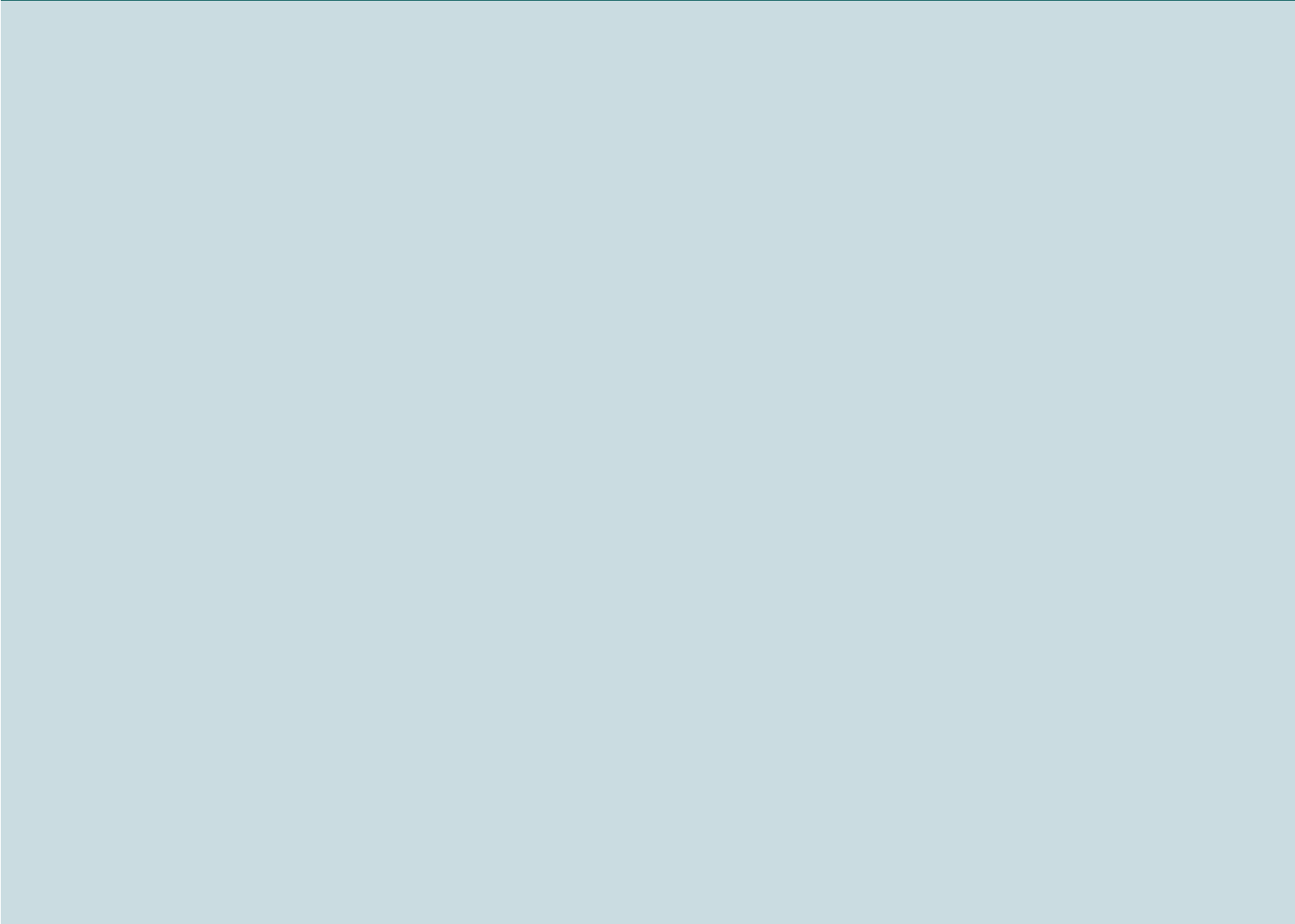




Human Rights Toolkit

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 those who are more powerful including governments.
- Guarantee people the means necessary to satisfy their basic needs, such as food, housing, and education.

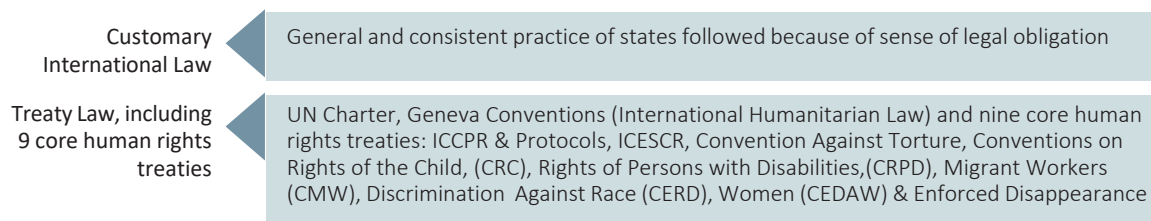


A.2 Sources of Human Rights Law

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.

