



Human Rights Toolkit

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FOREIGN AFFAIRS & TRADE
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FEDERAL COURT
OF AUSTRALIA





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

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

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PJSI Toolkits

Introduction

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

Toolkits

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

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

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

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

Use and Support

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

Your feedback

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

Dr. Livingston Armytage

Technical Director, Pacific Judicial Strengthening Initiative, May 2021

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Abbreviations

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



1 Introduction

1.1 Need for this Toolkit

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

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



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

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

To address these aims, this toolkit provides:

- Step-by-step guidance as to how court leaders can develop a human rights strategy and action plan to identify, strengthen, measure and track the progress made towards more consistent application of human rights principles across all court activities. The guide includes what the strategy and action plan should contain, how it can be integrated into the court's overall development plan, who should be involved and the steps to be taken from the beginning to the end of the human rights strategy cycle.
- A number of 'quick reference guides' in relation to particular themes, which explain how judges and court staff can apply human rights standards in their daily work. These guides have been designed to be used by:
 - **All Judicial Officers (both lay and legally trained).** This toolkit will help judges to identify relevant human rights issues in their cases, apply relevant human rights standards and resolve any conflicts which might arise between human rights standards and other laws or customary practices.
 - **Court administrators and court officers.** The contents of this toolkit could also be used to help court administrators develop Standard Operating Procedures for how court staff should apply a human rights-based approach in their day-to-day roles, such as by helping disadvantaged people use the courts, creating systems to receive feedback on court performance, collecting good case data to help improve court services, and ensuring the confidentiality of court users' information through secure file management and registry processes.



- **Regional/National Training Team members.** This toolkit can be used by Regional/National Training Team members as a basis for them to develop further human rights training packages tailored to the specific needs of judicial officers and court officers.
- c) **Six Human Rights Checklists** translating human rights standards into detailed, step by step practical guidance for Chief Justices, Judicial Officers and Court Staff, addressing six key thematic human rights areas including court responses in cases involving: children, victims of family and sexual violence, people with disabilities, detainees and providing more general guidance on creating welcoming and inclusive courts. These Checklists are designed to support coordinated, whole-of-court response capacity to common human rights issues and challenges facing Pacific Courts.

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

1.3 Other Relevant Toolkits

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

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



2 Human Rights ‘In a Nutshell’

2.1 What are human rights?

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

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

2.2 Common misconceptions about human rights

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

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

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

2.3 How do international human rights standards come about?

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

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



2.4 Obligations of Countries that Ratify Human Rights Treaties

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

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

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

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

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

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

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

Case Study: Solomon Islands Constitutionally Protected Human Rights

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

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

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



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

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

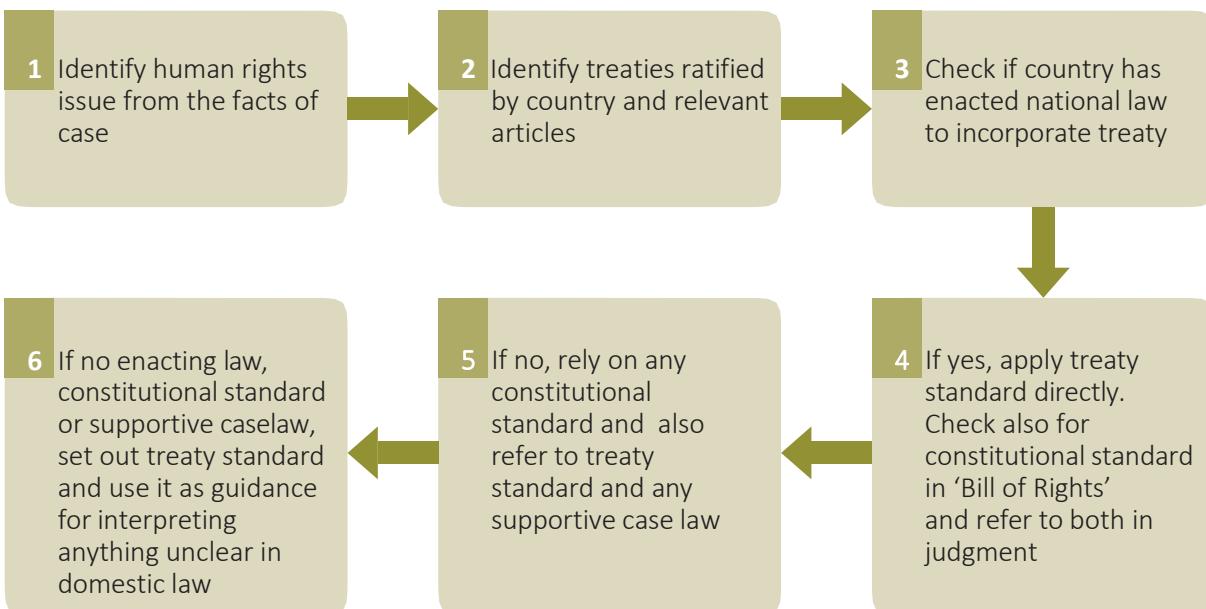
Often, judges will be taking into account a combination of these sources to guide them in how they apply human rights standards, as shown in the table below.

