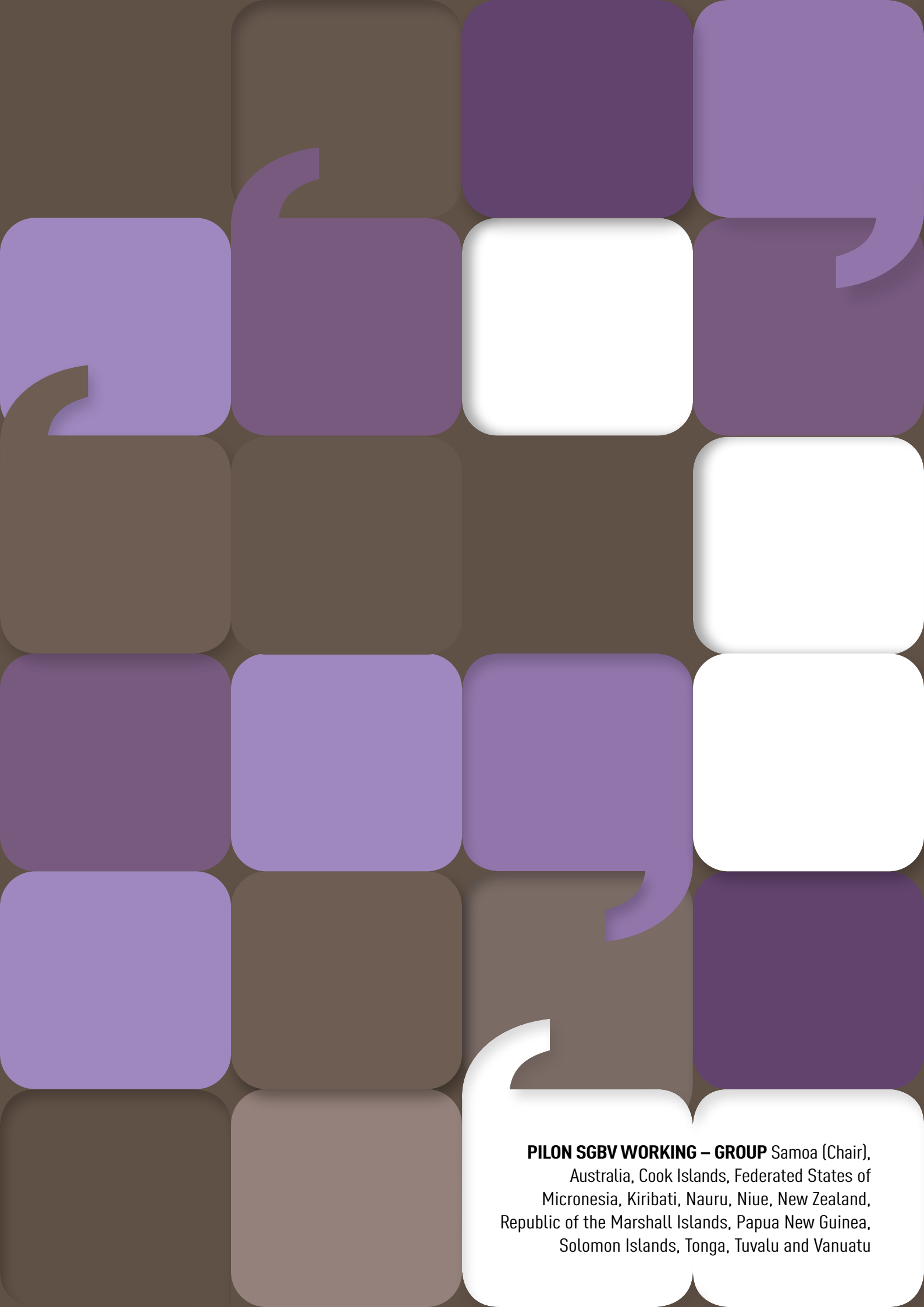


**General Principles for obtaining
the best evidence from vulnerable
witnesses in sexual and gender based
violence matters | November 2019**



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

Chair's statement



Although not exclusive to the Pacific, rates of Sexual and Gender Based Violence (SGBV) are high in the region. There are also low recorded rates of reporting and of convictions.

In 2012, the Pacific Island Forum Leaders adopted the Pacific Leaders' Gender Equality Declaration in which they committed to inter alia, 'enact and implement legislation regarding sexual and gender based violence to protect women from violence and impose appropriate penalties for perpetrators of violence.' PILON's focus on SGBV as a strategic priority is therefore an effort to contribute to the collective approach to meeting the region's recognised challenges, including Human

Security under the Boe Declaration, and supports the regional commitments to prioritise this issue.

When a victim or witness comes forward to seek relief from the Judicial process, their experiences from giving their police statement, liaising with the prosecution and finally appearing in the court, can compound their trauma and subject them to a form of emotional re-victimisation. They are often asked to provide evidence of very personal and highly distressing events in front of people they do not know and in surroundings that are unfamiliar and intimidating. The needs and rights of a complainant to access justice for the crime committed against them requires careful consideration, and must be balanced with the accused's right to a fair trial.

