for legal aid is usually insufficient. This means that legal aid bodies must usually impose priorities and selection criteria on which cases they represent. In practice, this usually means that representation is available for all/most serious offences, but is often not available for minor offences, which are generally heard in the Magistrates Courts, particular on remote islands.

The right to legal representation similarly exists in civil hearings, that is, in private disputes between individuals, but legal aid is generally not available to fund legal representation in these cases.

Single Magistrate Taibo Tebaobao

3.14 HAS THE UNREPRESENTED LITIGANT MADE AN INFORMED DECISION?

When an unrepresented litigant first appears at or in the court, you will not know whether s/he is aware of their right to legal representation and has made an informed decision to represent themselves, which is their right. For this reason, the first issue is to clarify whether the person is aware of their right to representation. Even if the person thinks they understand their right, they may not necessarily grasp all of the implications and they may also be ill-equipped to represent themselves effectively.

The person may be under-informed or unable to make an informed decision for a number of reasons: exclusion, vulnerability or disability:

- *excluded and/or marginalised* - the person may be a member of a marginalised group - that is, living outside the formal justice system by reason of their gender, cast, religion, ethnicity, economic situation or other factors. Such a person may hold no expectations that the justice system can or will help to address her/his needs.
- *vulnerable* - the person may also be 'vulnerable' (for example, a juvenile or a victim of domestic violence) who may have difficulties understanding or acting in their own best interests.
- *disabled* - the person may be suffering from a 'disability' that may impair their ability to represent themselves effectively or render them legally incapable.

The law generally defines a 'disability' as being:

> *The lack of competent physical and mental faculties; the absence of legal capability to perform an act. The term* disability *usually signifies an incapacity to exercise all the legal rights ordinarily possessed by an average person. Convicts, minors, and incompetents (among others) are regarded to be under a disability.*[18]

Under any of these circumstances, that person may not be able to make an informed decision. Public trust rests on the courts being seen to administer justice. In such cases, the court owes a special responsibility to protect the vulnerable and needy in order to maintain public trust in the courts by ensuring that the interests of justice are met.

3.15 VULNERABLE PERSONS REQUIRING SPECIAL PROTECTION

In the interests of ensuring a fair hearing, the court must ensure protection of the rights of a range of persons with special needs, including:

- Juveniles - UN Convention on the Rights of the Child (CROC).
- Women - UN Convention for the Elimination of Discrimination against Women (CEDAW): all countries except Nauru, Palau, Tonga.
- Aged
- Victims of crime, and the sexually-abused.
- Mentally unwell people.
- Intellectually challenged people.
- Members of social or ethnic minorities.
- People without legal status/recognition, including refugees
- Other conditions or disabilities - autism, deaf, blind.
- Uneducated, illiterate and those living traditional lives with limited access to cash resources.
- Shunned, marginalised and vulnerable: petrol-sniffers, alcoholics, prostitutes, prisoners …

This is a very substantial list - including each of us, at one time or another! [19]

Community members, Maiana

It is in all of our interests to ensure a fair trial, where the court satisfies itself that the unrepresented litigant is making a fully informed decision and properly understands the consequences of proceeding in person.

The court may be able to best protect the interests of a vulnerable or disabled person by appointing an 'interested party' to represent them in any proceedings.

Proceedings involving juveniles should be conducted in a closed court - that is, without spectators - in order to protect the interests of the juvenile.

3.16 UNDERSTANDING THE JUDICIAL PROCESS - CRIMINAL & CIVIL (INC. LAND) HEARINGS

As explained above, the judicial process consists of an independent person (judge or magistrate) conducting a hearing between two competing parties and 'judging' or making a decision on the case.

In criminal cases, the parties are called the prosecution and accused (or defendant); in civil cases, including land, the parties are called the plaintiff (or claimant) and the defendant. The judge or magistrates hears the case and ensures that it is conducted fairly for both parties using rules of law and court procedure.

Single Magistrate Teanneki Nemta

3.17 BURDENS AND STANDARDS OF PROOF - IN CRIMINAL & CIVIL CASES

It is essential to understand the difference between the burden and standard of proof, because these are different and they vary depending on whether the case is criminal or civil. The **burden** (or 'onus') of proof describes *who* has to prove what, and the **standard** of proof describes what degree of certainty they need to establish at a hearing. Importantly, both differ depending on whether the hearing is criminal or civil.

In **criminal** cases, the *prosecution* has the *burden* of proof to establish guilt '*beyond all reasonable doubt*' (that is, the *standard* is a very high degree of certainty). The accused does not need to prove anything, but may contest the prosecution's case.

In **civil** cases - including land - the *plaintiff* has the *burden* of proof to establish her/his case '*on the balance of probabilities'* (that is, the standard is lower, being a probable degree of certainty); and then the Defendant may have a separate burden in relation to any cross-claim (or counterclaim).

The magistrate or judge is responsible for conducting the hearing to always ensure that the appropriate party satisfies the relevant burden and standard of proof, using the relevant law and court procedures - in any specific case, see the relevant laws and procedures, and the bench book.

- **Criminal hearings** (or trials) are generally structured as follows:
  1. Court officer calls the case.
  2. Prosecution appears.
  3. Accused appears.
  4. Court officers reads charge.
  5. Accused enters a plea, including (if a plea of guilty) a plea of mitigation.

6. If *guilty*, the magistrate will convict the accused on his/her own plea of guilty and enter judgment. The magistrate then starts sentencing proceedings by listening to pleas of mitigation for the purpose of sentencing proceedings from both parties.
7. If *not guilty* (defended), the magistrate may adjourn the case and may impose bail or proceed by consent.
8. In defended hearings, prosecution presents evidence to establish the elements of the offence - case against the accused with witnesses.
9. If there is a case to answer, the accused then presents the defence with witnesses.
10. Magistrate makes a decision to acquit and convict - if guilty, the magistrate enters a judgment and imposes a sentence which may be a fine or imprisonment.
11. If convicted, the accused has a right to appeal - provided s/he has sufficient grounds for appeal.

- **Civil (including land) hearings** are generally structured as follows:-
  1. Court officer calls the case.
  2. Plaintiff appears.
  3. Defendant appears.
  4. Court officer reads the claim, and any counter-claim.
  5. Magistrate may inquire whether the disputes can be settled informally.
  6. In contested disputes, the plaintiff presents evidence to establish her/his claim with witnesses.
  7. The defendant presents her/his defence to contest the claim and present any counter-claim with witnesses.
  8. The magistrate makes a decision on the evidence presented, and enters a judgment which may include an order with damages, and may also include legal costs.
  9. The losing party has a right to appeal - provided it has sufficient grounds for appeal.

3.18 COURT GUIDANCE TO UNREPRESENTED LITIGANTS: WHAT YOU MUST - AND MUST NOT - DO

It is crucial that you clearly understand the difference between (a) *providing necessary guidance on hearing procedure*, but (b) *avoiding providing substantive advice on the merits of the case* under hearing.

As a judicial or court officer, it is your responsibility to ensure a fair hearing, that is to be impartial and provide even treatment of all and any person coming to the court. This means that:

- *you **cannot** give specific legal advice* to an unrepresented litigant on the merits of their case, because this would not be fair to the other party.

- *What you **can - and must do -*** is to ensure that the unrepresented litigant is aware of their right to legal representation and additionally that you provide guidance to ensure that they understand the court process, its requirements, and what they must do for themselves to enable the court to perform its adjudication (judging) role fairly. As a magistrate, you can always ask questions for clarification. If needed, you may also 'lead' the unrepresented party to a limited extent, *provided* that this is through asking neutral questions.

  For example, in a land dispute, you may ask: 'Can you prove that you own this land - do you have a certificate of title?', or, 'Do you have any witnesses who can confirm your story?' You should also

inform the unrepresented party that they have the right to 'cross-examine' (that is, to question) the other side. But it is *not* your role to perform this cross-examination yourself.

Without this guidance from the court, there is a risk that the unrepresented litigant will be disadvantaged in the adversarial process by a more experienced opponent (in criminal matters by a prosecutor or police officer; in civil matters by a lawyer).

A sample '***Court Guidance to Unrepresented Litigants'*** in Annex 3B of this Toolkit**:** This guidance should be adapted under the direction of your Chief Justice for use in your local jurisdiction.

Land Appeal Panel Magistrate, Tebano Tauatea

3.19 'FUNDAMENTAL RIGHTS' - WHAT TO DO IN CRIMINAL CASES

In criminal cases, your obligation to ensure fair trial is at its highest because the liberty of the individual is at risk. The law and procedure impose a range of requirements to ensure that safeguards protect the liberty of the accused. These safeguards - or '*fundamental rights'* - are the rights to fair trial.

To ensure this protection, you should provide the following guidance whenever you deal with an unrepresented accused in a criminal matter:

1. "You are entitled to be represented by a lawyer if you wish
2. You are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
3. You are presumed innocent until proved guilty according to law.
4. You are entitled to be informed promptly of any charge against you, to have adequate time and facilities to prepare a defence, to be tried without undue delay, and to defend yourself in person or through legal assistance of your choosing or (where the interests of justice require) provided without payment.
5. You are entitled to have witness on your behalf and to examine witnesses against you.
6. You are entitled to an interpreter if required
7. You cannot be compelled to testify against yourself or to confess guilt - this is sometimes also called the 'right to remain silent'.
8. Juveniles (children), those with disabilities and other vulnerable people require special protection

9. You cannot be tried twice for the same offence.
10. You may be entitled to appeal if you are not happy with the decision and, if so, you should obtain legal advice about proceeding further".[20]

Additionally, you must explain the criminal *burden* and *standard* of proof:

> *"In criminal cases, the prosecution or police has the obligation to establish guilt ('burden of proof'). Guilt must be established beyond all reasonable doubt ('standard of proof': a very high degree of certainty). You are not obliged to prove anything. But you may contest the prosecution charge (version of events). If so, you may call your own witnesses."*

You should also ensure that the accused properly understands both the nature of the criminal charge and the consequences of pleading guilty - that is, that s/he has abandoned their right to contest the charge and will be liable for a penalty to be imposed by the magistrate.

See a sample of these fundamental rights as extracted from this guidance and published as a brochure in *iKiribati* (Annex 3C).

3.20 WHAT TO DO IN CIVIL CASES - INCLUDING LAND

In civil matters, the liberty of the individual is generally not at risk so the requirements are less strict. But the court still has an ongoing obligation to ensure a fair hearing. Once again, you should provide guidance on the right to representation. You should also explain how the court operates to perform its role and what the unrepresented litigant should do to ensure s/he prepares and presents their claim effectively. Finally, you must also explain the different requirements of the civil *burden* and *standard* of proof:

> *"In civil cases (or private disputes) the claimant's (person bringing the case) has the obligation ('burden of proof') to establish their claim on the balance of probability ('burden of proof': a probable degree of certainty; to the court's satisfaction). The defendant (person against whom the case is brought) may contest the claim, and may bring their own claim against the claimant (counterclaim) with or without witnesses."*

3.21 LAND CASES - AND CUSTOMARY LAW

The law and procedure relating to land varies from PIC to PIC, and is a matter determined locally. Generally speaking, land law in the Pacific is largely determined by custom, but it is dangerous to generalise. In Kiribati, for example, where this Toolkit was piloted, the law relating to land is essentially customary and varies from island to island. This customary law is embodied in the Native Lands Ordinance 1964, which includes the *Lands Code* applicable to each island. What is important to explain is that it may be the function of the courts to administer customary law together with statutory law. In Kiribati, land disputes are classified separately because they are some common and because a special jurisdiction of Land Appeals Cases is administered to hear appeals against the decision of first instance by the panel of island magistrates. As already explained, these cases are heard using the general 'civil' procedures of the law relating, for example, to the burden and standards of proof required.

3.22 RIGHTS AND RESPONSIBILITIES

In all cases, you should explain to unrepresented litigants:

- their right to legal representation
- their right to appeal and the need to obtain legal advice on appeal

- their responsibility to be honest and truthful
- their responsibility to be courteous and respectful to the court and the other party
- the legal enforceability of court decisions.

Presiding Magistrate Toauru Karotu, Abemama

4. YOUR ROLE AS A JUDICIAL OR COURT OFFICER

4.1 UNDERSTANDING YOUR ROLE, RESPONSIBILITIES AND TRAINING NEEDS

In order for the court to perform its constitutional role effectively, it is necessary for its officers to fully understand and perform their responsibilities and duties efficiently. This section will focus on the roles and responsibilities of the three officers whose roles directly relate to the unrepresented litigant. These officers are:

(i) ***Registry staff -*** Registry staff operate the 'front counter' and provide the public face of the court. In practice, these officers are the first contact that an unrepresented litigant will have with the court. For this reason they perform an essential 'traffic management' role.

Training required - in order to perform these duties competently, registry staff require induction on their role, including:

a) Identification of unrepresented persons.

b) Diagnosis of needs and referral if required.

c) Provision of (approved) guidance on court functions, hearing requirements.

d) Customer service skills - including courtesy, patience, communication skills using plain language, and form-filling.

Workshop working group of Court Clerks

(ii) ***Court officers -*** Court officers assist the magistrate or judge with the administration of court files and hearings. They need to check that unrepresented persons have prepared and provided the court with whatever is required prior to the hearing. They also need to explain the requirements of court proceedings prior to the hearing in order to ensure the efficient administration of cases and hearings.

Training required - in order to perform these duties competently, court officers require induction on their role, including:

a) Explaining court process and hearing requirements, including major provisions of jurisdiction, law and procedure.

b) Case management and administration techniques.

c) Provision of (approved) guidance on court functions, hearing requirements.

d) Customer service skills - including courtesy, patience, communication and problem-solving skills.

Senior Registrar Abuera Uruaaba facilitates meeting with Magistrates, Abemama

(iii) ***Judicial officers -*** Judicial officers (being sworn magistrates and judges) have four key functions to perform:

1) judge the facts of the case - what happened;
2) apply the law to those facts;
3) preside over the hearing to ensure it is conducted in an orderly and fair manner; and
4) make a decision or judgment, which is enforceable as an order of the court.

The judicial officer is responsible - and accountable - to the public for the quality of justice administered. This duty arises both from the Constitution and from your *Code of Judicial Conduct,* which should include a complaints procedure. For this reason, s/he performs the senior judicial role in the court and her/his decision is subject to appeal and review by a superior court.

Training required - in order to perform these duties competently, judicial officers require induction on their role - depending on whether the judicial officer is lay or law-trained - including:

a) Independence, impartiality, fairness, honesty, diligence and decisiveness.
b) Proficiency in knowledge of law and procedure.
c) Explaining court process and hearing requirements.
d) Commitment to upholding principles of natural justice and equitable outlook.
e) Demonstrated concern and capability to ensure fair trial.

Land Appeal Panel Magistrate, Mariateretia Kaiboia presents working group report

All officers of the court should be provided with training to perform their roles whenever required and possible.

- Methodologies for identifying the training needs of officers of the court are explained in PJDP's ***Judicial Orientation Toolkit***, which can be downloaded at: https://www.fedcourt.gov.au/pjsi/resources/toolkits/judges-orientation-toolkit.pdf
- Techniques for designing your own training session(s) are explained in PJDP's ***Training of Trainer's Toolkit***, which can be downloaded at: https://www.fedcourt.gov.au/pjsi/resources/toolkits/PJDP-trainers-toolkit-2016.pdf

Exercise undertaken in the piloting workshop
(subject to time)

- Design and conduct:
  Training Session on Unrepresented Litigants for Magistrates / Court Officers.

4.2 FAMILY VIOLENCE - (FAMILY PEACE BILL 2014)

Family (or domestic) violence is a serious crime, and one that may involve unrepresented litigants - usually the victim.

Family violence - including sexual violence - occurs within the home. Violence - which is the use of force - can be physical, sexual, psychological or economic. It can include psychological abuse, harassment or intimidation. Violence includes the threat of violence. Rape, including rape within marriage - that is sex without consent - is a form of domestic violence. Violence is usually - though not invariably - used by men against women or girls.

In Kiribati, as in other countries in the region, domestic violence is extremely high in global terms. In a recent survey, **68% of females reported being victims of physical/sexual violence during their lives; and 38%**

during the past year. This compares adversely with the international benchmark of 35% of women report being victims of physical/sexual violence during their lives, globally.[21]

The gravity of this problem is concealed by cultural practice and social custom. The size of this problem is further concealed by systematic under-reporting. **Only 1.2% of victims report to police or other authorities** (church or village leaders).

Women under-report domestic violence for various reasons: cultural, economic and pragmatic: in Kiribati, domestic violence has traditionally been regarded as 'family business' to which neighbours turn a blind eye. The victims, as well as their families, suffer shame and embarrassment.

Women's options for relief and remedies are few: most victims are economically dependent on their husbands (the offenders) for support, and there are few if any shelters available. Professional observers describe both the police and the lay magistracy as being patriarchal, that is, biased towards the rights of males rather than the victim. This situation is aggravated by the shortage of legal aid facilities, and the effect of the 'conflict of interest' rules, which may result in the People's Lawyer defending the accused and then being unavailable to provide support for the victim. Some churches are reported by expert observers (UN Women) to routinely counsel victims to stay in their home and to forgive their abusers. Taken in combination, this state of affairs constitutes a **grave failure of the justice system to provide justice to the victim of family violence**.

The Chief Justice is committed to redress this failure. The recent enactment of the new Family Peace Act (2014) provides a timely opportunity to all law and justice service providers to address this problem with renewed vigour.

Single Magistrate (intern) Temoaa Iaribwebwe presenting working-group report

4.3 A QUESTION OF JUDICIAL LEADERSHIP

Domestic violence is a crime that usually goes under-reported by victims. Because the victim may opt-out of reporting, this conceals the crime but it is no less a crime. Under these circumstances it is very difficult for the justice system to perform its function.

Officers of the court should approach this issue with heightened awareness and sensitivity for the rights of the victim, which may not be simple to resolve. One of these rights is the right to protection and redress, and another right is to privacy. Once again, the question of informed decision-making arises: has the victim made an informed choice to not report, or does she believe that she has no choice but to put up with it?

Addressing this question raises difficulties for the court in ensuring that the neutrality and impartiality of the court is preserved at all times. Finding the right balance in answering this difficult question requires the leadership of the Chief Justice, for example, by:

- providing training for court and judicial officers
- drafting a pamphlet on the new Family Peace Act: '*Family violence is a crime, not family business'*.

Chief Justice Sir John Muria makes closing remarks

4.4 ADDRESSING THE CHALLENGE EFFICIENTLY

There are a number of project management and administration steps that you may take in order to accomplish your objectives of supporting unrepresented litigants and/or enabling the rights more broadly. These steps are outlined in PJDP's ***Project Management Toolkit***. Useful topics addressed in that toolkit include:

- ✓ Project planning
- ✓ Decision-making

- ✓ Organising consultations
- ✓ Project coordination
- ✓ Logistics
- ✓ Budgeting, financial management
- ✓ Monitoring and evaluation.

4.5 MAKING A DIFFERENCE: (SELF)-ASSESSING YOUR KNOWLEDGE-GAINS

This toolkit is only valuable if it helps you to do your job better.

For this reason, our donors encourage you to monitor and evaluate the outcomes of your using this toolkit and participating in a '*Court-Community Access to Justice Workshop on Enabling Rights & Unrepresented Litigants*' - which is Annex 1 of this toolkit.

A first step in assessing value is to find out if - and how much - your awareness and knowledge of key issues has increased as the result of using this toolkit and participating in the workshop. You can measure your knowledge-gain by using the *Pre-Post Knowledge Test*, which is Annex 3 of this toolkit.

You can do this either by using a facilitator to administer the test pre-post conducting the workshop, or you can self-administer to test on yourself after reading this toolkit.

Abuera Uruaaba, Senior Registrar of the High Court, presents Enabling Rights Plan.

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ENDNOTE

[1] In consultations with the Chief Justice in May 2014, it was agreed that the focus of the toolkit should focus primarily on explaining the judicial process, rather than substantive legal remedies. Hence the Kiribati version of the toolkit will be designed and piloted primarily for magistrates and court clerks in the Magistrates Court (mainly sitting on outer islands/atolls, though also on South Tarawa).

[2] Research undertaken in preparing this toolkit indicated that most people appear in court unrepresented owing to a complex of reasons including: (i) ignorance of their rights, (ii) distrust of lawyers or the (iii) inaccessibility/delay/cost of obtaining representation.

[3] Lawyers are scarce in Kiribati: there are some 50 members of the Law Society: most of whom practice in Government law offices (DPP, ministries etc). The largest private firm is the People's Lawyer (equivalent to legal aid) which employs 2-3 lawyers and some para-legals whose right to appear in court is restricted. Private lawyers practice mainly on South Tarawa, rendering parties on outer islands almost invariably unrepresented. In exceptional cases only lawyers appear in cases heard on outer atolls.

[4] Kiribati operates a 3-tier court hierarchy: in the Magistrates Court on South Tarawa (capital island) the rates of non-representation in 2012-3 were: (crime) 98.3%, (civil) 96.4%, (land) 90.08%. In the High Court, the rates in 2013 were: (Criminal) 0%, (Civil) 0%, (Criminal Review) 0%, (Criminal Appeal) 27.3%, (Civil Appeal) 51.5%, (Land Review) 60.67%. In the Court of Appeal, the rates in 2013 were: (all cases) 0%. Source: Registrar, High Court of Kiribati, 2014.

