

Explanatory Note

COURT GUIDANCE FOR UNREPRESENTED LITIGANTS

The Pacific Judicial Development Program (PJDP) is pleased to provide a template to help courts to administer justice with unrepresented litigants.

This template is designed to provide practical guidance for lay magistrates and court officers when dealing with unrepresented litigants. It is part of the **‘Enabling Rights & Unrepresented Litigants Toolkit’: Court Guidance for Unrepresented Litigants** (annex 3). This guidance has been drafted for your use, adaptation, translation into local language, and distribution to members of the public who come before your courts.

This guidance has been piloted in Kiribati where litigants (and potential litigants) are usually unrepresented. It was distributed at each court to members of the public. As a result, both the courts and unrepresented litigants found it useful in promoting understanding of the role of courts and in explaining how people can exercise their rights in court more effectively.

Building on this initiative, PJDP’s Program Executive Committee (PEC) has approved extending the benefits of this work to other PICs across the region.

Enabling People’s Right to Justice

It is a fundamental right of all people to come before the courts to obtain justice by exercising their legal rights. The constitution enshrines this right, which is protected by the courts where a judge or magistrate administers the law.

While the laws and procedures of any justice system are numerous and complex, there is a single pure principle at the heart of every justice system. This is **the principle of fairness**. This principle upholds the fundamental rule of *equal treatment* for all citizens who come before the courts seeking justice.

Unrepresented litigants - that is, people appearing in courts without representation by a lawyer - are very common across the Pacific. This may be by choice; but more often, it is because of barriers to accessing and exercising their legal rights. These barriers vary in any situation, and commonly include:

- geographical (distance),
- financial (expense),
- socio-cultural (customary practices and expectations),
- educational (lack of awareness and knowledge of the justice system).

Unrepresented litigants present the courts with many challenges in ensuring equal treatment and a fair trial. In the ‘adversarial’ system, justice is reached through each party arguing their case before the magistrate or judge. Where one party has a lawyer and the other does not, this creates a risk of ‘inequality of arms,’ that is, an unfair advantage. If a person is unable to access or use their legal rights, then it is not possible for the courts to perform their role of administering justice effectively. To avoid or minimise this risk, the court must take special steps to ensure a fair hearing. One of these steps is to ensure that courts circulate this guidance to people who may need to appear in court.

Purpose

This guidance briefly explains the role of the courts, how they administer law, and how unrepresented litigants can exercise their legal rights to justice. It outlines the 10 ‘fundamental rights’ to a fair hearing, and clarifies the major differences between criminal, civil and land proceedings.

Our consultations with communities have identified that many people do not understand the role of the courts or how they work. They are often uncertain, shy and unconfident to exercise their legal rights. These people are unlikely to approach the court for help - however needy - without some support from the court.

In the interests of justice, the courts have an important responsibility to ensure that citizens can exercise their rights to a fair hearing. This responsibility includes the courts taking active steps to ensure that all people can access and use their legal rights effectively - particularly those who are not represented by a lawyer. Courts that exclude or disable citizens from exercising their lawful rights fail to provide public service, and lose the trust and respect of the community.

Using this Guidance

When considering whether you need to use this Court Guidance, the first step is to consider the problems and needs of people who may seek help from the court. If these people have not obtained any advice from a lawyer, they are called ‘unrepresented litigants’. An unrepresented litigant is a person who comes before a court as a party to a case - not a witness - without any legal representation from a qualified lawyer or any assistance from a para-legal support officer or community-based organisation. These people will need your help to explain how the courts work and how they should exercise their legal rights. In doing so, it is extremely important that you fully understand when you should help and how:

Do’s and Don’ts

All officers of the court - whether registry staff, court clerks, magistrates or judges - are each responsible to ensure that all people coming before the court receive equal treatment and a fair hearing.

- *Registry staff and clerks of court* - are the public face of the justice system, and usually the first point of contact by members of the community. Assistance will normally focus on answering general inquiries, providing and/or advising about the correct forms/documents that need to be completed to initiate a court process, providing referrals to other service providers where required, and providing explanations about court procedures. This assistance should include giving the person this Guidance.
- *Magistrates and Judges* - usually encounter unrepresented litigants when they appear before them in court without a lawyer. Assistance will normally focus on ensuring that they understand their right to legal representation and to explaining the relevant court proceedings in a manner that ensures a fair hearing for both parties. This assistance should include giving the person this Guidance.

