



# REMOTE COURT PROCEEDINGS TOOLKIT

Revised May 2021





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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
- Efficiency 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
- Training-of-Trainers Toolkit
- Time Goals Toolkit
- **Remote Court Proceedings Toolkit**

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

In response to evolving priorities of partner courts, particularly in light of the COVID-19 pandemic, the PJSI has expanded its areas of activities to include a focus on the delivery of remote court proceedings. The addition of this new toolkit, **Remote Court Proceedings Toolkit**, aims to capture the legal, procedural, practical and technical aspects of remote court proceedings (RCP). It includes guidance on maintaining open justice, procedural fairness and upholding the right to confront doctrine, with recognition that local conditions and capabilities are varied. Accordingly, this toolkit aims to support courts as they develop systems suited to their unique needs and circumstances.

## 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](mailto:pjsi@fedcourt.gov.au)

## Your feedback

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

## Dr. Livingston Armytage

Technical Director, Pacific Judicial Strengthening Initiative, May 2021

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## Additional Materials

- Annex 1:** Additional Advantages of RCP
- Annex 2:** National Practitioners / Litigants Guide to Online Hearings and Microsoft Teams (Federal Court of Australia)
- Annex 3:** Example of Daily Listings (Federal Court of Australia)
- Annex 4:** Sample RCP Script
- Annex 5:** File Transfer Options and Considerations
- Annex 6:** Court Protocols on Remote Hearings (New South Wales Bar Association)
- Annex 7:** Special Measures Information Note (Federal Court of Australia)
- Annex 8:** Video Conference Applications: Comparison
- Annex 9:** Connectivity Snapshot
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- Annex 11:** Cost Estimate Template
- Annex 12:** Examples of Court Responses to COVID-19 Health Restrictions
- Annex 13:** Bench Guide for Judges (NCSC)
- Annex 14:** Draft Video Link Order (Federal Court of Australia)
- Annex 15:** Terms of Use of Footage of Judicial Proceedings (Supreme Court of Victoria)
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- Annex 17:** Outline of the Hague Evidence Convention
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# 1. Preface

COVID-19 was declared a global pandemic by the World Health Organisation on 12 March, 2020, resulting in restrictions being imposed within Pacific Island Countries (PICs), for example: states of emergency, social distancing and border closures.

PJSI partner courts were faced with the challenge of complying with health regulations and requirements to ensure a safe workplace for Judicial Officers, Court Officers and court users whilst at the same time fulfilling their role as essential services. This resulted in Judicial and Court Officers working from home or remotely, and not necessarily physically present in the traditional court room or court precinct. In this way, the pandemic has emerged as a catalyst for dramatic and rapid change away from traditional court proceedings held in a court room, and towards the more widespread use of Remote Court Proceedings (RCP). Until this time the use of RCP was optional. Now, it is a necessity.

The requirement for such a rapid transition in court organisations, which are typically slow to make change, presents many challenges and some obvious advantages. The central challenges have been to maintain the character and respect for the court and to find the right balance in continuing to protect the rights and interest of parties and the public, in addition to accessing and successfully using RCP technology.

Whilst there are challenges, normalising the use of RCP across the Pacific in a post-pandemic environment is expected to bring advantages. Long-lasting positive changes could see the courts save serious amounts of time and money and at the same time, potentially increase access to justice, particularly for citizens of remote islands.

Recognising the increased priority and importance of partner courts to successfully hold and manage remote court proceedings, PJSI is publishing this toolkit. The approach is holistic as opposed to proposing a one-size-fits-all model. We share and provide guidance on what we have gathered from around the region and the world, on a range of technical, procedural, legal and logistical topics associated with RCP. Consequently, this approach provides the flexibility for partner courts to consider and adopt RCP to suit local needs, technical capabilities and preferences across case types, jurisdictions and locations.

We thank everyone who has supported and contributed to the development of the toolkit and the PJSI team who, as always, provided excellent support.

We hope this RCP Toolkit is of enduring benefit to the courts of the Pacific region and beyond.

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## 2. Abbreviations and Terminologies

CTS/CTM	- Case Tracking System/Case Tracking Management
FCA	- Federal Court of Australia
FSM	- Federated States of Micronesia
HCTEACCM	- The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters
HD	- High Definition
ICT	- Information Communications and Technology
ID	- Identity Document
IP	- Internet Protocol
IT	- Information Technology
LAN	- Local Area Network
MFAT	- New Zealand Ministry of Foreign Affairs and Trade
NCSC	- National Centre for State Courts
OGCIO	- Office of the Government Chief Information Office
PICs	- Pacific Island Countries
PJSI	- Pacific Judicial Strengthening Initiative
RCP	- Remote Court Proceedings: refers to the hearings, appearances and taking of evidence before a Judicial Officer involving two or more locations interacting simultaneously by two-way video and/or audio transmissions. Other terms commonly used to describe RCP are 'video and audio conferencing', 'remote appearance', 'distributed proceeding', or 'video presence' or 'virtual court'.
RCPA	- Remote Court Proceeding Application: the technology to conduct a remote court proceeding (for example, Zoom).
VL	- Video Link: refers to the transmission technology which facilitates the Remote Court Proceeding.

## 3. Introduction

### 3.1 About this Toolkit

This Toolkit concerns court proceedings and communications which are conducted over electronic networks that permit interactive data, voice and visual transmissions. For the purpose of this toolkit, these remote court events are called Remote Court Proceedings (RCP) and we limit the means to audio visual and telephone communications.

At the outset of this toolkit we expand upon the varieties of RCP and present the advantages and other matters to consider when contemplating the use of RCP. In chapter five, the requirements in preparing and conducting both video and telephone proceedings are presented, along with the practicalities of managing files and documents in the virtual setting.

In chapter six the technical solutions for hardware, applications, set-up and recording are addressed to assist courts in navigating and choosing an option suitable to local requirements and the range of technical options available. The estimated costs of the technology is discussed in chapter seven, followed by chapter eight which shares lessons learned from experiences in the Supreme Court of the Federates States of Micronesia (FSM). Lastly, in chapter nine, the legal considerations around RCP are presented, including how PICs can address concerns about maintaining a public hearing and upholding the right to confront.

With the information and guidance provided in this toolkit, the intention is that PICs will be empowered with the knowledge and confidence to set-up, conduct, manage and administer RCP in a way that ensures quality justice continues during and after the COVID-19 period.

### 3.2 Purpose of this Toolkit

The purposes of this toolkit are to:

- Assist PJSI partner courts to maintain and extend access to justice, particularly in times of restrictions on being physically present in the court precinct due to the COVID-19 pandemic;
- Assist judicial leaders, Judicial Officers, Court Officers and technical Court Officers transition to and increase use of remote judicial services, through the promotion of information and knowledge exchange;
- Assist in the selection and use of video and audio technologies;
- Explain some of the policies, procedures and legal considerations required to introduce such technologies; and
- Help and assist partner courts to leverage the advantages of RCP and to overcome some of the challenges that can be experienced in the use of these technologies.

## 4. About Remote Court Proceedings

### 4.1 What is RCP?

A RCP is a proceeding before a Judicial Officer(s) which extends beyond the traditional, physical court room. It utilises video and/or audio technology to link two or more locations simultaneously. RCP allows for parties, their representatives and/or witnesses to appear and/or testify before a court from another location. These locations are not bound by traditional territorial, state or national borders, meaning that appearances can even be made from persons abroad.

### 4.2 Varieties of Remote Court Proceedings

There are several contexts in which court rooms are extended beyond the traditional physical court room. Some of the relevant contexts are:

- **The Remote Judge Context:** The first is where a Judicial Officer is physically and geographically remote from the court room: in chambers, overseas, on circuit or even at home.
- **The Remote Party Context:** This scenario includes where the Judicial Officer is in the court room and the parties and /or witnesses are appearing remotely from a public or private video-conferencing facility, a video-conferencing suite in a law firm, in a correctional facility or even at home.
- **Separate Room Context:** This context is where all parties are in one physical location or but are not all in the one court room together. This constellation is often used for the testimony of children, as a means of protecting them from the formalities and intimidation of the court room where the defendant is present.
- **Remote Mobile Court Context:** This context covers the scenario where a court is on circuit and where there is no court complex to use, for example in remote outer islands where there is no electricity or internet. This scenario is discussed specifically in **Chapter 6.6**.
- **Streaming:** This context is where the court proceedings in the court room are video or audio recorded and replayed in a remote location. For example, a case in Port Vila, Vanuatu, where the judge and parties are present in the court room, is streamed to a courtroom in the island of Santo so that the community can attend. Maintaining open justice in this way is discussed later in this toolkit.

#### 4.2.1 Paper Advocacy

One of the measures used by courts to reduce in person attendance at court is for Judicial Officers to make decisions on the basis of written submissions in chambers. This means the Judicial Officer makes a judicial decision on the basis of written submissions of the parties, without verbal evidence, oral submissions and attendance of any of the parties. This scenario is often called an “*on the papers decision*” and its use is particularly effective for consent orders, interlocutory matters, directions hearings and case management matters.<sup>i</sup> “*On the paper decisions*” are not video or audio recorded.