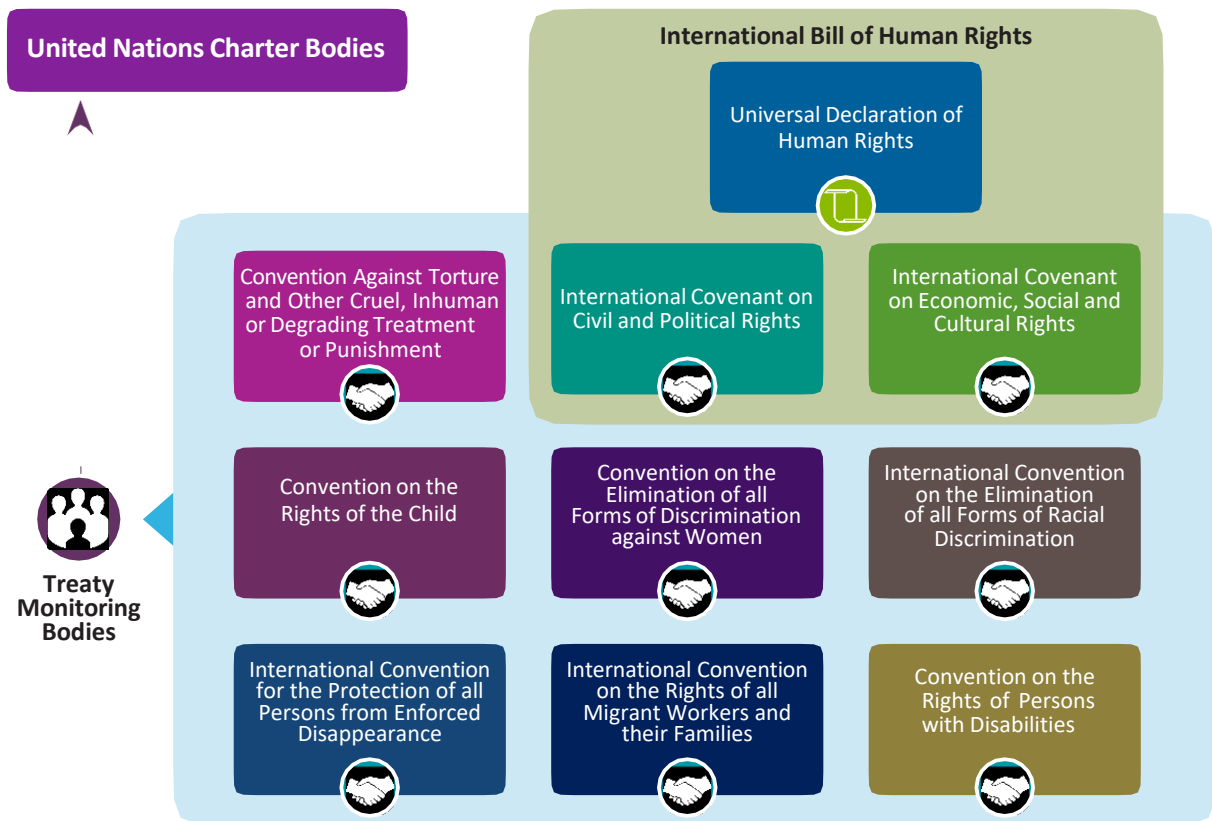
Article 1	Right to Equality
Article 2	Freedom from Discrimination
Article 3	Right to Life, Liberty, Personal Security
Article 4	Freedom from Slavery
Article 5	Freedom from Torture and Degrading Treatment
Article 6	Right to Recognition as a Person before the Law
Article 7	Right to Equality before the 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 Declaration⁶), the *UDHR* has inspired a rich body of legally binding human rights law comprised of both customary international law and international *human rights* treaties.



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

Introduction to the United Nations Human Rights Treaty

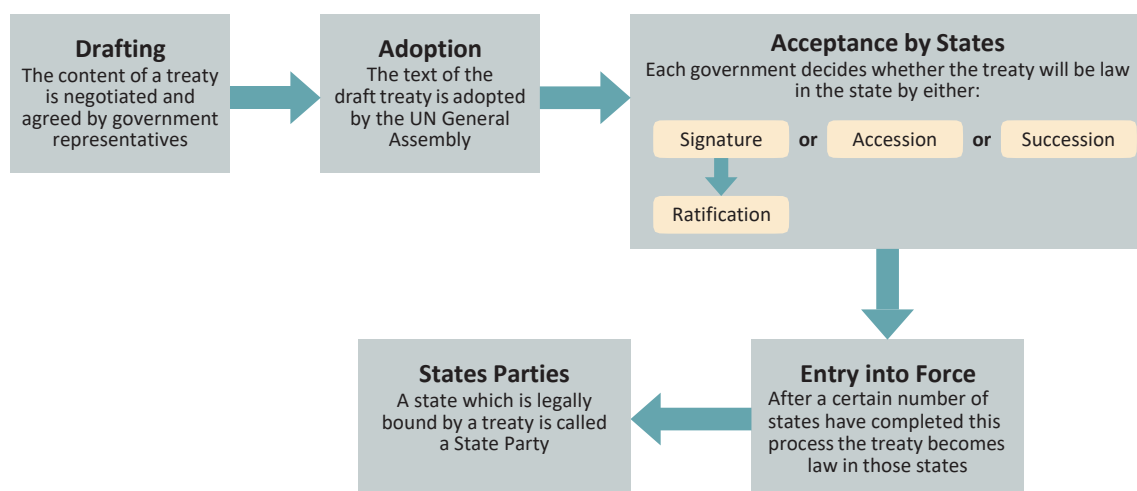


A.3 How are Treaties Made?

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 (ICCPR⁷), and human rights standards relating to women, especially violence against women (CEDAW⁸), children (CRoC⁹), and persons with disabilities (CRPD¹⁰).

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, ICESCR¹¹ and CAT¹²), 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 or Punishment.



