



PACIFIC ISLANDS
LAW OFFICERS' NETWORK

Model Provisions for amending *Evidence* or
Criminal Procedures Acts to incorporate
special measures for vulnerable witnesses to
Sexual and Gender Based Violence offences

PILON SGBV WORKING GROUP

(Samoa (Chair), Australia, Cook Islands, Federated States of Micronesia, Kiribati, Nauru, New Zealand, Niue,
Republic of the Marshall Islands, Papua New Guinea, Solomon Islands, Tonga, Tuvalu and Vanuatu)

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Section 1: Definitions

'audio-visual recording' means a visual and audio recording of a police interview in relation to the investigation of the offence, or offences, to which the proceedings relate, or a recording made under *Section 5* at a pre-trial hearing.

'closed-circuit television' means any audio-visual facility that enables communication between the courtroom and another place;

'family violence offence' - insert definition of by reference to criminal code.

'sexual offence' - insert definition of by reference to criminal code.ⁱ

'special measures' are provided for by *section 3*.

'vulnerable witness' means a witness in a proceeding who is –

- (a) under the age of 18 years at the time of the hearing; or
- (b) the complainant in a proceeding relating to a **sexual offence** or **family violence offence**; or
- (c) a witness found to be vulnerable, either on the application of a party or on the Judge's own initiative, on the grounds of any one or more of the following:
 - (i) the physical, intellectual, psychological, or psychiatric impairment of the witness;
 - (ii) the trauma suffered by the witness;
 - (iii) the witness's fear of intimidation;
 - (iv) a credible risk that the witness is likely to be intimidated;
 - (v) the linguistic or cultural background or religious beliefs of the witness;
 - (vi) the nature of the evidence that the witness is expected to give;
 - (vii) the relationship of the witness to any party to the proceeding;
 - (viii) any other circumstance the Court considers places the witness at a special disadvantage if required to give evidence in Court.

Section 2: Alternative ways of giving evidence

- (1) A **vulnerable witness** who gives evidence is entitled (but may choose not) to use any one or more of the special measures provided by *subsection 3(1)*.
- (2) On its own initiative, or on application by a party to the proceeding, a court may make an order that one or more special measures provided by *subsection 3(4)* are to be applied during the giving of evidence by a **vulnerable witness**.
- (3) On its own initiative, or on application by a party to the proceeding, a court may make an order that one or more special measures, as provided by *subsection 3(1)* are not available for a **vulnerable witness**, if satisfied that there are special reasons, in the interests of justice.
- (4) On its own initiative, a court may make an order that any one or more special measures provided for by *subsection 3(1)* are not available for a **vulnerable witness**, considering the availability of any necessary equipment or facilities.ⁱⁱ
- (5) In making an order under *subsection 2(2)*, the court must have regard to the need to ensure;
 - (a) the fairness of the proceeding,
 - (b) the need to minimise stress on the witness, and
 - (c) any other relevant factor.

Section 3: Special Measures

- (1) A **vulnerable witness** who gives evidence is entitled (but may choose not) to use any one or more of the following special measures:
 - (a) the use of a screen or other arrangement to prevent the **vulnerable witness** from seeing the defendant; or
 - (b) the presence of a support person of the **vulnerable witness** choosing seated with the **vulnerable witness** when he or she is giving evidence; or
 - (c) the examination of the **vulnerable witness** through an intermediary, who shall communicate and explain
 - (i) to the **vulnerable witness**, the questions put to the **vulnerable witness**, in a language appropriate to the **vulnerable witness**' age and development; and
 - (ii) to the court, the answers given by the **vulnerable witness** in reply; or
 - (d) giving evidence from a place other than the courtroom by means of **closed-circuit television**; or
 - (e) the admission of an **audio-visual recording**, or part thereof, as evidence.
- (2) If a support person is present in accordance with *subsection 3(1)(b)*, the support person must not:
 - (a) speak for the **vulnerable witness** during the proceeding; or
 - (b) otherwise interfere in the proceeding; or
 - (c) unless the court otherwise orders, must not be, or be likely to be, a witness or party in the proceeding.
- (3) If an intermediary is used in accordance with *subsection 3(1)(c)*, the intermediary must not:
 - (a) change, in any way, the meaning of the questions put to the **vulnerable witness**; or
 - (b) change, in any way, the meaning of the answers given by the **vulnerable witness**; or
 - (c) otherwise interfere in the proceeding; or
 - (d) unless the court otherwise orders, be, or be likely to be, a witness or party in the proceeding.ⁱⁱⁱ
- (4) The court may only make an order under *subsection (2)(c) or 3(d)* where there are exceptional circumstances that would justify the making of an order.
- (5) If an **audio-visual recording** is to be admitted as evidence under *subsection 3(1)(e)*:
 - (a) the witness must:
 - (i) identify himself or herself; and
 - (ii) attest to the truthfulness of the contents of the audio-visual recording; and
 - (iii) be available for cross-examination and re-examination, and
 - (b) *Section 5* applies.
- (6) If, in the opinion of the Court, distress to the **vulnerable witness** will be reduced, it may order that any one or more of the following special measures be applied:
 - (a) dispensing with the wearing of wigs and robes while the vulnerable witness is giving evidence; or