2.5.1 Degree to which Ratified Treaty Standard can be applied

Level of Application	Level of domestic support for using treaty	How treaty standard can be applied
Maximum	<ul style="list-style-type: none"> ● National law enacting human rights treaty. 	Treaty standard can be directly applied as though it were a national law.
Strong	<ul style="list-style-type: none"> ● National constitution protects particular human rights; but ● No national law enacting human rights treaty. 	<p>Constitutional standard can be relied on to strike out any domestic law that is wholly or partly inconsistent with the</p> <p>Constitutional standard. Courts should make reference to the treaty standard in interpreting the content of the constitutional standard.</p>
Middle	<ul style="list-style-type: none"> ● No mention of particular human rights in national constitution; ● No national law enacting treaty; but ● Some case law saying treaties can be used to interpret national laws consistently with treaty standard (on the basis Parliament did not intend that an Act conflict with a ratified treaty unless it explicitly says so ('legitimate expectation')). 	Treaty standard can be used to interpret any domestic law in a way that is consistent with the treaty standard.
Weaker	<ul style="list-style-type: none"> ● No mention of particular human rights in national constitution; ● No national law enacting treaty; and ● No case law or case law supports only limited use of treaty standards to interpret unclear national laws (i.e. treaty standards have no application where the national law is clear, even if it is not compliant with the treaty standard). 	Treaty standard can only be used to interpret any unclear domestic law or provision.

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

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



3 Developing a Court Human Rights Action Plan

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3 Kicking off the Process with an Assessment