Ex-parte proceedings are differentiated from “*on the papers*” decision making in that ex-parte proceedings are usually conducted in the court room and are brought by one party in the absence of, or notification to the other party.

### 4.3 Advantages of Remote Court Proceedings

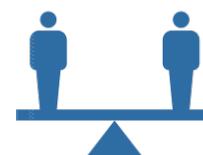
RCP offers many advantages, some of which are:

- The risk of spreading COVID-19 is minimised;
- Court users are more likely to feel less intimidated or marginalised, compared to being present in the physical formalities of a courtroom;
- Greater visibility and public access to justice available world-wide through video access to the court room;
- All cases are given a specific time to connect which eliminates waiting times often experienced at the physical courthouse;
- Reduction of travel cost associated with travelling from remote locations to the physical court;
- Outreach is improved and people can remain within the community to deal with legal matters; and
- Travel time for Judicial Officers, court staff, lawyers, litigants and witnesses is substantially reduced.

For more advantages of RCP, please see **Annex One** in the additional materials to this Toolkit.

### 4.4 Other Considerations

Whilst there are clear advantages in using RCP, there is some commentary in the research around other considerations to be aware of when contemplating the use of RCP. These include concerns about how to retain judicial authority, uphold the right to confront and how to maintain the open court principle. Throughout this Toolkit we identify and address these considerations.



### 4.5 Change and Adjustment

The technology and use of RCP is a significant change from the traditional and tested way of conducting proceedings in the physical court room. These changes uproot existing routines, which may pose a threat to the sense of identity, security, stability and purpose of Officers, and can lead to a resistance to change. For example, some Officers may feel insecure and distrust unfamiliar video technologies or feel frustrated as they conduct proceedings from home where the internet frequently drops out, dogs may be barking, or children interrupting. Leaders and managers should understand that these changes may have a negative impact on individuals. To encourage early adaptation to RCP, leaders and managers should:

- Keep the technology as simple and effective as possible;
- Ensure sufficient funding, which includes the engagement of appropriately qualified IT technicians to monitor the ongoing use and update of the RCP technology;
- Communicate, train and keep personnel informed about RCP, including how it can actually improve workflow and productivity;
- Work RCP into the everyday rhythms as quickly as possible to set it as a new standard of operating;
- Encourage the continuance of the formality of the traditional court environment as much as possible, including the use of robes for judges and counsel;
- Encourage RCP users to share suggestions for improvement; and
- Be particularly patient, understanding and supportive.

It should also be noted that working via video link requires increased levels of concentration leading to increased levels of fatigue. This should be factored into RCP scheduling which should allow for an increased number of breaks and shorter session times.

## 5. The Remote Proceeding

### 5.1 Preparation

#### 5.1.1 Information about RCP

The court should maximise the use of its website to provide clear, simple instructional materials about RCP procedures. The webpage should provide unrepresented parties with guides on how RCP are conducted and possibly even provide a mock RCP video, in addition to instructions for how to prepare for and access a RCP. A 'help' and/or contact person for queries should also be provided.

The example of the Federal Court of Australia's *National Practitioners/Litigants Guide to Online Hearings and Microsoft Teams* is provided in **Annex Two** of the additional materials to this Toolkit, for guidance.

#### 5.1.2 Deciding when to use audio only or video

The court or the parties can initiate a video or telephone proceeding. The overarching consideration in making a decision to use audio or video is whether it is beneficial to the overall *fair and efficient administration of justice*. Other factors which may also need to be considered include:

- The nature and importance of the case. For example, an audio RCP is usually reserved for case management conferences, interlocutory hearings and judicial review applications. These conferences are preceded by written submissions filed and served in advance;
- Whether testimony is to be taken. In such cases, audio RCP is generally considered inadequate as the witness's demeanour cannot be fully observed and assessed;
- The quality of picture and sound depending on the available equipment and transmission speed or bandwidth;
- The extent of documentation which might need to be viewed; and
- The limited access to video technology and greater access to mobile telephone technologies in remote locations.

***The higher the stakes of the hearing or case,  
the better the technology needs to be.<sup>ii</sup>***

#### 5.1.3 Scheduling the RCP

Procedures for the booking and conduct of RCP will require all applicants to submit their request in writing via email to the court, well in advance of the scheduled proceedings.

If the court initiates the RCP, the court will forward out details and instructions in sufficient time to permit the parties to make technology arrangements.

Due to the additional concentration required for a RCP, which can make participants become more easily fatigued, the times allotted for sessions should not be more than two hours (approximately). Short breaks should also be scheduled in the session, for 10 minutes (approximately) each hour.

Once scheduled, a Court Officer will need to amend the proceeding information and court list to reflect that it will be heard by RCP. For example, the case will appear in the Court List as "*Barkie versus Kuku (via RCP)*". An example of an RCP court list is provided in **Annex Three** of the additional materials of this Toolkit.

#### 5.1.4 Logistics

The court can require legal representatives to submit a joint document outlining the relevant logistical issues that have been agreed, for example:

- The technical platform to be utilised;
- The method to be used for handling documents electronically;
- The identity and location of all:
  - Legal practitioners;
  - Parties; and
  - Witnesses.
- Arrangements to protect integrity of witness evidence (for instance, ensuring that they have access to relevant documents, and ensuring no other person is present while they give their evidence remotely); and
- A proposed hearing schedule (opening, witness schedule, closing submissions).

Based on this joint submission, the court should provide participants with clear instructions on how documents, evidence and exhibits are to be submitted and managed in the RCP. This can include that relevant materials to be relied upon have been made available to the court beforehand.

See **Chapter 5.5** for more in relation to files, documents and exhibits.

#### 5.1.5 Translation

If the RCP is to involve an interpreter, consideration may also need to be given to:

- The qualifications, training and experience of the interpreter in the context of the added difficulties and complexity of the RCP;
- The impact of any interpreting on the need and operation of video recording equipment; and
- The best location at which the interpreting can be provided.

#### 5.1.6 Arrangements for prisons

At the prison, a remote Point Coordinator is responsible for ensuring access to the RCP room and that the equipment is operational prior to the scheduled time for the video conference.

The Coordinator should ensure that the inmate is seated and ready in the RCP room approximately 15 minutes prior to the scheduled time for the RCP.

Even if the video and audio unit is not activated at the remote point, inmates should assume that they will be visible to the court at all times while in the RCP Room.

#### 5.1.7 Other tips

- **Time:** The court and the parties should build anticipated technical difficulty time into the allotted time for each hearing to avoid running over into other hearings.
- **Dress:** Consider visibility when preparing what you will wear, for example: dress in a solid colour (e.g., black robe for judges) and, if a tie is worn, use a solid colour, not one with a pattern.
- **Background:** Choose a solid coloured wall, such as a green, neutral, or white wall, or use one of the videoconferencing platforms generated backgrounds. Keep in mind though, the virtual background will require more bandwidth to support. It is not recommended for remote witness testimony as other persons present cannot be seen.

- **Lighting:** Light from behind might make a participant appear dark and hard to see, while light from the centre of the room might cast a shadow too. Light that points down from in front and above the speaker is recommended.
- **Screens:** Be careful where screens are placed on the bench as they may block the image of the judge from the cameras used for recording the proceedings.
- **Noise:** Find a space where there is little or no background noise, such as traffic, roosters crowing or dogs barking.
- **Distractions or interruptions:** Find a space or room where you cannot be interrupted by children, pets, telephone calls etc.
- **Test:** Set-up equipment well in advance of the hearing and ensure you test the software in advance, including: the videoconferencing software, the Internet connection and equipment.

**Important Tip:** Do a practice run well in advance of the hearing.

## 5.2 Conduct of the RCP

It is necessary to adapt traditional protocols in a way that maintains the formality and legal legitimacy of the in-person proceeding in a court room. Here are some suggestions:

### 5.2.1 Technical Issues

- At the commencement of a videoconference, the Judicial Officer/staff attorney/video coordinator must check and establish the link and ensure that it is functioning satisfactorily;
- When adjusting cameras, try to fill the screen as much as possible with people rather than the furniture;
- Once connected to the RCP, parties must mute the audio settings on their device to prevent any unintended interruptions to court proceedings;
- Position the camera to be at eye-level or slightly above eye-level;
- Judicial Officers and the participants should speak to the computer camera, not the screen;
- When participants use videoconferencing software via a phone, their phone number might be displayed. This should be changed to their name; and
- If there is audio echo or feedback during the RCP meeting, troubleshoot by checking that there are not more than one device (phone, computer or tablet) with active “audio”.

### 5.2.2 Protocols

- Reflect formality by including in the video frame legal symbols such as a coat of arms, flag or local symbols of justice which can be easily setup in such applications as ZOOM and Microsoft’s TEAMS;
- Retain robes for Judicial Officers and counsel;
- Keep the normal court etiquette and protocols where practicable, for example: opening the court by the clerk or associate, and use of “your Honour”;
- Everyone should understand that there a fewer social cues to regulate behaviour. This means more articulation of procedure is required;
- Parties must refrain from speaking over each other, as much as practical;

- Parties when not speaking should be on MUTE, and this typically can also be controlled centrally;
- Judicial Officers should command clearly who and when participants are to talk;
- Parties can “raise a hand”, an “objection” sign or other agreed prompt in lieu of standing and interjecting;
- Before speaking, announce who is speaking;
- Say “over” or indicate clearly when you have finished speaking; and
- Self-represented parties should be expected to conduct themselves to same standard as required in a physical court room.