- (b) planned seating arrangements for people who have an interest in the proceedings, including the level at which they are seated and the people in the vulnerable witness' line of vision; or
- (c) the adjournment of the proceedings or any part of the proceedings to other premises.

Section 4: Details about the admissibility of audio-visual recording

- (1) This section applies if the prosecutor in a proceeding intends to produce an **audio-visual recording** as evidence under *subsection 3(1)(e)* or *section 5*.
- (2) The prosecutor must provide to the accused person, or their lawyer, within a reasonable time before the start of the proceeding;
 - (a) written notice that the prosecutor intends to produce the **audio-visual recording**; and
 - (b) a copy of a transcript of the **audio-visual recording**; and
 - (c) details about where the accused person and their lawyer may view the **audio-visual recording** prior to the proceedings.
- (3) An accused person and their lawyer may not be given a copy of the **audio-visual recording**, unless the Court orders that a copy of the **audio-visual recording** is to be given to them.
- (4) In considering whether to make an order under s 3(3), the Court must have regard to;
 - (a) whether the disclosure is in interests of justice, and
 - (b) the nature of the evidence contained in the **audio-visual recording**, and
 - (c) the ability of the accused person or their lawyer to view the audio-visual recording and to otherwise access the content of the audio-visual recording, including by way of a transcript of the **audio-visual recording**.
- (5) Subject to *subsection 4(4)*, an original **audio-visual recording** must not be edited or otherwise changed in any way.
- (6) The court may, on application, give approval for a copy of the original **audio-visual recording** to be edited or changed in a stated way to omit certain inadmissible or irrelevant evidence.
- (7) A person commits an offence if the person, without authority;
 - (a) possesses, supplies, plays, copies an **audio-visual recording**, or otherwise makes available an **audio-visual recording** to any person who does not have authority to access it.
- (8) For the purposes of this section, a person has authority in relation to an **audio-visual recording** only if the person possesses, or does something with the **audio-visual recording** in connection with;
 - (a) the investigation of, or a proceeding for, an offence in relation to which the **audio-visual recording** is prepared; or
 - (b) a re-hearing, re-trial or appeal in relation to the proceeding; or
 - (c) the permission of the Court

Section 5: Giving evidence at pre-trial hearing

- (1) On its own initiative, or on application by a party to the proceeding, a court may make an order that a **vulnerable witness** is to give evidence at a pre-trial hearing.
- (2) In making an order under *subsection 5(1)*, the court may provide directions, with or without conditions, as it sees fit.

- (3) The evidence of a vulnerable witness (including cross-examination and re-examination) given under this section must be recorded as an **audio visual recording** and *section 4* applies.
- (4) At a pre-trial hearing ordered under *subsection 5(1)* a **vulnerable witness** who gives evidence is entitled (but may choose not) to use the **special measures** provided for by *section 3*.
- (5) The **audio-visual recording** of the **vulnerable witness'** evidence at a pre-trial hearing under this section must be admitted in evidence, subject to *section 4*, at the proceeding for which the pre-trial hearing was held, as if the **vulnerable witness** gave the evidence at the hearing in person.
- (6) If an **audio-visual recording** of a **vulnerable witness'** pre-trial evidence is admitted, in accordance with *subsection 5(5)*, into evidence at the proceeding to which it relates the **vulnerable witness** is not required to attend the proceeding to give further evidence unless the court orders otherwise.
- (7) The court must not make an order under *subsection 5(6)* unless satisfied that special circumstances exist and it is in the interests of justice to make the order.