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

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

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



3.4 What should the human rights strategy/plan include?

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

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

Timeframe	<ul style="list-style-type: none"> Consider looping the plan into the court’s existing strategic planning cycle from the outset (i.e. The initial plan may need to be limited to whatever period is remaining in the court’s regular planning cycle and then integrated into the next full planning cycle).
Assess	<ul style="list-style-type: none"> Degree to which the court currently implements human rights standards across all four key human rights-related aspects of the court’s work/activities: substantive justice, procedural justice, access to justice, and accountability/transparency of justice. Advisable to develop a specific Terms of Reference for the assessment so that its goals are clear. Those courts without the in-house expertise should consider seeking funds from the PJSI, or other sources, to hire a consultant to undertake the first assessment in collaboration with relevant court staff. The consultant TOR could reflect a capacity development aspect, so that over time the court increases its ability to undertake or update the initial assessment, in-house.
Sources	<ul style="list-style-type: none"> The assessment can be based on a wide range of sources, both primary and secondary sources, such as UN and other human rights reports or surveys, court judgments, data, user-surveys, access to justice assessments.
Goals	<ul style="list-style-type: none"> Areas where improvement is most urgently needed. Frame strategic goals around these areas. <ul style="list-style-type: none"> Aim to choose no more than 2-3 key areas to focus on, as it is better to succeed even if only on a small number of practical changes than to be overwhelmed by the scale of change needed, and then achieve nothing. This toolkit (especially the Quick Reference Guides) identify many relevant standards and suggested actions that courts can take to improve access to justice for women, children, people with disabilities.
Activities	<ul style="list-style-type: none"> Break each goal down into the actions or steps needed to achieve the identified goal. Ensure inclusion of who will be responsible for taking each of the actions forward and for ensuring they are completed. Also include what resources will be needed to undertake each of the actions.
Indicators	<ul style="list-style-type: none"> To enable monitoring of the implementation of the plan, carefully consider possible indicators. Ensure that all indicators are ‘SMART’, meaning that they are: <ul style="list-style-type: none"> <i>Specific</i> – target specific areas for improvement and answer ‘what’, ‘who’, ‘how’ and ‘where’ questions. <i>Measurable</i> – be something that can be counted, observed, analysed or tested. Something that answers the question, ‘How will you know when it has been achieved or not?’. <i>Achievable</i> – be something that is motivating and achievable within the courts available resources. <i>Relevant</i> – be something that is meaningfully linked (based on research or knowledge) to the result sought and important or central to achieving that result. <i>Time-bound</i> – specify when the result(s) can be achieved.

4 Quick Reference Guide to Providing 'Access to Justice'

4.1 What is Access to Justice?

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

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

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

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

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

P
A
N
E
L

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

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

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

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

4.3 Finding out which groups face what barriers to accessing justice

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

4.3.1 Gather and Analyse Court-User Data

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

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

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



4.3.2 Minimum Data Fields/Breakdown by Party

Standard Recommended Court Form Disaggregated Data Fields

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

Type of Case

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

Information about the parties

TYPE OF PARTY

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

RELATIONSHIP BETWEEN VICTIM/PLAINTIFF AND OPPOSING PARTY

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

EXTRA QUESTIONS IN CRIMINAL CASES

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

EXTRA QUESTIONS FOR FAMILY LAW AND PROTECTION ORDER CASES*

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

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

Remaining Fields For all Case Types

GENDER

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

AGE

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

DISABILITY/IMPAIRMENT*

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

Legal Representation

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

Court Fees*

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

Case Management

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

Case Outcome

CRIMINAL CASE

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

FAMILY/PROTECTION/OTHER CIVIL CASE

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

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

NOTE: QUESTIONS FOR CIVIL/ FAMILY CASE FORMS

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

Q2 Tick any of the following that are appropriate:

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

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



4.3.3 Conduct Court-User Exit Surveys

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

4.3.4 Conduct Focus Group Discussions with particular User Groups

An additional method for finding out in more depth about particular groups’ court experiences is by conducting focus group discussions at regular (at least annual) intervals. Focus group discussions usually bring together around 6-8 people to discuss around 6-8 key questions (and additional follow up questions). It is important to ensure that participants give their informed consent³ to participate in such discussions. To ensure women feel comfortable to openly share their views, it is advisable to conduct separate groups for women and to ensure that both the facilitator and note taker are also female. It may also be advisable to separate groups according to age brackets, if possible (See PJDP ‘Access to Justice Assessment Toolkit, September 2014, for further detailed advice regarding conducting focus group discussions and key informant interviews).

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

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

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

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



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

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

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

CAUSES

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

POSSIBLE SOLUTIONS

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

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

CAUSES

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

POSSIBLE SOLUTIONS

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

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

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

CAUSES

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

POSSIBLE SOLUTIONS

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

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

4.4.4 BARRIER 4: Discriminatory laws, processes and decisions

CAUSES

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



POSSIBLE SOLUTIONS

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

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

CAUSES

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

POSSIBLE SOLUTIONS

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

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

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

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

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

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

5.1 Key Fair Trial Standards for Accused Persons

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

5.2 Key Points Regarding Right to Legal Advice and Representation

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

Minimum Standards for Legal Representation

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

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

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

6 Quick Reference Guide for Cases Involving Children

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

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

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

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

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

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

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



Other important justice standards for children:

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

See also Family Violence & Youth Justice Project Toolkit 2014.