A.5.1 Pacific Island Table of Treaty Ratification as of May 2016¹³

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					

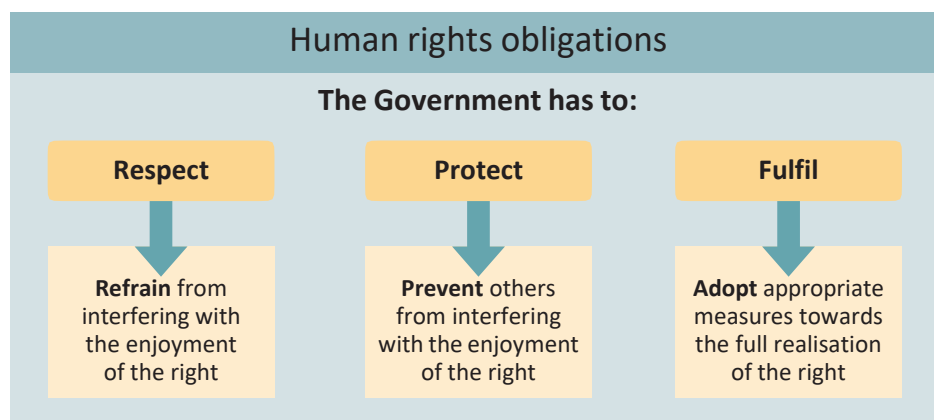
	Niue	Palau	Papua New Guinea	Samoa	Solomon Island	Tonga	Tuvalu	Vanuatu
ICESCR	R 28/12/78	S 20/09/11	A 21/07/08		R 17/03/82			
ICCPR	R 28/12/78	S 20/09/11	A 21/07/08	A 15/02/08				R 21/11/08
ICERD	R 22/11/72	S 20/09/11	A 27/01/82		R 17/03/82	A 16/02/72		
CEDAW	A 10/01/85	S 20/09/11	A 12/01/95	A 25/09/92	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, aimed at 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 of Children 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 become parties 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 and apply 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 or norms 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 although 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 process for financial hardship <i>Break down of further subsidiary actions needed to support main action:</i> <ul style="list-style-type: none"> collect data showing evidence 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 waiver process; 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; * Communication staff.

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 rights standards relating to children, including juvenile justice	No. court staff trained in helping children in court	% criminal cases where child suspect was legally represented	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) on cases 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 waiver process (Y/N)	% cases involving children published on PacLII
Existence of child-specific criminal law standards? (Y/N)	% cases involving children where names were suppressed in court records	% cases involving children when court application fee waived	
Age of Criminal Responsibility 12+ (Y/N)	% cases involving children where hearings held in closed court		
% criminal cases involving child aged between 10-14 where judge considers and finds child capable of understanding wrongdoing	% cases involving children where court room formalities were modified to create less intimidating environment		
Prohibition of death penalty or life imprisonment of children (Y/N)	% cases involving child suspect when 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 are also applicable to civil (including family) law cases too.

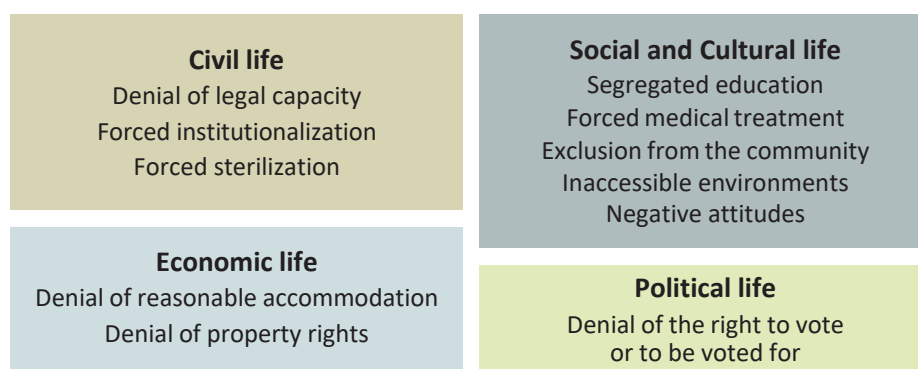
C.2 Regional Support for Gender Equality and Women's Human Rights

- 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 *Denarau 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



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 of reasonable 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.pacii.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 a 5-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 appeal to 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 of the 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 heavy mitigation weight in sentencing decisions in domestic violence and 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 gender stereotypes and customary reconciliation means that victims of domestic violence and sexual assault are often being denied equal 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 appears to 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. For example, 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 perpetrator is 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 be served 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. The Court 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 admitted to 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 of resources and limited presence, but also because of widespread perceptions that attacks or killings are justified 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, Barbara Gore 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.

Lapemal 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 and Family 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 of the Child 'best interests of the child' test, in the former granting custody to the mother (against customary 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 schedule 3 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 decisions such 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) This 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

Minimising pre-trial detention

CHECKLIST 1

For Chief Justice
Judge, Magistrate and Court Staff



NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme



**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
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- **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

- ☒ 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

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

See separate checklist for judicial officers to use during visits

5 Public Education

- ☒ 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.
- ☒ 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.....

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.