Section 6: Evidence to be given in closed court

- (1) In any proceeding, or pre-trial hearing, involving a **vulnerable witness**, no person may be present in the courtroom while the **vulnerable witness** gives evidence (whether in chief, under cross-examination or on re-examination), including by **audio-visual recording**, except for the following:
 - (a) the Judge;
 - (b) the jury;
 - (b) the prosecutor;
 - (c) the defendant and any corrections officer;
 - (d) any lawyer engaged in the proceedings;
 - (e) any officer of the court;
 - (f) the Police employee in charge of the case;
 - (g) a member of the media attending for the purpose of preparing a news article on the proceeding;^{iv}
 - (h) any person whose presence is requested by the **vulnerable witness**;
 - (i) any person expressly permitted by the Judge to be present.

Section 7: Prohibition on publication of identity

- (1) A person commits an offence if the person publishes, in relation to a **vulnerable witness**;
 - (a) the name of the witness; or
 - (b) information that discloses, or could reasonably lead to the disclosure of the identity of the witness; or
 - (c) the contact details of the witness, including the private or business address, email address or telephone number.
- (2) It is a defence to a prosecution under this section if the person establishes that the **vulnerable witness**, excluding a **vulnerable witness** under the age of 18 years, consented to the publication.

- (3) The penalty, upon conviction, of an offence against *subsection 7(1)* is 100 penalty units and imprisonment for a period not exceeding one year.

Section 8: Personal cross-examination of witness

- (1) A defendant in any proceeding, including any pre-trial hearing, is not entitled to personally cross-examine a **vulnerable witness**.
- (2) A defendant who, under this section, is precluded from personally cross-examining a **vulnerable witness** may have his or her questions put to the **vulnerable witness** by:
 - (a) a lawyer engaged by the defendant; or
 - (b) if the defendant is unrepresented and fails or refuses to engage a lawyer for the purpose within a reasonable time specified by the Judge, a person appointed by the Judge for the purpose; or
 - (c) the Judge.^v
- (3) In respect of each such question, the Judge may;
 - (a) allow the question to be put to the witness; or
 - (b) require the question to be put to the witness in a form rephrased by the Judge or an intermediary appointed under *subsection 3(1)(c)*; or
 - (c) refuse to allow the question to be put to the witness.
- (4) Nothing in this section imposes a requirement on a lawyer engaged by the defendant to put a question to the **vulnerable witness**, or otherwise derogates from a lawyer's duty to the court.

Section 9: Unacceptable questions

- (1) In any relevant proceeding, the Judge may disallow, or direct that a **vulnerable witness** is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.
- (2) Without limiting the matters that the Judge may take into account for the purposes of *subsection 9(1)*, the Judge may have regard to:
 - (a) the age or maturity of the witness; or
 - (b) any physical, intellectual or psychological impairment of the witness; or
 - (c) the linguistic or cultural background or religious beliefs of the witness; or
 - (d) the nature of the proceeding; or
 - (e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

Section 10: Evidence of sexual reputation

- (1) Evidence of the sexual reputation of a **vulnerable witness** is not admissible.

Section 11: Evidence of sexual experience

- (1) In a proceeding involving a **sexual offence**, no evidence related to the sexual experience of a vulnerable witness is admissible, except by order of the court.
- (2) In an application under *subsection 11(1)*, the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.

Section 12: Evidence of complaint generally admissible

- (1) This section applies to a proceeding in relation to a **sexual offence**.
- (2) Evidence of any complaint that was made about the alleged commission of the offence, prior to the complainant's first formal statement to police, is admissible in evidence, regardless of when the complaint was made.
- (3) Nothing in *subsection 12(2)* prevents the exclusion of evidence if the court is satisfied it would be unfair to the defendant to admit the evidence.
- (4) No inference shall be drawn that a delay alone in making the complaint indicates that the allegation is false.