In recent decades, changes to evidentiary and procedural provisions have transformed the way domestic violence and sexual offence trials are conducted. There have been changes to the way these crimes are investigated, and initiatives designed to make the criminal justice response sensitive to the needs of the person affected by the reported offending. A customised approach to judicial practice, employing special measures throughout the SGBV complainant's experience, is now commonplace in many adversarial trial-based traditions across the world. The idea is to uphold the rule of law and maximise a person's access to justice by ensuring their complaints are properly investigated, aired in the appropriate manner, and perpetrators are held accountable.

The PILON working group has made an effort over the past few years to raise awareness of the need for, and importance of, special measures to assist SGBV complainants and witnesses throughout the process - from their police interview, to prosecution briefings, to the giving of evidence in Court. The submission is that a defendant's right to a fair trial is not adversely affected by special measures (such as screens, CCTV, and recorded evidence in chief) which can offer relief from the trauma of giving evidence. On the contrary, a Court's ability to grant special measures for a witness decreases the pressures and stresses in the Court room, and supports the notion of a fair trial, as the fact finder is able to hear the 'best evidence' available.

I would like to thank each of the working group members that contributed to these General Principles. I hope they will be useful as we all work to build upon the improvements and in-roads that the Pacific is making to improve the way the criminal justice system responds to domestic, physical and sexual violence.

Lemalu Hermann Retzlaff,

Attorney General, Samoa
Chair, PILON - SGBV Working Group

Introduction

The Pacific Islands Law Officers' Network (PILON) continues to carry out activities to achieve the Pacific Islands Forum commitment to “eradicate Sexual and Gender Based Violence (SGBV) in the Pacific region and ensure that all Pacific peoples have equal access to justice and protection under the law”¹. In keeping with this commitment, the PILON SGBV Working Group resolved at its May 2016 meeting to prepare a best practice document for prosecutors and courts in PILON Member Countries (PMCs) relating to the treatment of child and other vulnerable victim/survivors or witnesses of SGBV offences. These General Principles were endorsed by PILON at its Annual Meeting in Majuro, Republic of the Marshall Islands, in October 2017. Under PILON's Strategic Plan 2019-21, PMCs committed to “focus on sharing successful approaches to implementing special measures for vulnerable witnesses and the Guidelines”.

It is well established that children and witnesses with cognitive impairments can have particular difficulties when it comes to providing reliable testimony in a court setting. They may suffer from anxiety; have trouble remembering long ago events; and/or struggle with complex lines of questioning. Adult victims/survivors and witnesses of SGBV offences can also be particularly prone to anxiety, intimidation and self-doubt which can influence their ability to provide reliable evidence. These issues have the potential to negatively impact on the ability of the criminal justice system to ensure that justice is done in SGBV offences. Although there is no single agreed definition of who is a ‘vulnerable witness’ and not all adult victims/survivors and witnesses of SGBV offences will be vulnerable, the application of any available special measures early and as a matter of course in SGBV offences will be of benefit.

These General Principles draw upon the principles set out in the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime². They identify broad concepts that underpin best practice policies and procedures for protecting the interests of vulnerable witnesses of SGBV offences during criminal proceedings.

“...the application of any available special measures early and as a matter of course in SGBV offences will be of benefit.”

1 This commitment was made by Pacific Islands Forum Leaders at their 2009 Meeting in Cairns

2 UN ECOSOC Resolution 2005/20

Purpose

Implementation of the General Principles is intended to maximize the ability of vulnerable witnesses to give reliable and truthful evidence in SGBV court proceedings. In doing so, the Principles seek to ensure that the criminal process does no further harm to the person and that their safety is prioritised while ensuring a fair trial for the accused. Maximising the ability of vulnerable witnesses to provide their best evidence and preventing their re-traumatization may also improve trust in the criminal court process, thereby increasing the likelihood of reporting of SGBV offences.

Scope

While many of the General Principles could assist any witness who interacts with the criminal justice system, they focus on 'vulnerable witnesses' to the extent that the vulnerability is caused by age and maturity, cognitive impairment or specific factors (such as isolation, stress and anxiety) resulting from being a victim/survivor or witness of SGBV offences. While broadly applicable to the entirety of the criminal justice process, including from when an alleged offence is first reported and investigated by police, their main focus is the criminal trial and prosecution process. It is a matter for the police to determine which, if any, of these Principles they could implement, preferably in consultation with prosecutors, courts and other relevant stakeholders (including health and support services).

Implementation

It is recognized that each PMC has different laws, practices and resources, making universal application and implementation of the General Principles difficult. For this reason, implementation of the Principles is intended to be flexible and not follow a one size fits all approach. PMCs will need to consider their own context and practical considerations related to the feasibility and best manner of implementing particular Principles. At the same time, PMC officials are encouraged to build awareness of the Principles among prosecutors and judges in their jurisdictions when dealing with vulnerable witnesses. Where there are no existing laws or rules, each jurisdiction is encouraged, where possible, to rely on the inherent jurisdiction of its courts to adopt suitable practices with respect to the treatment of vulnerable witnesses³. The use of inherent jurisdiction will rely heavily on education and training for the judiciary, as they will ultimately have control over the extent to which special measures for vulnerable witnesses will be utilised in the court room. Over time, these practices might be replaced by court rules, judicial guidelines (or bench books), prosecutors' guidelines and possibly amendments to relevant legislation (e.g. Police Acts, Evidence Acts, and Criminal Procedures Acts).