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

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

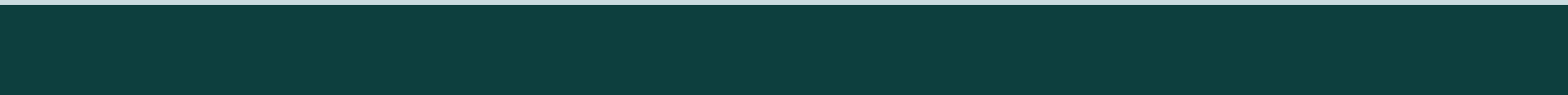
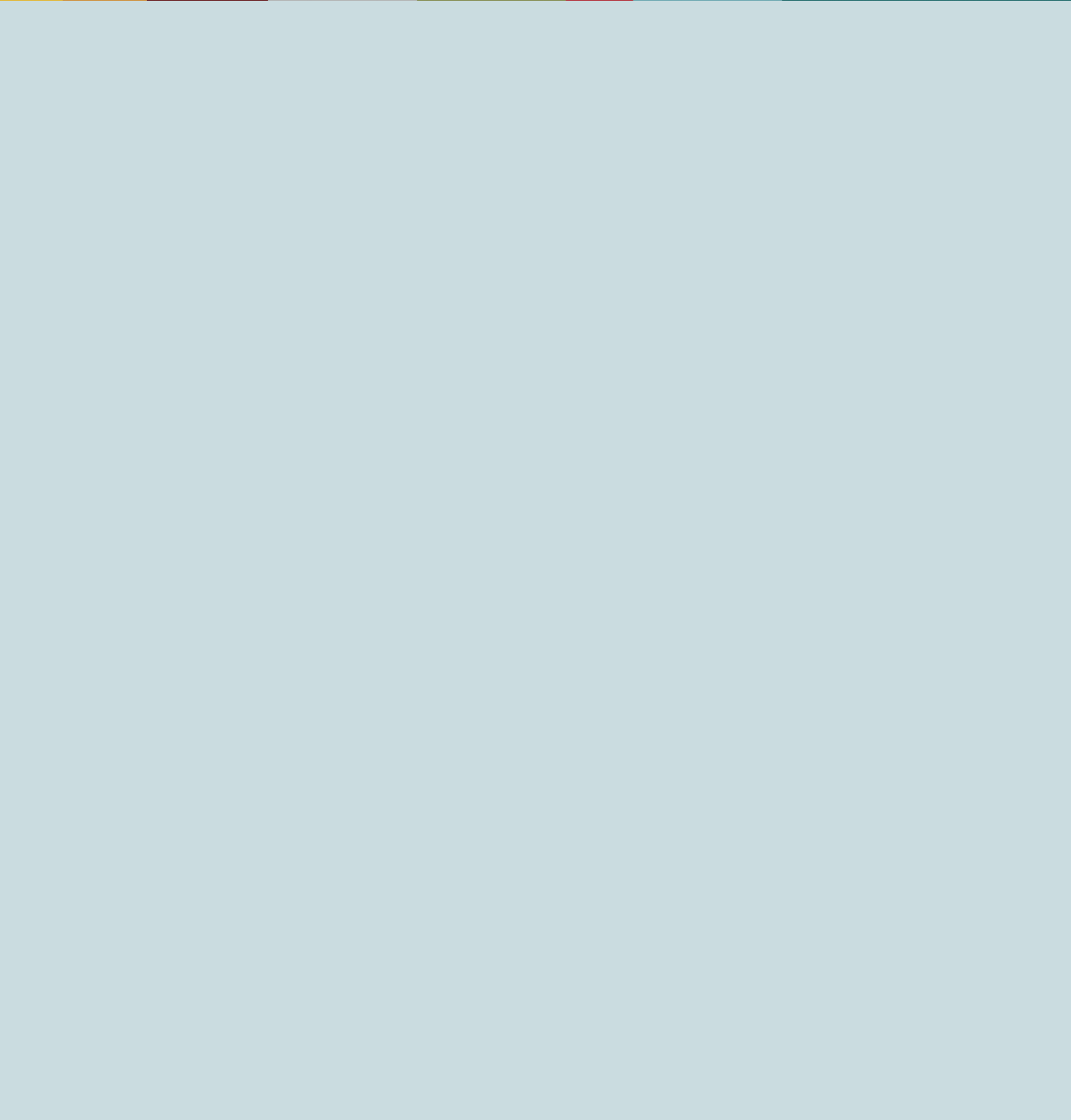
Prior to/on day of hearing

- ☒ 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).





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
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**FEDERAL COURT
OF AUSTRALIA**



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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.

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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.



- ☒ 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.
- ☒ 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/she 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



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.