[5] There are 155 magistrates of whom only 2 are law-trained.

[6] The legal competence of the lay magistracy is low: the main qualification for appointment is community respect.

[7] For those seeking a guide *for* unrepresented litigants see, for example: *Judicial College, A Handbook for Litigants in Person*, London 2013; http://www.judiciary.gov.uk/publications/handbook-litigants-person-civil-221013/

[8] Constitution, Chapter 11: Fundamental Rights; and Chapter V1: The Judiciary.

[9] Justice incorporates both individual rights and collective goals; fairness refers to those procedures that give all citizens roughly equal influence in decisions that affect them; procedural due process relates to the correct procedures for determining whether a citizen has violated the law. Dworkin, R 1978, *Taking Rights Seriously*, Duckworth, London.

[10] The quest to improve justice systems is of course perennial. For a critique of global efforts to improve courts and 'the rule of law' see, for example: Armytage L 2012, *Reforming Justice*, Cambridge University Press; Carothers, T 2006, *Promoting the rule of law abroad: in search of knowledge*, Carnegie Endowment for International Peace, Washington DC; Hammergren, L 2007, *Envisioning reform: improving judicial performance in Latin America,* Pennsylvania State University Press; Trubek, D & Santos, A 2006, *The new law and economic development: a critical appraisal*, Cambridge University Press; Sage, C & Woolcock, M 2005, *Breaking legal inequality traps: new approaches to building justice systems for the poor in developing countries*, World Bank, Washington DC.

[11] Golub, S, *Legal Empowerment: Working Papers*, IDLO, Rome, 2010, 6.

[12] See Rawls' '*difference principle*', discussed earlier in the context of the court providing guidance to unrepresented litigants.

[13] Visit PJDP's Project Management Toolkit, downloadable at: https://www.fedcourt.gov.au/pjsi/resources/toolkits

[14] Bangalore Principles of Judicial Conduct, 2002; http://www.unrol.org/doc.aspx?d=2328

[15] Latimer House Principles, 2009; http://thecommonwealth.org/history-of-the-commonwealth/latimer-principles

[16] The doctrine of '*equality of arms'* is established and recognized in Article 6 of the European Convention of Human Rights (ECHR); see for example, Toma E, 'The Principle of Equality of Arms – Part of the Right to a Fair Trial', *International Journal of Law and Jurisprudence Online Semiannually Publication*, 2014, http://www.internationallawreview.eu/article/the-principle-of-equality-of-arms-part-of-the-right-to-a-fair-trial .

[17] Rawls J, *A Theory of Justice*, Oxford, 1971, 13.

[18] http://legal-dictionary.thefreedictionary.com/disability

[19] PJDP acknowledges with appreciation the contributions of participants at the *Court-Community Access to Justice Workshop* held on South Tarawa, Kiribati, on 18-20 November 2014.

[20] Constitution: articles 5 and 10; chapters 2 and 6. In addition to applicable local law, see: Article 14, UN *International Covenant of Civil & Political Rights* (ICCPR).

[21] Kiribati Family Health Study 2009; and UN http://www.who.int/mediacentre/factsheets/fs239/en/

ENABLING RIGHTS & UNREPRESENTED LITIGANTS / PRO SE TOOLKIT ADDITIONAL DOCUMENTATION

Available at: https://www.fedcourt.gov.au/pjsi/resources/toolkits

Revised: October 2020

Toolkits are evolving and changes may be made in future versions. For the latest version of this Additional Documentation please refer to the website – https://www.fedcourt.gov.au/pjsi/resources/toolkits

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstances.

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ANNEX 1: COURT-COMMUNITY 'ACCESS TO JUSTICE' WORKSHOP OUTLINE (SAMPLE)

COURT-COMMUNITY ACCESS TO JUSTICE WORKSHOP
ENABLING RIGHTS & UNREPRESENTED LITIGANTS

(High Court of Kiribati, South Tarawa
18-20 November 2014: 9am-4pm)

Overview

Objectives

1. **Improve the quality of justice administered by courts to the community**
2. **Provide a process for court outreach and community engagement**
3. **Identify and address the needs of unrepresented litigants**
4. **Identify and address unmet legal needs by enabling rights for justice**
5. **Pilot and settle draft '*Enabling Rights & Unrepresented Litigants'* Toolkit.**

Day 1 Tuesday 18 November
Introduction by the Chief Justice
Theme: **What customers think: external perceptions on access to justice**
Public workshop for judicial/court officers and justice sector actors

- **Voices from the community**
- **SWOT Analysis: strengths, weakness, opportunities, threats**
- **Identifying unmet needs.**

Day 2 Wednesday 19 November
Theme: Unrepresented Litigants: challenges and solutions
Workshop for judicial and court officers

- **Toolkit on Unrepresented Litigants**
- **Judicial development workshop**
- **Guidance for Unrepresented Litigants.**

Day 3 Thursday 20 November
Theme: Enabling Rights: addressing unmet needs for justice
Workshop for judicial and court officers

- **Toolkit on Enabling Rights**
- **Judicial development workshop**
- **Enabling Rights Plan.**

Closing remarks from the Chief Justice.

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COURT-COMMUNITY ACCESS TO JUSTICE WORKSHOP
ENABLING RIGHTS & UNREPRESENTED LITIGANTS

High Court of Kiribati, South Tarawa
18-20 November 2014: 9am-4pm

Detailed Outline

Session Objectives

1. **Share and listen to public experiences and perceptions of the courts**
2. **Identify the needs of unrepresented litigants as court users**
3. **Identify unmet needs of non-court users for justice and court services**
4. **Assess public satisfaction with services of the courts.**

Day 1	Tuesday 18 November
Theme:	**What customers think: external perceptions on access to justice** Public workshop for judicial/court officers and justice sector actors
09.00-09.15	Introduction by Sir John Muria, Chief Justice of Kiribati
09.15-09.30	Overview by Dr Livingston Armytage, Team Leader, PJDP
09.30-10.00	Introductions by Participants
10.00-10.15	Morning refreshments
10.15-12.30	Voices of the Community - Experiences and perceptions of courts
12.30-13.30	Lunch
13.30-14.30	Identifying unmet legal needs of non-court users for justice
14.30-14.45	Afternoon refreshments
14.45-15.55	SWOT Analysis: strengths, weakness, opportunities and threats
15.55-16.00	Closing remarks.

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COURT-COMMUNITY ACCESS TO JUSTICE WORKSHOP
ENABLING RIGHTS & UNREPRESENTED LITIGANTS

High Court of Kiribati, South Tarawa
18-20 November 2014: 9am-4pm

Detailed Outline

Session Objectives

1. **Address the needs of unrepresented litigants**
2. **Familiarise and settle '*Enabling Rights & Unrepresented Litigants'* Toolkit**
3. **Training on roles of judicial/court officers and court proceedings**
4. **Settle Court Guidance to Unrepresented Litigants.**

Day 2 Wednesday 19 November
Theme: Unrepresented Litigants: challenges and solutions
Workshop for judicial and court officers

09.00-09.15	Introduction by Dr Livingston Armytage, PJDP
09.15-09.30	Review of Day 1
09.30-10.30	Toolkit on Unrepresented Litigants - familiarisation
10.30-10.45	Morning refreshments
10.45-12.30	Toolkit on Unrepresented Litigants (cont'd)
12.30-13.30	Lunch
13.30-15.00	Court Guidance for Unrepresented Litigants - settling
15.00-15.15	Afternoon refreshments
15.15-15.55	Settle other aspects of draft toolkit.
15.55-16.00	Closing remarks.

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COURT-COMMUNITY ACCESS TO JUSTICE WORKSHOP
ENABLING RIGHTS & UNREPRESENTED LITIGANTS

High Court of Kiribati, South Tarawa
18-20 November 2014: 9am-4pm

Detailed Outline

Session Objectives

1. **Address unmet legal needs by enabling rights for justice**
2. **Familiarise and settle '*Enabling Rights & Unrepresented Litigants'* Toolkit**
3. **Training on roles of judicial/court officers and court proceedings**
4. **Develop Court Plan for Enabling Rights.**

Day 3 Thursday 20 November
Theme: Enabling Rights: addressing unmet needs for justice
Workshop for judicial and court officers

09.00-09.15	Introduction by Dr Livingston Armytage, PJDP
09.15-09.30	Review of Days 1 and 2
09.30-10.30	Toolkit on Enabling Rights - familiarisation
10.30-10.45	Morning refreshments
10.45-12.30	Toolkit on Enabling Rights (cont'd)
12.30-13.30	Lunch
13.30-15.00	Develop Court Plan for Enabling Rights
15.00-15.15	Afternoon refreshments
15.15-15.55	Settle outstanding aspects of draft toolkit.
15.55-16.00	Closing remarks from the Chief Justice.

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ANNEX 2: COMMUNITY PERCEPTIONS SCORECARD

Scorecard

Community's Perceptions of Courts

1	Independence	/ 100
2	Honesty and integrity	/ 100
3	Competence – knowledge of law & procedure	/ 100
4	Fairness and recusal	/ 100
5	Efficiency and delay	/ 100
6	Access to justice and remedies	/ 100

ANNEX 3: PRE/POST KNOWLEDGE TEST

Instructions

a) *At the start of the workshop*, the facilitator will administer this test to participants anonymously:

1. Why are **unrepresented litigants** important?
2. List x6 **values of judicial conduct**
3. What is '**natural justice**'?
4. Explain **burden** and **standard of proof**
a. Criminal
b. Civil/Land
5. List x10 **fundamental legal rights**.

b) The facilitator will mark and return the answers, and keep the scores.

c) *At the end of the workshop*, the facilitator will re-administer this test to participants.
d) Once completed, ask participants to exchange their answers with someone at another table who will mark and return their answers.
e) Marking - each correct answer receives one mark; marking should be 'compassionate', that is, if the answer captures the spirit of the correct answer, it should be scored positively.
f) Model answers can be found in this toolkit, as below, at pages:-

1. Why are **unrepresented litigants** important? - at/around page 12.
2. List x6 **values of judicial conduct** - at/around page 13.
3. What is '**natural justice**'? - at/around page 15.
4. Explain **burden** and **standard of proof**:
   a) Criminal - at/around page 19,
   b) Civil/Land - at/around page 20.
5. List x10 **fundamental legal rights** - at/around pages 21 and 22.

g) Calculate the change in scores (knowledge) between pre- and post- testing.

ANNEX 3A: COURT GUIDANCE FOR UNREPRESENTED LITIGANTS - EXPLANATORY NOTE

Explanatory Note
COURT GUIDANCE FOR UNREPRESENTED LITIGANTS

The Pacific Judicial Development Program (PJDP) is pleased to provide a template to help courts to administer justice with unrepresented litigants.

This template is designed to provide practical guidance for lay magistrates and court officers when dealing with unrepresented litigants. It is part of the '**Enabling Rights & Unrepresented Litigants Toolkit': *Court Guidance for Unrepresented Litigants*** (annex 3). This guidance has been drafted for your use, adaptation, translation into local language, and distribution to members of the public who come before your courts.

This guidance has been piloted in Kiribati where litigants (and potential litigants) are usually unrepresented. It was distributed at each court to members of the public. As a result, both the courts and unrepresented litigants found it useful in promoting understanding of the role of courts and in explaining how people can exercise their rights in court more effectively.

Building on this initiative, PJDP's Program Executive Committee (PEC) has approved extending the benefits of this work to other PICs across the region.

Enabling People's Right to Justice

It is a fundamental right of all people to come before the courts to obtain justice by exercising their legal rights. The constitution enshrines this right, which is protected by the courts where a judge or magistrate administers the law.

While the laws and procedures of any justice system are numerous and complex, there is a single pure principle at the heart of every justice system. This is **the principle of fairness**. This principle upholds the fundamental rule of *equal treatment* for all citizens who come before the courts seeking justice.

Unrepresented litigants - that is, people appearing in courts without representation by a lawyer - are very common across the Pacific. This may be by choice; but more often, it is because of barriers to accessing and exercising their legal rights. These barriers vary in any situation, and commonly include:

- **geographical (distance),**
- **financial (expense),**
- **socio-cultural (customary practices and expectations),**
- **educational (lack of awareness and knowledge of the justice system).**

Unrepresented litigants present the courts with many challenges in ensuring equal treatment and a fair trial. In the 'adversarial' system, justice is reached through each party arguing their case before the magistrate or judge. Where one party has a lawyer and the other does not, this creates a risk of 'inequality of arms,' that is, an unfair advantage. If a person is unable to access or use their legal rights, then it is not possible for the courts to perform their role of administering justice effectively. To avoid or minimise this risk, the court must take special steps to ensure a fair hearing. One of these steps is to ensure that courts circulate this guidance to people who may need to appear in court.

Purpose

This guidance briefly explains the role of the courts, how they administer law, and how unrepresented litigants can exercise their legal rights to justice. It outlines the 10 'fundamental rights' to a fair hearing, and clarifies the major differences between criminal, civil and land proceedings.

Our consultations with communities have identified that many people do not understand the role of the courts or how they work. They are often uncertain, shy and unconfident to exercise their legal rights. These people are unlikely to approach the court for help - however needy - without some support from the court.

In the interests of justice, the courts have an important responsibility to ensure that citizens can exercise their rights to a fair hearing. This responsibility includes the courts taking active steps to ensure that all people can access and use their legal rights effectively - particularly those who are not represented by a lawyer. Courts that exclude or disable citizens from exercising their lawful rights fail to provide public service, and lose the trust and respect of the community.

Using this Guidance

When considering whether you need to use this Court Guidance, the first step is to consider the problems and needs of people who may seek help from the court. If these people have not obtained any advice from a lawyer, they are called 'unrepresented litigants'. An unrepresented litigant is a person who comes before a court as a party to a case - not a witness - without any legal representation from a qualified lawyer or any assistance from a para-legal support officer or community-based organisation. These people will need your help to explain how the courts work and how they should exercise their legal rights. In doing so, it is extremely important that you fully understand when you should help and how:

Do's and Don'ts

All officers of the court - whether registry staff, court clerks, magistrates or judges - are each responsible to ensure that all people coming before the court receive equal treatment and a fair hearing.

- ***Registry staff* and *clerks of court* - are the public face of the justice system, and usually the first point of contact by members of the community. Assistance will normally focus on answering general inquiries, providing and/or advising about the correct forms/documents that need to be completed to initiate a court process, providing referrals to other service providers where required, and providing explanations about court procedures. This assistance should include giving the person this Guidance.**
- ***Magistrates and Judges* - usually encounter unrepresented litigants when they appear before them in court without a lawyer. Assistance will normally focus on ensuring that they understand their right to legal representation and to explaining the relevant court proceedings in a manner that ensures a fair hearing for both parties. This assistance should include giving the person this Guidance.**

Caution is required: officers of the court are *not* allowed to provide legal advice on the legal merits of any particular case that comes before the court for hearing, because this could affect the impartiality - or the appearance of impartiality - of the hearing and damage public trust in the independence and fairness of the court. This means that you can explain how the court works, but *not* who is at fault or who will win or lose the case.

Adopting or adapting this Guidance

You may wish to use this template Guidance as drafted, or alternatively, you may wish to change it to suit local conditions in your jurisdiction and court. If so, we encourage you to do so, as required. Each jurisdiction is different. While it is likely that the law and procedures outlined in the template are appropriate and apply in your jurisdiction, we recommend that you check with your Chief Justice to be sure. You may consider that some aspect of local culture or traditions should be mentioned. We also recommend that the Guidance is written in words that are readily understood in your country and is translated into local language/s.

Finally, we recommend that this Guidance should be accompanied by oral communication, that is, a court officer explains the contents in-person to ensure that unrepresented litigants understand the contents, and if needed also clarifies any issues by answering any questions.

Step-by-Step to Additional Recourses: Toolkits and Tools

PJDP has produced a number of related resources to help courts to improve services, a number of which are listed below for your use:

1) **First, if you wish to assess the community's unmet needs for justice, visit:**
   https://www.fedcourt.gov.au/pjsi/resources/toolkits/Access-To-Justice-Toolkit-v2.pdf
2) **Second, if you wish to improve information available to the public and court users, visit:**
   https://www.fedcourt.gov.au/pjsi/resources/toolkits/Public-Information-Toolkit.pdf
3) **Third, if you wish to use this Court Guidance to Unrepresented Litigants, visit:**
   https://www.fedcourt.gov.au/pjsi/resources/toolkits/Enabling-Rights-Toolkit-2016.pdf

The '***Enabling Rights Toolkit'*** explains the fundamentals about justice for lay magistrates and court officers including:

- **Function of the Constitution and the rule of law in society**
- **Role of courts to administer justice**
- **Six values: independence, impartiality, integrity, propriety, equality, competence**
- **Principles of 'natural justice', procedural fairness and rights to fair trial**
- **Ten 'fundamental rights' of fair trial - including the right to legal representation**
- **Differences in 'burden' and 'standards' of proof in criminal/civil proceedings**
- **Conflict of interest - and when you must disqualify (recuse) yourself**
- **Responsibilities to protect the needy, vulnerable and disabled.**

In piloting of this guidance, the courts of Kiribati undertook two additional activities that you may also find useful:

1) ***'Court-Community Access To Justice' workshop*** **- the goal of this workshop is to improve the quality of justice administered by courts to the community by:**

   (a) providing a process for court outreach and community engagement;
   (b) identifying the needs of unrepresented litigants;
   (c) addressing unmet legal needs by enabling rights for justice (annex 1: A1-4).

2) ***Enabling Rights Action Plan*** **- as part of addressing the legal needs of unrepresented litigants, the court also developed an action plan, which identified: *what* actions it would take, *who* was responsible, *how* the needs would be addressed, and *what* it would cost (annex 4: A10).**

All of these additional resources can be found at:
https://www.fedcourt.gov.au/pjsi/resources/toolkits

Should you have any queries, please contact us: pjsi@fedcourt.gov.au

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ANNEX 3B: COURT GUIDANCE FOR UNREPRESENTED / PRO SE LITIGANTS - SAMPLE

SAMPLE COURT GUIDANCE FOR UNREPRESENTED LITIGANTS

(People who appear in court without a lawyer)

GOING TO COURT: WHAT ARE MY RIGHTS AND RESPONSIBILITIES?

1. Role of the courts

The Constitution of *[insert name of your PIC]* establishes the courts of law. The courts are responsible for administering the laws. These laws are either criminal (offences against the state, such as murder or theft) or civil (involving the rights of individuals, such as land or agreements). It is the responsibility of the courts to administer these laws independently, equally, impartially, fairly, honestly and competently. In practice, the nature of cases coming before the courts is a mixture of criminal offences, and civil disputes often relating to land.

2. Adversarial system of justice

In *[insert name of your PIC]*, the courts operate in what is called the 'adversarial system'. In this system, it is the responsibility of the parties to present these cases, and the responsibility of the court (being the magistrate or judge) to make the decision. This means that two sides (or parties) usually contest cases or disputes in front of the magistrate.

3. Role of the magistrate - making decisions

The magistrate (or judge) is the officer of the court who is responsible for deciding the case justly. The magistrate has four key functions to perform: (i) to judge the facts of the case - what happened, (ii) to apply the law to those facts, (iii) to preside over the hearing to ensure it is conducted in an orderly and fair manner, and (iv) to make a decision or judgment, which is legally enforceable as an order of the court.

The magistrate is independent and required to treat both sides equally and fairly. For this reason s/he will explain what the unrepresented litigant should do at the hearing and how the hearing works. The magistrate cannot provide any legal advice on your case - this is *your* responsibility: if you need help, you are strongly encouraged to consult a lawyer.

4. Recuse of the Magistrate

A magistrate may recuse himself/herself to hear the case - that is, excuse themselves from hearing the case because of a potential conflict of interest - on application by a party or on the magistrate's own motion where there is or may be a conflict or an appearance of a conflict of interest.

5. Role of the parties to a hearing

In ***criminal*** matters, the prosecution (usually the police) brings the case (or complaint) against the accused (defendant).

In ***civil*** matters, the claimant (plaintiff) brings the case (claim) against another party (defendant).

6. Appearing in court and legal representation

As a citizen, you are required to appear in court if charged with a criminal offence. You are also entitled to come before the courts to exercise your civil rights and responsibilities. *What is a right?* A right is an entitlement that you have as a citizen that is enforceable by law. Should you wish to come before the courts, you should be clearly aware of your rights and responsibilities before doing so.

In all cases, you have a right to legal advice and representation - that is, you have the right to be represented by a lawyer. If in any doubt, you are encouraged to consult a lawyer for advice because the law may be complicated and you may require expert assistance. Should you choose not to exercise this right, you may appear in person. If you chose not to use your right to representation, you should understand that the court's decision is usually final and will be enforced by the law.

7. Legal Aid

You may obtain legal advice and representation from a qualified lawyer who will charge a fee or, alternatively, you may be entitled to free legal aid which may include advice and representation.

8. Appearing in court - telling your story: facts not opinions

If you chose to appear in court without a lawyer, you should prepare your case carefully in advance. In court, the magistrate will explain the order of proceedings. Be sure to do what the magistrate tells you. You will be given an opportunity to 'tell your story'. Prepare this in advance: start at the beginning and present it in time order. You should include facts (what actually happened), and not opinions (what you thought). You can bring witnesses to support your story or to contest that of the other party. In all cases, it is your responsibility to be honest and tell the truth - failure to do so is punishable.