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

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

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

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

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

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

Age of Criminal Responsibility

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

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

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

6.4 Minimum Standards for Criminal Cases Involving Children

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

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

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



Arrest:

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

Detention:

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

During Trial:

- Courts should actively take steps to assist children and reduce any stigma children may face due to any aspect of having a case in court;
- All children should have access to legal advice and representation in any kind of case. (CRoC Article 40(2)(b)(ii) & (iii));
- The privacy of children must be specially protected (CRoC Article 40(2)(b)(vii)). Cases involving children should be held in closed court. Court listings, judgments, other public records should not identify children by name (See also Rules 8 and 21 of the *Beijing Rules*); and
- Ensure children fully receive all their ‘fair trial’ rights such as: to be treated as innocent unless proven guilty (CRoC Article 40(2)(b)(i)); to have a fair hearing before a competent, independent and impartial judge (CRoC Article 40(2)(b)(iii)); to have legal representation, to examine witnesses (CRoC Article 40(2)(b)(iv)); and to appeal the verdict or the sentence (CRoC Article 40(2)(b)(v)).

Sentencing:

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



6.5 Measures to Make Court Processes Fairer to Children

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

6.5.1 Pre-court Processes

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

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

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

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

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

6.5.2 In Court Processes

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

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

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

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

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

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

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

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

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

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

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

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

6.5.3 After Appearance in Court

Work with the correction authorities to oversee and ensure that:

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

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

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

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

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

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

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

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

Key Provisions of CEDAW

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

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

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

Declaration on the Elimination of Violence Against Women (1993)

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

The World Conference on Human Rights (1993)

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

The Beijing Platform for Action (1995)

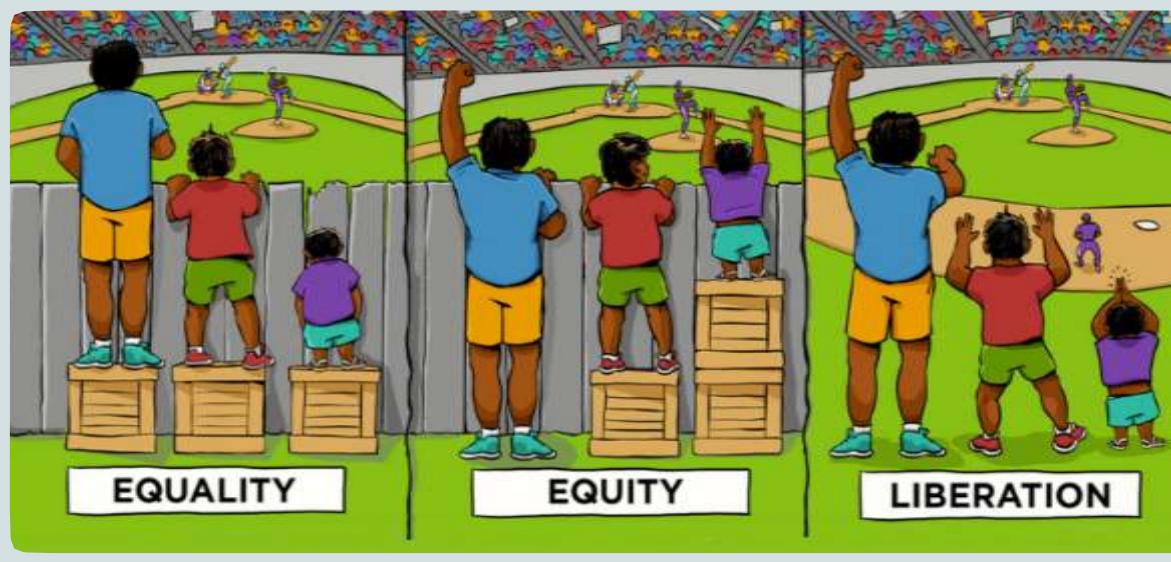
- Identified specific actions Governments must take to prevent and respond to violence against women and girls;
- Identified ending violence as one of 12 key areas for priority action; and
- Used an expanded definition of forms of violence