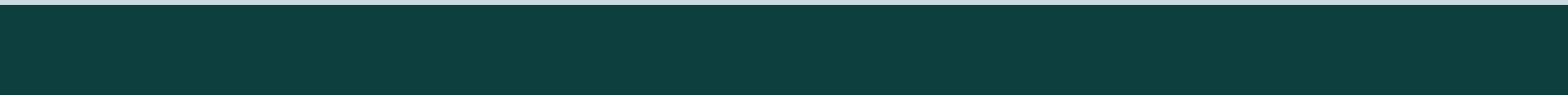
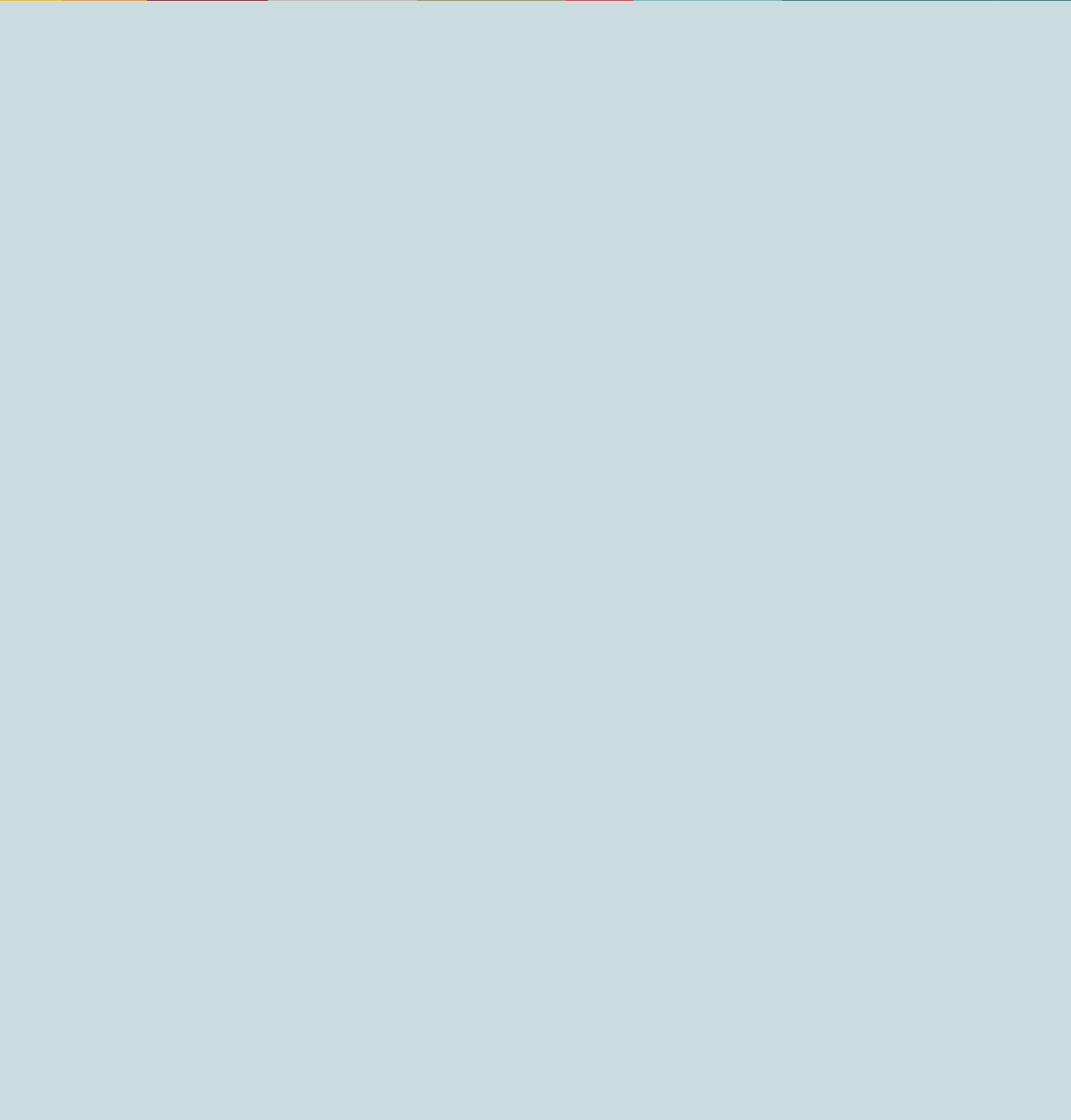


Day of hearing

- ☒ 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.



Judicial visits to places of detention

CHECKLIST 3

For Chief Justice
Judge, Magistrate and Court Staff



NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme



**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

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- **Checklist 3** Judicial visits to places of detention
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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

- 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:

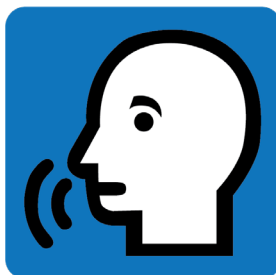
▶ Difficulty communicating or understanding/being understood;

▶ 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 detainees 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)

- ☒ Take photographs of any issues raised if possible.
- ☒ 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:

- ☒ Daily opportunity to exercise in the open air for at least one hour.
- ☒ Access to adequate medical treatment, medication, and dental treatment as required.
- ☒ 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).
- ☒ Ability to immediately inform family where held, ongoing access to visits, all reasonable facilities for communication with family, others.
- ☒ Anyone visiting them?
- ☒ Access to religious lead and place/means to worship.
- ☒ 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/Magistrate 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



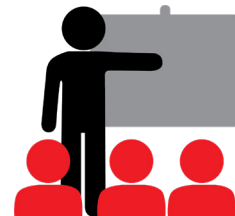
Concerning documentation for ongoing follow up and complaints.