9. Rights to compensation with costs

A party may make an application to court to be compensated with costs for attending the court if the other side does not come to court.

10. Appeals

If you are not happy with the decision of the court, you may have a right to appeal. If you want to appeal, you are again strongly encouraged to seek legal advice. If you appeal, you are entitled to be represented by a lawyer.

If unable to get legal assistance, you may file your appeal using the 'Appeal Form' available in all the Magistrates' Court offices. Seek the assistance of the Court Clerk for filling the form.

Appeals on the decision of the Magistrates' Court must be made within 3 months starting from the date the decision is delivered. Appeals from the High Court decision must be made within 21 days starting from the date the decision is delivered. You are required to get legal assistance to file your appeal in the Court of Appeal.

11. Right to appeal

Any party dissatisfied with the order/ruling/decision of the Magistrates' Court has the right to appeal to the High Court within 3 months starting from the date the order/ruling/decision of the court is delivered.

It is important to highlight some key differences between **criminal** and **civil** cases as these differences may affect your rights and the manner in which you exercise them.

CRIMINAL CASES

Crimes are offences against the state (such as murder or theft) that are prosecuted by the police before the courts.

You have 'fundamental rights' when charged with a criminal offence, including:

1. **You are entitled to be represented by a lawyer if you wish**
2. **You are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.**
3. **You are presumed innocent until proved guilty according to law.**
4. **You are entitled to be informed promptly of any charge against you, to have adequate time and facilities to prepare a defence, to be tried without undue delay, and to defend yourself in person or through legal assistance of your choosing or (where the interests of justice require) provided without payment.**
5. **You are entitled to have witness on your behalf and to examine witnesses against you.**
6. **You are entitled to an interpreter if required**
7. **You cannot be compelled to testify against yourself or to confess guilt - this is sometimes also called the 'right to remain silent'**
8. **Juveniles (children), those with disabilities and other vulnerable people require special protection**
9. **You cannot be tried twice for the same offence**
10. **You may be entitled to appeal if you are not happy with the decision and, if so, you should obtain legal advice about proceeding further".**

12. Burden and standard of proof in criminal matters

In criminal cases, the prosecution or police has the obligation to establish guilt ('burden of proof'). Guilt must be established beyond all reasonable doubt ('standard of proof': a very high degree of certainty). You are not obliged to prove anything. But you may contest the prosecution charge (version of events). If so, you may call your own witnesses.

If you do not understand the charge, you should ask the magistrate to explain. If you 'plead guilty' (that is, admit the charge), or are found to be guilty by the court, you will be liable for a penalty imposed by the law.

CIVIL CASES - INCLUDING LAND

Civil cases are disputes over personal rights between individuals (such as agreements or over land).

1. Burden and standard of proof in civil cases

In civil cases (or private disputes) the claimant (person bringing the case) has the obligation ('burden of proof') to establish their claim on the balance of probability ('standard of proof': a probable degree of certainty). The defendant (person against whom the case is brought) may contest the claim, and may bring their own claim against the claimant (counterclaim) with or without witnesses.

2. Discretion for Court Fee Waiver

A citizen with shortage of economic incomes may apply to the Court for a Court Fee Waiver if unable to meet a court fee specified by law.

The court's decision, which may include an order for damages and/or costs, is enforceable by law.

3. Enforcement of Judgment

In civil cases, the winning party may file an enforcement application of the court decision if the losing party never complies with the order/decision of the court.

UNDERSTANDING THE JUDICIAL PROCESS: CRIMINAL & CIVIL HEARINGS

As explained above, the judicial process consists of an independent person (judge or magistrate) conducting a hearing between two competing parties and 'judging' or making a decision on the case.

In criminal cases, the parties are called the prosecution and accused (or defendant); in civil cases, the parties are called the plaintiff (or claimant) and the defendant. The judge or magistrates hears the case and ensures that it is conducted fairly for both parties using rules of law and court procedure. In **criminal** cases, the prosecution has the *burden of proof* (or obligation) to establish guilt '*beyond all reasonable doubt*' (the standard of proof is to a very high degree of certainty). The accused does not need to proof anything, but may contest the prosecution's case. In **civil** cases, the plaintiff has the burden of proof to establish her/his case '*on the balance of probabilities'* (the standard of proof is lower: to a probable degree of certainty).

The magistrate or judge is responsible for conducting a fair hearing that is impartial, providing even treatment to both parties coming before the court, and applying the relevant law and court procedures.

- **Criminal hearings (or trials) are generally structured as follows:**
  1. Court officer calls the case.
  2. Prosecution appears.
  3. Accused appears.
  4. Court officer reads charge.
  5. Accused enters a plea, including (if a plea of guilty) a plea of mitigation.
  6. If *guilty*, the magistrate will convict the accused on his/her own plea of guilty and enter judgment. The magistrate then starts sentencing proceedings by listening to pleas of mitigation for the purpose of sentencing proceedings from both parties.
  7. If *not guilty* (defended), the magistrate may adjourn the case and may impose bail or proceed by consent.
  8. In defended hearings, prosecution presents evidence to establish the elements of the offence - case against the accused with witnesses.
  9. If there is a case to answer, the accused then presents the defence with witnesses.
  10. Magistrate makes a decision to acquit and convict - if guilty, the magistrate enters a judgment and imposes a sentence which may be a fine or imprisonment.
  11. If convicted, the accused has a right to appeal - provided s/he has sufficient grounds for appeal.

- **Civil (including land) hearings are generally structured as follows:**
  1. Court officer calls the case.
  2. Plaintiff appears.
  3. Defendant appears.
  4. Court officer reads the claim, and any counter-claim.
  5. Magistrate may inquire whether the disputes can be settled informally.
  6. In contested disputes, the plaintiff presents evidence to establish her/his claim with witnesses.
  7. The defendant presents her/his defence to contest the claim and present any counter-claim with witnesses.
  8. The magistrate makes a decision on the evidence presented, and enters a judgment which may include an order with damages, and may also include legal costs.
  9. The losing party has a right to appeal - provided it has sufficient grounds for appeal.

Need any help? If you have any questions before the hearing, contact the court clerk *[insert clerk's contact details]* or Legal Aid on *[insert contact details for Legal Aid]*

ANNEX 3C: COURT GUIDANCE ON FUNDAMENTAL RIGHTS (EXTRACTED FROM 3B, IN IKIRIBATI)

Iai "inaomatam aika a kakawaki' ngkana ko tiatinaki ma te bure

1. Iai inaomatam bwa e na kona n tei ibukim te Rooia, ngkana ko tangiria.
2. Iai inaomatam n tangiran ongoraean am keiti n te aro ae aki tabeitera ao n kona n ongoraeaki n te bowi ae e uki iroun te rabwata ae konabwai, e inaomata ao n aki tabeitera ae kinaki ao n kateaki iaan te tua.
3. Kona taraaki bwa akea am bure n karokoa te tai are ko kakoauaki raoi bwa ko bure iaan te tua.
4. Iai inaomatam bwa kona kaongoaki n te tai ae bon tau taekan taian tiati ake a kaitarako, ao man riai n tau am tai n karaoa ao n katauraoa am itera n kaitarai bukinam, n ongoraeaki am keiti n aki kawenenakoaki n maan n bukina aika aki riai, ao n tei n kaitarai bukinam i bon iroum ke rinanon aia ibuobuoki Rooia are ko bon rineia ke (ibukin tangiran te motiraoi) ko kona n buokaki n akea boona.
5. Iai inaomatam n tangiria am taan kakoaua ao n titirakinia taan kakoaua ake ana kaitarako.
6. Iai inaomatam n tangira te Tia Raitaeka ngkana e kainanoaki.
7. Ko aki riai n kairoroaki bwa kona anga am kakoaua n kaitarako ke n kariaia bukinam – aio naba are e kona n aranaki bwa "inaomatam n aki taetae."
8. Ataei aika a uarereke, aomata ake iai toaraan rabwataia ao aomata riki tabeman ake a kai rootaki n te kanganga (vulnerable) ao n tangira kamanoaia ae okoro.
9. Ko aki kona n kateaki n te bowi n am bure ae ti tebo.
10. Iai inaomatam n tabekarake am manga tang ngkana ko aki kukurei n te moti ma, ngkana ngaia anne, e riai n iai te ibuobuoki nakon n ataakin te tua bwa kona kanga n waaki nako riki."

HIGH COURT OF KIRIBATI
TE BOWI AE E RIETATA I KIRIBATI

ANNEX 4A: CONDUCTING COMMUNITY CONSULTATIONS GUIDANCE

PJSI GUIDANCE

PROMOTING ACCESS TO JUSTICE THROUGH COMMUNITY CONSULTATIONS

The Pacific Judicial Strengthening Initiative (PJSI) is pleased to provide a guidance note to assist courts to promote access to justice through community consultations. This guidance consolidates the experiences and distils lessons learned by courts across the region to promote access to justice through community consultations over recent years.[1]

Purpose

The purpose of this guidance note is to assist law courts across the Pacific region to conduct and use community consultations to promote access to justice and improve the quality of judicial service delivery.

This guidance note explains why courts should and how courts can conduct community consultations. It addresses the need to find the right balance between the imperative to preserve judicial independence with the competing needs for community engagement and collaboration with other justice sector actors. It frames these consultations within the broader process of planning for continuous improvement, and the value of adopting a people-centred approach. Finally, it outlines and describes a range of useful public information, community education and outreach activities that have been developed by the courts across the region to promote access to justice.

Using this Guidance

This guidance is designed for judicial officers and court administrators as an informal resource for use in and by the courts of the Pacific to assist ongoing efforts to promote access to justice through community consultations.

Courts may wish to use this guidance as drafted, or to adapt it to suit local conditions in your jurisdiction and country. Each jurisdiction is different. You may consider that some aspect of local culture or traditions should be specifically mentioned. We also recommend that the guidance and any associated materials relating to promoting access to justice through community consultations is written in words that are readily understood in your country and is translated into local language/s.

We recommend that this guidance should be read and used within the broader context of the courts public relations endeavours to promote access to justice.

[1] Output 4 of Project 4 of PJSI's COVID-19 Redesign 2020 specifies: (d)evelop a Court Guidance on '*Promoting Access to Justice through Community Consultations*' for all courts across the region, which consolidates the experiences and distils lessons learned in 'enabling rights' visits to PICs. These visits included Kiribati in 2014 & 2019, FSM in 2017, RMI in 2018, Cook Islands in 2018, and Vanuatu in 2019 among other related activities.

1. WHY CONDUCT COMMUNITY CONSULTATIONS?

Community consultations are important, valuable and useful for the courts for 3 main reasons that relate to the courts performing their role to administer justice and improving the quality of the services they deliver.

1.1 CONSTITUTIONAL ROLE AND RESPONSIBILITIES OF THE COURTS

The first rationale for community consultations relates to the responsibility of the courts to administer justice. This rationale is concerned with the courts performing their role under the constitution.

The constitution is the supreme law of each country. It embeds the '*separation of powers*' doctrine which divides the powers and responsibilities of government into 3 arms: (1) *executive*, (2) *legislature* and (3) *judiciary*. Under the constitution, courts are mandated to administer justice. The main functions of the courts are to protect the constitution, administer the law, resolve disputes and review the administrative decisions of government. Justice is dependent on - but separate and additional to - law. At its essence, justice is concerned with fairness. Fairness describes the equality of distribution and the treatment of legal rights in any given situation. In this way, the courts may be seen as guardians of the norms and values of each country as enshrined in its constitution.

On a day-to-day basis, the courts administer justice by applying the law to specific cases or disputes that are brought before them. These disputes may be criminal or civil. The courts determine the application of the laws to the particular situation. In doing so, they resolve disputes between government, people and businesses. They protect the rights of the citizen and, where needed, they protect the citizen against the abuse of government power. Ultimately, the courts exist to protect the liberties and to enforce the rights of the people. They also protect the citizen from unlawful intrusion by government. Without the courts, there is no justice (excluding custom) in the state.

The courts can only discharge their constitutional mandate when the community they serve understand their mandate and role to administer justice. Hence to perform their constitutional role, the courts must be proactive in consulting the community to ensure this understanding.

1.2 PROMOTING ACCESS TO JUSTICE

Second, in order for the courts to perform their role and responsibilities, it is essential that the people can understand this role so that they can access and exercise their legal rights when needed.

Unfortunately, our consultations with communities have found that many - if not most - people across the Pacific region do not clearly understand the role of the courts or how they work. Moreover, they are often uncertain, shy and unconfident to exercise their legal rights. Consequently, a large proportion of the population is unlikely to approach the court for help - however needy - without some support from the court.

Our courts operate in what is called the 'adversarial' model of justice. This means that the parties to any dispute are responsible for claiming and defending their dispute in court, and the magistrate/judge make the decision based on their representations. Where however one of the parties does not know or understand how to exercise their legal rights, this process can become uneven and impair the quality of justice. For the adversarial process to operate fairly, it is essential that both parties understand and can use the process.

Hence, it is in the interests of justice that the courts exercise the responsibility to ensure that citizens can understand and use their rights to a fair hearing. This responsibility requires courts taking active steps to ensure that people can and do understand the role and functions of the courts, so that they are able to

exercise their legal rights as/when needed. As the constitutional guardians of justice, the courts have the responsibility to ensure that citizens can exercise their lawful rights to a fair hearing.

Courts that exclude or disable citizens from accessing justice fail to perform their role, and risk losing the trust and respect of the community. To ensure that citizens can exercise their legal rights, the courts should be proactive in informing and educating the community on the court's role and how people may use the courts to exercise their rights.

1.3 MECHANISM FOR CONTINUOUS IMPROVEMENT OF COURT SERVICES

The third rationale for community consultations relates to improving the quality of the justice services that courts deliver. This rationale is concerned with the courts being accountable to the communities they serve by providing court users with an opportunity or mechanism to provide feedback on their satisfaction with those services, and how they can be improved.

Courts, among other progressive organisations around the world, are committed to continuous improvement. Continuous improvement presumes that these organisations will do the best they can but simultaneously recognises that mistakes and shortcomings are unavoidable. The distinctive notion of continuous improvement is in ensuring the organisation learns from these mistakes, so they are avoided in future.

Community consultations provide a precious mechanism for the courts to consult their users - and equally importantly, their non-users - to ascertain whether they are doing a good job and, if not, how they can improve.

Some judges may be uncomfortable with the notion that courts provide 'services to users', who may also be described as 'clients' or 'customers.' This is because it seems to suggest that the courts are like other suppliers of services, for example, lawyers or shopkeepers who are paid for professional or commercial services. Courts are of course not like lawyers who are hired for a professional fee, nor are they like retailers who are paid to supply commercial goods. Courts are fundamentally unique in performing a constitutional role to provide a public good, that is, to administer justice for the state and community. Seeing the courts as the provider of justice services is however useful in positioning the courts as being seen to be in a relationship of accountability to both the state and the community to whom they are mandated to serve. Ultimately, the courts must be accountable for the quality of these services.

Hence community consultations provide the courts with a valuable mechanism to both explain their role in order to ensure that the courts can be used by the needy when they are needed, and also to provide accountability by enabling and addressing feedback on its services.

2. DOCTRINE OF JUDICIAL INDEPENDENCE

Creating opportunities for court users to provide feedback on their services does however raise unique challenges for the courts. The courts are unlike other service providers in terms of their relations with their users, clients or customers. Unlike other service providers, the courts are required to be independent, not only from the other branches of government, but even from the parties who may appear before them. Independence is vital to ensure impartiality, the appearance of impartiality, and thereby public trust in the courts and the administration of justice.

The importance of preserving and consolidating judicial independence cannot be over-stressed, as seen in the Bangalore Principles of Judicial Conduct, 2002, which enshrine 6 core principles that embody the international norms of judicial good practice. These principles or norms are independence, impartiality, integrity, propriety, equality and competence. These are mutually interdependent and may overlap. Significantly, the principle for independence is foremost: -

Value 1:
INDEPENDENCE

Principle:
Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Independence is required to protect and guarantee the integrity of the courts to administer justice according to law, without interference or improper influence from government, the parties or other powerful interests. Without this guarantee, public trust and confidence in the courts would be eroded, and the role of the courts would be perverted from protector to oppressor.

The principle of independence requires the courts to ensure that they are in fact independent and equally *are seen to be* independent. This requires that courts to be extremely careful in operating at an appropriate distance separated from government, court users and the community. It is for this reason that it is inappropriate for the courts to market their services as other service providers might. Unlike professional or commercial service providers, judges generally do not socialise much or mingle in public in order to protect the appearance of independence of the courts.

Traditionally, the imperative to preserve the independence of the judiciary and protecting the neutrality of the courts from improper influence has led the courts to a withdrawal from public contract. This withdrawal was seen as being legitimate and necessary to insulate the judiciary. Over recent years, however, this 'insulation' has on occasion been publicly criticised as becoming 'isolation' and has provoked complaints that the courts are 'out of touch' with the needs of the community. These complaints have most commonly been driven by public perceptions that judges are non-representative of the community and patriarchal (usually men) who fail to properly understand and adequately protect the needs of women, minorities and the powerless poor. Courts are often criticised for being too remote. These are of course serious complaints - even if misconceived - because they erode trust.

There are now mounting concerns that the protection of independence has been at the expense of the courts failing to adequately enable to rights of the poor, the vulnerable, the marginalised and the weak - that is, to address the needs of the most needy in society.

Understandably, the courts have found it difficult to find the right balance between independence and engagement. But increasingly, they are recognising the importance of doing so, in part recognising that engagement may strengthen public perceptions of independence. It is within this context of the imperative to preserve judicial independence, that community consultations provide a valuable strategy and mechanisms for the courts to reach out and engage in a transparent two-way dialogue with the community which could otherwise not happen.

In order for the courts to exercise their mandate to administer justice, they must enable the rights of claim-makers. But to do so, they must first ascertain what needs are going unmet. Getting an answer to the question: *What needs are going unmet?* requires the courts to more actively engage with the community.

3. PLANNING FOR IMPROVEMENT

Over the past decade, courts across the region have increasingly engaged in organisational planning to improve the quality of their services. The agendas and priorities of each plan has of course varied from country to country, and from court to court. Usually, however, these plans start with an assessment of what is going well and what needs improvement. This process is variously called a 'needs assessment', 'situation analysis' or 'court user survey'. Whatever their name, these assessments are usually based largely on inputs from community consultations among other sources.

Community consultations provide local stakeholders with the opportunity to provide feedback on their satisfaction with court services. They may identify any number of challenges and opportunities for the courts to redress. Once identified, it is necessary for the courts to set its priorities on where to start. Across the region, these challenges often relate to barriers to accessing the courts - whether physical, geographic, financial, informational or cultural; lack of knowledge and understanding of how the courts work, and how people can use them. Delay and cost are other common problems.

These consultations also usually reveal that many in the community neither know or understand the role and functions of the courts or how to access and use their services. Unsurprisingly these people are *non*-users of the courts. Community consultations can not only inform and educate these non-users on the role of the courts and their legal rights, but also contribute to enabling them to use court services, thus transforming and restructuring community relationships.

Hence planning consultations is usually directed towards reaching two goals: (a) to inform the community on the role and services of the courts for *non-users*, and (b) to initiate a dialogue seeking feedback on *users'* satisfaction with court services. Courts should focus on attaining these goals within the broader context of assessing, planning, developing and addressing their various improvements in an integrated organisational strategic manner.

As a result of conducting community consultations, it is likely that the courts will identify and prioritise a range of improvement activities, which may be inter-connected and overlap. For example, the court may decide to introduce a public information strategy that provides community-level education through visits, presentations and brochures with related education-raising activities in schools or on public radio, etc. Similarly, initiatives to obtain feedback from court-users might include a range of measures such as court user surveys after hearings, bench-bar liaison meetings and public open days, etc.

4. CONDUCTING COMMUNITY CONSULTATIONS: PEOPLE-CENTRED OUTREACH

Over the past decade, courts across the region have revitalised their approach to the organisation of their business and their relationship with the community, sometimes radically. They have experienced that community consultations can play a valuable role in introducing a people-centred outreach - where the court proactively goes out to the people, rather than waiting for the people to come into the court.

Judicial 'outreach' is a term used to describe those activities undertaken by the courts to engage with the community. These activities provide a communication process and relationship in building public understanding and trust in the work of the courts by external engagement and providing public information.

Given the constraints of judicial independence, this people-centred approach offers the courts some significant advantages including: -

- **displaying court's commitments to quality, transparency and accountability**
- **addressing the needs and convenience of communities rather than government**
- **humanising the court, which is otherwise impersonal, strange and potentially threatening**
- **empowering rather than intimidating or bewildering ordinary people**
- **providing an informal mechanism to obtain feedback to redress problems.**

5. Collaboration with Justice Sector Actors

As we have now seen, the courts can conduct transparent public consultations with the community that provide information and education on the role and function of the courts, as well as feedback on users' satisfaction with their services, among other things.

These outreach activities are enhanced by the courts collaborating with other justice sector actors - notably the Ministry of Justice (however named), the prosecution, police, bar, legal aid and any relevant community-based organisations specialising for example in human rights or domestic violence.

Early inquiries are likely to reveal to the courts that the community has a spectrum of informational needs about various aspects of the justice system, and how it operates, that may be better addressed in a shared and coordinated approach rather than separately by respective agencies. For this reason, it may be useful to plan and organise a community public activity of, say, 2 hours at the end of a circuit court sitting, when all representatives of the bench, prosecution, police and bar are gathered together. In this activity, a representative from each agency can then present a description of their respective roles in the justice process and contribute to forming a panel discussion to answer questions on matters of community interest or concern.