Caution is required: officers of the court are not allowed to provide legal advice on the legal merits of any particular case that comes before the court for hearing, because this could affect the impartiality - or the appearance of impartiality - of the hearing and damage public trust in the independence and fairness of the court. This means that you can explain how the court works, but not who is at fault or who will win or lose the case.

Adopting or adapting this Guidance

You may wish to use this template Guidance as drafted, or alternatively, you may wish to change it to suit local conditions in your jurisdiction and court. If so, we encourage you to do so, as required. Each jurisdiction is different. While it is likely that the law and procedures outlined in the template are appropriate and apply in your jurisdiction, we recommend that you check with your Chief Justice to be sure. You may consider that some aspect of local culture or traditions should be mentioned. We also recommend that the Guidance is written in words that are readily understood in your country and is translated into local language/s.

Finally, we recommend that this Guidance should be accompanied by oral communication, that is, a court officer explains the contents in-person to ensure that unrepresented litigants understand the contents, and if needed also clarifies any issues by answering any questions.

Step-by-Step to Additional Recourses: Toolkits and Tools

PJDP has produced a number of related resources to help courts to improve services, a number of which are listed below for your use:

- 1) First, if you wish to assess the community's unmet needs for justice, visit:
<http://www.fedcourt.gov.au/pjdp/pjdp-toolkits/Access-To-Justice-Toolkit-v2.pdf>
- 2) Second, if you wish to improve information available to the public and court users, visit:
<http://www.fedcourt.gov.au/pjdp/pjdp-toolkits/Public-Information-Toolkit.pdf>
- 3) Third, if you wish to use this Court Guidance to Unrepresented Litigants, visit:
www.fedcourt.gov.au/pjdp/pjdp-toolkits/Enabling-Rights-Toolkit.docx

The **'Enabling Rights Toolkit'** explains the fundamentals about justice for lay magistrates and court officers including:

- Function of the Constitution and the rule of law in society
- Role of courts to administer justice
- Six values: independence, impartiality, integrity, propriety, equality, competence
- Principles of 'natural justice', procedural fairness and rights to fair trial
- Ten 'fundamental rights' of fair trial - including the right to legal representation
- Differences in 'burden' and 'standards' of proof in criminal/civil proceedings
- Conflict of interest - and when you must disqualify (recuse) yourself
- Responsibilities to protect the needy, vulnerable and disabled.

In piloting of this guidance, the courts of Kiribati undertook two additional activities that you may also find useful:

- 1) **'Court-Community Access To Justice' workshop** - the goal of this workshop is to improve the quality of justice administered by courts to the community by: (a) providing a process for court outreach and community engagement;
(b) identifying the needs of unrepresented litigants;
(c) addressing unmet legal needs by enabling rights for justice (annex 1: A1-4).

- 2) *Enabling Rights Action Plan* - as part of addressing the legal needs of unrepresented litigants, the court also developed an action plan, which identified: *what* actions it would take, *who* was responsible, *how* the needs would be addressed, and *what* it would cost (annex 4: A10).

All of these additional resources can be found at:

<http://www.fedcourt.gov.au/pjdp/pjdp-toolkits>

Should you have any queries, please contact us: pjdp@fedcourt.gov.au

COURT GUIDANCE FOR UNREPRESENTED LITIGANTS

(people who appear in court without a lawyer)

GOING TO COURT: WHAT ARE MY RIGHTS AND RESPONSIBILITIES?

1. Role of the courts

The Constitution of *[insert name of your PIC]* establishes the courts of law. The courts are responsible for administering the laws. These laws are either criminal (offences against the state, such as murder or theft) or civil (involving the rights of individuals, such as land or agreements). It is the responsibility of the courts to administer these laws independently, equally, impartially, fairly, honestly and competently. In practice, the nature of cases coming before the courts is a mixture of criminal offences, and civil disputes often relating to land.

2. Adversarial system of justice

In *[insert name of your PIC]*, the courts operate in what is called the ‘adversarial system’. In this system, it is the responsibility of the parties to present these cases, and the responsibility of the court (being the magistrate or judge) to make the decision. This means that two sides (or parties) usually contest cases or disputes in front of the magistrate.