Where possible, jurisdictions should try to implement available special measures as a rule when vulnerable witnesses are engaged with the criminal justice system. However, to encourage understanding and explore available measures, it may be necessary to explore the discretionary use of any special measures in the first instance, before moving to a presumption of their use and finally cementing their use as a rule. Jurisdictions should be careful to ensure that no adverse inference is drawn by juries with respect to the use of permitted special measures or arrangements for vulnerable witnesses under these Principles.

³ Criminal Courts have an inherent jurisdiction at common law to determine their own processes and act in the interest of fairness and justice. Courts in jurisdictions without laws or court rules that specify how evidence may or should be taken from vulnerable witnesses have relied on their inherent jurisdiction at common law to modify court processes, including controlling cross-examination, to ensure that courts and legal counsel adapt to the needs of vulnerable witnesses. See recent English cases *R v Baker* [2010] EWCA Crim 4 and *R v F* [2013] EWCA Crim 424.

- 1. Dignity and Respect** – Vulnerable witnesses should be treated in a compassionate and sensitive manner, so as not to increase any feelings of helplessness, shame or distress. The manner in which they are treated should take into account their personal situation and immediate needs, ensure that interference in their private life is minimised as far as possible and the person is treated in a way that is respectful and preserves their autonomy and physical, mental and moral integrity.
- 2. Best Information** – Vulnerable witnesses should be informed promptly and fully about the availability and best ways of accessing any available support service, such as health, counselling or emergency financial and housing support. The procedures and processes of the criminal justice system should be explained clearly, including the timing and location of hearings and other relevant events, the person's role and the ways in which they might be asked to participate. They should be advised how decisions could be reviewed and the progress of the case, in particular the apprehension, arrest or release of the accused and any protective measures that might be available. Participation of vulnerable witnesses should be planned ahead of time, as much as possible, so they can be provided with certainty and a clear understanding of what to expect.
- 3. Coordinated Assistance** – Vulnerable witnesses should have access to services by professionals who are relevantly and adequately trained. Services should be linked up as much as possible to minimise the number of contacts with the justice system and times the vulnerable witness is required to recount the trauma. Service providers should ensure that, where possible, the person is provided with continuity of care. Assistance should be provided in a timely manner, in accordance with the needs and wishes of the person. Such assigned professionals should be aware of, and thereby make vulnerable witnesses aware of, alternative methods of giving evidence that can be sought or applied for by prosecution.
- 4. Safety** – The safety of vulnerable witnesses should be protected at every stage of the criminal justice process. It is important that appropriate safeguards are put in place to reduce potential instances of intimidation, threats or harm to vulnerable witnesses and that direct contact with or questioning by alleged perpetrators is avoided. This includes steps to offer and facilitate alternative methods of giving evidence. Steps should also be taken to protect their safety after the conclusion of the proceedings, such as when the person is released following a period of incarceration.
- 5. Privacy** – The privacy of vulnerable witnesses should be protected to the maximum extent possible, by restricting the disclosure of information that could identify the witness and by prohibiting the public and the media from the courtroom, where possible. Personal information should not be disclosed to others without the person's consent, unless necessary.
- 6. Non-discrimination** – Vulnerable witnesses should not be discriminated against, irrespective of their race, colour, religion, beliefs, age, family status, culture, language, ethnicity, national or social origin, citizenship, gender, sexual orientation, political or other opinions, disability, status of birth, property or other condition. Professionals working in or with the criminal justice sector should be aware of individual differences that can impact a person's ability to fully participate in the criminal justice process.
- 7. Individual Expression** – Vulnerable witnesses should be treated as autonomous individuals with their own needs, wishes, thoughts and feelings. Every effort should be made to enable them to give their evidence and tell their story in their own words. It is also important to allow the person to be able to freely express their concerns and views about the criminal justice process, including concerns regarding their involvement, ways in which they would like to contribute and how they feel about the outcome. Professionals should demonstrate that they have considered the person's views and concerns and explained reasons why they might not be able to be accommodated.
- 8. Victim Impact and Compensation Principle** – Vulnerable witnesses, who are victims/survivors, should be assisted to make a victim impact statement, in the most appropriate way possible. Information about compensation or restitution for any harm suffered should be provided along with assistance in accessing such measures.

General principles for obtaining the best evidence from vulnerable witnesses to SGBV offences



Dignity and Respect Principle

Dignity and Respect Principle

- All vulnerable witnesses should be treated with dignity and respect, so as not to increase any feelings of helplessness, shame or distress.
- The person's situation and individual needs should be considered and interference in their life should be minimised as far as possible.
- Professionals should ensure they address vulnerable witnesses using language appropriate to age, education, maturity and mental capacity.

Training for judges, prosecutors, criminal justice and healthcare professionals in the dynamics of SGBV and family violence

PCMs should consider introducing **training** to relevant professionals in the dynamics of family violence and SGBV. Understanding the dynamics of family violence and SGBV will assist professionals to use language that does not **stereotype, discriminate or minimise the impact of the abuse on the person**. Training should also ensure that the professional is better equipped to appreciate the complexity and uniqueness of a witnesses' experience of family violence and provide examples of interview and assessment techniques that minimise distress and trauma and ensure they deal with vulnerable witnesses in a sensitive, understanding, constructive and reassuring manner.