6. Some Practical Considerations

When planning and conducting community consultations, there are a range of practical considerations to be considered and addressed. These include ensuring that adequate and appropriate preparations are made to contact and brief local stakeholders, to explain the purpose and process of the consultations, arrange a convenient place to meet, and schedule these consultations at a convenient time to suit local stakeholders. Care should also be taken to respect cultural and customary practices, for example, it may be normal practice to provide travel allowances and refreshments for participants. Additionally, there may be a need to provide an interpreter.

7. Rule Against Discussing Specific Cases

In any such community consultations, it is essential that everyone understands that discussions must remain general, rather than focus on any specific case. The reason for this is that justice requires court decisions to be made in open court hearing before the parties based on the application of law to the facts, the rules of evidence and procedure. Should a party be unhappy with either the process or outcome of that hearing, then they may have rights to review and/or redress by appeal to a superior court, or by lodging a formal complaint to the court.

Participants in community consultations must understand, therefore, that in the interests of justice it is neither appropriate nor proper to discuss aspects of any specific case with judicial officers outside the safeguards of these processes.

8. Community Consultation - Public Information, Education and Outreach Activities

Over recent years, PJSI has supported the work of many courts across the region to promote access to justice through community outreach, engagement and consultation. These courts have included Kiribati, Federated States of Micronesia, Republic of Marshall Islands, Cook Islands, Papua New Guinea and Vanuatu among others. The situation in each country is - and will remain - unique. It follows that the public information, education and outreach initiatives of each court have been crafted to address local needs and conditions. Each is different. As a result, the courts have introduced and are continuing to develop a wide variety of measures and tools for community consultations and engagement. These initiatives are ongoing.

This guidance outlines a range of these initiatives that have been and continue to be developed over recent years for the possible consideration and adaptation of other courts: -

	Activities	Description
1.	Community outreach, roadshows, public awareness	Representatives of the court visit local communities and conduct meetings, focus group discussions, and other engagement activities to open a dialogue to explain the role and function of the courts, raise awareness on peoples' rights, how courts can help needy community members, and to receive feedback on court services. Some courts regularly conduct a travelling 'roadshow' to communities. FSM, Vanuatu and Kiribati have each conducted various community outreach and awareness-raising programs in remote communities and on outer islands.
2.	Public information, community education	Courts develop information packages in multiple media to inform and educate the public on the role and function of the courts, the rights of citizens, and how they can exercise their rights in court: - • **pamphlets in local language** • **posters with graphics** • **radio talks and interviews** • **video.**
3.	Pamphlets	Pamphlets can be very useful in providing brief descriptions of the role and services of the courts in particular jurisdictions or matters - for example, crime, land disputes, domestic violence. They should be written in local language and preferably include graphics. They are generally simple and cheap to produce in-house. Kiribati has recently produced more than a dozen brochures on various functions of the courts which were distributed at its 'open day'. It is also planning to produce pamphlets for specific needy or vulnerable groups (rather than topics) such as women, youth and old people. Vanuatu is in the process of printing 24 pamphlets on many aspects of court proceedings.
4.	"*Know Your Rights*" Guidance	This brochure (see: Annex 3B) was piloted in Kiribati and adapted in FSM, RMI and the Cook Islands. It provides essential basic information on the role of the courts; and it also explains people's fundamental legal rights, particularly in criminal proceedings, and also civil disputes. It should be printed in local language and distributed to district and local authorities in remote communities. Some courts, like Kiribati, have circulated a general guidance; while others, like Vanuatu, are producing separate guidance notes for criminal and civil proceedings among others.
5.	Posters	Posters are very useful in displaying brief messages of public importance relating to the role and services of the courts in

	Activities	Description
		particular jurisdictions or matters - for example, crime, land disputes, domestic violence and any special Covid-19 procedures - in local language and preferably with graphics. They can be easily displayed on court, government, school and community notice boards. If displayed outside, they should be behind glass or laminated to preserve condition.
6.	Radio show, interviews	Over the years, some courts including RMI and Kiribati have regularly conducted talk shows on public radio of about 30 minutes duration on a monthly basis. The advantage is these programs has been that they are generally popular, usually have wide community reach, and are low cost for the court to produce. It is recommended that thought be given to preparing a script of discussions in advance - in terms of topics, questions and answers, to keep the conversations on track.
7.	Video	While videos take more effort and resources to produce, they have a long 'shelf life' and can be used often. Recently, a video has been produced for public broadcast explaining the role of the courts and the Centre for Judicial Excellence in PNG.
8.	Needs questionnaires, exit surveys	Some courts conduct exit surveys of court users, such as Federated States of Micronesia, Palau, and Republic of Marshall Islands. The courts of Kiribati are considering questionnaires for the public to raise questions about the courts, law and justice that they can address.
9.	Circuit court meetings	Some courts conduct public meetings after court circuit sittings in remote communities periodically. These sessions should coordinate with and include the other justice sector actors - prosecution/police, defenders and bar - to give presentations on their role and form a panel discussion for questions. Their advantages are that they are quite simple to organise, usually at no cost. Vanuatu currently plans to develop a grass-roots approach for the Courts' engagement with the community by undertaking consultation in conjunction with court circuits.
10.	Court registry training	Some courts conduct training on public relations, customer service, inquiries, referrals to other service providers. While this training is internal for court staff, it focuses externally on engagement with the public and community. In recent years, Palau, Papua New Guinea and Kiribati have conducted service training for their registry staff.
11.	Court technology, data management upgrades	A number of courts are upgrading their information communication technologies (ICT) relating to public information and community relations as part of their broader strategic planning and data management systems.

	Activities	Description
		These courts include implementing electronic case tracking systems in RMI, FSM, and Nauru; and excel-based case tracking system in Tuvalu and Niue.
12.	Website public information page(s)	Some courts that have websites, or share use of a website, have introduced dedicated public information pages to explain the role and functions of the court in brief simple language. These are separate and additional to pages for legal practitioners. For example, RMI has recently upgraded its website to include a new 'Public Information' page for interested citizens. Kiribati and Nauru are also reviewing/updating their websites, and creating a community relations database to track, manage and monitor its engagement activities as part of its ongoing access to justice strategy and managerial operating system.
13.	Cultural activities	Some courts have found cultural activities are a locally compelling way to communicate interesting messages on law and justice. In Kiribati, for example, officers of the court recently conducted a song composition competition for school students which was well received. They are also planning a drama activity for the schools. Puppet shows have been successful in schools over the years.
14.	School curriculum	Discussions with the secondary school curriculum committee have been initiated in some countries to consider introducing education on the justice system, role and function of the courts, and legal rights as part of secondary school social studies courses. The reach and depth of this initiative is potentially very substantial. Materials may be extracted from the University of the South Pacific's new *Certificate of Justice* which has been recently developed in collaboration with PJSI. School awareness sessions are also undertaken in Palau by judges/court officers.
15.	'Open day'	Some jurisdictions conduct 'open days' for the public either alone or with other justice sector actors with posters, pamphlets, presentations, and Q&A sessions. Kiribati has done this very successfully several times in conjunction with the Ministry of Justice. FSM also has a 'National Law Day'. This year they had a remote/Zoom debate by high school teams from all four states.
16.	Press releases	Some courts regularly issue press releases to the media relating to community consultations and on related matters of broader public interest as/when required - for example, FSM, Palau, RMI, PNG and Kiribati.
17.	Annual reports	Some courts distribute their annual reports not only to parliament but also distribute the reports or key extracts more broadly on their court's (or PacLII's) website, to the media and district/local councils.

9. ADDITIONAL RESOURCES: TOOLKITS AND TOOLS

The Pacific Judicial Strengthening Initiative (PJSI) has published a wide collection of 19 toolkits for the ongoing development of courts in the region. These toolkits aim to support partner courts to implement their development activities at the local level by providing information and practical guidance on what to do. They may be downloaded at: - http://www.fedcourt.gov.au/pjsi/resources/toolkits

More specifically, 3 toolkits relating to promoting access to justice through community consultations are linked below for your reference and use: -

- Access to Justice Assessment Toolkit
- Enabling Rights and Unrepresented Litigants Toolkit
- Public Information Toolkit

These toolkits were designed to support change by promoting the local use, management, ownership and sustainability of judicial development in PICs across the region. By developing and making available these resources, PJSI aims to build local capacity to enable partner courts to address local needs and reduce reliance on external donor and adviser support.

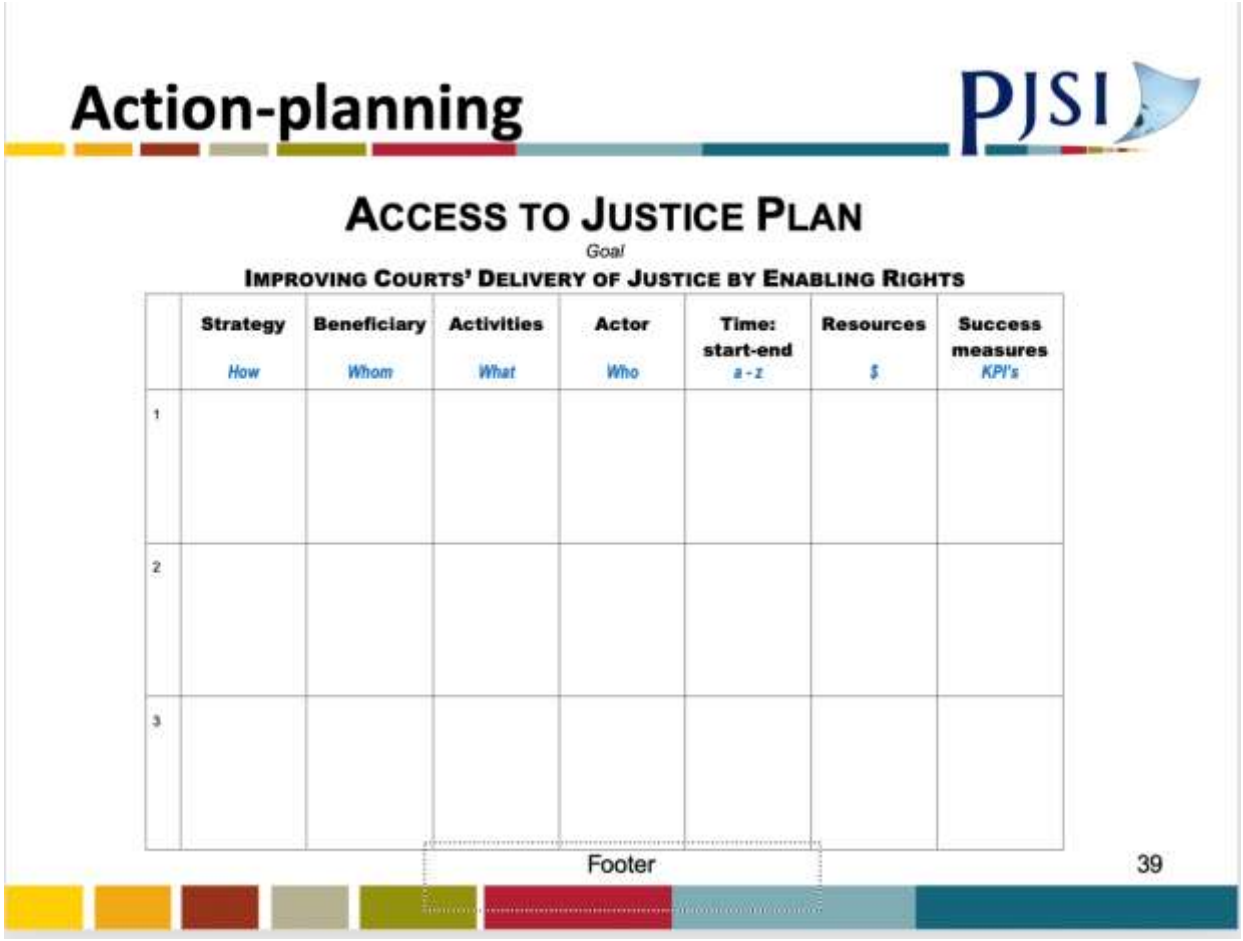
These toolkits are available on-line for the use of partner courts. We hope that partner courts will use these toolkits as/when required. Should you need any additional assistance, please contact us at: pjsi@fedcourt.gov.au.

***

ANNEX 4B: COURT-COMMUNITY 'ENABLING RIGHTS PLAN' TEMPLATES / SAMPLES

(with sample for local adaptation)

Working in workshop groups, complete the planning template using one of the templates below:-

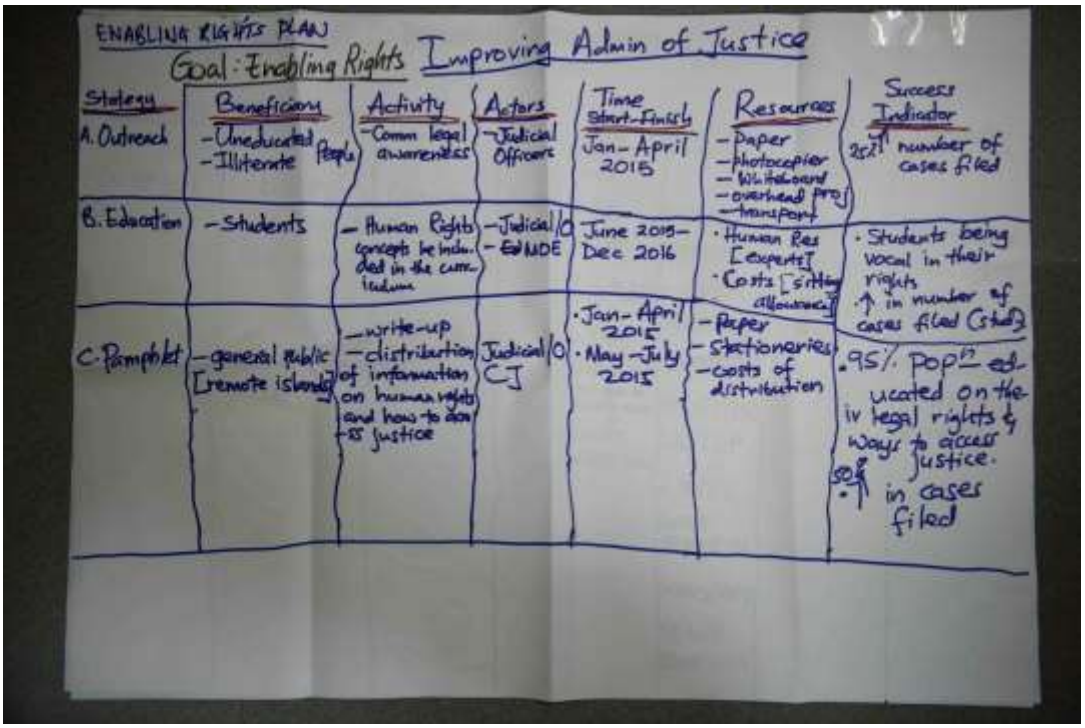


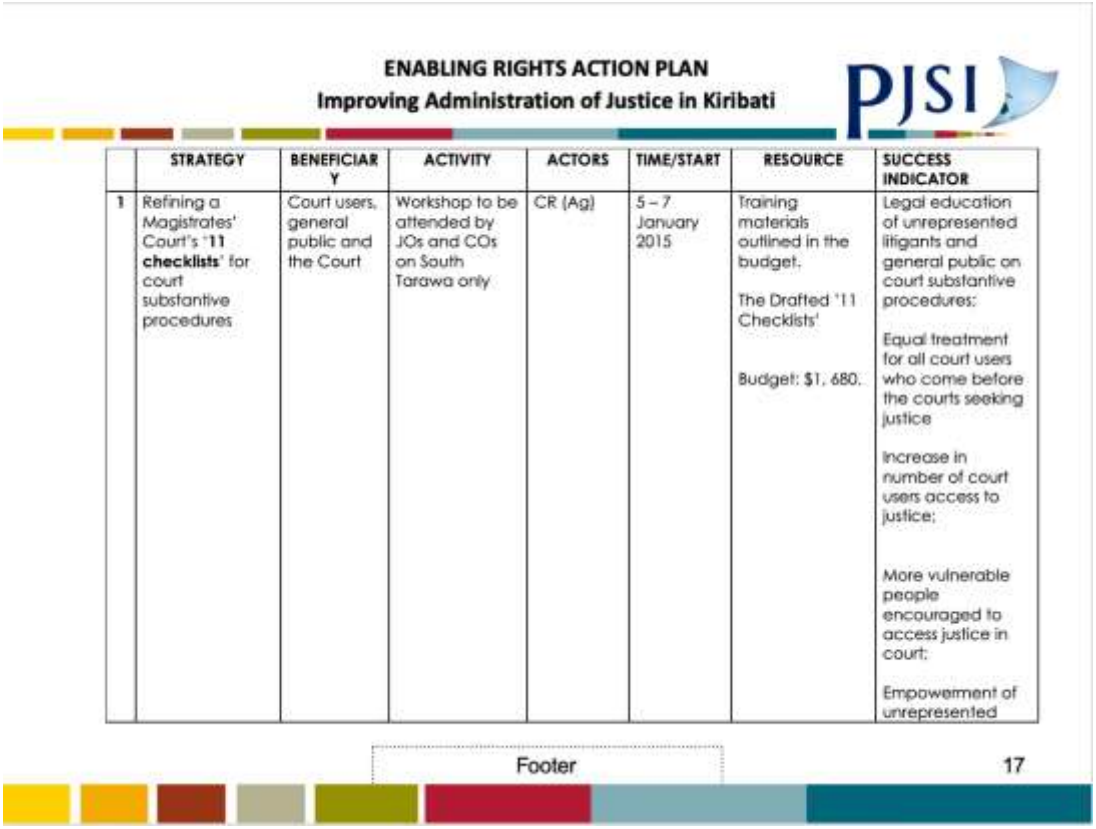
***

COURT-COMMUNITY 'ENABLING RIGHTS PLAN'						
Strategy *(sample)*	**Beneficiary**	**Activity**	**Actor**	**Start-Finish**	**Resources**	**Success Indicator**
Outreach						
Education						
Information						
Others (TBA)						

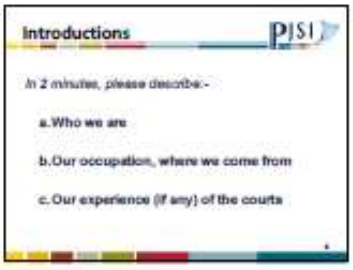
***

(sample for illustration)





ANNEX 5: WORKSHOP POWER-POINTS (SAMPLE)



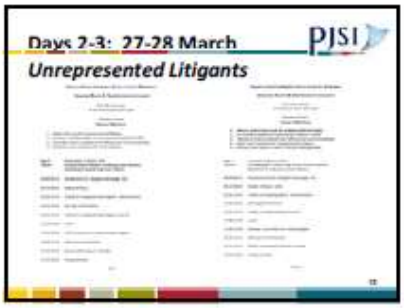

Voices from the community
PJSI
1) Your actual experience(s) of the courts
2) Perceptions of court performance
3) What was good ...
4) What could be improved ...

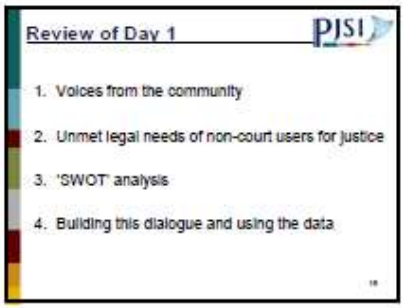

Identifying unmet needs
of non-court users
PJSI
• Who are non-users?
• What are their legal needs for justice?
• Can the courts meet these needs better?
• How ...?

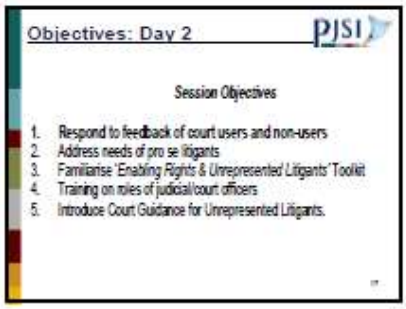

'SWOT' analysis of courts
PJSI
Outside looking in > < Inside looking out
• Strengths
• Weaknesses
• Opportunities
• Threats


Score-card
PJSI
Scorecard
Public Perceptions of Courts


PACIFIC JUDICIAL
STRENGTHENING INITIATIVE
Improving Access to Justice
Court-Community Workshop
Day 2: Unrepresented Litigants
Dr Livingston Armytage, Team Leader, PJSI
PACIFIC


Days 2-3: 27-28 March
PJSI
Unrepresented Litigants


Review of Day 1
PJSI
1. Voices from the community
2. Unmet legal needs of non-court users for justice
3. 'SWOT' analysis
4. Building this dialogue and using the data


Objectives: Day 2
PJSI
Session Objectives
1. Respond to feedback of court users and non-users
2. Address needs of pro se litigants
3. Familiarise 'Enabling Rights & Unrepresented Litigants' Toolkit
4. Training on roles of judicial/court officers
5. Introduce Court Guidance for Unrepresented Litigants.