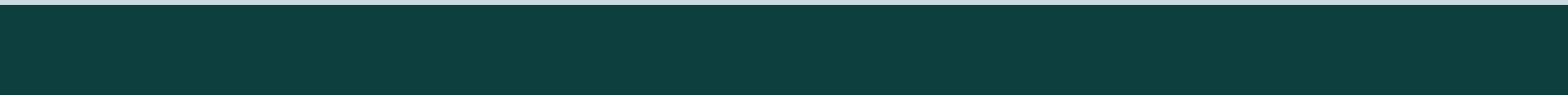
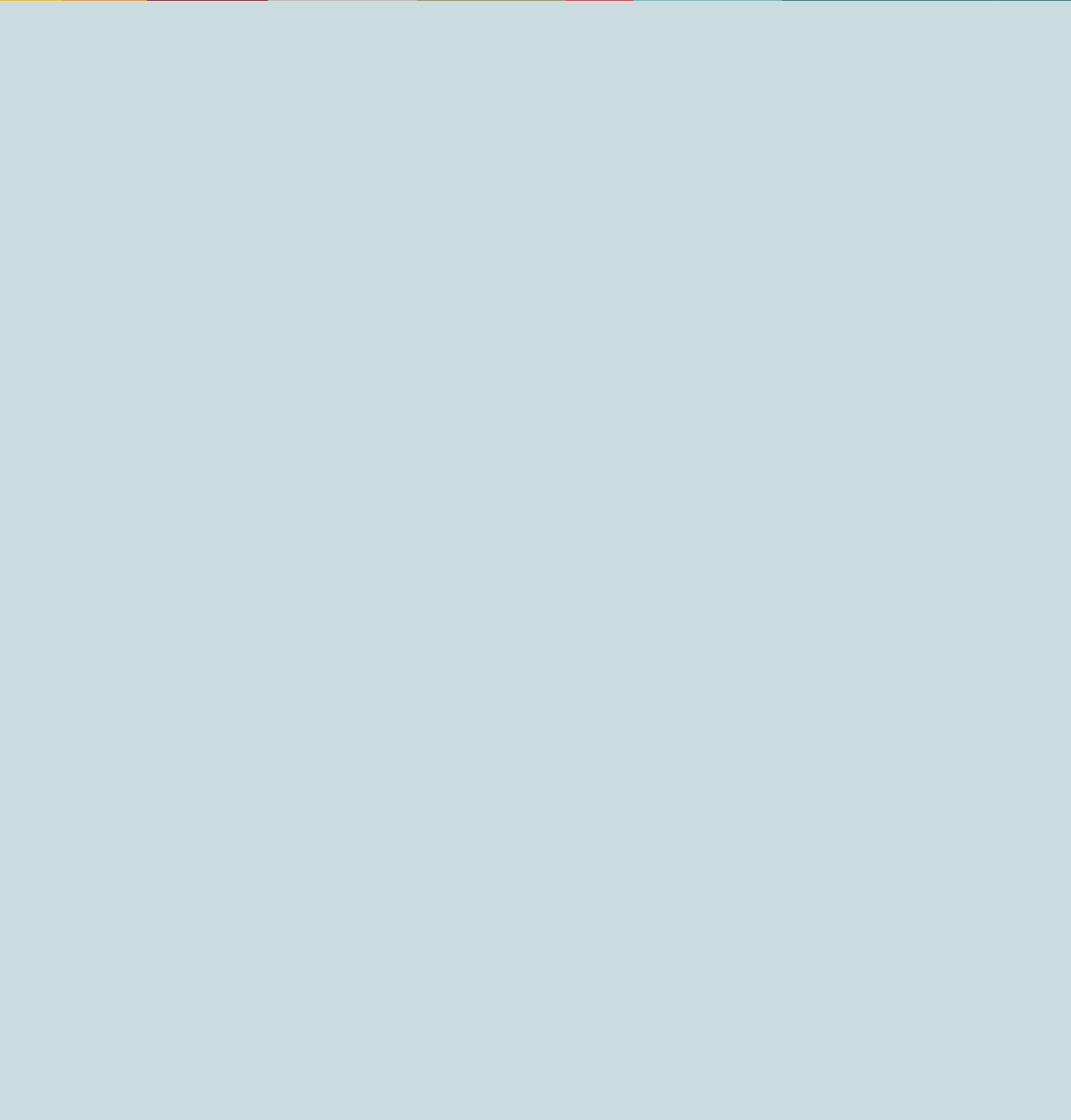


Ensure that outcomes of complaints are recorded and that detainees have been informed of these.



Support arrangements for training of judges/magistrates on conducting judicial visits to places of detention/imprisonment.





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



**FEDERAL COURT
OF AUSTRALIA**



Purpose Statement and User Guide

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- **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 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 community 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

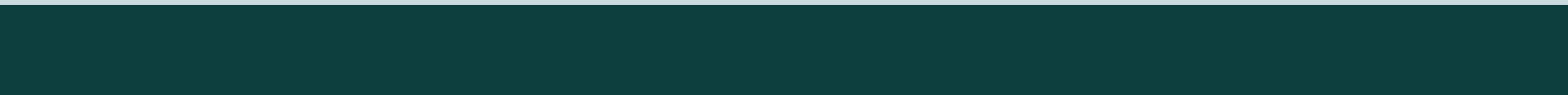
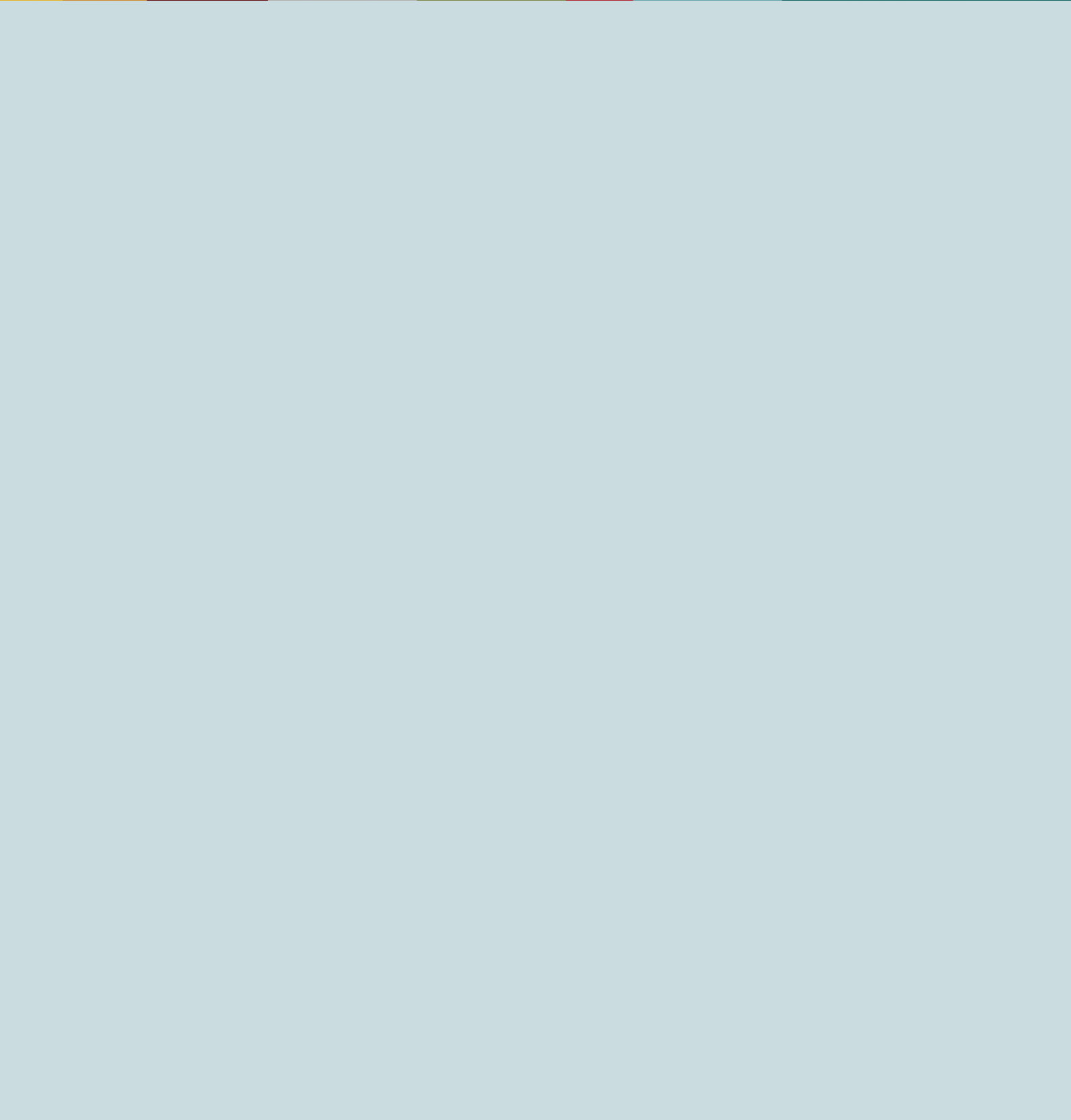
 Make sure that the victim/witness safely departs from the court and has money for transport and somewhere to go.