Training should reinforce the inappropriateness of language that judges, stereotypes the person, is dismissive or minimises the trauma the person has suffered.

Avoid unnecessarily **invasive medical examinations**

The dignity of victim/survivors of SGBV should be preserved to the fullest extent possible by **limiting medical intervention** only to what is necessary. If it appears that the person is in distress they should receive assistance from a **mental health** professional without delay. The presence of a **support person** during medical examinations should be facilitated, unless the witness specifically decides otherwise.

Consideration of **individual needs** of the person

People including vulnerable witnesses have many and varied needs and **flexibility** to the extent possible is the key to considering individual needs. Some of the things that should be permitted include writing answers instead of speaking, **frequent breaks** or toilet stops, allowing the person to cover their head if things get too much or allowing them to bring items of comfort into the court room with them. Some jurisdictions conduct a **pre-trial hearing** to determine what special measures should be put in place for vulnerable witnesses and how they will give their evidence in Court.

Give **due regard** to the person's concerns

Where the vulnerable witness has expressed a concern, or a desire to change the way that the criminal justice process operates, the professional should give **due regard to their views and concerns** and if they are not able to be accommodated the **reason** for that should be explained.

Best Information Principle

2.

Best Information Principle

- Information about best ways of accessing any support services, such as health, counselling or emergency financial and housing support.
- Clear explanation of the criminal justice process and the person's role in that process.
- Fully informed about the progression of the case, including the release of the offender (which may be many years after the case has concluded).
- Participation is well planned and explained so the witness can prepare and know what to expect.

Liaison officer

A prosecutor should explain the trial process and keep the vulnerable witness informed about each stage of the criminal justice process, including timing and location of hearings, witness's role in hearings, whether the accused has applied for bail, how decisions of the trial court may be reviewed, and any protective measures that may be available to a vulnerable witness.

Consideration might also be given to appointing a **suitably qualified liaison officer** to communicate with and support the vulnerable witness (and their personal support person or guardian) as appropriate and answer any questions they might have. A liaison officer can be particularly useful if prosecutors become distracted by the demands of the job and approaching trial and lack the time to dedicate to this important task. This person should, in addition to explaining the criminal justice process, extend their role to ensure that the person is also informed about available support and health services and should **coordinate and facilitate** the person's access to those services.

Court familiarisation and meeting of prosecutor

Consideration should be given to allowing vulnerable witnesses and their support person the opportunity to **visit the court** before the trial, so they can become familiar with the court room, meet the prosecutors and receive a clear and comprehensive explanation of the manner in which they will give evidence, how the court operates and where the key parties will be seated. PMCs should also consider ensuring that there is a person available to **greet** the vulnerable witness (and their support person) **on their arrival at court** and who can guide them during the day. This person should be the liaison officer to ensure **continuity of support**. Consideration should be given to having regular breaks and holding hearings at times of day that are appropriate, especially for children.

Updates on **progress** of the case

The prosecutor, or liaison officer, should ensure that the vulnerable witness is **kept informed** about how the matter is progressing. It is especially important that they are informed as far in advance as possible of the release of the alleged perpetrator on bail or after serving a custodial sentence.

Availability of information in appropriate format

PMCs should consider **developing brochures** or other resource material that can be provided to vulnerable witnesses in SGBV offences. Where appropriate it may be necessary to take the person directly to the services they need so they can find them. A **dedicated phone number** that vulnerable witnesses can call at any time for assistance might also be appropriate.

Coordinated Assistance Principle

Coordinated Assistance Principle

- Professionals supporting vulnerable witness should have relevant training and experience.
- Support services by different professionals should, where possible, link up to minimize the need for the witness to relive their trauma.
- Support should be provided in a timely manner and for as long as needed, where possible by the same person.

Supporting professionals have relevant training and experience	In addition to training on appropriate communication techniques and the dynamics of SGBV, all professionals and service providers involved in the care and support of vulnerable witnesses should themselves be supported by relevant and up to date training in their area of expertise . Professionals should also receive regular training or support that will assist them to be mindful of the serious physical, psychological and emotional consequences of SGBV. Medical professionals could be trained to write medical reports in a way that can be used in court as evidence.
Support services linked and continuous	PMCs should consider the development of a framework to clarify roles, maintain good working relationships and ensure coordination among agencies involved in investigation, prosecution and hearing of SGBV offences, and the delivery of counselling and support services. This should include protocols for information-sharing where appropriate and not in breach of the person's privacy. Some other things that should be considered include co-located services and use of appropriate facilities , especially where children are involved. It is useful to minimise the number of times the vulnerable witness has to have contact with the criminal justice process and the number of interviews, statements and hearings they need to participate in. It is also useful to have continuity of care , where possible, to provide an opportunity for the vulnerable witness to develop rapport and trust with prosecutors, treating counsellors, medical staff and other service providers. This can be assisted by having a liaison officer who supports the person through each stage of the medical, criminal and support process and providing clear information listing the availability and contact details for existing support services.
Pre-recording of vulnerable witness's evidence	PMCs should consider allowing an audio-visual recording of police interviews to be admitted as the evidence-in-chief of the vulnerable witness. This practice is now used in a number of common law and civil law jurisdictions and should be considered so as to limit the need to re-tell a story and to ensure that testimony is provided without delay . To facilitate this process, PMCs could consider training of police investigators about the kinds of information prosecutors will require to be covered in the interview.
Minimise delay	Investigation and prosecution of crimes involving vulnerable witnesses, in particular children, should be fast-tracked and expedited as much as possible, including hearing dates, unless there is a reason why a delay would be in the person's best interest. Delays at court should be avoided or minimised wherever possible to minimise anxiety and tiredness in the witness.
Timely and continued assistance	Support services should be provided in a timely manner, without delay and in accordance with the person's needs and wishes and for as long as it is needed .