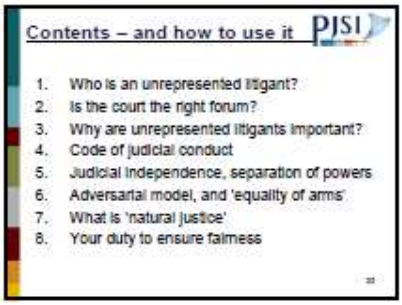

Vanuatu
PJSI
Vanuatu


Feedback of court users
Remote communities
• Pentecost, Santo, Epi, Port Vila
• By air, truck, boat, foot
• 16 villages
• 45 meetings: chiefs, men, women
• 650 informants
• 40% women

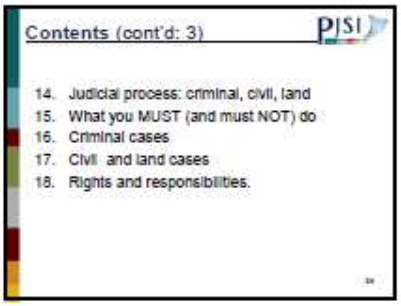

Major findings
• Customary justice
• Crime and disputes
• Confusion, ignorance, fear of courts
• Absence of state
– Few or no police
– Court sittings rare: Village, Magistrate Courts
• No public awareness
• Major barriers

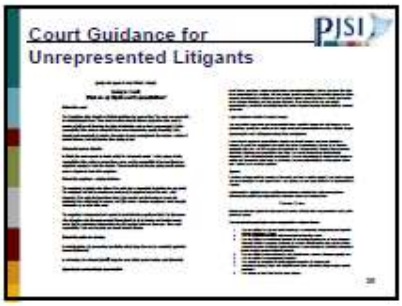

PJDP Toolkits
PACIFIC


Unrepresented Litigants
Toolkit
• What is a toolkit?
• Why is PJDP piloting this toolkit?
• Who should read it?
• Does your court need it?
• What is its scope and contents?
• Other resources ….


Contents – and how to use it
1. Who is an unrepresented litigant?
2. Is the court the right forum?
3. Why are unrepresented litigants important?
4. Code of judicial conduct
5. Judicial independence, separation of powers
6. Adversarial model, and 'equality of arms'
7. What is 'natural justice'
8. Your duty to ensure fairness

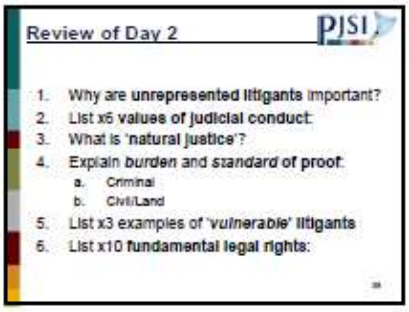

Contents (cont'd: 2)
9. Managing the risk of uneven power
10. Right to legal representation – and legal aid
11. Fundamental legal (human) rights
12. Has the litigant made an informed decision?
13. Persons requiring special protection

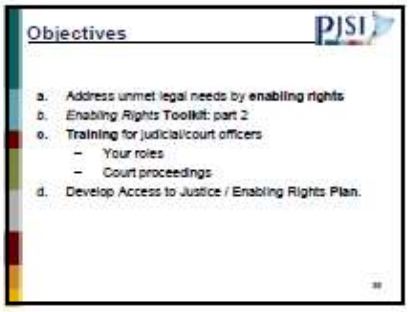

Contents (cont'd: 3)
14. Judicial process: criminal, civil, land
15. What you MUST (and must NOT) do
16. Criminal cases
17. Civil and land cases
18. Rights and responsibilities.


Court Guidance for
Unrepresented Litigants


PACIFIC JUDICIAL
STRENGTHENING INITIATIVE
Improving Access to Justice
Court-Community Workshop
Day 3: Enabling Rights
Dr Livingston Armytage, Team Leader, PJSI
PACIFIC


Day 3: 28 March
Enabling Rights
PJSI


Review of Day 2
PJSI
1. Why are unrepresented litigants important?
2. List x6 values of judicial conduct:
3. What is 'natural justice'?
4. Explain burden and standard of proof:
a. Criminal
b. Civil/Land
5. List x3 examples of 'vulnerable' litigants
6. List x10 fundamental legal rights:


Objectives
PJSI
a. Address unmet legal needs by enabling rights
b. Enabling Rights Toolkit: part 2
c. Training for judicial/court officers
– Your roles
– Court proceedings
d. Develop Access to Justice / Enabling Rights Plan.


'Rule of Law' Indicators: 1996-2017
PJSI


Score-card
PJSI
Scorecard
Public Perceptions of Courts

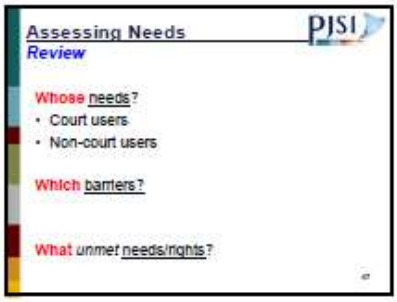

Scorecard - Public
PJSI
Scorecard


Scorecard - Court
PJSI
Scorecard

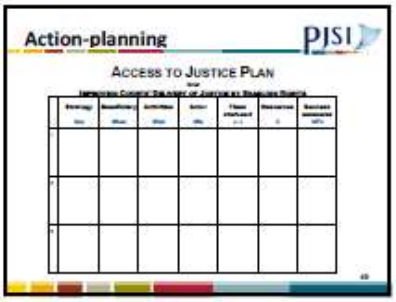

Scorecard - Joint
PJSI
Scorecard
JOINT Perceptions of Courts


Enabling Rights
Unmet legal needs for justice
PJSI
• Constitution, your powers and 'ultra vires'
• What is justice – why is it important?
• Courts, justice and rights
• Barriers – what?
• Legal empowerment
• Independence, outreach and engagement
• Improving court performance:
– Procedural fairness
– Equitable outcomes


Your role
as judicial / court officer
PJSI
• Understanding your role, responsibilities
• Family and gender-based violence
• Judicial leadership:
– Public information
– Outreach and community engagement
– Community legal education, legal empowerment
– Other ....


Assessing Needs
Review
PJSI
Whose needs?
• Court users
• Non-court users
Which barriers?
What unmet needs/rights?


Priorities: 1 + 5
Unmet needs
PJSI
• Unrepresented Litigants – Guidance/Pamphlet
Who? What? When? How?
1. ...
2. ...
3. ...
4. ...
5. ...


Action-planning
PJSI
ACCESS TO JUSTICE PLAN


PJSI

ANNEX 6: SITUATION ASSESSMENT: UNREPRESENTED LITIGANTS - KIRIBATI, MAY 2014

1) Kiribati confronts some extraordinary governance challenges arising in particular from its geography. The population of some 100,000 citizens is highly dispersed across 34 island/atolls - organised in 23 court districts - over some 3.5 million sq. kms of Pacific Ocean. 55,000 people inhabit South Tarawa, and a further 6,000 inhabit adjacent North Tarawa. The remainder are dispersed as far as Christmas Island, which is without direct air-link and takes two weeks to reach by sea.

2) The absence of lawyers is characteristic of court hearings in Kiribati, particularly in the Magistrates Court on outer islands/atolls. Unrepresented litigants (URLs) constitute a major feature of ordinary court proceeding: some 95%+ of all cases in the Magistrates Court, and 16.5% of cases in the High Court - statistics to be confirmed.

3) The judiciary of Kiribati is three-tiered: Magistrates (lay and law-trained), High Court (now 2 law-trained expat judges), and the Appeal Court (convenes once annually, comprising expat judges from the region: mainly Aust/NZ). Appeals from the decisions of magistrates are relatively rare, owing in part to lack of understanding of the right to (a) representation and (b) appeal. Appeals from decisions of the Magistrate Court are often upheld owing to errors of law - statistics to be confirmed.

4) Access - most people do not have ready access to the High Court, which conducts a circuit to one atoll annually; most atolls many have not been visited during the past 5 years. Consequently, the hearing of appeals may be postponed for many years unless relocated to South Tarawa.

5) The magistracy is essentially lay. Of 155 magistrates, only 2 are law-trained. 7 magistrates sit in three courts on South Tarawa (the 'capital' island), only two of whom are law-trained - each of whom sit as single magistrates; the rest sit in panels of three. On the outer islands, all magistrates are lay, sitting in panels of 3-5-7.

6) The legal competence of the lay magistracy is low: the main qualification for appointment is community respect. While all magistrates have prior experience as court clerks, their knowledge of law/procedure and their understanding of the judicial role is basic at best. The magistracy has access to a bench book, published by PJEP in 2004, which is elementary but remains sound. The court plans to encourage staff to enrol in USP's Certificate of Law from 2015 onwards.

7) Lawyers are scarce in Kiribati: there are some 50 members of the Law Society: most of whom practice in Government law offices (DPP, ministries etc). The largest private firm is the People's Lawyer (equivalent to legal aid) which employs 2-3 lawyers and some para-legals whose right to appear in court is restricted. Private lawyers practice mainly on South Tarawa, rendering parties on outer islands almost invariably unrepresented. In exceptional cases only lawyers appear in cases heard on outer atolls.
8) The community has very low levels of legal literacy, in terms of base-level understanding of the justice system, role of judicial officers and lawyers, and legal rights.

9) URLs - many/most people appear in court unrepresented owing to: (i) ignorance of their rights, (ii) distrust of lawyers or the (iii) inaccessibility/delay/cost of obtaining representation.

10) Consequently, in most court cases in Kiribati, there is no legal expertise available in court hearings whatsoever - neither the bench nor the litigants have any legal training. As the Chief Justice knows, this presents fundamental challenges for the administration of justice.

11) Other existential challenges in Kiribati include subsidence from global warming, over-population, economic fragility, unemployment, sanitation, transport and IT.

12) Many/most civil disputes relate to land - particularly in the outer islands. Kiribati society remains a close-knit and traditional community and church structures at village level are extant and vibrant. There is some crime of South Tarawa: alcohol-related fighting between unemployed young males using weapons (knives) is quite common, as is domestic violence.

13) Women are systemically disadvantaged in Kiribati society which is culturally patriarchal. Domestic violence is pandemic and at scandalous levels in global terms: 68% of females report being victims of physical/sexual violence during their lives; and 38% during the past year. This compares grievously with the international benchmark: 35% of women report being victims of physical/sexual violence during their lives, globally.[2] This problem is concealed by massive under-reporting: only 1.2% of victims report to police or other authorities (church or village leaders). Women under-report domestic violence for various reasons: cultural, economic and pragmatic: in Kiribati, domestic violence is regarded as 'family business' to which neighbours turn a blind eye. Women's options for relief are scant: most are economically dependent on their husbands for support. Both police and the lay magistracy are described by professional observers as being patriarchal; and the Roman Catholic Church is reported by expert observers (UN Women) to routinely counsel victims to forgive their abusers and stay in their home. Taken in combination, this constitutes a grave justice failure. The imminent promulgation of the new Family Peace Bill (2014) provides a timely opportunity to all law and justice service providers to address this problem with renewed vigour.

14) While each case differs, generally it is court practice for lay magistrates on outer islands to *not* advise URLs of their rights to legal representation or appeal. By contrast, generally lay magistrates on South Tarawa *do* provide this advice to URLs. For the purposes of a toolkit, this constitutes a significant distinction in court practice between South Tarawa and the outer islands/atolls.

[2] Kiribati Family Health Study 2009; and UN http://www.who.int/mediacentre/factsheets/fs239/en/

Pacific Judicial Development Programme

ENABLING RIGHTS &

UNREPRESENTED LITIGANTS / PRO SE TOOLKIT

PJDP toolkits are available on: https://www.fedcourt.gov.au/pjsi/resources/toolkits

Pacific Judicial Development Programme

Access To Justice Assessment Toolkit

September 2014

PJDP is funded by the Government of New Zealand and managed by the Federal Court of Australia

Toolkits are evolving and changes may be made in future versions. For the latest version of the Toolkits refer to the website - http://www.fedcourt.gov.au/pjdp/pjdp-toolkits.

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstances.

Published in September 2014. © New Zealand Ministry of Foreign Affairs and Trade.

Prepared by Matthew Zurstrassen for the Federal Court of Australia.

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Australia, NSW 1235

Email pjdp@fedcourt.gov.au
Web http://www.fedcourt.gov.au/pjdp

PJDP TOOLKITS

Introduction

For over a decade, the Pacific Judicial Development Programme (PJDP) has supported a range of judicial and court development activities in partner courts across the Pacific. These activities have focused on regional judicial leadership meetings and networks, capacity-building and training, and pilot projects to address the local needs of courts in Pacific Island Countries (PICs).

Toolkits

Since mid-2013, PJDP has launched a collection of toolkits for the ongoing development of courts in the region. These toolkits aim to support partner courts to implement their development activities at the local level by providing information and practical guidance on what to do. These toolkits include:

- Judges' Orientation Toolkit
- Annual Court Reporting Toolkit
- Toolkit for Review of Guidance on Judicial Conduct
- National Judicial Development Committee Toolkit
- Family Violence and Youth Justice Project Workshop Toolkit
- Time Goals Toolkit
- *Access to Justice Assessment Toolkit*
- Trainer's Toolkit: Designing, Delivering and Evaluating Training Programs

These toolkits are designed to support change by promoting the local use, management, ownership and sustainability of judicial development in PICs across the region. By developing and making available these resources, PJDP aims to build local capacity to enable partner courts to address local needs and reduce reliance on external donor and adviser support.

Use and support

These toolkits are available on-line for the use of partner courts at http://www.fedcourt.gov.au/pjdp/pjdp-toolkits . We hope that partner courts will use these toolkits as / when required. Should you need any additional assistance, please contact us at: pjdp@fedcourt.gov.au

Your feedback

We also invite partner courts to provide feedback and suggestions for continual improvement.

Dr. Livingston Armytage
Team Leader,
Pacific Judicial Development Programme

September 2014

TABLE OF CONTENTS

ABBREVIATIONS

ADB	-	Asian Development Bank
EPPSO	-	Economic Policy, Planning & Statistics Office
FGDs	-	Focus Group Discussions
HIES	-	Household Income and Expenditure Survey
MFAT	-	New Zealand Ministry of Foreign Affairs and Trade
NGO	-	Non-Government Organisation
NSW LJF	-	New South Wales Law Justice Foundation
PIC	-	Pacific Island Country
PJDP	-	Pacific Judicial Development Programme ('Programme')
PNG	-	Papua New Guinea
RAMSI	-	Regional Assistance Mission to Solomon Islands
UNDP	-	United Nations Development Programme
UNIFEM	-	United Nations Development Fund for Women

1 INTRODUCTION

1.1 WHAT IS AN ACCESS TO JUSTICE ASSESSMENT?

An Access to Justice Assessment is a tool that can assist courts in planning their work, allocating resources and responding to community concerns. It can assist the court to improve service delivery by identifying justice needs within a particular country. Access to Justice Assessments provides people with an opportunity to give feedback on their justice needs and how justice sector agencies are addressing those needs. They also provide courts, including island courts, and other justice sector agencies with an opportunity to collect this feedback and plan taking the views of users and potential users into consideration.

The key aspect of Access to Justice Assessments is not that they are conducted but how the findings are used. A court needs to be committed to implementing the assessment and using the findings for these assessments to add value.

This toolkit recommends:

- as a pilot, courts that use the toolkit should pro-actively seek to address at least 2-3 concrete needs identified through Access to Justice Assessments;
- Courts undertake some form of assessment on a routine basis to measure performance in addition to identifying emerging needs; and
- Courts provide information publicly on steps the courts will take to address identified need. This process is important in building confidence in the judicial system.

There are numerous approaches to conducting Access to Justice Assessments. Which approach to take will vary from country to country. It is recommended that a simplified approach is initially adopted in the Pacific. This involves conducting a series of Stakeholder Focus Group Discussions. This can be scaled up depending on the results.

i. Stakeholder Focus Group Discussions

A first step is to undertake routine Stakeholder Focus Group Discussions to receive feedback on court service delivery and broader justice needs. The toolkit provides detailed information for conducting these discussions with different key interest groups.

ii. Access to Justice Surveys

Some courts may wish to go further to conduct Access to Justice surveys to provide more detailed and authoritative information. The toolkit provides some initial guidance on how to conduct Access to Justice surveys.

1.2 WHY CONDUCT AN ACCESS TO JUSTICE ASSESSMENT?

> *"(Access to Justice) tools can help to determine whether access to justice problems are serious enough to warrant action. If the tools are sufficiently precise, these can also provide feed-back on the type of action that is likely to be successful."*[1]

The Access to Justice Assessment toolkit will enable courts to identify, on a routine basis, justice needs and issues of concern for the citizens. This information is important for courts in planning processes, improving service delivery and making decisions on prioritisation of resources. Assessments also allow courts to

[1] Barendrecht *et al* "How to Measure the Price and Quality of Access to Justice" in Social Science Research Network, Nov 2006 <http://ssrn.com/abstract=949209> accessed 19 May, 2012 at p19.

identify the needs of particularly marginalized or vulnerable members of the community. Targeting these groups should be a key component of any access to justice assessment. Finally, listening to people's views can increase confidence in a justice system. It tells community members that institutions are responsive and making an effort.

Implementing the toolkit will assist courts:

Assessments provide courts with important information including:

- what categories of people are using courts and for what types of cases;
- what factors influence the ability of people to access courts or restrict access to courts;
- are there particular groups of people with more difficulty in using court services;
- what categories of people are not using courts and why;
- if people are not using courts what other mechanisms (if any) are they using;
- how people perceive the delivery of court services; and
- how people access and use information.

i. *Strengthen current Court services:*

The toolkit enables courts to ask stakeholders a range of questions on court service delivery. Of particular relevance for courts in the Pacific, it enables courts to collect information on service delivery of lower level courts, such as island courts.

ii. *Identify needs that should be addressed but are currently not addressed:*

Across the Pacific, as in many other jurisdictions, there are numerous justice needs that never reach the courts. Access to justice assessments provide courts with a means of identifying what those justice needs are, which are of most concern and which may require additional services or changes in current practices from the courts.

Examples of areas where Access to Justice Assessments can assist courts:

- Inform the drafting of strategic plans;
- Identify needs for training and assist design of training programs;
- Identify types of information public require from courts;
- Identify best approach to providing information;
- Prioritise resources allocated to different services delivered by courts;
- Suggest changes to court rules or procedures that may assist public;
- Strengthen annual reporting;
- Improve design and targeting of donor programs.

iii. *Document Progress:*

If conducted on a routine basis, the information that is collected can document progress on specific issues. This information is particularly useful for annual reporting purposes and for making representations to Government or donors for additional resources.

iv. *Encourage other justice sector agencies to address needs:*

By undertaking Access to Justice assessments and acting on the findings, courts can, over the longer-term, encourage other justice sector agencies to adopt a similar approach to service delivery.

1.3 WHO SHOULD BE INVOLVED IN IMPLEMENTING ACCESS TO JUSTICE ASSESSMENTS?

As the Pacific Judicial Development Programme (PJDP) is focused on the needs of judiciaries, the primary users of this toolkit are judges and court staff of judiciaries across the Pacific.

i. *Chief Justices* and *senior members of the judiciary* need to have active ownership of the Assessment process. This will ensure that findings are implemented.
ii. *Court registrars* and *staff* need to be involved in the design and implementation of the toolkit.

iii. *Judges from lower-level courts*, including *lay judges*, should be made familiar with the objectives of the assessment. They should understand that the assessment aims to strengthen service delivery rather than evaluate performance.

A secondary audience exists for the results of Access to Justice Assessments.

- Government & Policy Makers: Findings can often be useful in influencing policy makers, such as officials with responsibility for justice sector budgets.
- Other Justice Sector Agencies, such as the police, prosecutors and lawyers associations, will be interested in the results of access to justice assessments. The toolkit itself may also be of relevance for these actors.
- Civil Society Organisations will be interested in the results. In a number of countries, civil society organisations also play an active role in implementing access to justice assessments.
- Donors have an interest in the results of Access to Justice Assessments. Assessments can be important tools in identifying and negotiating priorities with donors or advocating for additional resources.

1.4 THE CONTENTS OF THIS TOOLKIT

The toolkit is structured as follows:

Section 2 of this toolkit outlines options for the substantive issues these assessments can possibly cover. These substantive areas will differ from country to country depending on the needs of each country.

Section 3 describes the steps involved in planning, implementing and analysing the results of Stakeholder Focus Group Discussions. This covers:

- Objective of Stakeholder Focus Group Discussions
- What are Stakeholder Focus Group Discussions
- Identifying issues for discussion
- Identifying appropriate stakeholders
- Who to Involve - Court Staff and Resources Required
- Preparing the Discussion and Drafting a questionnaire
- Conducting Focus Group Discussions
- Documenting and Using Findings

Section 4 provides some information on developing Access to Justice Surveys. The section covers:

- What is an Access to Justice survey?
- Approaches to Conducting an Access to Justice Survey
- Planning and Implementing an Access to Justice Survey
- Using the Findings of an Access to Justice Survey

Section 5 provides guidance on how to ensure findings from Access to Justice Assessments are implemented.

2 What Substantive Areas Should Access to Justice Assessments Cover?

2.1 The Substantive Areas

The specific areas that access to justice assessments cover will vary from country to country depending on the local context. Assessments can be designed to cover just about any justice or court-related issue. This section lays out the potential range of issues that assessments generally are used for and provides a brief description of how each issue can benefit the work of courts.