### 5.2.3 *Outset of proceedings*

The Judicial Officer, at the outset of the proceedings should assess the RCP quality by asking key questions and stating clear instructions, such as:

- “Are you able to hear me and can you understand what I am saying?”
- “Are you able to see me and is the picture quality sufficient?”
- “If, at any time, you are not able to see or hear what is happening in court today, you must immediately inform me of the issue.”
- “Please remain in the same place and turn on your mobile phone if the internet drops out. Someone will contact you by phone if this happens. Alternatively, you can phone this number: XXXXXXXX.”
- “Please wait to speak until requested.”
- “When you speak, please do so slowly and please do not interrupt others when they are speaking.”

#### **Important Tips:**

- **Speak in a normal voice without shouting. The microphones used are sensitive and are designed for normal speech;**
- **Avoid the tapping of pens on tables and rustling of paper near microphones, as this will disrupt the sound levels and affect court recording equipment;**
- **Use natural gestures when you speak; and**
- **Mute the microphones at your end when you are not speaking for an extended period.**

The Judicial Officer, at the outset of the proceedings, should also address on the record:

- That the parties waive any rights they may have to be present in the courtroom for the proceeding;
- That the parties consent to the proceeding being conducted via videoconference technology;
- That all court rules of evidence and procedure apply during remote hearings or conferences;
- If there are any unmet disability or accessibility needs;
- If there is a need for an interpreter or not;
- If the participants have caretaker responsibilities (e.g. for a baby) or privacy issues (especially for domestic violence matters) at the location where they are participating in the remote hearing;
- What they need to do if they wish to speak;
- Generally, how the RCP hearing will proceed;

- That the witness is alone by asking the witness to scan the camera around the room and under tables; and
- Require legal counsel to provide the court with a general assurance such as: “I confirm that X will be appearing from Y and will not have access to the hearing before giving evidence.”

## 5.2.4 During the RCP

### 5.2.4.1 Administering the Oath and Warning Witnesses

Judicial Officers should:

- Swear in witnesses by oath/affirmations in the usual fashion;
- Advise the witness of the operational logistics of the RCP;
- Warn the witness that, although this is a RCP, it is an offence to commit perjury or contempt of court;
- Ask the witness to turn off all electronic devices except for the device enabling participation;
- Warn the witness to refrain from exchanging any electronic messages with anyone while testifying or from recording the event;
- Ask witnesses not use a virtual background as the Judicial Officer needs to be assured that there is no one prompting or interfering in the proceeding;
- Ask the witness to confirm that they are alone in the room from which they are giving evidence; and
- Ask the witness to confirm that they have documents in front of them.

## 5.2.5 Managing the Proceedings

In managing the proceedings, the Judicial Officer and/or counsel should:

- Keep within view of the video camera and refrain from turning away from the camera too often as this can be unsettling for those making submissions or for a vulnerable witness undergoing sensitive cross examination;
- Judges may wish to have a separate means of communicating directly with their clerk/associate, outside of the video application, and this can easily be achieved through such tools as SMS, Messenger or another video application in parallel;
- Use “waiting room” functions to allow individuals into the “virtual courtroom”;
- Place disruptive participants into the “waiting room” if necessary;
- Use “break-out” rooms or “chat” functions for sidebar conversations that others should not hear (such as bench discussions, attorney-client discussions or where confidentiality is required);<sup>1</sup>
- Ensure the means for confidential counsel/client discussions is managed by counsel, not the court;
- Prevent any person, other than those already introduced to the court, from entering the videoconference room whilst a videoconference hearing is in progress; and
- Confirm email addresses, mobile telephone numbers or the preferred means of communication with parties.

<sup>1</sup> These discussions are considered private and not be audio- or video-recorded.

## 5.2.6 What to say

In **Annex Four** of the Additional Materials is a sample script as to what might be said to help ensure a successful and procedurally correct RCP. The script is divided into three sections:



1. Logistical issues – what is said to help ensure the technology supports the proceeding and the participants know what they need to do
2. Preliminaries – these are the legal and procedural elements which might need to be addressed and placed on the court record
3. Witnesses – what might be said in the management of proceedings where a witness is testifying remotely.

### 5.2.6.1 Maintaining the security and integrity of witness testimony

In the course of managing the proceedings, the court should to the best of its ability, be satisfied that witness testimony is not influenced or prompted by persons physically or virtually present during the process of giving evidence. Some strategies to maintain the integrity of witness testimony being used are:

- directions that a witness must be alone in the room in which the evidence is given (save for a technical support person);
- directions that the evidence not be recorded;
- have the witness testify on oath that there are no other persons present;
- have the witness testify that they are not using any unauthorised mobile devices;
- simply ask the witness scan to scan the room to check that no unauthorised persons are in the room and/or that there are no additional mobile devices present which could be used to record or transmit messages;
- closely monitor where the eyes and head of the witness are tracking. If for example, a witness is continually turning their eyes downward, they may be being coached by via messaging on a device;
- observe the light levels around the witness. This is because it might indicate that messaging is happening, as many devices light up when a message comes are received; and
- have any support or technical persons present state the purpose for being present on the court record.

### 5.2.6.2 Microphones

Microphones used in RPC can be very sensitive. Persons appearing before a RPC should assume from the time the video link is activated until the time the link is disconnected that microphones are "live" and that all remarks are audible to the court. The exception here is where, for any reason, the court or the remote site "mute" their microphones.

Where for any reason it is necessary to mute the microphone at the remote site (for example, if counsel need to speak confidentially with client), the court must be advised before the microphones are switched to mute.

## 5.3 Audio Proceedings

The following paragraphs present practical and technological considerations around the conduct of audio RCP.



### 5.3.1 Practical Matters

The practical process requires that both the court and the party use a unique, direct telephone number. There must be no call centre or receptionist receiving the call. To ensure security, the court should call the party, not the party call the court.

Any person appearing before a court by audio conference must adhere to normal court protocols, for example, as if they were personally in the courtroom, so far as possible. They must be available at the appointed time and must remain available until the court contacts them.

A failure to answer when the court calls the nominated number may be considered a failure to appear before the court, in which case the matter may proceed ex-parte.

When using a mobile phone, the caller must ensure that they are in an area with good reception with no background noise that may affect the audio quality, such as wind, traffic, machinery.

### 5.3.2 Technology Requirements

Care and consideration must be given to the court installing and testing a phone (system) with sufficient speaker capacity to ensure all those in the court can hear the remote party. If the court already has a speaker system, the phone can be placed next to existing microphones which can amplify the voice. Similarly, microphones need to be dispersed throughout the courtroom to ensure the remote party can hear all those speaking within the proceeding.

Equipment necessary for conducting an audio call within the courtroom is significantly less expensive than when using videoconference technologies, as there is no requirement for cameras and screens. Costs for audio conferencing equipment ranges from AUD \$200 to AUD \$2,000, depending on the facilities required.

## 5.4 RCP for Vulnerable Witnesses

Safeguarding accessibility and fairness for vulnerable groups is essential for creating an inclusive justice system which operates remotely. Vulnerable groups include amongst others, persons who: have a disability, experience mentally illness, are elderly, children and minority or marginalised groups. A vulnerable witness may also be a victim of crime.

Where a vulnerable witness is required to testify, it may be appropriate for the witness to give evidence from a location remote from the witness box in the court room. This location is usually in a room within the court precinct that is set up with RCP technology.

In such cases the procedure is:

- Arrange for an officer of the court to go to the vulnerable witness room and make sure the computer is ready to connect (via the court's Wi-Fi or Internet);
- Login to the court network, and access the video conferencing application;
- Demonstrate to the witness how the process will work;
- Mute the vulnerable witness room and make sure that they cannot hear the courtroom and vice versa;
- Show a document on the document viewer to see if this can be clearly seen in the vulnerable witness room;
- When ready, instruct the witness to join the proceeding.

It is emerging that RCP increases stress for vulnerable persons because of:

- A lack of familiarity with technology;
- Decreased eye contact and non-verbal cues;

- Technical glitches; and
- Legal counsel being in a separate location, leaving them feel unsupported.

This stress may be reduced through:

- Judicial Officers providing additional support such as explaining the process and introducing more 'sign posting';
- Introducing more breaks;
- Allowing a support person to be present. The decision whether court staff or an appropriately qualified independent support person are to remain physically present with the witness whilst giving evidence is decided by the judge and dependent on such factors as security and the vulnerability of the witness<sup>2</sup>;
- Using the closed captioning, automatic transcripts and screen reader support (all available on Zoom) for those with hearing impairments or language comprehension difficulties;
- Using an electronic virtual background to alleviate potential embarrassment or discomfort of having participants seeing their home;
- Being aware that for some people RCP causes nausea and feelings of being ill; and
- For the court to provide other support and information as appropriate.