Safety Principle

4.

Safety Principle	
<ul style="list-style-type: none"> Physical safety of vulnerable witness to be taken into account and all possible safeguards considered. Unrepresented accused prevented from directly cross-examining a vulnerable witness. Comfortable and safe environment at court. Prevention of intimidation by the accused. 	
Physical safety always considered	<p>The physical safety of the vulnerable witness should always be a central consideration and any applicable safeguards should be applied to the fullest extent appropriate. Such safeguards could include ordering pre-trial detention of the accused, setting special 'no contact' bail conditions, the use of restraining orders or apprehended violence orders, placing the accused under house arrest, or requiring that they live in a different community, providing witness protection and not disclosing the whereabouts of the witness. In addition, the criminal justice system and related professionals should work together to develop comprehensive and specially tailored strategies to reduce the risk of the vulnerable witness being subjected to future instances of harm, both by the offender and/or the broader family/community group.</p>
Unrepresented accused prevented from directly cross-examining vulnerable witness	<p>Wherever possible, the court should prevent the accused from directly cross-examining the vulnerable witness. This can be achieved by providing the accused with legal aid or a duty lawyer, even if they are only available for that particular part of the trial. Other ideas could include the use of a communication assistant, questioning by the court, or prohibiting cross examination. Where it is not possible to prevent cross-examination by the accused directly, the court should take particular care to disallow inappropriate questions and take any available steps to ensure that an appropriate tone and line of questioning is used.</p>
Support person may accompany vulnerable witness	<p>A support person, from the vulnerable witnesses' family and community whom they trust, should be permitted to accompany them throughout the criminal justice process, including during interviews and attendances at court. The support person should be permitted to sit next to the witness in court, wherever possible. For children, this person may or may not be their parent or guardian. The presence of this support person should always be at the discretion of the witness.</p>
Comfortable and safe environment at court	<p>PMCs should consider strategies to make sure that the court environment is less intimidating for vulnerable witnesses. For instance, ensuring that there are separate, secure and comfortable waiting rooms at court, judges should consider sitting at eye level with the other participants rather than on the bench, judges and barristers should consider de-wigging and de-robing in SGBV trials involving vulnerable witnesses, particularly children.</p>
No direct contact between accused and vulnerable witness	<p>No direct contact between the accused and the vulnerable witness should occur at any point during the criminal process, particularly during the trial. A screen should be placed between the alleged perpetrator and the vulnerable witness to ensure that the person is not intimidated by eye contact, facial or other gestures by the accused. Other ways this can be implemented is by facilitating the ability of the witness to give testimony from remote location by one-way CCTV or other means (e.g. a pre-recorded interview or Skype). Prosecutors should discuss options with the witness and make appropriate applications to the court in advance of the hearing.</p>

Privacy Principle	
<ul style="list-style-type: none"> • • • 	
Use of pseudonyms or initials	
Holding proceedings in closed court	PMCs should consider whether it is possible to hold proceedings in a closed court , where the public and media are excluded. This can apply to either the whole trial, or only to the parts of the trial where the witness is providing evidence. If it applies to only parts of the trial, pseudonyms or initials should be considered for use, if not already used, in the open parts of the trial.
Prohibit the publishing or broadcast of identifying details	<p>To prevent the publication of identifying details in the media, a prohibition on publication of identifying details of vulnerable witness can be introduced into legislation. To strengthen the prohibition it could be made an offence for someone to publish identifying information about a vulnerable witness.</p> <p>Even without legislation, the court could consider making non-publication or suppression orders in SGBV cases, which if breached might constitute a contempt of court.</p>
Personal information should be protected to the fullest extent possible	The personal information of the vulnerable witness should only be shared with their permission (unless required by law or necessary for their safety) and only to the extent that information-sharing will be beneficial to the person. Disclosure of unnecessary personal details during the criminal process and particularly in court should be avoided.

Non-discrimination Principle

6.

Non-discrimination Principle	
<ul style="list-style-type: none">No discrimination against vulnerable witnesses on basis of race, gender, colour, religion, beliefs, age, family status, culture, language, ethnicity, national or social origin, citizenship, sexual orientation, political or other opinion, disability, status of birth, property or other condition.	
Use of interpreters	Prosecutors and courts should consider using the services of a suitably qualified interpreter when communicating with a vulnerable witness who has difficulty speaking or understanding the official or working languages of the criminal justice process.
Provision of travel/ accommodation assistance	Prosecutors should consider whether the vulnerable witness requires assistance with travel or accommodation costs to attend court, medical or counselling appointments and make this available where possible and appropriate.
Use of communication aids	Expert assistance on the use of communication aids used by people with a disability, such as picture boards, or specialist communicators should be used to the fullest extent possible where the person suffers from a disability to ensure non-discrimination . Anatomical models may also assist where children are involved or the terminology is complex.
Waiver of medical fees	Jurisdictions should consider directing all hospitals, health centres and other health facilities to waive fees for providing health care services and medical reports for SGBV victim/survivors.