	Substantive Issue	Description	Example of Information that can be Collected
1.	Personal, or socio-demographic Information	Socio-demographic information captures data on social and economic conditions in the population. This allows the court to identify whether there are issues that affect specific groups of people. Many countries will have some form of social or economic survey that can be used to determine what socio-demographic information should be collected. Court assessments should attempt to use similar types of categories. This allows courts to compare data when the assessments are complete.	• Age of respondents; • Ethnicity, origin of respondents; • Level of education; • Gender, marriage status, family size; • Economic & employment status including housing.
2.	Legal Awareness & Access to Information	This can include two types of questions. First, questions can be asked about people's level of understanding about the legal system. This normally focuses on whether people know and understand their rights. This helps courts determine whether problems accessing the legal system are related to knowledge or the services provided. Second, questions can be asked about where people obtain information and the type of information people need. The information helps courts identify the subjects people need legal information on and the best methods for sharing information.	• Familiarity with particular laws; • Familiarity with specific rights; • Knowledge of functions of justice institutions; • Sources of information on legal issues; • Type of information that is most useful; • Method of receiving information that is most effective.

	Substantive Issue	Description	Example of Information that can be Collected
3.	Access to Legal Services	This can include questions about access to legal aid, lawyers or police/courts. This type of information is especially useful where a large proportion of the population lives in remote or non-urban areas. It can also include information on costs of services, access to court fee waivers and frequency of circuit courts.	• Awareness of and access to legal aid; • Costs / barriers in accessing legal services; • Quality of services provided by courts, police, prosecutors… • Access to court fee waivers and other court services; • Access to circuit courts.
4.	Actual Experiences / Disputes / Criminal Disputes	Assessments can ask people about their experience in actual disputes. This information is useful because it is based on actual experience rather than knowledge or perceptions. As will be discussed below, in small jurisdictions it is more appropriate to collect this information in surveys than through focus group discussions. Disputes are very personal and as a result questions need to be phrased carefully to make sure the respondent is comfortable in answering.	• Proportion of people who experience cases; • Most common types of cases; • impact of cases on lives of respondents; • institutions responsible for resolving cases (formal or local); • what factors affect how people resolve cases; • types of cases that need special attention or oversight; • People's perceptions on effectiveness of different systems; • How customary systems or local courts are functioning.
5.	Confidence in Local and State Actors	Many assessments include a range of questions to examine the degree of confidence in actors involved in dispute resolution. This includes satisfaction with the services of courts, prosecutors, police and lawyers. It also includes local actors such as customary and religious leaders. Responses to these questions can assist courts in prioritising training and capacity building assistance. Most of these questions are based on perception of respondents.	• Perceptions of justice sector and local actors; • Preferred actors in resolving disputes; • Awareness of and confidence in local level courts; • Likelihood of being asked for bribes or additional payments.
6.	Land	There are a range of questions that can be asked in relation to land. The types of questions that are asked will change depending on the type of land issues in each country.	• Status of land people live on (own, rent, right of abode, no right); • Types of disputes relating to land use; • Differences in dispute resolution processes depending on land ownership or socio-economic status of parties; • Differences between urban and rural areas; • Functioning of land tribunals or local mechanisms.

	Substantive Issue	Description	Example of Information that can be Collected
7.	Safety and Security / Social Order	Issues of public safety and law and order can be examined in a number of ways through access to justice assessments. This can involve asking about actual experiences, perceptions or confidence. Information on sentencing and the criminal justice system can also be examined. Some countries in the Pacific already undertake assessments that deal with these issues. This includes the Solomon Island's annual "People's Survey" and Community Crime Victimization surveys conducted by the police in PNG.	• Confidence in safety and responsiveness of law enforcement; • Approaches to dealing with criminal activity; • Type of criminal activity of most concern to respondents; • Perceptions of court handling of criminal activity; • Effectiveness of different sentencing mechanisms and role of different actors in addressing crime; • Perceptions on potential role of alternative/community sentencing.
8.	Family Law	There are a range of issues that can be examined in relation to family law. These include issues relating to marriage and divorce, adoption, custody and child support. They can also cover issues relating to inheritance. It is quite common for family law issues to also be integrated into questions on other substantive issues, in particular gender and legal identification (for issues relating to birth certificates and adoption).	• Levels of adoption (traditional and formal) in a community; • Approaches to registering adoption; • Approaches to resolving marital disputes; • Types of child support payment and enforcement; • Formalization of legal documentation (birth, marriage certificates) and consequences.
9.	Gender	It is important to examine whether courts treat men and women differently. This can be done in two ways. First, responses to regular questions can be divided by gender and this will identify differences. Second, there are particular issues that require specific attention such as issues relating to domestic violence or family law. Questions can be drafted to address these issues. In the Pacific several gender assessments that include areas covering domestic violence have been conducted, both at a country level and at a regional level. Both UNIFEM and the Government of New Zealand's Police and Domestic Violence program have undertaken assessments.	• Whether there are differences in resolving disputes or accessing services based on gender; • Whether there are difference in justice needs based on gender; • types of disputes experienced by women; • Prevalence of violence against women and effectiveness of reporting mechanisms; • Access to services for family law matters.

	Substantive Issue	Description	Example of Information that can be Collected
10.	Vulnerable Groups	Some countries will have specific vulnerable groups. Examples may include ethnic / religious minorities, youth or disabled people. Access to Justice Assessments are a useful tool to measure how courts and other justice sector actors treat these vulnerable groups or whether these groups have specific needs that are not being addressed.	• Whether particular groups experience specific challenges in accessing or using courts; • Differences in preference for using system based on characteristics of particular groups; • Types of legal services that vulnerable groups may need.
11.	Access to Official Documentation	In some countries people find it difficult to obtain official or legal documentation such as identification cards, birth or marriage certificates and land title documents. In some countries, courts are responsible for providing these services. These documents are often needed to access government services. Access to Justice Assessments can measure if access to documentation is an issue and particular groups it affects.	• Types of legal documentation most in need by population; • Role of courts or other justice sector agencies in providing legal documentation and quality of service; • Impact of not having legal documentation; • Quality of information about legal documentation.
12.	Integrity in Government Services & Accountability	In many countries issues of corruption or accountability important. Often these questions are included in a way that measures people's perceptions. That is, people are asked how much confidence they have in different actors. It is also possible to ask people about actual experiences in accessing government services and whether they had to pay additional fees for those services. A number of organisations conduct corruption indexes. For example, Transparency International has undertaken assessments covering several countries in the region.	• Perceptions of trust in government and local officials; • Actual experiences in being asked to pay bribes or additional fees.
13.	Barriers to Accessing Courts	There may be specific groups of people or types of cases that never make it to court. People may choose to use other actors, such as traditional / local leaders, or do not act on their grievances. It is important for courts to be aware of these cases, so they can determine what additional services, if any, should be provided. Court records will not identify any barriers to accessing courts.	• Types of grievances that are not acted on; • Reasons for not acting on grievances; • Consequence of failing to act on grievances; • Cases resolved by traditional/local actors and satisfaction level with resolution.

2.2 DECIDING ON WHICH AREAS TO FOCUS ON

One of the biggest challenges in designing assessments involves deciding on how many issues to focus on and the level of detail for each issue. These decisions are a balancing exercise.

Including more issues in an assessment obviously has the potential to increase the amount of information available. However, this needs to be balanced with the negative consequences of assessments that are overly comprehensive:

- It can significantly increase the amount of time for assessments;
- It can result in a loss in focus of the assessment as it attempts to cover too many areas; and
- It may limit the ability to go into too much detail on specific issues.

It is generally better to cover a smaller number of issues properly rather than a larger number of issues superficially.

Given the range of issues identified above, courts need to think carefully about which issues are of highest priority to include in an assessment.

- It can be useful to consult with other stakeholders in making this decision. This is particular the case because it is important to capture information about issues that are not making their way to court and courts will not always be aware of these issues.
- Similarly, should courts decide to implement access to justice surveys following focus group discussions, the results of those discussions are the perfect tool to define the scope of the survey.

3 STAKEHOLDER FOCUS GROUP DISCUSSIONS

Many courts in the Pacific have not yet been involved in any form of Access to Justice Assessment. An appropriate starting point in this instance is to conduct a range of stakeholder focus group discussions with representatives of different interest groups. This will enable courts to commence engagement on the issue and determine the need for on-going or additional assistance.

This section outlines how to plan, implement and use information gathered from these focus group discussions.

3.1 WHAT ARE STAKEHOLDER FOCUS GROUP DISCUSSIONS?

> *"A focus group brings together individuals sharing certain key characteristics to discuss a particular topic. A moderator asks the group a set of questions in a conversational manner that allows them to respond to, and elaborate on, the comments of others. This can result in a deeper, more thoughtful discussion than an interview, as the comments of research participants trigger thoughts and ideas among others."*[2]

Stakeholder Focus Group Discussions are meetings (ideally held on a routine basis) with people who represent the views of different groups within the community, including vulnerable groups. The meetings are semi-structured. That is they aim to receive feedback on a range of pre-determined issues but also allow enough flexibility to enable participants to raise other issues.

Feedback should be used by the courts to inform planning processes. This can include identifying priority areas that require attention and developing concrete plans to address those areas.

Stakeholder Focus Group Discussions should be undertaken periodically, for example either every year or in the lead up to preparation of strategic plans. This form of dialogue can be used to discuss progress and build public confidence in courts and justice institutions more broadly. If undertaken periodically, these discussions can also inform the annual reporting processes of courts.

It is important to note that the objective of these discussions is to focus on policy issues and not on the results of individual cases.

3.2 OBJECTIVE OF STAKEHOLDER FOCUS GROUP DISCUSSIONS

It is important for courts to obtain feedback periodically from representatives of the community they represent. This feedback should cover both the quality of services they are providing and whether or not there are areas that should be addressed by courts that are currently not being addressed. That is to say, are there people who face challenges accessing justice?

Focus Group Discussions will assist courts in their planning processes and in determining how to best use their resources. It does this by ensuring community input into these processes, helping to target allocation of resources with identified needs.

[2] ABA Rule of Law Initiative, "Access to Justice Assessment Tool: A Guide to Analyzing Access to Justice for Civil Society Organizations", New York, 2012.

3.3 How to Identify Issues for Discussion?

Section 2 identified the range of issues that courts could potentially examine in Access to Justice Assessments. It is important that assessments remain focused and prioritise some of these issues. Priorities will vary from country to country. A key first step involves deciding on what issues should become the focus of the assessments.

Courts should seek to limit the number of issues to a maximum of 5 specific areas of priority.

There are a number of sources of information courts can use to determine what issues to focus on:

- Internal Consultations: This can include discussions with judges and registrars. Reviewing annual reports or trends in cases being filed or pending in court should also assist in determining priorities. Although this is a starting point, priorities identified by courts should be cross-checked with other sources;
- Informal external consultations: court staff should seek the views of external observers to either confirm priorities identified by courts or provide alternative priorities. This can include other justice sector agencies, civil society organisations or off the record discussions with journalists.
- Secondary sources: a range of secondary sources can also be used to cross-check identified priorities. These can include reports from local organisations like human rights commissions or ombudsman. Other examples include the US State Department annual country assessments or reports from development agencies (eg: UNDP, UNIFEM) or organisations such as Human Rights Watch.

The box below provides an example of how this was done in Tuvalu.

Using initial interviews to define topics to include in an Assessment

The Access to Justice Assessment in Tuvalu started with a series of meetings with stakeholders with an interest in the justice sector. The following categories of people were interviewed:

i. Justice Sector Agencies: courts, People's Lawyer, Attorney General's office, private solicitors;
ii. Government: police, local government representatives, members of parliament and Ministry of Home Affairs; and
iii. Civil Society: umbrella organisation of NGOs, Tuvalu Family Health Association.

These interviews were used to identify the key topics included in the assessment. Based on discussions with these partners a Focus Group Discussion guide was drafted that included sections on: legal knowledge and access to information; access to legal services (in particular court services); and social order and family law issues.

3.4 Identifying Appropriate Stakeholders

The stakeholders to invite for discussions will vary from country to country and will depend also on the priority issues identified. The courts should identify between 3-5 different categories of stakeholders and hold separate focus group discussions for each category of stakeholder.

Potential stakeholders will include the following:

- Representatives from women's interests;
- Representatives from youth interests;
- Customary leaders and/or lay officers from local level courts;
- Religious leaders;
- Representatives from different minority ethnic or religious groups;
- Representatives from rural or remote communities;

- Members of civil society organisations with an interest in justice issues; and
- Representatives from other vulnerable groups such as intellectual or physical disabilities, HIV/AIDS positive, or vulnerable employee groups.

For the reasons discussed in the box above, when a particular target group is identified, it is important to speak to actual members of that group and not only people who represent the group.

Are Representatives really 'Representative'?
In selecting the interest groups you wish to target it is important to be clear about the type of people you wish to receive information from. Sometimes there will be a significant difference in information obtained between an organisation that represents particular groups and people that come directly from that group.

Two examples:

i. In Tuvalu, we wanted to ask youth about their experiences with the law. This was in particular because people had identified alcohol and related social order problems affecting youth as a significant issue. A discussion was organised with the Tuvalu National Youth Council. All the participants were well educated, to quote one of the participants, 'law-abiding citizens'. They had limited personal experience with courts and as a result were not able to speak on behalf of youth who face difficulties with the law.
ii. Asking the most marginalized members of a village about their access to legal services is very different to asking a village leader how people in his village access legal services. In some instances the main reason why people do not access legal services is because they are afraid of their village chief. You won't find this out if you only speak to the village chief and assume they speak on behalf of everyone in the village.

3.5 WHO TO INVOLVE – COURT STAFF

The Stakeholder Focus Group Discussion process will require human resource from judges and court staff at three levels:

i. Leadership: ownership and leadership from the most senior members of the judiciary is required. This includes commitment from the Chief Justice and other senior members of the management team. In most cases the Chief Justice or another senior judge, should open focus group discussions.

ii. Implementation: the court will need to dedicate some staff resources to the stakeholder focus group discussion process. Courts can either facilitate focus group discussions themselves or identify a skilled facilitator. Both have advantages and disadvantages. A facilitator from the court will add increased legitimacy to the process. However, people may feel more comfortable speaking to a trained facilitator, especially if providing constructive criticism of the court. If court staff facilitate the discussions this should be done by senior members of the court registry staff. Irrespective, court registry staff will need to be involved in the design and preparation of the focus group discussions.

iii. Support: judicial officers across all levels should be made aware of the process and the objectives of the focus group discussions. It is important to obtain their support for the discussions and also to reassure judicial officers that the purpose is to strengthen service delivery rather than assess the performance of particular judges.

Where possible, judicial officers should not conduct focus group discussions themselves. If judges are involved it will limit the amount of objective feedback from participants on quality of legal services. Participants might also become too focused on individual court cases rather than on broader policy issues. The best practice is for a judge to be present at the opening and introduce the discussion, then leave and allow the participants to continue the discussion with the facilitator.

3.6 PREPARING THE DISCUSSIONS AND DRAFTING A QUESTIONNAIRE

The Stakeholder Focus Group Discussion process involves courts hosting 3-5 detailed discussions with representatives from different interest groups. There are two aspects to this: the substantive content and the logistical arrangements.

3.6.1 Preparing the Substance

Focus Group Discussions are semi-structured discussions. This means that the objective will be to obtain responses across a number of key issues. However, the discussions should be open and should not follow a rigid format.

Prior to the Focus Group Discussions the court will want to draft a broader outline of a questionnaire for the discussions. A draft questionnaire was prepared for the assessment in Tuvalu. It is included as a guide at *Annex 2*.

It is best to test the Questionnaire Guide through several 'pilot' discussions. In Tuvalu, the field guide was tested with discussions with Island Court judges and Land Court judges prior to being used for community consultations. On each occasion it was updated and questions were amended or deleted following the tests.

Testing the Questionnaire Guide also provides the facilitator with an opportunity to become familiar with the approach and the questions they will be asking. This is crucial to ensure the facilitator is comfortable with implementing the Guide.

3.6.2 Preparing the Logistics

A Focus Group Discussion should be held for each Stakeholder Group identified. Ideally, this would bring together representatives from more than one organisation.

The ideal number of participants for each focus group discussion is between 5-10 people. Any more than 10 people and the session will become difficult to facilitate. It will also limit the opportunity for everyone to participate.

Invitations to participants should be sent in advance. The invitation should include some explanation of the objective of the discussion, providing participants with time beforehand to consider the issues and prepare for the meeting.

As Focus Group Discussions will generally last approximately 2-3 hours, they should be held in a location that is comfortable and convenient to the participants. The location should encourage open discussion. In many instances, the court will have facilities that can be used for the discussion. In some countries, where budgets exist, it will be more appropriate to hire seminar or workshop facilities.

The actual resource costs involved in hosting the focus group discussions will vary depending on the jurisdiction. It may be possible to minimize costs by using court facilities. Costs involved could include:

- Hire of seminar / workshop facilities to host focus group discussions;
- Travel or per diem costs for participants involved in the discussions, although this is not generally recommended as it creates an incentive for groups to participate; and
- In some instances it may be useful to recruit a consultant to assist in the facilitation of the focus group discussions.

Compensating Participants?
Should participants be paid? Providing payments to participants has two negative aspects. First, it affects objectiveness. They are more likely to provide answers the facilitator is after because they are receiving remuneration. Second, it can lead to expectations that programmes should only operate if they are associated with payments. This reduces community commitment to the results.

On the other hand, there is a need to acknowledge that people are taking time out of their busy schedules to participate. In some countries in the region, it has also become common practise to provide allowances for participation.

This issue arose in the course of organising Focus Group Discussions (FGDs) in Tuvalu. For meetings with Island Court and Land Court judges it was agreed that they would be reimbursed equivalent to their sitting fees. For FGDs with community groups a contribution was made to the community group organisation. Another preferred approach is to provide an allocation for lunch and a transport allowance if required. This can be done in recognition of their participation in the meeting.

3.7 CONDUCTING THE FOCUS GROUP DISCUSSION

The agenda should include the following aspects:

i. An opening by either the Chief Justice or a senior judge explaining the purpose of the Focus Group Discussions;
ii. An introductory session that allows participants to introduce themselves and make preliminary opening comments;
iii. Facilitated questioning across the key priority areas identified by the Court;
iv. An opportunity for participants to raise issues that may not have been covered; and
v. Closing remarks including summary on how information will be used.

At least two court staff will be required to participate through the whole Focus Group Discussion: a facilitator and a note-taker. Focus Group Discussions will ideally be no shorter than 1 hour and no longer than 3 hours. In Tuvalu, 2 hours was allocated for each Focus Group Discussion.

It is important to try and encourage all participants to share their opinions throughout the session. The facilitator plays an important role in providing everyone with an opportunity to contribute equally.

It is important also to ensure that the discussion does not become focused on individual cases. It is fine to use cases as an example of particular issues. However, the Focus Group Discussions cannot review case decisions or assess performance on particular cases. It is important to emphasize this at the beginning of the session and to remind participants if too much time is spent discussing individual cases.

Tips for Conducting Successful Focus Group Discussions

There are a number of useful tricks to facilitating Focus Group Discussions. Facilitators should:

i. Be well prepared and familiar with the questionnaire. This encourages a more free flowing conversation;
ii. Encourage an open conversation. This includes ensuring a comfortable setting and also opening the discussion in a way that encourages informality and a relaxed atmosphere;
iii. View the questionnaire as a tool that is not set in stone. Flexibility is required, allowing the conversation to take its course; and
iv. At the same time, the facilitator needs to balance a listening role with a guiding role. If a few people are dominating the conversation or too much time is spent on certain issues the facilitator needs to take control of the discussion and guide it forward.

It can be useful to set guidelines at the beginning of the conversation. In Tuvalu the following guidelines were introduced to participants:

i. The FGD aimed to receive feedback on different issues, NOT to discuss the merits of individual cases;
ii. Everyone was encouraged to participate and have an equal say;
iii. The information would be treated in confidence. Notes were taken but names would not be used in reports; and
iv. There were no right or wrong answers. Everyone's views are equally important and should be respected.

Finally, the process of conducting a Focus Group Discussion can also be a useful exercise for educating the public about the work of the judiciary. Experience from Tuvalu, as shown in the box below, highlighted that people are keen to obtain more information on the court system and used the focus group discussions to raise their own questions.

Two-Way Sharing of Information in Tuvalu

In February 2013, a Focus Group Discussion was held with community members from a village at the northern end of Funafuti. Thirteen people turned up to the discussion, held in the church.

As the facilitator worked his way through the questions, the participants were keen to ask a few themselves. A lady wanted to know how a case involving reckless driving causing death did not go to court and was asking if it was now possible to negotiate resolutions to these cases. A man asked for an explanation of the difference between the Island Court and the Land Court. Another woman had a few questions to ask about the adoption process.

The difficulty comes in trying to balance these general questions with specific advice about particular cases. At the close of the discussion, one of the participants used the opportunity to seek advice on a land case, involving payment of rent for the land the church was on.

3.8 Documenting Findings

Detailed notes should be made for each of the Focus Group Discussions. Notes should preferably be typed and saved accordingly so they can be referred to again in the future.

At the completion of all of the Focus Group Discussions, it will be necessary to compare the findings from each discussion. Courts should document these in the form of a summary report that can be circulated for comment within the court. Some courts may also feel comfortable sharing this summary with the groups who participated in the Stakeholder Focus Group Discussion.