## 5.5 Managing the Files, Documents and Exhibits

There are a wide range of scenarios to be considered for document handling in RCP depending on where the parties and Judicial Officers are located. The setup for each scenario requires careful consideration, planning and testing, before the start of any RCP.

If we look at a scenario where a Court of Appeal judge(s) may be located remotely in New Zealand, but all parties are based in the courtroom in Tonga, we need to consider the factors set out in the following sections.

### 5.5.1 How do we transfer files?

#### 5.5.1.1 Judicial Officers and the electronic file

Typically, the Judicial Officer would have had the physical material as filed at court prior to the hearing and would have been able to peruse the file in physical format. In this scenario the material file needs to be both scanned and sent electronically, or the physical file(s) transported to New Zealand.

Sending the file electronically though, is a more expedient and cost-effective solution for a court. However, the receiving Judicial Officer needs to be comfortable to work with an electronic file and have the tools available to easily navigate and prepare from an electronic file.

#### 5.5.1.2 Electronic transfer of large files

##### Via the court server

The preferred mechanism is for the judge in New Zealand to access the court's main repository/server (for example, the Case Management System) by logging in securely. The Judicial Officer can then access one, any or all documents on the file, electronically. This method is predicated on the fact that a country/court has a well-established Case Management System that can manage documents electronically (similar to those in Palau, Vanuatu, Papua New Guinea and Solomon Islands). Even a Case Tracking System that stores documents, like in the Federated States of

<sup>2</sup> For example, the *Evidence Act* s106R(4) specifically provides for the court to make orders regarding an appropriately qualified independent support person to remain in the remote witness room with the vulnerable witness.

Micronesia and the Republic of the Marshall Islands, can provide access to the documents in electronic form. It is not appropriate for parties to be granted access to files via this method.

#### Via 'Cloud' services

If the above option is not available and documents are large, either singularly (greater than 10 megabytes) or collectively (many documents totalling 50 megabytes or more), then serious consideration should be given to using Cloud services such as Dropbox, Google Drive or similar, to load the documents into and to provide remote access for the judge(s).

Whilst these mechanisms allow secure access, it must be recognised that these documents are in the 'cloud'. For many jurisdictions this presents more challenges, such as: the technical operational issues, questions about security and questions about the confidentiality of the file.

#### Via e-mail

Transferring files via email is possible however, the size will typically exceed file size limits, so the above options should be considered.

For a summary of options and considerations around file and document access, see **Annex Five** in the Additional Materials.

### **5.5.2 Lawyers**

RCP places more onus on lawyers to agree upon documents to be distributed electronically in advance of the proceeding. For an example of how lawyers should prepare for an RCP see the *New South Wales Bar Association Court Protocols on Remote Hearings* in **Annex Six** of the additional materials to this Toolkit.

Lawyers also need even access to files and documents. This can be done by dispatching documents via email or sharing via a Cloud type service (as explored above). Lawyers typically would not have access to any files located on the court's repository server.

### **5.5.3 Managing files and documents during the RCP**

With the growing use of RCP where parties are spread across multiple locations, the management of documents 'inside the courtroom' takes on a whole new dimension, priority and importance. Some of the considerations are:

#### *5.5.3.1 Ensuring everyone works off the same copy*

It is important that the parties and the Judicial Officer have certainty that they are operating 'off the same copy'. Operating 'off the same copy' is when the document is shared across the courtroom. Here the Judges' Associate or Court Officer plays a key role in 'turning to the page in question' and ensuring everyone is able to see the document on a large screen that is the 'same page'.

#### *5.5.3.2 Updating the court file*

When it comes to a matter where members of a Judicial Panel of an Appellate Court are located in separate locations, we now have to ensure that all Judicial Officers are working from the same version of the electronic file, and that it matches with counsel - whether it be in physical or electronic form. Where a document is tendered in court, the document should be scanned in court and quickly added to an electronic file.

#### *5.5.3.3 How to tender a document from a remote location*

The simplest for handing up documents is for the remote party/counsel to simply scan and email the document to the courtroom. Once received it can be shared via the videoconferencing application and/or made available through the court's CMS/CTS.

#### 5.5.3.4 How to distribute a tendered document to a party in a remote location

If the document is tendered locally in physical form, the court clerk needs to scan and make it available via email and through screen-sharing. A document display projector may also be used to project the image locally, which can also be seen remotely.

#### 5.5.3.5 What happens in RCP using a smart-phone

If the matter is simply a directions or conference, then simple audio facilities are generally enough to progress the matter. If, however, the proceeding requires documents to be viewed or handed up, the court or counsel may need to take action to provide access to a computer or tablet device, or the court may make a suitable order for service of the document.

### 5.5.4 Documents and RCP equipment

The judge, witnesses and all parties must be able to 'see' the material being presented in court. This can be done via sharing the screen features in the videoconferencing applications. If the witness and exhibit is in the courtroom, then the usual procedures apply, in addition to the exhibit being clearly shown to the video camera.

Experience shows that larger monitors are better for viewing documents, such as a 23 inch monitor. These monitors need careful placement, especially on the Bench where they should not block the Judicial Officer from being seen by the video camera.

## 5.6 E-Filing & Signatures

As courts move towards RCP many are also considering 'e-filing'.<sup>iii</sup> Partner courts should note that there are very few courts around the world today operating totally electronically and paperless. What we do see in many instances is the physical and electronic file being used in parallel, for reasons such as personal preference or necessity.

What we are also witnessing in the response to COVID-19, is an increased use of email to file documents. Given the difficulties in obtaining original signatures and sworn affidavits, some courts are accepting electronic signatures and unsworn affidavits, on the understanding that these documents can be sworn or affirmed at a later time. For an example of these special measures, see the Federal Court of Australia's *Information Note* at **Annex Seven** in the additional materials to this Toolkit.

## 6. Technical Solutions

### 6.1 Video Conference Applications

There are many products now on the market, from the well-known applications like Zoom, Microsoft Teams and GoTo Meeting, to less well-known applications such as WhereBy. When considering what Remote Court Proceeding Applications (RCPA) to use, the court should consider such aspects as:

- Starting cost
- Ease of set-up and use
- Participant numbers
- Meeting numbers
- Meeting duration
- Screen share
- File sharing
- Messaging
- Audio calls
- Video calls
- Break-out rooms
- Application and browser
- Recording
- Registration required by participants
- Security
- Bandwidth

**Annex Eight** in the additional materials to this Toolkit, provides a comparative assessment of five major video conferencing applications.<sup>iv</sup> It is crucial that each country assesses the market and makes the choice specific to their needs, facilities, geographic and budgetary contexts.

It is recommended that the court decide on only one application and equipment for its RCP. This ensures continued familiarity for Judicial and Court Officers and those accessing remotely, especially the legal community. Generally, it is not practical for individual Judicial Officers to decide and use their own preferences.

### 6.2 Technical Support

Adequate technical support must be in place to help prepare and support RCP, because things do go wrong given the many factors at play, such as equipment within the court room, internet connectivity, remote user setup and the need for general ‘how to use and operate’ support.

Fortunately, most courts within the Pacific have dedicated IT officers within their compliment of staff, but some courts rely on private IT companies and others on government wide IT offices. Regardless of where IT personnel are positioned, their presence in the setup, testing, and operation of any session is vital. While not necessarily having to be ‘in-court’ for the entire proceeding (for example, a full day trial), their availability to respond within 10 minutes should be assured.

In addition, the technologies involved, from the applications like Zoom or Microsoft Teams, to the physical equipment (for example, Logitech camera bundles or high-end video cameras/spitters), now requires the IT officers to be well versed in quite a range of different aspects. IT personnel need to have good training, and communication skills and patience, in addition to technical skills, because it is their responsibility to ensure that Judicial and Court Officers are comfortable and confident in the use of RCP technologies.

### 6.3 Bandwidth

One of the most important aspects of any videoconference proceeding will be the quality of the bandwidth, or Internet connectivity between the various locations. For many countries in the Pacific, the country is now served by undersea fibre optic cables connecting to main communication lines between United States of America (USA), Asia and Australia. For those countries not yet connected

to a submarine cable, they are using satellite technology and all (bar one), have plans to be connected to a submarine cable in 2020-2021.