7.1.2 Formal vs Substantive Equality

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

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

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



7.2 Regional Standards

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

7.3 Domestic Standards

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

7.3.1 New Laws

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

7.3.2 Community-Based Campaigns

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

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

7.3.3 Courts

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

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

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

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

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

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

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

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

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



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

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

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

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

7.5.1 Prior to Court Trial Processes

Ensure protection orders are readily available 24 hours by telephone through having an on-call judge available at all times.

Where suspects are not detained, consider use of orders that suspects must reside away from the family home until the case is determined, rather than victims and children having to leave their home and support network.

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

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

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

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

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

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

7.5.2 During Trial Process

Use accelerated case management to make sure cases involving family violence are prioritised and heard quickly. Set and enforce standards in SOPs for how quickly they must be heard and finally dealt with. Ensure court staff confirm in advance the attendance of all those needed for the case to proceed (to avoid adjournments).

Only grant adjournments if they are strictly necessary and take other measures to reduce delay (e.g. if suspect does not appear, issue warrants for their arrest and direct they be presented to the court).

Demand high standards of professionalism from prosecutors and defence lawyers. I.e. do not readily grant adjournments if prosecutors or defence lawyers are poorly prepared or organised. Make complaints of unprofessional conduct to professional bodies if necessary.

Ensure sufficient security is in place and that no weapons are brought into the court house.

Wherever possible, ensure courts have separate entrances for victims of family violence and always have separate waiting areas for victims and prosecution witnesses.

Provide child-care, child-friendly space, private place for breast feeding for court parties.

Ensure court reimburses victim/prosecution witness transportation costs and provides food during waiting periods and secure accommodation where victims/witnesses are not local and hearings last several days.

Provide necessary supports to victims/witnesses/suspects suffering from any disabilities (see section below).

Provide training to judges hearing family violence cases including how to use CEDAW/CRoC/ constitutional rights of women and children and any special laws that apply to family violence cases. Also provide training on how judges can support the participation of victims, (including children), in court processes, such as by adopting a more informal manner, providing clear non-judgmental explanations, being sensitive to any fear or trauma of victims by providing encouragement, regular breaks etc. and allowing victims' representatives/support persons to make submissions if they wish.

Consider ordering that court proceedings, especially those involving sexual violence and children, be held in closed court and that the victims and witnesses' names be suppressed.

Ensure that suspects are offered legal representation (to ensure fair trial) but also to discourage suspects from directly cross-examining victims. If the suspect insists on their right to represent themselves, strictly exclude any improper, gender-biased or intimidating lines of questioning directed at victims or prosecution witnesses.

Consider ordering the removal from the court room of any person, (including the suspect if necessary), who fails to observe warnings regarding their conduct, intimidates or threatens the victim or any witnesses, or otherwise obstructs the hearing.

Consider creating a more informal setting for child victims to give their evidence, including the option of giving pre-recorded evidence or giving evidence in the court room but not in direct view of the suspect.

Consider giving the opportunity for the prosecution to present a victim impact statement in any sentencing hearing.

Consider developing and implementing sentencing guidelines for cases of sexual and family violence to ensure sentencing decisions consistently reflect the seriousness of crimes, including aggravating factors (i.e. abuse of trust or power, child victims, victims with disabilities etc.) and do not give weight to inappropriate mitigation factors including gender stereotypes and customary/cultural factors such as reconciliation.

7.5.2 During Trial Process

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



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8 Quick Reference Guide for Handling Cases Involving Persons with Disabilities

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

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

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

Ofeina Leka's Story, from Tonga

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

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

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

*Transcript from Tonga Disability Convention

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

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

8.1.1 General Obligations of CRPD

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

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



8.1.2 Key Definitions

'Disabilities': Long-term conditions can be physical, mental, intellectual or sensory impairments, which may prevent participation/access to opportunities, along with barriers such as discriminatory attitudes and policies, and inaccessible infrastructure and services.