Individual Expression Principle

- The vulnerable witness should be entitled and encouraged to give evidence and tell story in own words.
- The person should feel free to express their views and concerns about the criminal justice process and their involvement.
- Use of court approved professional facilitator.

Use of **appropriate language** by prosecutors and judges

Criminal justice professionals should ensure that **language is modified**, in particular when dealing with children or persons with a cognitive impairment, to ensure that they can understand and participate fully during their interaction with the criminal justice system. It is important to avoid unnecessarily complex language or long winded questions. This should be facilitated by providing specialist **training in communication techniques** and the use of appropriate language for children and traumatised witnesses for criminal justice professionals or by intensively training a small number of criminal justice professionals who are called on specifically to work with vulnerable witnesses.

Avoid the use of **leading questions** and **fast paced questioning**

Studies have shown that closed questions and leading questions are the most likely to elicit inaccurate responses and unreliable evidence, particularly from children and witnesses with cognitive impairments. It is **important to avoid closed or leading questions and aggressive fast paced questioning** that could lead to an increase in anxiety in the vulnerable witness.

Allow the person to tell their story at their **own pace** and in their **own words**

Some of the ways a person can be encourage to tell their story in their **own words** and at their **own pace** are through providing a **safe and secure** environment, using communication assistants, testimonial aids or **open ended and non-leading questions** to encourage a **free narrative** to the fullest extent possible.

Use of **communication assistants**

Some jurisdictions use intermediaries who are specialists in communication techniques to relay questions and answers between the witness and the lawyer. These **communication assistants** can have a variety of roles. They may not be allowed to change the wording of the question and may only lighten the tone, they could examine the witness entirely on their own with the lawyer just directing them about what issues to explore, or they may work with the court by intervening if an inappropriate question is used and helping counsel to rephrase the question or re-putting questions themselves in appropriate language.

Communication assistants can assist the person to tell the story in their own words by helping to **avoid leading and closed questions** and suggesting **testimonial aids**.

Provide opportunities for the vulnerable witness to **express themselves**

The criminal justice professional should provide **space and opportunity** so that the person can **express any concerns, complaints or views** they might have about the criminal justice process, their role or involvement in that process or their **feelings about the outcome**. The professional should refrain from judging the person for any negative views they might have and allow the person to **feel that they are being heard and considered**. It may be useful, in certain circumstances, to provide reasons, without any defensiveness, about why some things are the way they are.

Victim Impact and Compensation Principle

8

Victim Impact and Compensation Principle

- Victim/survivor entitled to make oral representation or submit a signed victim impact statement through the prosecutor to the sentencing judge specifying personal harm and loss for sentencing purposes.
- Prosecutor to provide victim/survivor with information about any process for compensation or restitution.
- Ability of prosecutor to make such an application on behalf of a vulnerable witness.

SGBV victim/survivor entitled to make oral representation through prosecutor or submit a signed **victim impact statement** to court

Victim impact statements can be **cathartic** and help SGBV victims/survivors with **closure** and a feeling of finality. They are a good tool for ensuring that the person **feels heard** during the criminal justice process. Being given an opportunity to state the impact the crime has had can be very helpful to the person and so the opportunity should be made available, although not compulsory.

Provide victim with information on any applicable **compensation or restitution** process

The SGBV victim/survivor should be provided with information about any available **restitution or compensation** available to victims of crime. If it is available, the prosecutor or liaison officer should **make the application on behalf** of the vulnerable witness, where possible and they have been requested to do so, keeping the person fully informed of the progress of their application and providing any assistance they can. Consideration should be given to telling the victim/survivor about compensation arrangements in a special conference before sentencing proceedings.

Further resources and specific examples

ARTICLES AND RESEARCH

Bowden P, Henning T and Plater D, *Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?*, Melbourne University Law Review, 2014; 37(3), 539-584

Powell M, *Improving the reliability of child witness testimony in court: The importance of focusing on questioning techniques*, Current Issues in Criminal Justice, July 2005; 17(1), 137-143

Powell M and Snow P, *Guide to questioning children during the free-narrative phase of an investigative interview*, Australian Psychologist, March 2007; 42(1), 57-65

Powell M, Roberts K and Guadagno B, *Particularisation of Child Abuse Offences – Common Problems when Questioning Child Witnesses*, Current Issues in Criminal Justice (2007) Vol 19(1), 64

Eastwood C and Patton W, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, Criminal Research Council, Canberra (2002)

Bakshi K and Katzin D, *Helping Child Victims and Witnesses Present Effective Testimony*, The United States Attorneys' Bulletin, November 2006; 54(7), 42-48

The United States National Crime Victim Law Institute, *Navigating the Perils of Pro Se: How to Protect Your Client From Cross-Examination by a Pro Se Defendant*, Victim Law Bulletin; 2017, 1-4.