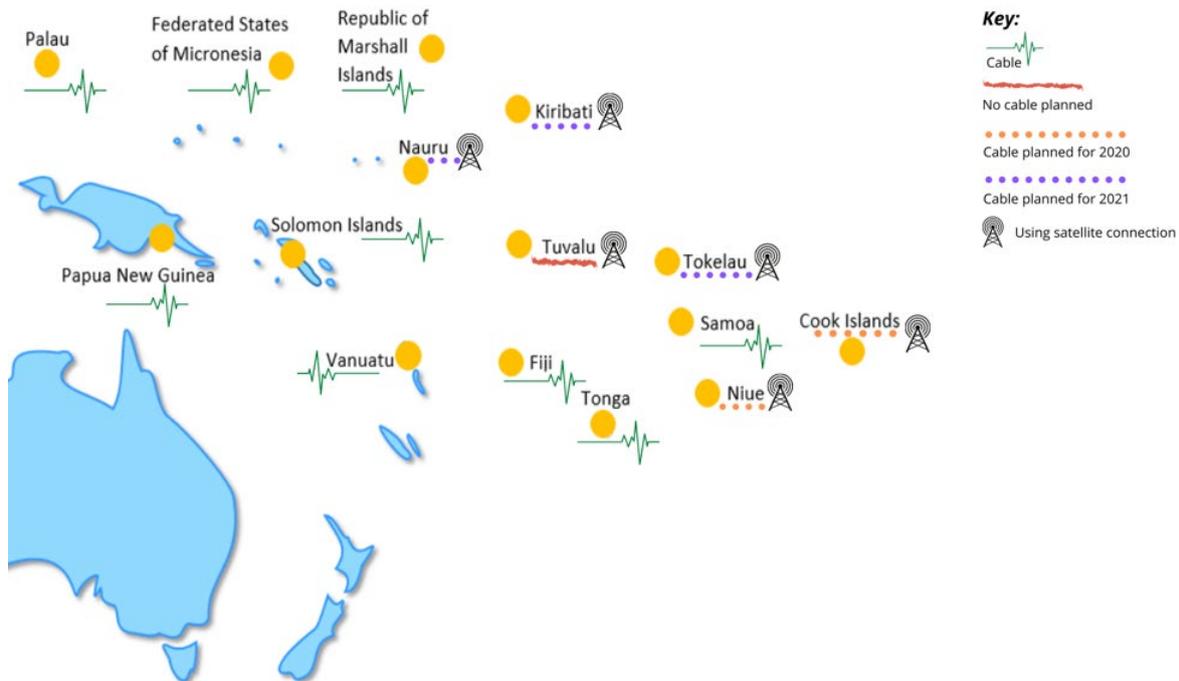


Figure 1: Connectivity Map, Pacific Islands Region

The advantages of submarine cables versus satellite are generally price, performance and reliability. However, just because the country may be connected to a submarine cable, that does not mean the court or those attending, will be guaranteed ‘A1’ connections. For some countries, the courts are served by government technology providers (for example, the Vanuatu Courts are served and supported by the Office of the Government Chief Information Office (OGCIO), who provides the internet connectivity through their own network). In other countries, specific packages need to be obtained from telco providers such as Vodafone or Digicel.

Generally, government provided connectivity will be of higher performance and less cost than accessing the Internet through a private provider, but it does depend on the ‘package’ of service paid for. This also means consideration to both upload and download speeds and any data restrictions (volumes) per month. On the other hand, if accessing through a government network, the country’s IT policies may restrict access to certain video applications (for example, Skype or Zoom), and stipulate that any videoconferencing must be through the authorised product of the country (for instance, True Conference in Vanuatu). Regardless of the means of connectivity, a court should monitor the speed and connection times from their end, as well as requesting those participating in the RCP to do similar.

**Important Tip:** Regardless of the means of connectivity, a court should monitor the speed and connection times from their end, as well as requesting those participating in the RCP, to do similar.

### 6.3.1 Testing bandwidth

One of the easiest tests to undertake is via <http://www.speedtest.net>. Using 'Speedtest' there are three important performance aspects to check and monitor, namely:

1. **The 'ping' time:** which reflects the time between two sites to 'connect' and is measured in milliseconds (mS). The lower the number, the better, and ideally, less than 20 mS is needed for a good quality video session.
2. **The 'upload' speed:** which reflects the data transfer speed from the host, to those who will be receiving/seeing the conference. It is measured in megabits per second (MBPS) and the greater the number, the better for the conference. Ideally, anything over 2 mpbs will ensure a reasonable video conference session.
3. **The 'download' speed:** which reflects the data transfer speed from the internet to the host and is typically greater than the 'upload' speed. Again, this is measured in MBPS, and the greater the number, the better-quality session that will be held. Ideally anything over 5 mpbs will ensure a reasonable videoconference session.

Without all three components, the quality of the session will be at risk, and potentially make the session difficult for all those attending (with participants experiencing jolting, delay, and frozen screens).

In addition, the challenge of bandwidth to the Internet is amplified when considering locations away from the capital or main towns in each country. There may be a fibre optic cabling between major centres (for instance, between Port Vila and Santo in Vanuatu), but often communication is either over the traditional telephone tower arrangements (in 2.5G or 3G) or again, via satellite. This has a direct impact on the three performance aspects mentioned above.

### 6.3.2 Connectivity snapshot

It is vital that the Internet connectivity in each location is well understood and, where videoconference is likely to be used, that all efforts are made to increase to the minimum standards recommended, at least on a temporary basis. Therefore, it is recommended that each Court/IT Officer undertake a snapshot of the connectivity arrangements within their respective country to ensure the judiciary are aware of the potential performance degradation. For an example of a connectivity snapshot, see **Annex Nine** in the additional materials to this Toolkit, which presents the work of the IT Manager in the Federated States of Micronesia (FSM).

Through this type of analysis, IT Managers can see which locations are well or not well serviced. Where possible, improving connectivity through private telco providers should be undertaken if unsatisfactory performance is identified, however this may have significant cost implications.

## 6.4 Components

The conduct of a proceeding via videoconference requires the following components/technology:

Component	In the courtroom	For those attending remotely
<b>Software</b>	Product such as Zoom, Microsoft Teams, controlled by the Clerk	Will be provided a URL link to the virtual courtroom in the videoconferencing application  There is no cost, and no requirement to sign-in or have an account

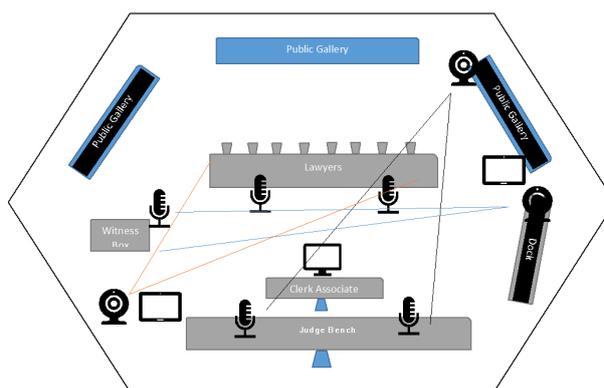
Component	In the courtroom	For those attending remotely
<b>Security</b>	Controlled by the Clerk	Those appearing before the Court will be required to login and upon visual identification be allowed to enter the 'VC Room'
<b>Recording</b>	Clerk will control digital recording as per normal, but may also wish to record for the video application for later use/streaming	Will be captured within the courtroom
<b>Camera/microphone</b>	Two cameras will be enabled in the courtroom, along with speakerphone	Via laptop, or desktop computer with audio/video capability
<b>Tablet/Smartphone</b>	Not applicable	Most video application can be activated via an app on either Android or Apple devices

**Table 1: RCP Technology Components**

## 6.5 Technical Levels

Courts generally have a three-level RCP setup:

- **Level 1:** Basic arrangement including camera, projector/screen, laptop and desktop;
- **Level 2:** As per Level 1, but projector replaced with Plasma screen (and on a mobile stand), and higher quality camera/microphone equipment; or
- **Level 3:** As per Level 2, but Plasma screen(s) now mounted within room and professional grade cameras installed.



**Diagram 1: RCP Setup**

Where there are minimal time or funds available, Level 1 can be easily achieved with relatively low-cost equipment.

It is expected that the main courtrooms each have a Level 2 setup, as with any Conference Room or vulnerable witness room.

It is expected that Level 3 be established for the main Supreme Court courtrooms and main Magistrate Court. This might include two plasma screens (minimum size 48 inches), strategically located to allow for an integrated view of the gallery and bar table, and for the witness and the Judicial Officer(s) to be able to see the remote person(s). In addition, Level 3 would have professional grade video cameras (at least three) connected to the videoconferencing application, which is a significantly better image for all to see on a Plasma screen.

As many courtrooms already have digital recording, the current microphones and audio facilities should not need any modification.

### 6.5.1 Cameras

In Level 3, there are three high end cameras (for instance, PTZOptics PT12X-SDI-GY-G2) strategically located within the courtroom, allowing the person appearing before the court to see the Judicial

Officer and Clerk, and secondly, the bar table and those persons in the gallery of the court. Courts will at all times have the ability to control the camera view within the courtroom.

Those attending remotely will need to ensure that the camera is focused clearly on themselves, and able to show the room in entirety if needed.

For more guidance on how to set up a RCP room see **Annex Ten** of the additional materials to this Toolkit.

## 6.6 No Available Power or Internet

In many parts of the Pacific, courts need to conduct hearings where there is no power, no infrastructure and no apparent Internet connectivity.

With some planning and infrastructure investment however, there are ways to conduct hearings in remote venues with the support of mobile RCP technologies which include voice, data and video transmission capabilities.