4 ACCESS TO JUSTICE SURVEYS

This section will describe the benefits of Access to Justice surveys and provide some introductory comments on planning and conducting Access to Justice surveys. The section covers the following areas:

- What is an Access to Justice survey?
- What Approaches exist to conducting surveys
- Planning and Implementing an Access to Justice survey

The section will use several examples of surveys that have been conducted in the region to guide this discussion.

4.1 WHAT IS AN ACCESS TO JUSTICE SURVEY?

An Access to Justice survey collects information from a broad range of respondents to assist justice sector agencies plan and deliver their services based on actual need.

The most rigorous (and expensive) type of survey is a randomly selected, representative sample of the population based on a mathematical formula. The information obtained can then be viewed as being representative of the population. Other survey approaches randomly select respondents from the population or target groups. These approaches also provide important information, often at a much cheaper cost.

As opposed to Focus Group Discussions, a survey is generally quantitative in nature. Information that is collected is in response to fixed questions. In most cases, respondents will need to choose responses from a number of possible options. This allows the responses to be compiled and provides an overall picture. If the survey is broad enough it also allows for responses to be compared between different groups of people. This can be particularly important because it highlights areas where people may be missing out on justice services.

Strengths and Weaknesses of Access to Justice Surveys

Access to Justice surveys are not recommended for all countries in the Pacific. The list below identifies some benefits and weaknesses of using a survey-type approach.

Benefits

- Greater ability to capture views of broad section of population, including marginalised groups;
- Allows for analysis between groups or types of users;
- More empirically rigorous – provides more reliable data;
- Can allow for cross-reference to broader data sources; and
- Provides data on a broad range of issues.

Weaknesses

- Is expensive and time consuming to implement;
- Requires specialized expertise and detailed attention in designing tools;
- Doesn't explain *why* particular findings occur, only documents that they do occur;
- Interpretation of results subject to bias; and
- To be representative in small populations requires a large sample, in proportion to population size.

4.2 APPROACHES TO CONDUCTING ACCESS TO JUSTICE SURVEYS

There are a broad range of options available for conducting Access to Justice surveys. This toolkit outlines three categories of approaches that have been taken and includes examples for each category. More detailed information about the different tools available, along with links to examples mentioned below, are provided in the Annexes.

4.2.1 Inclusion of Justice Issues in Broader Social / Economic Surveys

There are a number of examples, including examples in the region, where access to justice issues have been covered in broader social or economic surveys. Governments, often with the support of donors, conduct household surveys to measure progress on economic and/or social indicators. Over the last decade, the surveys are increasingly including sections that cover dispute resolution, access to legal services or related issues. The box below provides three examples:

Three Examples of Justice Issues Covered by Broader Surveys:

i. Papua New Guinea's Household Income & Expenditure Survey (HIES), 2009

In 2009, PNG's National Statistical Office conducted a nation-wide HIES Survey, with support from the World Bank. This survey is statistically representative of the population. The substantive part of the survey covered 10 sections including: income and expenditure, access to health and education and housing. One section was focused on dispute resolution. The section asked respondents to identify (against a list) actual disputes experienced in the past 12 months, who was involved in the dispute and its impact. Respondents were asked more detailed questions on the most serious dispute they had experienced. This included: who they asked for advice (and why), how they sought to resolve the dispute, the cost of resolution and their satisfaction with the resolution process.

ii. *People's Survey* in Solomon Islands, 2011

Introduced under RAMSI's engagement in Solomon Islands, the People's Survey is an annual stocktake of progress across a range of issues. The 2011 survey gathered people's perceptions on a range of economic, public service delivery, governance and law and justice issues. Of the 9 substantive sections in 2011, two focused specifically on justice issues: Section D (Safety) and Section I (Resolution of Disputes). Topics include perceptions of justice sector actors; causes of conflict; frequency of disputes; dispute resolution processes; and costs of resolving disputes. The survey uses both quantitative and qualitative tools. It gathers data primarily on perceptions rather than actual experience (with the exception of several questions on disputes in Section I). The survey is driven by RAMSI and it is unclear to what extent Justice Sector agencies use the results.

iii. *Demographic & Health Survey,* Marshall Islands, 2007

The Republic of Marshall Islands was one of four countries to conduct comprehensive demographic and health surveys in the Pacific in 2007. The surveys were supported by ADB. In the Marshall Islands the Government's Economic Policy, Planning & Statistics Office (EPPSO) implemented the survey. The survey was quantitative with a sample representative of the population. It included a specific section on domestic violence. Data collected provides detailed information on prevalence of domestic violence, factors associated with domestic violence and reporting options available.

As the examples above indicate, one of the challenges with sections included in broader surveys is that it reduces ownership. On justice issues, for example, courts would be less involved in the design of the survey and, as a result, less interested in the results. All of the surveys above are implemented and the results analysed by agencies outside of the justice sector. A consequence of this is that courts, and other justice sector agencies, are less involved in the design and less committed to implementing the findings.

4.2.2 Justice Sector-Wide Surveys

A number of countries undertake Access to Justice surveys at a sector-wide level. The surveys frequently cover a broad range of topics with the results of interest to the judiciary, other justice sector agencies, civil society and the legal profession more broadly. These forms of surveys are becoming increasingly common.

In the United States, the United Kingdom and Australia, sector-wide Access to Justice assessments are normally carried out by civil society organisations. The results are presented as recommendations to courts and other justice sector agencies. The box below describes the recently launched "Legal Need in Australia" survey conducted by the New South Wales Law and Justice Foundation (LJF).

Legal Australia-Wide Survey: Legal Need in Australia, 2012
In 2012, the NSW LJF published its report on legal needs in Australia. The report draws on telephone interviews with over 20,000 respondents. Results are representative for each state. Respondents were asked about their experiences relating to 129 different types of legal problems across 12 broad categories. In addition, information on the characteristics of legal problems and demographic information was collected. The demographic information allows the report to make findings specific to the needs of particular groups. Those with the most significant needs were: people with a disability, indigenous people, the unemployed, single parents, people living in disadvantaged housing and people living primarily on government payments.

The reports main key finding was the important link between legal problems and non-legal needs. This led to recommendations to increase distribution of legal information through non-legal service providers (e.g. health, welfare, housing) and to ensure legal service providers can better advise clients about other non-legal services available, including through stronger coordination between legal agencies and other human service providers.

There are numerous examples of justice-sector wide surveys conducted in developing countries, including a wide range of Access to Justice surveys. Most of these surveys are conducted for donor agencies and the findings are generally used to design donor programs. A UNDP review of 23 Access to Justice assessments that it has supported in the Asia-Pacific region, documents examples of some of these surveys. To date, none of these assessments have been conducted in countries in the Pacific.

4.2.3 Surveys focusing on Specific Issues

The final approach is to conduct surveys focusing on specific issues. There are numerous examples of this type of approach, including several from the Pacific. The Pacific surveys have been implemented by other justice sector agencies. Examples include the series of "Community Crime Victimization Surveys" conducted by the police in urban centres in PNG and discussed in the box below.

Lae Urban Community Crime Victimisation Survey, 2010
The PNG Government's Law and Justice Sector Secretariat conducted a survey on community perceptions of crime and the level, extent and type of crime in the urban centre of Lae in 2010. This included data on community views about justice sector agencies. 382 respondents were selected using the 2000 Census and previous surveys to ensure different urban areas and age-brackets were covered. Survey results showed an increase in crime across most of the categories covered.

This was the third time the survey was done in Lae. Surveys are also used in Kokopo and National Capital District. This allows the Government to compare results over time and to allocate resources to each of the areas and design strategies to target specific types of crime based on identified need.

There are very few examples of courts using targeted surveys to support their activities in the Pacific. A very small pilot was developed and tested under PJDP in the Marshall Islands in 2011. The box below describes that experience.

Piloting an Access to Justice Survey in the Marshall Islands

As part of research conducted under Phase 1 of PJDP a small survey was designed and tested in Majuro, Marshall Islands. The survey was divided into three sections: (i) demographic information; (ii) legal knowledge and access to information; and (iii) experience of actual disputes. The survey questions were designed following interviews with a number of stakeholders and incorporated requests from the judiciary to examine issues relating to land disputes. The survey was implemented primarily by a clerk of the court in Marshallese with assistance from the adviser. Respondents were selected randomly from three geographic locations in Majuro representing different socio-economic characteristics.

Several interesting findings arose from the survey. Over 60% of households who responded had no formal right to land they lived on. They were living on land at the invitation of the formal landowners and if they experienced disputes would have limited ability to bring their dispute to court. This confirmed other research on socio-economic issues in urban areas of the Marshall Islands. The main type of disputes experienced by respondents were, equally, fighting, land, domestic violence and debt problems and a number of these disputes remained unresolved or the respondents did not follow up on complaints. Respondents identified information on family issues (e.g. adoption, divorce) as being their primary need followed by land and crime. Community leaders and the radio were identified as the most effective means of distributing information.

4.3 Planning and Implementing an Access to Justice Survey – Issues for Consideration

Implementing an Access to Justice survey can be a complex undertaking. In most cases it will involve significant effort and, depending on the method adopted, financial commitment. For this reason, it is crucial upfront to determine the aim of the survey. All other aspects of preparing and conducting a survey will be influenced by the aim. This section will outline some of the issues involved in planning and implementing an Access to Justice survey.

4.3.1 Defining the Purpose of an Access to Justice Survey

Access to Justice surveys can address a number of purposes for courts. For example, they can provide courts with an overall picture of service delivery and issues faced by people in accessing courts. Partnering with other justice sector agencies, they can identify key access to justice issues more broadly. They can also focus on specific issues or groups of people and assist courts in developing relevant policies to address those issues.

Initial Access to Justice surveys are generally undertaken at a sector-wide level. This allows courts to obtain an overall picture of how people view the justice system and justice needs. It also ensures that areas are not overlooked purely because questions were not asked in relation to those areas. In countries where donors support these surveys, donors also prefer overall surveys because these can be used to assist in identifying areas of support for donor programs.

Courts may wish to focus surveys on specific issues or groups of people. This approach is generally undertaken either where there are specific, identifiable issues that need to be addressed or there are donors or civil society organisations with a specific focus willing to support the court's work.

Where courts undertake Stakeholder Focus Group Discussions as a first step this will assist in both determining if they need to undertake broader Access to Justice surveys and identifying the focus of those surveys.

4.3.2 Defining the Survey Method

Defining the survey method will often depend on two main factors. First, the purpose of the survey will determine what type of survey needs to be implemented. Second, the budget available will also affect the approach that is taken.

Surveys that are representative of the population at large or specific geographic or socio-economic groups, will provide the most accurate data and be most influential. However, implementing these surveys requires specific technical expertise. These types of surveys are also generally expensive and there are limited organisations in the Pacific with experience in undertaking these types of surveys.

Courts may wish to start with more targeted or less statistically valid surveys that provide a snapshot of the population without being definitive.

4.3.3 Resourcing an Access to Justice Survey

As has been noted above, implementing Access to Justice surveys, depending on the approach taken, can be expensive exercises. Courts will rarely have the technical capacity in-house to undertake the surveys and as a result will need to seek assistance from external parties.

A starting point for seeking information on surveys may be to contact government departments that frequently undertake surveys (eg: departments responsible for statistics or research) or university faculties with experience in this area.

As has been noted above, it may be possible to 'piggy back' on surveys that are already planned on other issues. This means, that modules on access to justice would then be added to survey questionnaires that cover a broader range of issues. This approach can be effective for a number of reasons. It means that costs can be shared between a number of parties. It also means that the court can draw on the technical expertise of other actors in developing and implementing surveys. It does however, limit ownership of the court in conducting the surveys and means that the court is dependent on other actors for timing and content.

For countries with significant donor activity, it may be possible to engage donors to support implementation of surveys. Donors are progressively seeking to develop and monitor programs based on a more reliable evidence base. Quantifiable analysis in the form of survey results can provide this evidence base and as a result donors may be interested in supporting these kinds of research. Donors already support access to justice surveys in the Solomon Islands (through the *People's Survey*) and in Papua New Guinea (where a dispute resolution section exists in a World Bank supported Households Income and Expenditure Survey).

4.3.4 Drafting a Survey Questionnaire

It is important to emphasize several key issues when designing a survey.

First, surveys must be developed to respond to the local context. This means both asking questions in a culturally appropriate manner and ensuring the substance is applicable to the local context. Generally the starting point for developing surveys is to look at other examples. There are benefits in ensuring consistency across countries because it means results can be compared. However, this must be

balanced with ensuring appropriateness in the local context. For this reason surveys must be field tested prior to implementation.

Examples of Access to Justice Surveys
Full copies of the following survey questionnaires are provided in the Annex:

i. Marshall Islands Judiciary 'pilot' survey PJDP: this survey questionnaire was designed specifically for the High Court of the Republic of the Marshall Islands in relation to the PJDP Customary Dispute Resolution Research.
ii. People's Survey, the Solomon Islands: this survey provides an example of access to justice and dispute resolution questions inserted into a broader governance survey questionnaire.
iii. Household Income and Expenditure Survey, PNG: this survey provides an example of dispute resolution sections inserted into a broader socio-economic survey questionnaire.
iv. Legal Knowledge, Attitudes and Perceptions Survey, Open Society Justice Initiative: this survey is a civil society designed survey for measuring access to justice from a community perspective.

Second, it is a constant balancing act between wanting to gather as much information as possible and ensuring that the surveys are easy to administer. Larger scale quantitative surveys can take as long as 2-3 hours to administer. This places a significant burden on respondents. Except where modules are included in broader surveys, it is good practise to ensure surveys can be completed in between 30-60 minutes by respondents.

Third, people rarely enjoy talking about justice issues. If you are talking to strangers about justice issues they often link this to problems. For this reason, it is crucial that surveys are clearly explained to respondents, that information is kept confidential and that surveys are administered in a comfortable and private environmental. It can also help to commence the survey with less confronting questions prior to discussing issues like actual disputes experienced.

Fourth, it is useful to ensure that accurate socio-demographic data is collected. This allows you to compare data across categories of people when analysing results and identifying trends for specific or vulnerable groups. A good practice is to examine the background questions in other social or economic surveys conducted in your country.

5 USING THE FINDINGS FROM AN ACCESS TO JUSTICE ASSESSMENT

The most crucial element of conducting Access to Justice assessments is ensuring that the findings are used to strengthen judicial processes. This section provides guidance on how courts can use the findings.

To ensure findings are used by courts, senior management within courts need to be committed to the process. This means:

- Management needs to be involved in the design of the assessment and defining the scope of the assessment;
- Progress in conducting the assessment should be reviewed periodically, making changes as required to better suit the needs of courts;
- Courts need to review findings and identify specific, concrete items on which they can act to implement change;
- Information should be disseminated to the public and interested stakeholders on the action items that will be followed up on; and
- Undertaking assessments on a periodic basis allows courts to set benchmarks, monitor progress and explain to constituents what has changed and issues where further change is required.

5.1 WAYS TO USE FINDINGS

Courts should identify a number of concrete issues that arise from assessments that they can seek to address. These areas could include:

- Changes to regulations to improve service delivery or make services more accessible (e.g: reducing fees, providing fee waivers, targeting services for certain groups);
- Improved access to court information (e.g: brochures on specific issues or in different languages, information campaigns through radio or community groups);
- Improved community participation in justice processes (e.g: changes to sentencing to include community mechanisms, increased acknowledge of community mediation);
- Improved support for vulnerable groups (e.g: designating contact people for vulnerable groups, providing information to specifically address their issues, supporting inter-governmental department working panels to overcome issues); and
- Capacity building for key officials (e.g: training for local level courts or non-state mechanisms, improved documentation of local level mechanisms).

Linked specifically to PJDP, areas identified through an Access to Justice assessment could become activities a Court proposes as part of its application for the Responsive Fund. The court would be using the Responsive Fund to directly address needs identified through the assessment.

Best practice would be for the court to develop a plan to address these specific issues or include action in annual planning processes. Announcing the plan publicly or informing the interested stakeholders can have the benefit of encouraging support for the court's work to address the issue. It also builds confidence in the system, as the public sees efforts to improve service delivery.

5.2 USING RESULTS FROM FOCUS GROUP DISCUSSIONS

Once results from Focus Group Discussions have been documented, senior management in courts should meet to analysis the results and develop an action plan that identifies key areas where the court can follow up on results. The best approach is to identify a small number of concrete items where a court can institute changes that respond to the needs identified.

Some action items may require minimal change or can be instituted relatively quickly. There may be other items that require consultation with other key stakeholders including other justice sector agencies or broader social service providers. The findings may also identify more significant issues that require further analysis or on-going assessments.

The Access to Justice Assessment in Tuvalu

An Access to Justice Assessment was conducted in Tuvalu, with fieldwork undertaken in November 2012 and March 2013. The assessment involved an initial round of interviews with approximately 15 key stakeholders. Based on information obtained from those interviews, a Focus Group Discussion guide was developed. In total, 9 focus group discussions were conducted. The focus group discussions involved meetings with 5 representative groups on the main island and 2 discussions each on 2 outer islands. Separate discussions were held with community representatives and magistrates from Island and Land Courts.

The findings identified three main areas of engagement for the Court:

i. *Engagement with the Public:* the results from the assessment identified a need for more accessible public information on the work of the courts, in particular in relation to jurisdiction of the courts, procedures for adoption, reporting of family violence and social order issues and the role of apologies in court proceedings. The findings also identified radio and brochures as the most suitable means to disseminate information. Finally, there was a need to review procedures for providing support to parties or witnesses in cases with disabilities.
ii. *Administration of Courts*: the discussions identified areas where further training was required for magistrates. This included training on family law matters, specific aspects relating to land law and documentation of cases in Island and Land Courts. It also included a request to update the judicial bench book.
iii. *Broader Justice Issues:* a range of broader issues were identified including engaging with traditional leaders and providing additional information on the work of the Peoples' Lawyer. The assessment recommended making judicial decisions relating to the jurisdiction of traditional leaders more accessible to the public. It also recommended the court working with the Peoples' Lawyer to disseminate information through brochures or the radio.

Ideally, Focus Group Discussions should be held on a routine basis. This could either be annually or every 2-3 years to inform the process of developing court strategic plans. This would allow the courts to review progress and identify any new, emerging issues.

5.3 Using Survey Results

As with other forms of Access to Justice Assessments, results of Access to Justice surveys can be used in a number of ways. This includes:

- *Informing policy*: results can lead to changes in court policies or rules in relation to how cases are heard or judicial administration and service delivery;
- *Improving services*: results can assist courts target services based on needs, either by improving or reallocating the types of services provided or identifying needs for new services;
- *Resourcing courts*: results can assist courts in making a case for additional resources or for new resources to address specific issues; and
- *Engaging donors*: courts can be better prepared for engaging with donors by providing documented evidence of justice needs.

The box below provides an example of how Access to Justice survey results have been used by courts in Indonesia.

Access and Equity Survey in Indonesia

Between 2007-09, the Supreme Court in Indonesia, with support from the Family Court of Australia, conducted at Access and Equity Study to compile empirical data on quality of services provided by general and religious courts in family law. The study involved extensive surveys of court users and non-users as well as case file analysis and interviews with legal professionals. The Court worked with an NGO delivering services to women-headed households to identify non-users, predominantly women living below the poverty line.

The survey identified that court costs in family cases were almost four times the monthly income of people living on the poverty line, explaining non-use. In addition, the consequences of not using court services were serious for women and their children, limiting the ability to claim child support and access to legal documentation.

The Supreme Court used the survey results in a number of ways:

i. They drafted new guidelines on providing legal aid services through waiver of court fees, provision of circuit courts and establishing legal aid posts;
ii. They strengthened systems to implement these guidelines and established a monitoring system that included SMS monitoring on caseloads across courts; and
iii. The Government was convinced to significantly increase budgetary support to the Supreme Court initiatives leading to a 14-fold increase in the number of people accessing courts through court fee waivers.