The United States National Crime Victim Law Institute, *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, Violence Against Women Bulletin; September 2011, 1-16

AVAILABLE TRAINING AND RESOURCES

UNODC free on-line course for justice professionals dealing with child victims:

<http://www.unodc.org/unodc/en/frontpage/2011/December/free-online-course-for-justice-professionals-dealing-with-child-victims.html>

The Advocate's Gateway (UK) – a number of resources, practice notes and toolkits:

<https://www.theadvocatesgateway.org/>

Pacific Prevention of Domestic Violence Program (PPDVP):

<https://www.ppdvp.org.nz/>

Training in Papua New Guinea: the Pikinini Witness Workshops, Medical Workshop and Male Advocacy programs for legal professionals.

Pacific Judicial Strengthening Initiative: Regional training for judicial officers in the Pacific region

Pacific Judicial Development Programme – Family Violence Toolkit

Papua New Guinea has a Victim Liaison Officer based in the court, who assists in keeping victim/survivors informed of processes and time frames. There is also a MeriSeif hotline for victim/survivors of Family Violence to provide coordinated assistance.

Office for Victims of Crime (US Department of Justice) free webinars for lawyers on the impact of trauma on child victims and effective communication techniques for child victims -

<https://www.ovcttac.gov/views/dspLegalAssistance.cfm>

American Judge's Association – Domestic Violence & the Court Room - Knowing the Issues, Understanding the Victim -

<http://aja.ncsc.dni.us/pdfs/domestic-violence-the-courtroom.pdf>

EXISTING GUIDELINES/PRINCIPLES

NZ Crown Law – *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (July 2019)

<https://www.crownlaw.govt.nz/assets/Uploads/Solicitor-Generals-Guidelines-for-Prosecuting-Sexual-Violence.pdf>

UK Ministry of Justice – *Achieving Best Evidence in Criminal Proceedings – Guidance on interviewing victims and witnesses, and guidance on using special measures* (March 2011)

https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf

United Nations Office on Drugs and Crime (UNODC) *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary*, United Nations, New York 2009

https://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf

ECOSOC Resolution 2005/20 – *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*

<https://www.un.org/ruleoflaw/files/UNGuidelinesChildVictimsWitnesses.pdf>

International Bureau for Children's Rights (IBCR) – *Guidelines on Justice for Child Victims and Witnesses of Crime*, March 2003

http://www.iccnw.org/documents/IBCRGuidelinesMar2003_e.pdf

Queensland Government *Response to sexual assault: Queensland Government Interagency Guidelines for Responding to People who have Experienced Sexual Assault*, June 2014

The Tonga Magistrates Bench Book

Solomon Islands Magistrates Bench Book

Vanuatu Magistrates Bench Book

Samoan Prosecutorial Guidelines (Article 12)

PNG Department of Health Guidelines (waiver of fees and support person during medical examinations)

PNG Guidelines for Family and Sexual Violence Service Providers in Papua New Guinea

LEGISLATIVE PROVISIONS

De-robing: s37B Evidence Act 1975 (PNG)

Definition of Vulnerable Witness: s21A, *Evidence Act* (NT); s21A, *Evidence Act 1977* (Qld); s103 *Evidence Act 2006* (NZ); s37B *Evidence Act 1975* (PNG); 18 U.S.C §3509(e) *United States Code* (US) (applicable only to children)

Closure of Proceedings to Public: s63, *Family Protection and Domestic Violence Act 2014* (Tuvalu); s37B *Evidence Act 1975* (PNG); 18 U.S.C §3509(e) *United States Code* (US)

Not to Draw Adverse Information: s40K 40U, *Evidence (Miscellaneous Provisions) Act 1991* (ACT); 18 U.S.C §3509(c) *United States Code* (US)

Audio-visual Recordings: s40F, *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s37C *Evidence Act 1975* (PNG); 18 U.S.C §3509(b)(2) *United States Code* (US)

Victim Impact Statements: s8, *Victims of Offences Act 1999* (Cook Islands); 18 U.S.C §3509(f) *United States Code* (US); In Papua New Guinea victim impact statements are commonly taken and submitted to the Court.

Requirement to Refer and Provide information: ss46-48 *Family Protection Act 2014* (Solomon Islands); s47 *Family Protection and Domestic Violence Act 2014* (Tuvalu) 18 U.S.C §3509(g) *United States Code* (US) (multidisciplinary teams)

Pre-Trial Hearings: s37D, 37F *Evidence Act 1975* (PNG); 18 U.S.C §3509(i) *United States Code* (US) (requirement for a speedy trial)

Protection Orders: *Family Safety Act 2013* (Samoa); *Family Protection Act 2014* (PNG)

Frameworks for Coordinated Services: ss49-55 *Family Protection Act 2014* (Solomon Islands); s58 *Family Protection and Domestic Violence Act 2014* (Tuvalu); 18 U.S.C §3509(g) *United States Code* (US) (multidisciplinary teams)

Screening: s38C, *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s37B *Evidence Act 1975* (PNG)

Restriction of Direct Cross-Examination by Accused: s38D, *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s21N *Evidence Act 1977* (Qld); s8 *Family Safety Act 2013* (Samoa); s95 *Evidence Act 2006* (NZ); s37E *Evidence Act 1975* (PNG)

Use of CCTV/audio-visual Link: 18 U.S.C §3509(b)(1) *United States Code* (US); s21B, *Evidence Act* (NT); s37B *Evidence Act 1975* (PNG)

Support Persons: s37B *Evidence Act 1975* (PNG); 18 U.S.C §3509(i) *United States Code* (US) (adult attendant)

Non-publication: s6 *Sexual Offences Act 1978* (Qld)⁴; 18 U.S.C §3509(d) *United States Code* (US)

4 In Papua New Guinea, there is no provision for non-publication orders under their Evidence Act. Applications can still be made under the common law but have the potential to conflict with the PNG Constitution – other jurisdictions may also need to consider constitutional issues.