Section 13: Evidence of Corroboration

- (1) In a proceeding involving a **sexual offence**, no corroboration shall be necessary for the defendant to be convicted.

Section 14: Appeals

- (1) If a person is convicted of an offence and on an appeal against the conviction, a new trial is ordered, the prosecutor may tender as evidence in the new trial proceedings an **audio visual recording** of the original evidence of the **vulnerable witness**.
- (2) If an **audio-visual recording** of a **vulnerable witness'** evidence is admitted into evidence at an appeal, the **vulnerable witness** is not required to attend the proceeding to give further evidence, unless the court orders otherwise.
- (3) The court must not make an order under *subsection 14(2)* unless satisfied that it is in the interests of justice to make the order.

For jurisdictions that use jury trials:^{vi}

Section 15: Judicial directions

- (1) In proceedings where a **vulnerable witness** has provided evidence in an alternative way under this Part, the judge must direct the jury that:
 - (a) the law makes special provision for the manner in which evidence is to be given, or questions are to be asked, in certain circumstances; and
 - (b) the jury must not draw any adverse inference against the defendant because of that manner of giving evidence or questioning.

- (2) If in a **sexual offence** proceeding, where evidence is given that tends to suggest that either no complaint was made, or there was delay in making a complaint, the judge must tell the jury:
 - (a) that there may be good reasons why a victim of a sexual offence may not make or may hesitate to make a complaint; and
 - (b) that this does not necessarily indicate that the allegation is false.^{vii}

- (3) In any proceedings relating to a **sexual offence** or **family violence** offence, it is not necessary for a Judge to;
 - (a) warn the jury that it is dangerous to act on uncorroborated evidence or to give a warning to the same or similar effect; or
 - (b) give a direction relating to the absence of corroboration.

- (4) A Judge may only give a warning or direction under *subsection 15(4)* where it is in the interests of justice to do so.

- (5) In any proceeding where a **vulnerable witness**, who is under the age of 18 years, provides evidence, the Judge, prosecution, defence counsel, or the defendant must not suggest in any way to the jury that:
 - (a) children as a class are unreliable witnesses; or
 - (b) the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults; or
 - (c) a particular child's evidence is unreliable, or requires more careful scrutiny, than the evidence of adults; or
 - (d) it would be dangerous to convict on the uncorroborated evidence of a witness because that witness is a child.

ⁱ The definition of a sexual or family violence offence is subject to the legislation of each country; it could be defined by reference to a Division or Part in a criminal code, or each offence provision may be listed separately. As the complainant in the listed offences will become a vulnerable witness by operation of the section, care should be taken to ensure that the offences are not so broad to unintentionally capture witnesses who would not be considered vulnerable. Victims of offences that are not listed (ie violent offences) can still be classed as vulnerable, as appropriate, by order of the Court, under subsection 1(c).

ⁱⁱ Subsection 2(3) has been included in recognition of the limited court resources available in a number of Pacific Island countries. Where possible, PILON recommend that this provision not be included in legislation, but recognise that it may be a necessity where resources are at issue.

ⁱⁱⁱ The term 'intermediary' has not been defined to allow for maximum flexibility in the Pacific region, where it is possible that availability of intermediaries could be limited and may, of necessity, be family members. Where possible, consideration could be given to requiring that an intermediary have some sort of formal education or experience requirement (ie psychology, special counsel or other specific qualifications/training).

^{iv} It is important to include restrictions on publication of identities of vulnerable witnesses, especially if the media is not able to be excluded from the court room, see Section 7.

^v In many common law jurisdictions, it would not be considered appropriate for a Judge to cross-examine a witness. It has been added here as a possible consideration in Pacific jurisdictions with limited resources.

^{vi} Jurisdictions that do not use jury, or jury-like, bodies in their criminal trial procedure, may wish to ensure that the legislation adequately directs a Judge about what evidence/considerations are appropriate (ie what directions the Judge should give him/herself)

^{vii} Jurisdictions may also want to consider including an ability for a party to apply to the Court for a warning to the Jury about forensic disadvantage to the accused caused by a delay in complaint. This should be limited to occasions where a delay in complaint causes a significant disadvantage not merely because of the passage of time, but because of the death of, or inability to locate, witnesses or otherwise unavailability of potential evidence.