3. Role of the magistrate - making decisions

The magistrate (or judge) is the officer of the court who is responsible for deciding the case justly. The magistrate has four key functions to perform: (i) to judge the facts of the case - what happened, (ii) to apply the law to those facts, (iii) to preside over the hearing to ensure it is conducted in an orderly and fair manner, and (iv) to make a decision or judgment, which is legally enforceable as an order of the court.

The magistrate is independent and required to treat both sides equally and fairly. For this reason s/he will explain what the unrepresented litigant should do at the hearing and how the hearing works. The magistrate cannot provide any legal advice on your case - this is your responsibility: if you need help, you are strongly encouraged to consult a lawyer.

4. Recuse of the Magistrate

A magistrate may recuse himself/herself to hear the case - that is, excuse themselves from hearing the case because of a potential conflict of interest - on application by a party or on the magistrate’s own motion where there is or may be a conflict or an appearance of a conflict of interest.

5. Role of the parties to a hearing

In **criminal** matters, the prosecution (usually the police) brings the case (or complaint) against the accused (defendant).

In **civil** matters, the claimant (plaintiff) brings the case (claim) against another party (defendant).

6. Appearing in court and legal representation

As a citizen, you are required to appear in court if charged with a criminal offence. You are also entitled to come before the courts to exercise your civil rights and responsibilities. *What is a right?* A right is an entitlement that you have as a citizen that is enforceable by law. Should you wish to come before the courts, you should be clearly aware of your rights and responsibilities before doing so.

In all cases, you have a right to legal advice and representation - that is, you have the right to be represented by a lawyer. If in any doubt, you are encouraged to consult a lawyer for advice because the law may be complicated and you may require expert assistance. Should you choose not to exercise this right, you may appear in person. If you chose not to use your right to representation, you should understand that the court's decision is usually final and will be enforced by the law.

7. Legal Aid

You may obtain legal advice and representation from a qualified lawyer who will charge a fee or, alternatively, you may be entitled to free legal aid which may include advice and representation.

8. Appearing in court - telling your story: facts not opinions

If you chose to appear in court without a lawyer, you should prepare your case carefully in advance. In court, the magistrate will explain the order of proceedings. Be sure to do what the magistrate tells you. You will be given an opportunity to 'tell your story'. Prepare this in advance: start at the beginning and present it in time order. You should include facts (what actually happened), and not opinions (what you thought). You can bring witnesses to support your story or to contest that of the other party. In all cases, it is your responsibility to be honest and tell the truth - failure to do so is punishable.

9. Rights to compensation with costs

A party may make an application to court to be compensated with costs for attending the court if the other side does not come to court.

10. Appeals

If you are not happy with the decision of the court, you may have a right to appeal. If you want to appeal, you are again strongly encouraged to seek legal advice. If you appeal, you are entitled to be represented by a lawyer.

If unable to get legal assistance, you may file your appeal using the 'Appeal Form' available in all the Magistrates' Court offices. Seek the assistance of the Court Clerk for filling the form.

Appeals on the decision of the Magistrates' Court must be made within 3 months starting from the date the decision is delivered. Appeals from the High Court decision must be made within 21 days starting from the date the decision is delivered. You are required to get legal assistance to file your appeal in the Court of Appeal.

11. Right to appeal

Any party dissatisfied with the order/ruling/decision of the Magistrates' Court has the right to appeal to the High Court within 3 months starting from the date the order/ruling/decision of the court is delivered.

It is important to highlight some key differences between **criminal** and **civil** cases as these differences may affect your rights and the manner in which you exercise them.

CRIMINAL CASES

Crimes are offences against the state (such as murder or theft) that are prosecuted by the police before the courts.

You have 'fundamental rights' when charged with a criminal offence, including:

1. You are entitled to be represented by a lawyer if you wish
2. You are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
3. You are presumed innocent until proved guilty according to law.
4. You are entitled to be informed promptly of any charge against you, to have adequate time and facilities to prepare a defence, to be tried without undue delay, and to defend yourself in person or through legal assistance of your choosing or (where the interests of justice require) provided without payment.
5. You are entitled to have witness on your behalf and to examine witnesses against you.
6. You are entitled to an interpreter if required
7. You cannot be compelled to testify against yourself or to confess guilt - this is sometimes also called the 'right to remain silent'
8. Juveniles (children), those with disabilities and other vulnerable people require special protection
9. You cannot be tried twice for the same offence
10. You may be entitled to appeal if you are not happy with the decision and, if so, you should obtain legal advice about proceeding further".