Disability Discrimination: Any distinction, exclusion or **restriction on the basis of disability**, including denial of 'reasonable accommodation', **which restricts enjoyment of any human rights** (political, economic, social and cultural) on an equal basis as others.

'Reasonable accommodation': Necessary and appropriate **modifications and adjustments** that do not impose a **disproportionate or undue burden** and are needed **in a particular case**, to ensure that person with disabilities can **exercise their human rights and freedoms on an equal basis to** others. Note: The obligation to 'reasonably accommodate' is only triggered when the measure is requested by the individual and it must be considered a reasonable request, from the perspective of an outsider to the case.

8.1.3 CRPD Recognition of Special Groups

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

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

8.2 Key CRPD Rights and Standards

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



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

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

8.3.1 Identification

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

8.3.2 Attitudinal

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

8.3.3 Communication

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

8.3.4 Informational

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

8.3.5 Organisational

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



8.3.6 Physical and Sensory

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

8.4 Creating Disability-Inclusive Courts

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

8.4.1 Ability of persons with disabilities to enter and move within courts and navigate proceedings	
Disability Type	Factors to Consider
Mobility impairments	<ul style="list-style-type: none"> • Is the court room on the ground floor or accessible by a lift? • If the courtroom is on the ground floor – are there still any steps to enter the court room, or a ramp? • Is the court door wide enough to accommodate wheelchairs? • Is there space for wheelchair users to move around the courtroom? • Where will a person in a wheelchair sit in the courtroom when they are giving evidence? • Are court hallways wide and clear of furniture or debris? • Is there a wheelchair accessible toilet available?
Visual impairments	<ul style="list-style-type: none"> • Do all court staff know that a guide dog may enter the courtroom? • Will court staff assist with directions and/or walk with the client to the courtroom? • Do elevators have braille buttons or a sound system to announce the floors? • For reading documents, can the document be emailed to the client as one that can be “read” by someone with a visual impairment, using appropriate software?
Any kind of disability	<ul style="list-style-type: none"> • Is courtroom signage clear? • Are staffs available and trained to help users to navigate their way around the court?
8.4.2 Ability of persons with disabilities to prepare for, and participate in proceedings	
Any kind of disability	<ul style="list-style-type: none"> • Is disability-inclusive information available: By phone? Email? In person at the registry? Via the court website? – Does it include information about the law, the process and the help available? (From court, legal aid, other specialised services?)
Hearing impairments	<ul style="list-style-type: none"> • Is there a sign interpreter available or a ‘hearing loop’ in court? • Is there someone available to answer any questions on what will happen on the day through a text phone, email, skype or some other message service?

Intellectual impairments	<ul style="list-style-type: none"> • Is a trained support person available to explain processes in ways the person is able to understand and to help them participate to the maximum degree possible?
8.4.3 Court processes to keep records and data on assistance provided	
For Court Staff	<ul style="list-style-type: none"> • Is there a registry checklist of questions for each case file, which includes questions regarding individual client disability needs? • Is there a case management system in place to make sure preparatory arrangements, bookings or other follow up is done to ensure cases of persons with disabilities are not delayed or adjourned? • Is a colour-coded filing system used to enable ready identification of cases involving persons with disabilities so special care can be taken with managing these files? • Have the staffs been trained to assist people with disabilities? • Is data kept on the numbers and types of court services needed for people with disabilities and the types of cases and results of cases involving persons with disabilities?