 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).





When people with disabilities come to court

CHECKLIST 5

For Chief Justice
Judge, Magistrate and Court Staff



NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme



**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

- 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:

- ☒ 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.
- ☒ 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.
- ☒ 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.
- ☒ 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 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


 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.

 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.

 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

 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.

 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 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

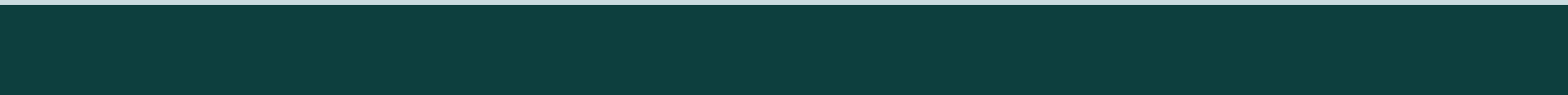
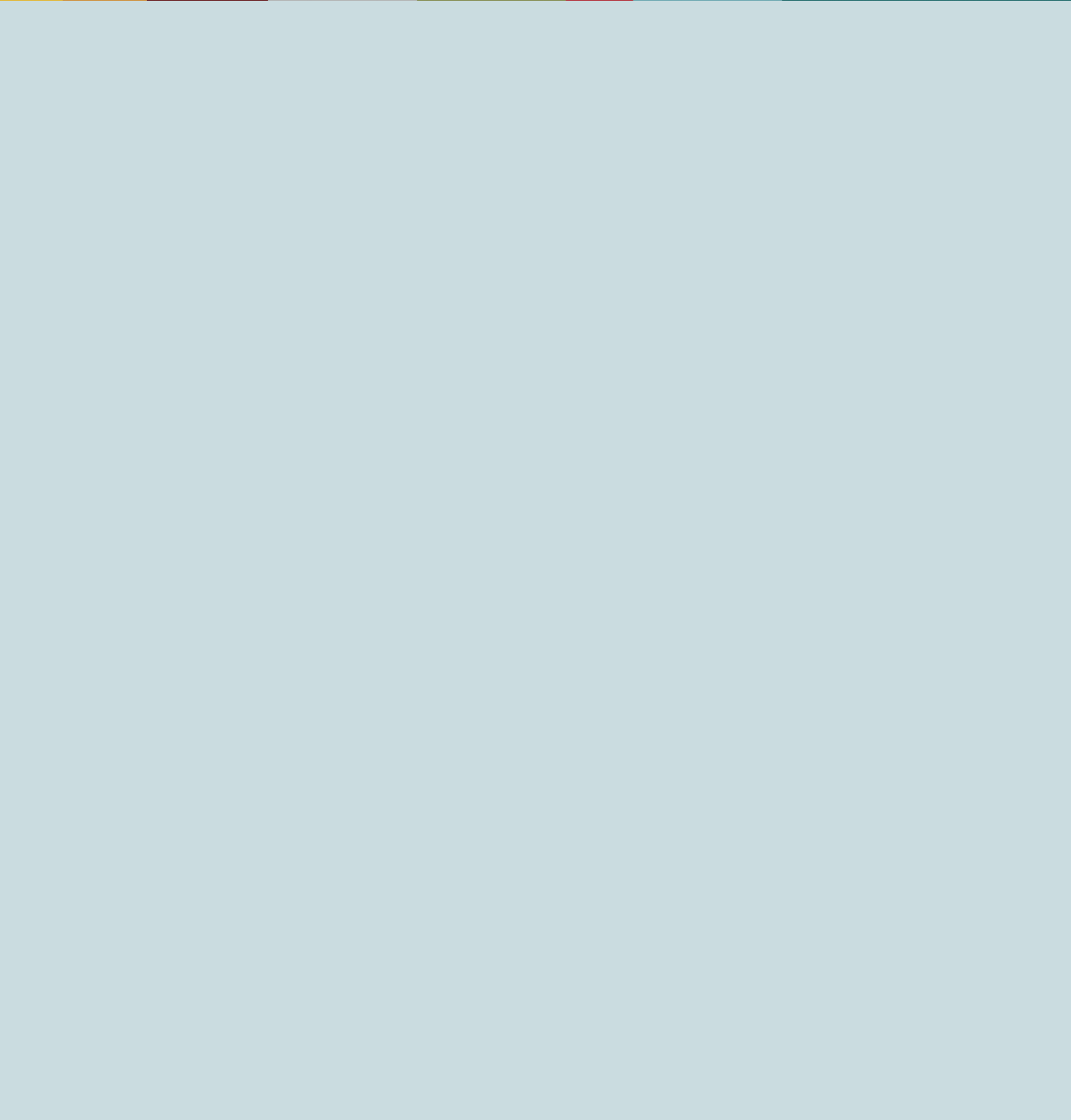
Ensuring that planning is done regarding allocation of hearing room:

- ▶ 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.