ACCESS TO JUSTICE ASSESSMENT TOOLKIT - ADDITIONAL DOCUMENTATION

available at: http://www.fedcourt.gov.au/pjdp/pjdp-toolkits

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ANNEX 1: METHODOLOGICAL TOOLS AVAILABLE

Key Respondents	Strengths	Weaknesses	Assumptions	Summary
1. Key Stakeholder Focus Groups Discussions				
Annual, structured discussions with representatives of particular groups, including: • Local customary leaders; • Local judges; • Women representatives; • Youth representatives; • Ethnic or cultural minorities; • People with disabilities.	Extensive direct experience; Capable of articulating range of views on access to justice issues (positive & negative); Accessible – most located in capital; Will highlight trends; May have access to empirical data; Builds partners for reform/better service delivery.	Information provided is frequently second hand and not objective. Risk of selection bias – only certain views represented; Not empirical; Unlikely to be directly representative of most marginalized; Respondents are frequently those 'in positions of power' – vested interest in maintaining status quo.	Sufficient representation of stakeholders buy-in to research and provide access and feedback openly; Focus only on this approach will not provide sufficient diversity of views or will lead to bias.	Strong tool as a starting point for identifying issues and measuring progress. But need to double check information by directly questioning population more broadly. Use as one of variety of tools.
2. Court User Surveys				
Randomly selected court users or people attending court building.	Ensure respondents have had actual experience; Cheap and easy to implement as can be conducted at court buildings; Data directly relevant to court work; Data comparable across countries.	Only people who use courts respond. May exclude particular groups (poor, living in remote locations); Only focuses on court-related issues; Respondents may be less open – may fear it affects case.	That courts collect this type of information on a routine basis; Capacity and time of court staff to implement survey.	Useful tool where surveys already exist or are being considered. Allows comparison between court users & non-users.
3. Representative Quantitative Survey Tools				
Households	Results representative of broader population; Provides detailed, statistical responses; Enables comparison across countries and time periods.	Expensive; Time and human resource capacity to design, test & implement survey; Access to suitable local survey firm.	Either budget exists to design and implement standalone survey or other survey tools exist to which modules could be added.	Costs and capacity constraints outweigh benefits in most countries – may be possible in some larger PICs.
4. Targeted Quantitative Survey Tools				
Randomly selected households but from purposefully selected	Approach provides for flexibility; Target specific areas (eg: remote or	Results can't be generalized across broader area; Still requires time and	Capacity exists in court to conduct interviews and analysis	May be more appropriate and cost effective

Key Respondents	Strengths	Weaknesses	Assumptions	Summary
villages. Select from urban vs rural/remote villages; and average vs poor socio-economic indicators.	poor villages); Allows courts to focus on local context or specific issues; Less threatening for respondents.	human resource capacity to design and implement; May get non-responses from respondents.	data or can be sourced locally. People respond to survey approach and openly provide information.	approach in smaller communities. Allows targeting. Can always expand based on results.
5. Administrative Data				
Key data collected by courts on case filing, disposal rate and time taken.	Already collected by courts so no replication; Represents actual experiences; Can be followed up with in-depth interviews with parties; Could support documentation in local courts.	Data doesn't always disaggregate by gender, age, economic status; Only covers cases filed in court; Data doesn't show why something happened only what happened; May not always be capacity to collect (eg: local courts don't have data).	That data is easily available and can be disaggregated across different socio-demographic indicators. Assumes that most cases make their way to court.	Can be very effective to compare with other data. But administrative data is limited in showing actual access issues as only represents cases filed in court.
6. Media Monitoring				
Documentation of legal-related incidents in media: newspapers, television and radio.	Provides analysis of both policy debate and actual cases; Can view trends over time; Can assist in formulating socialization strategies, informs what public is interested in and most effective way to disseminate.	Selection bias in cases – only document cases that go to court, are high profile or involve violence; Fail to examine small-scale or day-to-day cases; Geographic bias – focused on news from city.	Presumes that different forms of local media exist and accurately represent local issues.	Can be useful tool for documenting trends over time. Also use to double-check against findings from surveys. But can be time intensive and mostly focuses on larger cases.
7. Review of Literature and other secondary sources				
Desk review of journals/books and other surveys that exist.	Review of other survey tools can provide points of comparison or support in designing tools – highlights what works what doesn't; Can make link to broader social service delivery.	Limited research in countries in question. Much of research focuses on structures and not impacts; Other surveys mainly related to social issues (health and education).	Assumes that accurate research is accessible on issues in question.	Part of background.

ANNEX 2: STAKEHOLDER FOCUS GROUP DISCUSSION GUIDE, TUVALU

PACIFIC JUDICIAL DEVELOPMENT PROGRAMME

Access to Justice Assessment Toolkit

Focus Group Discussion – Tuvalu

Questionnaire Guide

12 November, 2012

PJDP is funded by the Government of New Zealand and managed by the Federal Court of Australia

Session 1. Introduction

Objectives

- Explain the purpose of the focus group discussion and introduction of presenter and participants;
- Ensure participants are comfortable.

Content

1. Introduce Workshop

Introduce the objectives of the workshop:

- To assist the courts in Tuvalu identify access to justice needs and develop a plan to improve services to address those needs;
- To support the development of a toolkit that will be available to all courts in the Pacific.

Include an introduction of the Pacific Judicial Development Programme.

2. Participant Introduction

Provide participants with an opportunity to introduce themselves. Where there are less than 10 participants they should each briefly introduce themselves. Include information such as name, job, family status,..

3. Introduce Guidelines for Workshop

Guidelines are important so participants feel more comfortable in speaking freely. They can include:

- Explain that the focus group discussions aim to receive feedback on different issues NOT to discuss individual cases. The discussion can not review decisions or give advice on specific cases;
- Encourage everyone to participate and provide equal opportunity to participants;
- Emphasize the information will be treated in confidence. Notes are taken but names will not be used in any reports;
- Emphasize that there are no right or wrong answers. Everyone's views are equally important and should be respected.

4. Introduce structure of workshop

The discussion will take between 1 ½ to 2 hours. Over that time a range of questions will be asked on a range of issues.

List issues that each session will cover.

Preparation

The session will last approximately 15 minutes

It is important to keep the atmosphere as relaxed as possible. This includes being patient with participants and not rushing to discuss topics before the groups feels comfortable doing so.

- Make sure participants receive invitation well in advance;
- Ensure that a comfortable room is prepared;
- Identify a suitable facilitator. Make sure the facilitator has prepared and is familiar with the questionnaire;
- Identify a suitable note-taker;
- Consider any language issues. The facilitator, note-taker and participants should all communicate in the same language.

Introductions should be kept short but are important because they help make participants more comfortable with speaking in a group setting.

During the Focus Group Discussion the facilitator will need to ensure that all participants are provided with an opportunity to speak.

The facilitator will also need to make sure all topics are covered. At times, the facilitator will need to move the discussion forward when participants take too much time focusing on specific issues.

Session 2. Legal Knowledge & Access to Information

Objectives

To obtain information on:

- How people access legal information when they need it;
- The types of legal information people need;
- Particular areas where courts could improve the quality of information they provide.

Content

1. Access to Information?

- If you had a dispute over the boundary of the house you live in who would you contact to assist you in resolving the dispute?
- If you were summoned to appear in court where would you go to get information to support you before you went to court?
- A husband and wife are always fighting. It is also affecting their children and disturbing neighbors. Who would be best place to provide advice in these family disputes?
- Over the last 2 years can you remember any programs where information on the law or your rights was provided?
  - Who provided the information?
  - How was information distributed?
  - How useful was that information to you?
  - What do you think are the best ways to distribute information to the public?

  (Examples could include radio, brochures, through community groups, through the church, posters, NGOs,…)

2. Types of Information needed?

- If the court or other legal organizations were going to provide the public with more information on specific legal issues what type of issues are most important for them to provide information on?
  - Why?

- Are there any particular groups of people that need more information or information on specific issues?

  (for example: do people from the outer islands need different type of information from people in Funafuti? Do women, young people, chiefs, disabled people,…. Need more detailed information?)

Preparation

The session will last approximately 20 minutes

This session is an 'ice-breaker'. It provides important information but also addresses issues that are not too sensitive. It allows participants to become more comfortable with the discussion.

Encourage participants to focus on specific examples instead of hypotheticals.

Responses should help courts:

- identify types of issues that the public would like more information on;
- determine the most effective way for disseminating information;
- identify gaps in court awareness activities.

Information provided will also be relevant for People's Lawyers Office, Police and NGOs.

Session 3(a). Court Services (Community Members)

Objectives

- To provide the court with feedback on services it provides across each level of courts;
- To provide recommendations for improving court processes;
- To identify areas of concern where legal actors are not providing enough support.

Content

1. Services in Island Courts and/or Land Courts

- How familiar are you with the work of your local Island Court or Land Court?
  - Have you had any experience with either of these courts in the last 12 months?
  - If yes, how would you describe that experience?
- Based on your experience and what you have heard about the Island Court or Land Court list some of the things you thought were most positive about these Courts?
- If you could make suggestions to improve these Courts what are the main suggestions you would make?

2. Services in Magistrates Court

- How familiar are you with the work of the Magistrates Court?
  - Have you had any experience with this court in the last 12 months?
  - If yes, how would you describe that experience?
- Based on your experience and what you have heard about the Magistrates Court what are some of the positive aspects of the work this Court does?
- If you could make suggestions to improve the services of the Magistrates Court what are the main suggestions you would make?

3. Support in Dealing with the Court

- What do you think about the level of support and information that is provided to people in using the Courts?

  (Note: this could refer to the support by the People's Lawyers Office, the support of clerks in different courts, information available,….)

Preparation

The session will last approximately 20 minutes.

This session is specifically to receive feedback from different community groups on the services offered by courts.

It is crucial to stress again that this session is not about individual decisions but about the services provided. People should use cases as examples. If they focus too much on individual cases the facilitator will need to move the discussion forward.

Responses should help the Courts:

- Identify specific areas where they can improve the services provided to court users;
- Identify key issues court users may have with the performance of courts;
- Measure the degree of familiarity and knowledge people have about the work of the courts;
- Double-check assumptions the courts have about the services they deliver.

Session 3(b) Court Services

(Island and Land Court Judges)

Objectives

- To receive feedback from judges on operation of the Island and Land Courts;
- To assist the judiciary in identifying and prioritizing needs for the Island and Land Courts.

Content

1. Court Services

- Provide a brief summary of how you believe your Court is operating.
  - Identify 2-3 areas where you think your court has done a good job in the last 12 months.
  - Identify 2-3 of the main challenges for the work of your court.
- What issues are becoming more frequent in your court or are becoming more difficult to deal with?
- In your opinion, are people who use the court comfortable and familiar with the courts processes?

2. Relationship with other Actors

- Many of your functions involving implementing by-laws from kaupule. How would you describe your relationship with the kaupule?
  - What type of information/support do you receive from the kaupule?
- As part of the national judiciary what type of support could be better provided to help your work from the national judiciary?
  - list the 2-3 most important areas for support?

3. Documentation

- What type of documentation do you collect on the cases handled by your court?
  - who do you provide this information to? (*e.g: the Magistrate's Court, the Kaupule,….)*

Preparation

The session will last approximately 20 minutes.

This session is specifically for Island and Land Court Judges.

The information provided should assist the court in planning support for the work of the Island and Land Court.

- Identify any training needs or new issues where these courts need support;
- Support approaches to improve documentation and reporting of cases;

The session also provides a court to cross-check information provided by judges with feedback from community groups.

Session 4: Social/Family Issues and the Court

Objectives

- To assist the Court to identify key issues relating to social order that are affecting the Court's work;
- To assist the Court to identify key issues relating to families and the law that are affecting the work of the Court;
- To identify possible options to make the courts more just and accessible in dealing with the social order and family law priorities identified.

Content

1. Social Order Issues

- Police and the Courts are dealing with an increasing number of disputes as a result of alcohol-related matters. These include minor offenses to more serious offenses, including assaults and even murder. Do you have recommendations on how alcohol-related offences can better be dealt with by justice actors (police, courts, prosecutors)?

2. Families and the Law

- Family issues, such as divorce, child custody, domestic violence, are always very difficult to deal with. How would you describe the services of legal organizations, including the courts, in dealing with family issues?
- Are there any areas where services could be improved when dealing with these family issues?

Preparation

The session will last approximately 20 minutes

Initial interviews raised a number of social issues being of primary concern for access to justice. These included alcohol-related offences (disturbing the peace, assaults, youth crime,…) and family issues including domestic violence and child rights given an increase in youth pregnancy.

This session will try to receive feedback on how Courts can respond to changing trends on these issues.

Information can help Courts:

- plan and allocate resources to address specific issues;
- develop appropriate and contextual court rules on issues identified;
- inform (and work with) other government departments to improve service delivery or regulations on emerging issues;
- tailor information to address identified needs;
- make requests for additional resources based on need.

Session 5: Conclusion

Objectives

- To wrap up the focus group discussions;
- To re-affirm how the information will be used;
- To provide participants with an opportunity to identify any additional issues relating to access to justice.

Content

1. Summary of Focus Group Discussions

- Quick summary of previous sessions;

  It is useful to highlight a couple of points that emerged from each of the sessions as a quick summary. This shows the participants that their contributions have been important.
- Provide a summary on the next steps of Court work;
  - *These discussions were test. Further focus group discussions will be held with other community groups early in 2013.*
  - *The Court will then use this information to improve its planning process. This will include identifying 2-3 specific action items for the Court to address in 2013.*

2. Additional Comment

- Provide participants with an opportunity to make any additional comments or add issues they feel may have been missed.

  This is important because there may be justice issues that are important to communities but Courts are not aware of. This is an opportunity for communities to raise those issues.

3. Thank participants for their time and contributions.

Close Focus Group Discussion

Preparation

The session will last approximately 15 minutes

In this session, it is important to:

- thank the participants of their contributions throughout the meeting;
- summarize some of the key messages/issues that have been identified in the discussion;
- inform the participants, again, of how the information will be used;
- allow the participants with an opportunity to identify additional issues or add any further comments.

ANNEX 3: EXAMPLE QUESTIONNAIRES

Piloted Access to Justice Questionnaire for the High Court of the Republic of the Marshall Islands

This survey was tested as part of an assessment of customary mechanisms in the Republic of the Marshall Islands in late 2011. This survey, attached below is also available as an annex to the Republic of the Marshall Islands Country Report located in the "Customary Dispute Resolution Research: Final Report" document located on the PJDP website: http://www.fedcourt.gov.au/__data/assets/pdf_file/0005/18698/CDR-Final-Regional-Strategy-and-Recommendation-Report-2012.pdf

Survey of Justice Issues - High Court of the Republic of the Marshall Islands

Dear Respondent

Hello. My name is _____ and I am working with the High Court of the Republic of the Marshall Islands. We are conducting a small survey that asks women and men about various legal and justice issues. We would very much appreciate your participation in this survey. The survey usually takes approximately 30 minutes to complete. Whatever information you provide will be kept strictly confidential and will not be shown to other persons. If we should come to any question you don't want to answer, just let me know and I will go on to the next question; or you can stop the interview at any time.

Section A: Background Questions.

Individual

1 Age _____ years

2. Place of birth

Majuro ☐

Other _____

3 Sex: Male ☐ Female ☐

4 Highest Education Attained:

Elementary School	
Attended High School (did not graduate)	
Graduated High School	
Some college (did not Graduate)	
Associate Degree	
Bachelor's Degree (or above)	

5 Married Status

Single	
Married/Living with Partner	
Divorced/Separated	
Widowed	

6. How many children do you have? _____

7. Of those under 18 y/o do they all live with you?

Yes ☐ No ☐ Where? _____

Household

8 How many people live in the current house where you live? _____

9 How many people in your house are under 18 years old? _____

10 Which of the following best describes the house you live in?

The land belong to me	
The land belongs to someone else living in the house	
I pay rent for the house	
Another person living in the house pays rent	
We have permission to live on the land without paying rent	

Employment

11 Which of the following best describes your current employment and the employment of other adults living in your house?

	Respondent	Others
Government Employee		
Public Sector Company		
Private Sector - Professional		
Private Sector - Support		
Part-time		
Self-employed/subsistance		
Unemployed		

Section B: The following section asks you about your familiarity with different justice actors.

Please circle a number that best reflects your agreement with each of the statements below

		Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	If I had a dispute I know where I could find help	1	2	3	4	5
2	I feel that I understand my rights well enough	1	2	3	4	5
3	If I had a dispute my alap would be able to help me	1	2	3	4	5
4	The courts here treat everyone fairly and equally	1	2	3	4	5
5	Family disputes should never be reported to the police or courts	1	2	3	4	5

6 Organizations exist that can provide me with free legal advice Yes ☐ No ☐ Not sure ☐

7 If I needed legal information I would:
(do not read out)

Ask my family or a friend	
Ask my alap or another traditional leader	
Ask a religious leader	
Visit an NGO	
Visit the Public Defender or MLSC	
Visit a private lawyer	
Go to the police/court	

Other _____

8 If I could receive more information on legal issues I would like information on the following? (choose maximum 2)

Crime/Theft/Public Security	
Land Issues	
Employment/Wage	
Delivery of public services	
Family (adoption, divorce)	
Inheritance	
Domestic Violence	
Money (debt/contract/loans)	

9 The best way for me to receive information on legal issues & my rights is:

The radio	
The newspaper	
Brochures and posters	
Small community meetings	
NGOs	
Local/Community leaders	

Other (please write) _____

Section C: The following section asks you about actual disputes you may have experienced.

1 In the last 2 years have you experienced any disputes relating to the following issues:

No disputes		Inheritance	
Theft		Family (adoption/divorce)	
Fights		Domestic violence	
Land dispute		Delivery of public services	
Money (debt, contract, loan)		Sexual Assault	
Employment/Wage		Other (please write)	

Of the disputes you have mentioned we would like to ask you some questions on the one that has had the most significant impact on your life.

2 Can you briefly describe the dispute?

3 Who was the dispute with? _____
(eg:neighbour, alap, bank,...)

4 What action was taken to solve the dispute?

Nothing	
Direct negotiation with other party	
Sought assistance of third party	

5 If reported to third party or assistance requested, who from?

Family/Friends		Private Lawyer	
Traditional leader		Police	
Religious leader		Court	
Public Defender/MLSC		Other Government Department	
NGO		Other	

6 Why was that person choosen?

7 Has the dispute been resolved?

No, ongoing	
Yes, satisfactorily resolved	
Yes, but not satisfied with the resolution	

8 Briefly describe the steps involved in resolving the dispute

9 What part of the resolution process were you most/least happy with?

People's Survey, Solomon Islands (2011)

http://www.ramsi.org/media/peoples-survey/

The survey questionnaire is available in the annexes to each of the Annual Reports at the website above. The survey asks a range of questions on service provision and trust in government services across a number of sectors. Section I of the most recent (2011) survey is of particular relevance to judiciaries as it focuses on resolution of disputes.

Legal Knowledge, Attitudes and Perceptions Survey, HAKI Network (2012)

http://static.squarespace.com/static/53f7ba98e4b01f78d142c414/t/53ffdf0fe4b0c1ee385c22c3/1409277711910/LEP-KAP-Survey%20FINAL.pdf

The survey was initially developed for use in Sierra Leone but has subsequently been amended and used in a number of other countries. It is targeted at all justice sector agencies and not just the judiciary. It provides a range of questions on: knowledge of the law; perceptions of different legal actors; experiences in resolving disputes; and socio-demographic information. It is available at the above website.

Legal Australia – Wide Survey: Legal Need in Australia (2012)

http://www.lawfoundation.net.au/ljf/app/&id=EDD640771EA15390CA257A9A001F7D08

A quantitative survey conducted by the NSW Law and Justice Foundation of legal needs across Australia. The survey provides a broad range of questions across 12 categories of disputes. It is a whole of sector survey so results are relevant to both courts and other justice sector agencies. The survey document is available in Annex 1A at the above website.

ANNEX 4: ADDITIONAL READING

ABA Rule of Law Initiative, 2012. *Access to Justice Assessment Toolkit: Guide to Analyzing Access to Justice for Civil Society Organizations*, Washington, DC: American Bar Association. Available at: http://www.americanbar.org/advocacy/rule_of_law/publications.html [Accessed May 17, 2012].

Barendrecht, Maurits, Mulder, Jose & Giesen, Ivo, 2006. How to Measure the Price and Quality of Access to Justice. *Social Science Research Network*. Available at: http://ssrn.com/abstract=949209 [Accessed May 19, 2012].

BRAC & OSJI, 2010. Legal Knowledge, Attitudes and Perceptions Survey 2010.

Coumarelos, Christine, Wei, Zhigang & Zhou, Albert, 2006. *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, Sydney: Law and Justice Foundation of NSW. Available at: http://www.lawfoundation.net.au/ljf/app/&id=C522D3717E1236E9CA25793A0017CF61 [Accessed May 21, 2012].

Government of PNG, 2010. PNG Household Income & Expenditure Survey: Personal Schedule.

Law and Justice Sector Secretariat, 2010. *Lae Urban Community Crime Victimization Survey*, PNG.

National Centre for State Courts, *Trial Court Performance Measures: Access and Fairness Overview Brochure*, National Center for State Courts. Available at: http://www.ncsconline.org/D_Research/CourTools/index.html [Accessed May 17, 2012].

Open Society Justice Initiative, 2010. *Community-Based Paralegals: A Practitioners Guide*, Open Society Justice Initiative. Available at: http://www.soros.org/initiatives/justice/articles_publications/publications/paralegals-manual-20101208.

Seymour, Anne, 2004. Focus Groups: An Important Tool for Strategic Planning. Available at: http://www.justicesolutions.org/art_pub_focus_groups.pdf [Accessed October 9, 2012].

TISCO, 2009. *A Handbook for Measuring the Cost and Quality of Access to Justice*, Tilburg: Maklu. Available at: http://www.measuringaccesstojustice.com/.

UNDP, 2011. *Access to Justice Assessments in the Asia Pacific: A Review of Experiences and Tools from the Region*, UNDP. Available at: http://www.snap-undp.org/elibrary/bytype.aspx?Type=Tools.

Vera Institute of Justice, 2003. *Measuring progress toward safety and justice: a global guide to the design of performance indicators across the justice sector*, New York: Vera Institute of Justice. Available at: http://www.vera.org/content/measuring-progress-toward-safety-and-justice.

Woolcock, Michael, Himelein, Kirsten & Menzies, Nicholas, 2010. *Surveying Justice: A Practical Guide to Household Surveys*, Washington, DC: World Bank.

Pacific Judicial Development Programme

ACCESS TO JUSTICE ASSESSMENT TOOLKIT

PJDP toolkits are available on: http://www.fedcourt.gov.au/pjdp/pjdp-toolkits