12. Burden and standard of proof in criminal matters

In criminal cases, the prosecution or police has the obligation to establish guilt ('burden of proof'). Guilt must be established beyond all reasonable doubt ('standard of proof': a very high degree of certainty). You are not obliged to prove anything. But you may contest the prosecution charge (version of events). If so, you may call your own witnesses.

If you do not understand the charge, you should ask the magistrate to explain. If you 'plead guilty' (that is, admit the charge), or are found to be guilty by the court, you will be liable for a penalty imposed by the law.

CIVIL CASES - INCLUDING LAND

Civil cases are disputes over personal rights between individuals (such as agreements or over land).

1. Burden and standard of proof in civil cases

In civil cases (or private disputes) the claimant (person bringing the case) has the obligation ('burden of proof') to establish their claim on the balance of probability ('standard of proof': a probable degree of certainty). The defendant (person against whom the case is brought) may contest the claim, and may bring their own claim against the claimant (counterclaim) with or without witnesses.

2. Discretion for Court Fee Waiver

A citizen with shortage of economic incomes may apply to the Court for a Court Fee Waiver if unable to meet a court fee specified by law.

The court's decision, which may include an order for damages and/or costs, is enforceable by law.

3. Enforcement of Judgment

In civil cases, the winning party may file an enforcement application of the court decision if the losing party never complies with the order/decision of the court.

UNDERSTANDING THE JUDICIAL PROCESS: CRIMINAL & CIVIL HEARINGS

As explained above, the judicial process consists of an independent person (judge or magistrate) conducting a hearing between two competing parties and 'judging' or making a decision on the case.

In criminal cases, the parties are called the prosecution and accused (or defendant); in civil cases, the parties are called the plaintiff (or claimant) and the defendant. The judge or magistrates hears the case and ensures that it is conducted fairly for both parties using rules of law and court procedure. In **criminal** cases, the prosecution has the *burden of proof* (or obligation) to establish guilt '*beyond all reasonable doubt*' (the standard of proof is to a very high degree of certainty). The accused does not need to prove anything, but may contest the prosecution's case. In **civil** cases, the plaintiff has the burden of proof to establish her/his case '*on the balance of probabilities*' (the standard of proof is lower: to a probable degree of certainty).

The magistrate or judge is responsible for conducting a fair hearing that is impartial, providing even treatment to both parties coming before the court, and applying the relevant law and court procedures.

Criminal hearings (or trials) are generally structured as follows:

1. Court officer calls the case.
2. Prosecution appears.
3. Accused appears.
4. Court officer reads charge.
5. Accused enters a plea, including (if a plea of guilty) a plea of mitigation.

6. If *guilty*, the magistrate will convict the accused on his/her own plea of guilty and enter judgment. The magistrate then starts sentencing proceedings by listening to pleas of mitigation for the purpose of sentencing proceedings from both parties.
 7. If *not guilty* (defended), the magistrate may adjourn the case and may impose bail or proceed by consent.
 8. In defended hearings, prosecution presents evidence to establish the elements of the offence - case against the accused with witnesses.
 9. If there is a case to answer, the accused then presents the defence with witnesses.
 10. Magistrate makes a decision to acquit and convict - if guilty, the magistrate enters a judgment and imposes a sentence which may be a fine or imprisonment.
 11. If convicted, the accused has a right to appeal - provided s/he has sufficient grounds for appeal.
- Civil (including land) hearings are generally structured as follows:
 1. Court officer calls the case.
 2. Plaintiff appears.
 3. Defendant appears.
 4. Court officer reads the claim, and any counter-claim.
 5. Magistrate may inquire whether the disputes can be settled informally.
 6. In contested disputes, the plaintiff presents evidence to establish her/his claim with witnesses.
 7. The defendant presents her/his defence to contest the claim and present any counter-claim with witnesses.
 8. The magistrate makes a decision on the evidence presented, and enters a judgment which may include an order with damages, and may also include legal costs.
 9. The losing party has a right to appeal - provided it has sufficient grounds for appeal.

Need any help?

If you have any questions before the hearing, contact the court clerk [\[insert clerk's contact details\]](#) or Legal Aid on [\[insert contact details for Legal Aid\]](#)