Testimonial Aids: 18 U.S.C §3509(l) *United States Code* (US)

Evidence of Sexual Reputation/Experience: Rule 412 *Federal Rules of Evidence* (US)

Unacceptable Questions: Rule 611(a) *Federal Rules of Evidence* (US); 18 U.S.C §3509(c) *United States Code* (US) (children)

Each State in the US also have a Crime Victims' Bill of Rights – see for example N.J.S.A. 52:4B-36

CASES

Inherent jurisdiction:

R v Barker [2010] EWCA Crim 4; R v F [2013] EWCA Crim 424

R v Daniels [2007] NZCA 183 (the last case relying on inherent jurisdiction in NZ prior to amendment to Evidence Act)

R v Moke and Lawrence [1996] 1 NZLR 263

R v Lewis [1991] 1 NZLR 409

Alternative ways of providing evidence:

Crown v Iosefa CKHC 11 September 2017 Keane J - (Cook Islands) (on use of screen for taking evidence of victim of sexual assault)

Crown v Nubono CKHC 14 July 2017 Doherty J (Cook Islands) (admission of pre-recorded video evidence of child victim of indecent assault, use of screen and other protections); **R v Accused** (T4/88), [1989] 1 NZLR 660 (CA); **R v Wihongi** 6/5/03 CA 432/02 (NZ) (use of screens)

Samatua v Attorney-General [2015] CKHC 14; **Plaint 5.2012** [3 June 2015] Grice J (use of skype)

R v Katuke 25 April 2017 CR NO'S 599-601/2016 Williams CJ (Cook Islands) (permitted evidence in chief to be provided as a transcript of police interview and controls were put on cross examination)

Cases from NZ (since introduction of special measures into Evidence Act):

R v O (CA 433/2012) [2012] NZCA 475 (no default position or presumption in favour of giving evidence in the ordinary way)

R v Raj [2007] NZCA 10 and **R v O** (CA 433/2012) [2012] NZCA 475 (no presumption that the older the witness is, the less likely that something other than traditional means of giving evidence should be adopted)

R v M (CA 590/2009) [2009] NZCA 455 (exceptional circumstances must be established before a pre recorded interview of a child won't be played as her evidence-in-chief)

R v Simi [2008] NZCA 515 (Court of Appeal approved the use of audio-visual link for rape complainant)

Connolly v R [2012] NZCA 41 and *Wealleans v R* [2015] NZCA 353 (examples of the development law on ordering pre-recorded interviews be played for adult sexual complainants)

R v Miller [2016] NZCA 183 (case where Court upheld DC decision not to allow pre-recorded interview to be played for adult sexual complainant)

White v R [2017] NZCA 322 (an example of screens being used for a non-complainant)

R v Check [2009] NZCA 548 (use of audio-visual link for witnesses in gang killing)

R v Crozier [2016] NZHC 1530 (an unsuccessful application for a witness to a violent assault on her partner to give evidence by pre-recorded interview)

R v Mussa [2010] NZCA 123 (Court willingness to use of screen for adult complainant; without the need for expert evidence in support of application for alternative evidence)

CASES FROM THE US (REGARDING THE SIXTH AMENDMENT RIGHT TO CONFRONTATION VS. USE OF ALTERNATIVE MEASURES)

Maryland v. Craig, 497 U.S. 836 (1990) (on use of one-way CCTV not violating constitution right to confrontation - a defendant's right to confront the witness may be satisfied absent a physical face-to-face confrontation where it is within the state's interest and the reliability of the evidence is assured)

Depp v. Commonwealth 278 S.W.3d at 619 (2009) (Court decision that the defendant has "no constitutional right to intimidate a victim by personally questioning him or her")

United States v. Pleasant, 12 F. App'x 262 (6th Cir. 2001) (Court holding that it was not an abuse of discretion to prohibit a self-representing defendant from personally cross-examining the victim where case involved alleged abuse and intimidation)

Fields v. Murray, 49 F.3d 1024, 1036 (4th Cir. 1995) (Court finding that protecting child victims from trauma is an important state interest which provides an adequate basis to prohibit a defendant from cross-examining the victim)

United States v. Moses, 137 F.3d 894, 898 (6th Cir. 1998) (holding that the trial court erred in permitting closed circuit testimony by relying only on a child's statement that she never wanted to see the defendant again and failing to consider her additional comment that she "was not afraid of him.")

United States v. Etimani, 328 F.3d 493 (9th Cir. 2003) (finding that the use of two-way closed circuit television did not violate right to confrontation)



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