

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 including both PDF and Word formats for information accessible on Websites. 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 the reasonable adjustments you will need to make to ensure their needs are met 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
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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 application/originating proceeding forms and case file documents regarding all case types (civil and criminal). For court application forms:

▶ Do you/any of the other parties in this case have a disability?
 Yes No Don't know

▶ Tick any of the following that are appropriate:

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

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

What kind of special assistance will they need from the court?

For court registry form:

Do any of the parties in this case have a disability?

Yes No Don't know

What kind of disability/ies? [please circle]:

mobility, sight, hearing, intellectual disability/mental illness, multiple.

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.

Standard Recommended Court Form Disaggregated Data Fields

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

Type of Case

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

Information about the parties

TYPE OF PARTY

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

RELATIONSHIP BETWEEN VICTIM/PLAINTIFF AND OPPOSING PARTY

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

EXTRA QUESTIONS IN CRIMINAL CASES

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

EXTRA QUESTIONS FOR FAMILY LAW AND PROTECTION ORDER CASES*

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

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

Remaining Fields For all Case Types

GENDER

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

AGE

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

DISABILITY/IMPAIRMENT*

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

Legal Representation

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

Court Fees*

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

Case Management

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

Case Outcome

CRIMINAL CASE

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

FAMILY/PROTECTION/OTHER CIVIL CASE

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

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

NOTE: QUESTIONS FOR CIVIL/ FAMILY CASE FORMS

- Q1** Do you have a disability, impairment or long-term health condition that may affect your participation in court?
Yes/ No
- Q2** Tick any of the following that are appropriate:
- Do you have difficult seeing?
 - Do you have difficulty hearing?
 - Do you have difficulty walking or moving around?
 - Do you have difficulty understanding or concentrating?
 - Do you have difficulty being understood by others?
- Q3** Would you like the court to contact you to discuss beforehand what help can be provided to you to make it easier for you to participate in and be ready for your court case? Yes/ No