Creating welcoming, inclusive courts

CHECKLIST 6

For Chief Justice
Judge, Magistrate and Court Staff



NEW ZEALAND
FOREIGN AFFAIRS & TRADE
Aid Programme



**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

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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.
- ☒ 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.

See separate
checklist for
supporting court
users with a
disability





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 convey 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.



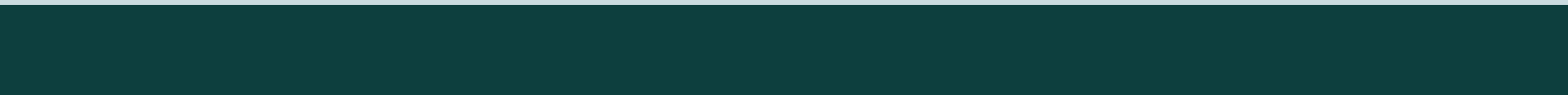
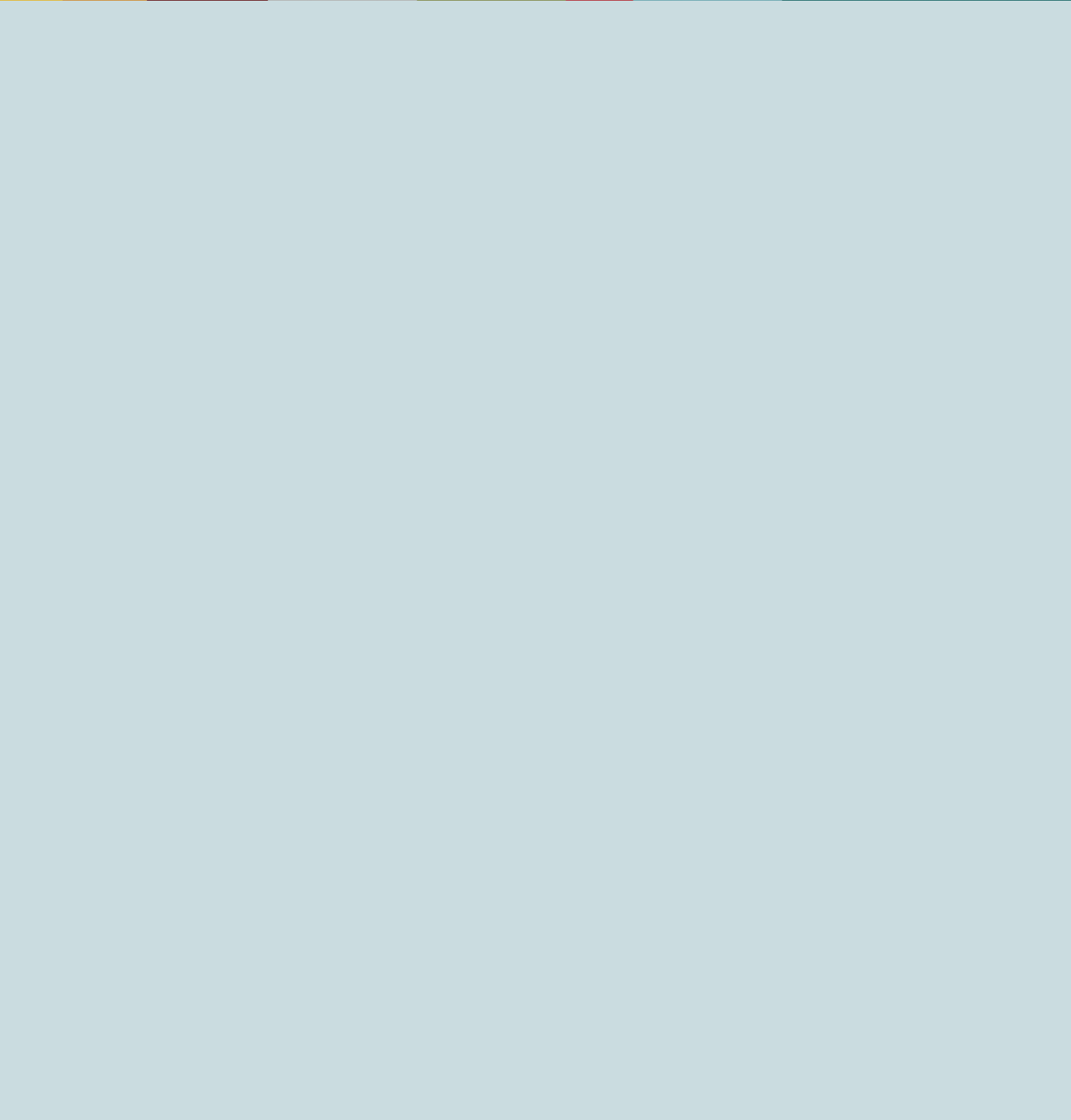
Implement practical solutions for court users needing:



Private way to enter court precinct;



Private place to wait for their case to be heard.



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.



Human Rights Toolkit

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