For this to happen, several key pieces of equipment are needed:

1. Portable power generator (AUD \$200-\$400);
2. Portable solar panels (AUD \$200-\$400);
3. Laptop(s) (AUD \$1,000 per unit);
4. Satellite phone (AUD \$500, plus data costs);
5. Additional web cameras (AUD \$400);
6. Portable projector and screen (AUD \$500); and
7. Microphones (AUD \$200).

The total cost of such a package would be in the vicinity of AUD \$5,000.

While this may seem burdensome to setup and transport, the benefits are significant in that it provides connectivity to locations that were once thought to be inaccessible to the modern facilities experienced elsewhere.

Mobile RCP technology is now used in such places such as the remote parts of the Australian outback, where courts like the Federal Court of Australia and Northern Territory Courts travel thousands of kilometres to remote settlements to conduct hearings. Often the court sits successfully out in the open, or under a make-shift shelter, and conducts the proceedings connected to the 'outside' world using the equipment described above.

In the context of the Pacific, mobile RCP technology could be used in a variety of scenarios, such as where the court clerk travels to outer islands whilst the Judicial Officer and counsel remain in a national or regional court room.

## 6.7 Recording Proceedings

Most, if not all, videoconferencing applications can record the proceedings in both audio and video. This is of particular value if wishing to subsequently replay or post on the court website or, to provide a streaming/replay service via facilities such as YouTube. However, consideration should also be given to video recording in parallel with existing digital court recording that most courts in the Pacific do have (for example, the For The Record (FTR) product).

While many videoconferencing applications have the capacity to record the session (both audio and video), careful consideration should be undertaken to not end up with the recording of proceedings in multiple locations. If a court is using Polycom as well as Zoom, the videoconferencing technology can feed directly into the court's recording system, such that when the court calls into the Zoom

virtual courtroom, the court’s recording system will record just like any other use of Polycom. Where a direct feed into the recording system is not possible due to equipment limitations, a microphone should be placed near the speaker.

## 6.8 Tracking the Use of RCP

The use of RCP to assist with the delivery of justice should be tracked and monitored regularly. This ensures that recordings can be easily located and helps provide data that helps managers monitor usage and trends. It is the responsibility of the Video Coordinator to register all proceedings using RCP, noting the following information:

- Proceeding type (for example, Trial/taking evidence, etc);
- Case type (for example, Criminal or Civil);
- Division (for example, Trial Division);
- Date, time and location;
- Length of proceeding;
- Judge; and
- Reason for videoconferencing (for example, vulnerable witnesses).

Reports should be tabled monthly to the Chief Justice summarising the above information collected and used to guide investment decisions in technology.

## 7. Costs

The estimated costs for the setup of the various items necessary to conduct RCP can be as little or as much as a court wishes. Costs of high-quality cameras, Plasma screens, etc continue to drop worldwide, and while a Level 3 courtroom may be expensive, over time with improving technology, costs will continue to drop.

Equally important, is that with a minimum of technology, RCP can be done simply with a projector, laptop, desktop computer and additional webcam (if needed for the desktop computer).

The template in **Annex Eleven** in the additional materials to this Toolkit may be of use for courts when considering costs, and how many courtrooms are needed and to what level. In addition to the indicative hardware costs,<sup>3</sup> based on Australian Dollars (AUD), there would be transportation, delivery costs and possibly import duties. Therefore, an allowance of 10% should be added to the overall estimate.

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<sup>3</sup> As at August 2020.

## 8. Case Study: Lessons Learned in the Federated States of Micronesia

In 2018, the FSM installed and commenced use of RCP. Some important lessons learned from running RCP and experiencing what can go wrong, may be of assistance to PICs using this toolkit.

These lessons include:

- When running RCP, advise those within the court facility to limit their Internet access as much possible (for example, refrain from using Skype, or streaming services during the RCP);
- When establishing Wi-Fi access within a courtroom, endeavour to run a fixed cable from the network server into the courtroom, and then run a Wi-Fi router from that point, rather than relying on accessing a remote Wi-Fi device and/or a Wi-Fi repeater;
- Discuss with the Judicial Officer prior to the RCP session whether exhibits are likely to be called up during the proceeding, and ensure easy access is available for them to be presented on the screen;
- Before commencing the videoconferencing session, provide the opportunity for the Judicial Officer to see the setup and be assured that performance of the Internet and placement of screens is as the Judicial Officer thinks best;
- When the 'remote witness' is being streamed into the courtroom, be sure to sound test the volume not only for those in the courtroom, but also so that the court recording devices can adequately pick up the voice(s); and
- Where there is significant natural light coming into the courtroom, be sure to test how the court looks from the 'eyes' of the person/party not present (for example, the expert witness in Hawaii).

## 9. Legal Considerations

### 9.1 Which Proceedings can be Conducted Remotely?

Realising that COVID-19 imposes restrictions on the conduct of in-person court proceedings, courts around the world have generally gravitated toward a default position that all matters, except jury trials can or should, be conducted remotely provided that the fairness of the proceeding is not unduly compromised.

The emerging standards of proof for the decision to use RCP, appears to be if the RCP is on balance, beneficial to the overall fair and efficient administration of justice or, if good cause is demonstrated. To assist in making this decision a ‘Justice Test’ can be applied.

The Justice Test<sup>v</sup> is made up of seven elements, requiring that courts should secure and deliver:

1. Substantive justice (fair decisions);
2. Procedural justice (fair process);
3. Open justice (transparency);
4. Distributive justice (accessibility);
5. Proportionate justice (appropriate balance);
6. Enforceable justice (backing by the state); and
7. Sustainable justice (sufficient resources).

Due to COVID-19, an additional new standard has emerged. This is that the courts’ primary consideration must be the health risk posed to practitioners, witnesses, Judicial and Court Officers of contracting the Coronavirus and of spreading it. This view suggests that the orders of the court must not result in a situation where the risks of the virus are increased.<sup>vi</sup>

Other defining considerations are if the matter relates to essential areas of life, then they should proceed as a priority using RCP. These cases include domestic and family violence, emergency child custody matters and proceedings related to the health and care of persons with the virus.<sup>vii</sup> Routine matters that allow people to continue their lives, such as uncontested divorce and probate proceedings, are another category of cases considered suitable for RCP.<sup>viii</sup>

At the same time, partner courts should examine local statutory schemes of evidence for provisions which permit or prohibit RCP being conducted.

For some more guidance on how to identify, triage and manage cases using RCP during the pandemic, see **Annex Twelve** in the additional materials to this Toolkit: *How courts in Australia have responded to COVID-19 health restrictions*.

### 9.2 Procedural Fairness

Procedural fairness lies at the heart of the right to a fair trial and constitutes the second of the seven elements of the “Justice Test” mentioned above. Central to the procedural fairness doctrine is that parties are given the opportunity to present their arguments in court and to test through cross-examination the truthfulness, demeanour and credibility of a witness.

Crucial to considerations is the quality of the virtual hearing and if that quality compromises procedural fairness. Emerging case law from Australia acknowledges that whilst RCP may not be ideal due to the reduction in formality and diminished chemistry between counsel and witnesses, ultimately this would not result in an unfair trial.<sup>ix</sup> Indeed, some Judicial Officers have noted that RCP technology enhances the quality of the trial as it allows the Judicial Officer to better focus on the facial expressions of the witness.<sup>x</sup>

Judicial Officers might find the *Core Elements of Procedural Fairness* checklist developed by the National Centre for State Courts in the USA, as presented in full in **Annex Eleven** of the additional materials to this Toolkit, useful in their deliberations. The PJSI **Enabling Rights Toolkit** also provides more guidance around the principles of natural justice, procedural fairness and the duty to ensure a fair hearing to both parties.

### 9.3 Open Justice and Right to a Public Hearing

The concept of an open court is anchored in the principle that '*justice should not only be done but should manifestly and undoubtedly be seen to be done*'.<sup>xi</sup> Open justice often has constitutional underpinnings which dictate practical rules, including that judicial proceedings should be conducted in public.

In the context of COVID-19 and the restrictions placed on public and press attendance at hearings, there are concerns over whether or not RCP are sufficiently transparent and possibly unfair. The concern is that the vital protections associated with open justice may be unnecessarily denied, and that a practice to exclude the press and the public from virtual proceedings may be difficult to wind back after COVID-19.

In practice however, these concerns are dissipating as courts innovate and adapt and realise that broadcasting or streaming proceedings can ultimately, strengthen the principles of open justice by providing access to court proceedings publicly online. Indeed, some courts such as the High Court of Australia have been doing this prior to the pandemic.

In the following paragraphs we present some of the techniques being used by courts in the region to provide open justice whilst at the same time, maintaining the security and privacy of information.

#### 9.3.1 Ways of ensuring a public hearing

Courts around the world are using a variety of means to ensure an open court and public hearing. These include:

- Providing access to information on the court website, about how the court is providing access to proceedings and listing the proceedings, times and manner of joining the proceedings;
- Providing on the court list information on how to access the proceeding (See **Annex Three** of the additional materials for an example from the *Daily List* of the Federal Court of Australia);
- Streaming proceedings on YouTube (for example, in the Supreme Court of Victoria);
- Making audio-visual recordings of hearings available on the court website (for example, in the High Court of Australia);
- Putting a screen in an open space in the court precinct for the public to view proceedings being streamed from a court room;
- Using iPads or screens in separate rooms, streaming from different court rooms;
- Publication of written transcripts on websites; and
- Providing access to the link of the live proceedings for persons who requests it from the Judges' Associate.