9 Quick Reference Guide for Reconciling Human Rights and Customary Practices

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

Step 4 Decide on the format and agenda of the exchange

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

Step 5 Prepare presentations and other materials for the exchange

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

Step 6 Organise logistics:

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

Step 7 Conduct Forum

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

Step 8 Conduct a team review of each forum

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

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

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

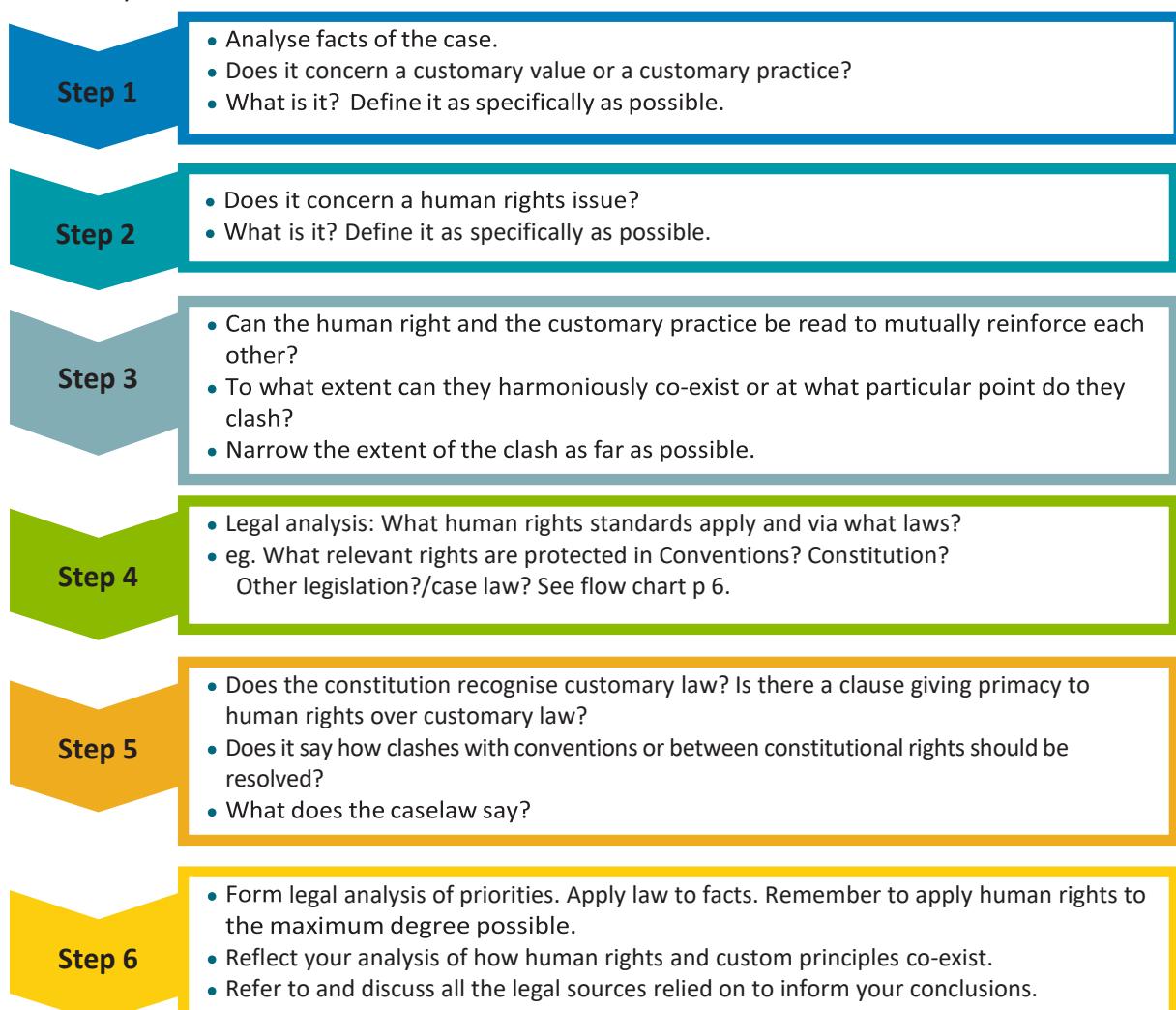
9.2 Resolving Legal Conflicts between Human Rights Standards and Customary Law

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

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

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

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



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

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

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

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

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

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

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



Minimising pre-trial detention

CHECKLIST 1

For Chief Justice
Judge, Magistrate and Court Staff



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