#### 9.3.2 Recording, terms of access & security of streamed proceedings

Whilst courts should make every effort to prevent court proceedings from being recorded and replayed, it is very difficult to police. One deterrent is for the court to make a *Video Link Order* at the

commencement of the proceedings, prohibiting the making of audio or video, such as used by the Federal Court of Australia (available in **Annex Fourteen** of the additional materials to this Toolkit). Another approach is to place warnings prior to viewing and to have the viewer agree to the terms of viewing. One example is the *Terms of Use of Webcast Proceedings* used by the [Supreme Court of Victoria](#) in **Annex Fifteen** of the additional materials to this Toolkit. Another example is the [Supreme Court of New South Wales, Australia](#).

## 9.4 Privacy

The privacy and personal data of court users' needs to be protected as courts move online. To do so, privacy policies and processes should be reviewed and adapted to apply to the RCP environment. This includes where documents are stored on servers.

To avoid the broadcasting of 'in camera' evidence, streaming should not be done in real time. Rather courts should delay transmission by approximately half an hour to avoid the inadvertent broadcasting of non-public proceedings.

## 9.5 The Right to Confront

The right to confront an accuser or witness to cross-examine them, is a requirement of a fair trial and in some partner courts across the Pacific, this right is enshrined in the Constitution. Therefore, the right cannot simply be ignored in the context of COVID-19 and RCP.

How each jurisdiction preserves and ensures the right to confront is a matter to be considered and decided by the presiding Judicial Officer in each individual case, informed by the legislation, quality of technological options available to conduct hearings remotely and, the directions of the Chief Justice.

For example, in the Republic of the Marshall Islands, proposed amendments to the Marshall Islands Rules of Criminal Procedure (2005), maintains the right to confront by stating at Rule 26(d):

***“Witnesses Appearing by Contemporaneous Transmission.***

***(1) For good cause and consistent with the confrontation cause, the court may permit testimony in open court by contemporaneous transmission from a different location.***

***(2) Witnesses appearing by contemporaneous transmission shall be deemed to be “present” in court.***

***(3) The court may make any proceeding accessible to the public by contemporaneous transmission, which proceeding shall be deemed to be held in “public” and in “open court.”***

and at Rule 53 (b) about Courtroom Photographing and Broadcasting:

***“The court may make any proceeding accessible to the public by contemporaneous transmission, which proceeding shall be deemed to be held in “public” and in “open court.”***

For an example of emerging caselaw from the Pacific about remote witness testimony, the right to confront and the use of video link in the absence of explicit provisions, see the ruling from the Supreme Court of Tonga in [Rex v. Satini \[2020\] TOSC 62; CR 227 of 2019 \(26 August 2020\)](#) available on Paclii.

## 9.6 Access to Justice

RCP may pose barriers for access to justice and equality before the law for partner courts in the Pacific. The principal concern is digital exclusion, where court users may not have access to adequate technology or Internet services to support RCP, or they lack the knowledge about how to use it. At the same time, it is observed that mobile telephone technologies are widely and successfully used throughout the Pacific Region.

Self-represented litigants are reported to be particularly vulnerable to digital exclusion. In this regard, the National Centre for State Courts (NCSC) suggests to:

***“Offer alternatives for litigants who lack devices or internet access to participate remotely: Courts should suggest community resources (e.g., public schools, libraries, community centers) where litigants can use computers or get access to a stable internet connection, including, if possible, dedicated computer kiosks or Zoom pods at the courthouse”.***<sup>xii</sup>

For more suggestions from the NCSC see **Annex Sixteen** in the additional materials to this Toolkit for advice on the *Conduct Fair and Just Remote Hearings: A Bench Guide for Judges*.

Cost to users may also be a barrier to access. To mitigate costs to users, some courts are providing iPads or RCP facilities in isolated rooms in the court precinct to avoid court users using their personal devices and personal Internet data.

For first-time RCP participants, the court should provide support and information with instructions on ‘how to’ participate and use the technology prior to the proceeding.

## 9.7 Cross International Border Witness Testimony

Partner courts should consider a complex range of issues when contemplating the taking of evidence in a foreign country using remote video or audio technologies. Some of these issues are discussed below.



### 9.7.1 Can RCPs be held in a foreign country?

In both criminal and civil matters, it is particularly important for partner courts to thoroughly consider relevant legislation, case law, regulations and treaties in both the home jurisdiction and the foreign country, or states within the foreign country, in which the party or witness is located. This is because there is no uniform approach internationally to the taking of evidence across international borders, and because there is a very wide variance in stances with respect to issues such as sovereignty and the legal requirements and processes to be followed. In fact, some States may even have ‘blocking statutes’ which might prevent evidence being taken at all.

In every case it is important that proper procedure be followed and that the parties and the court know what is required. Here a Practice Note of the Chief Justice is helpful. *The Practice Note on Overseas Service and Evidence of the Federal Court of Australia* is provided in the additional materials to this Toolkit in **Annex Seventeen** as an example.

In all matters, evidence should be taken in a manner consistent with the procedural and evidentiary rules of both the local jurisdiction and the foreign jurisdiction in which the evidence is to be given.

### 9.7.1.1 Civil Matters Generally

In civil matters, some countries prioritise *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970* (The Hague Evidence Convention). The Hague Evidence Convention best covers situations where witnesses are reluctant to voluntarily give evidence in civil and commercial matters, however it also provides for the taking of evidence without compulsion.

The Hague Evidence Convention firstly provides for the taking of evidence abroad by allowing transmission of [Letters of Request](#) from one signatory state to another. This is done through judicial authorities. The second avenue is for the taking of evidence by diplomatic offices, consular agents and commissioners. For more detail on the Hague Evidence Convention and for access to useful explanatory documents go to [The Hague Evidence Convention website](#) and for an outline of The Hague Evidence Convention see **Annex Eighteen**.

Whilst many countries are signatories to The Hague Evidence Convention, including Australia and New Zealand, according to [The Hague Evidence Convention website](#) no PJSI PIC is a signatory. For PICs that are not a signatory to The Hague Evidence Convention, the procedure may still be applied and a [Letter of Request](#) may still be used, although the country receiving a Request is under no obligation to comply with the request. Otherwise, States may rely upon the principles of reciprocity and the comity of courts toward one another, noting though that the rules of procedure in the country of origin may prevail.<sup>xiii</sup>

In Europe, the [European Judicial Network in Civil and Commercial Matters](#) facilitates the networking of judicial authorities in European Union (EU) countries, and provides country specific resources to help should evidence be taken in a European country.

In civil matters where a witness is willing to give evidence, private arrangements may be able to be made for the taking of evidence. When taken, parties should ensure that evidence is taken in a manner which is consistent with the rules of both the foreign State and local PIC jurisdiction for which the evidence is required. This includes requirements for the taking of testimony using video or audio technologies.

### 9.7.1.2 Criminal Matters Generally

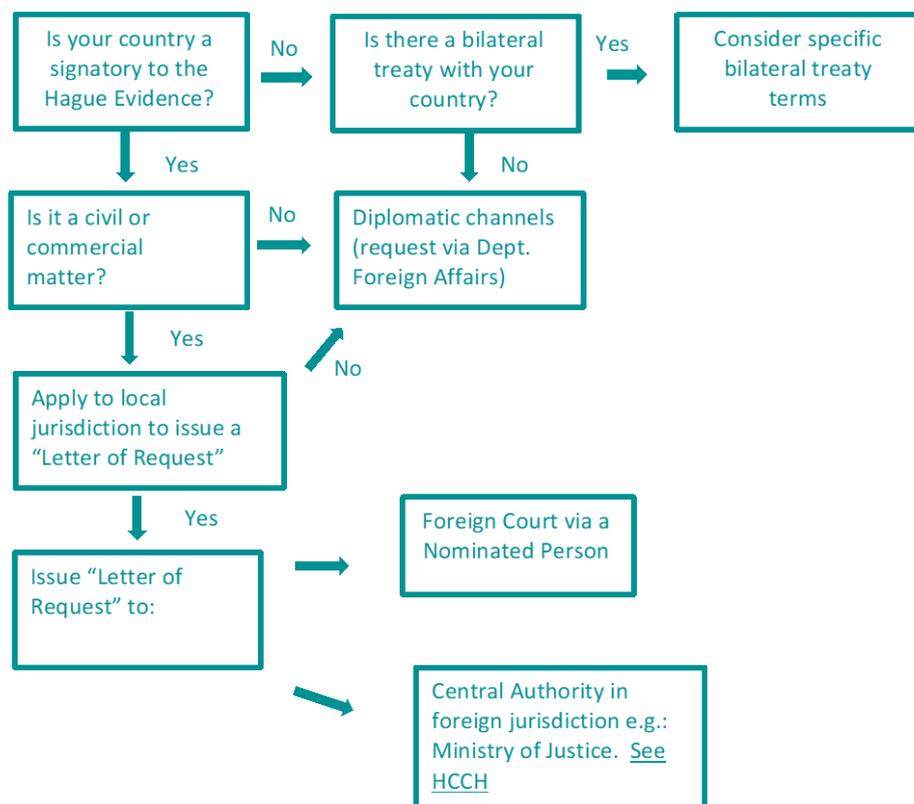
The taking of evidence abroad in criminal matters is often regulated by bilateral or multilateral judicial cooperation treaties which articulate how States agree to cooperate to provide mutual assistance in criminal matters. Therefore, partner courts should, as a first step, check if there is a current treaty with the foreign State regulating cross-international border testimony.

At the same time, partner courts should become familiar with any relevant domestic legislation to be complied with. This might be a specific Foreign Evidence Act that regulates the taking of evidence abroad or laws setting out Mutual Assistance in Criminal Matters. Here, the [Commonwealth Secretariat](#) and the [United Nations Office on Drugs and Crime](#)<sup>xiv</sup> in recent years have been helping strengthen international cooperation in the administration of criminal justice by focusing on the domestic legislative basis for international cooperation, including the taking of evidence across international borders. To this end, PICs may find the [Model Law on Mutual Assistance in Criminal Matters](#) of assistance.

For a summary of the process to obtain evidence in a foreign jurisdiction, see Diagram 2 below which outlines the process for obtaining evidence across international borders.

Diagram 2: Process for Obtaining Evidence across International Borders

Obtaining Evidence Across International Borders



9.7.2 Can video or audio technology be used in the foreign country?

Among countries that use RCP for cross international border witness testimony, the legal basis for such use can vary substantially between States and states within a foreign country. Generally, the taking of RCP evidence must comply with the procedural and evidentiary rules of both the relevant partner court and the foreign State and, state within that country. This requires the Judicial Officer(s) to consider the legal bases for RCP on a case-by-case and country-by-country basis.

9.7.3 Oaths, perjury and contempt

The administration and enforceability of the oath or affirmation of a witness requires particular consideration by the presiding Judicial Officer in RPC, because the proper administration of the oath is foundational to the establishment of the crimes of perjury<sup>4</sup> and contempt. The oath may be administered to a remote witness:

- By the presiding Judicial Officer;
- By a Court Officer present with the witness at the remote end; or
- By a Court Officer remote from the witness.

<sup>4</sup> Establishing perjury in transnational court proceedings is a complex area of law where there is great variation in perjury statutes from country to country. From the point of view of the country where the evidence is received, there are two main issues to consider: (1) whether a statement made in another country can amount to perjury at all; and (2) whether it is justified for an extra-territorial exercise of the criminal jurisdiction.

When administering an oath to a witness in another country, prior permission may be required, because the swearing of a witness may be seen by some countries as sovereign right. Therefore, the giving of an oath and taking of evidence without permission may be a violation of sovereignty.

Unless privilege or other legal justifications apply, contempt committed in a RCP constitutes direct contempt as it has taken place in the presence of the court, even though the witness is ‘virtually present’. However, as with perjury, finding an effective means to actually prosecute the witness for contempt is of significant practical and legal complexity. In these rare circumstances, the judicial officer should not be distracted by these complexities. Rather, focus should remain on their key role which requires the judicial officer to consider how the perjury or contempt offence may have impacted, or compromised the head case and to then, take this into account in the final judgment.

## 9.8 Use of RCP Domestically

There may be many reasons to use RCP for a trial where the witnesses are in-country. The COVID-19 pandemic is one of them. Another example would be where a child victim witness in criminal proceedings gives testimony remotely to avoid facing the accused.

In considering the use of RCP, the court should consider firstly if the domestic rules include “the provision for a judge or registrar to make directions for the taking of evidence and receipt of submissions by video link, audio link, electronic communication or other means that the Court considers appropriate”,<sup>5</sup> in addition to the over-arching interests of justice. Where a jurisdiction does not have legislation which provides for, or is broad enough to encompass RCP, they should consider drafting appropriate legislation or amendments, to address the conduct of RCP.

## 9.9 Judicial Directions and Orders

All RCP participants in each hearing are to be advised that the RCP is a court of law and that evidentiary laws and rules still apply. Additionally, by order of the court, participants should also be reminded that:

- The proceeding is live and that anything said is recorded;
- That unless the court otherwise orders, no person may make any audio or video recording, or photograph of the hearing or any part of it;
- Members of the public may not participate in, or interrupt, the hearing or make an audio or video recording of the proceeding in part of full; and
- Penalties may apply if there is non-compliance with the RCP order.

An example of the RCP *Court Order* used by the Federal Court of Australia is attached in the additional materials to this Toolkit as **Annex Fourteen**.

## 9.10 Duties of Legal Representatives

The court should issue a Practice Direction to enable practitioners to know RCP expectations. An example of the *Practice Direction*, issued by the Chief Justice of Vanuatu, is attached as **Annex Nineteen** in the additional materials to this Toolkit.

The duties of the legal profession should also be articulated in a protocol of Bar Associations and Law Societies. A protocol for RCP provides guidance to practitioners and can set out a minimum standard for court hearings, conduct and technical aspects, such as in the protocol of the *New South Wales of Australia Law Society* presented in **Annex Six** of the additional materials to this Toolkit.

<sup>5</sup> Federal Court of Australia. 2020. Videoconferencing: *Videoconferencing in the Federal Court*. <https://www.fedcourt.gov.au/going-to-court/videoconferencing-guide>

The party or legal representative applying to a court for leave to take testimony in a foreign jurisdiction, should assist the court by providing information about the application of the Hague Evidence Convention or other instrument, along with the domestic provisions and procedures that support the taking of evidence in the foreign jurisdiction. In practice, the party applying for the foreign evidence also prepares the “Letter of Request” under the Hague Evidence Convention. To do this, legal representatives may need to engage a practitioner in the foreign jurisdiction to assist with the preparation of the “Letter of Request”.

### **9.11 Admissibility of Evidence**

Evidence taken following an RCP order may be admitted on any terms the trial judge thinks fit. This may include rendering the evidence inadmissible in its entirety or in part, if it is in the interests of justice to do so. Consideration should also be given to whether the evidence should be rejected if the evidence was unlawfully or improperly obtained.

No adverse implications are drawn from a person's appearance by way of a video link and as such, the evidence does not have any greater or lesser weight.

## 10. Additional Sources of Information about RCP

Information about RCP is continually emerging as justice systems around the world adapt and publish their experiences, policies and user guides.

For leading sources of further information see **Annex Seventeen** in the additional materials to this Toolkit.

## 11. End Notes

<sup>i</sup> If a court intends to make a decision on written submissions the court usually makes orders for the parties to file written evidence or submission in relation to the decision. Notifications are usually made in writing of the outcome of the decision by order forwarded by email and/or mail.

<sup>ii</sup> National Centre for State Courts, *Civil Justice Initiative. (2020) Findings and Recommendations on Remote Conferencing*. NCSC Civil Justice Initiative.

<https://www.ncsc.org/~media/Microsites/Files/Civil-Justice/NCSC-CJI-Appendices-G.ashx>

<sup>iii</sup> Material in electronic form such as applications, affidavits, exhibits, displayed in electronic files and evidence.

<sup>iv</sup> As at August 2020.

<sup>v</sup> Susskind, R, *The Future of Courts*, The Practice, Volume 6, Issue 5, July/August 2020, Harvard University, USA, <https://thepractice.law.harvard.edu/article/the-future-of-courts/>

<sup>vi</sup> *Capic v Ford Motor Company of Australia* [2020] FCA 486; *McDougall v Nominal Defendant* [2020] NSWDC 194

<sup>vii</sup> National Centre for State Courts, Civil Justice Initiative. (2020) *Findings and Recommendations on Remote Conferencing*, NCSC Civil Justice Initiative.

<https://www.ncsc.org/~media/Microsites/Files/Civil-Justice/NCSC-CJI-Appendices-G.ashx>

<sup>viii</sup> *Ibid.*

<sup>ix</sup> *Capic v Ford Motor Company of Australia Limited (Adjournment)* (2020) FCA 486 (Perram J)

<sup>x</sup> *Ibid.*

<sup>xi</sup> *R v Sussex Justices; Ex parte McCarthy* [1924] KB 256

<sup>xii</sup> National Centre for State Courts. 2020. *Conducting Fair and Just Remote Hearings: A Bench Guide for Judges*. <https://www.ncsc.org/newsroom/public-health-emergency>

<sup>xiii</sup> *Soci te' Nationale Industrielle Aerospatiale v. United States District Court*, 482 US 522, 107 S. Ct. 2542 (1987)

<sup>xiv</sup> [https://www.unodc.org/res/cld/bibliography/model-law-on-mutual-assistance-in-criminal-matters\\_html/Model\\_Law\\_on\\_MLA\\_20071.pdf](https://www.unodc.org/res/cld/bibliography/model-law-on-mutual-assistance-in-criminal-matters_html/Model_Law_on_MLA_20071.pdf)