




P I L O N

**Model Provisions and Explanatory Text:
Supporting vulnerable witnesses in cases
involving sexual and gender based violence**

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PILON SGBV working group:

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

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Chair's Statement



Talofa lava. I am pleased to present to my Pacific colleagues explanatory text that explores the policy reasons and justifications for the use of special measures in the courtroom. My predecessor, Mr Lemalu Hermann Retzlaff, former Attorney General of Samoa, ably led the PILON Sexual and Gender Based Violence (SGBV) working group for a number of years prior to my appointment. It is through his dedication and the hard work of the working group that a set of Model Provisions for Special Measures for Vulnerable Witnesses to SGBV was settled by PILON in 2019. Through these Model Provisions, PILON is supporting the call by Pacific Leaders to take concrete measures to prioritise the eradication of violence against women and girls in our region.

The work on these Model Provisions generated extensive discussion amongst the law and justice community in the Pacific. As we know, rates of violence against women and girls is unacceptably high in our region and societal attitudes in relation to gender remain a barrier to effective change. A number of Pacific law and justice officials raised concerns that the use of special measures could jeopardise the impartiality and balance of fairness that is of central importance to the trial process. Throughout the past few years, the working group has been exploring how the adversarial system and history of rape trials have actually operated to create bias and an unfairness that operates against access to justice for survivors of sexual and gender based violence. The low rates of reporting, difficulties with gathering evidence, societal attitudes and many other barriers are a significant impediment to successfully prosecuting sexual violence matters. The very low rates of conviction and appropriate sentencing for these crimes are further demonstration of the challenges which the traditional adversarial system of justice has faced in providing access to justice to survivors of this kind of violence.

I am proud to present PILON's **Model Provisions and Explanatory Text: Supporting vulnerable witnesses in cases involving sexual and gender based violence**, as a practical tool to assist Pacific countries with law reform in this area. It is one small step that can be taken to ensure that justice is being served in prosecutions for these crimes, and reinforce that the rights of the survivors of sexual and gender based violence have a legitimate place in our legal system, alongside the rights of those accused of perpetrating such crimes.

I encourage you all to use these Model Provisions and the policy justifications that have been drafted here by the working group to lobby for appropriate changes to legislation and practice in each of your countries. Reach out to your PILON SGBV working group for support and encouragement. Together with all of you, I am proud to continue to support this working group and its efforts to improve the experience of Court for some of our more vulnerable members of our Pacific family

Savalenoa Mareva Betham-Annandale

Attorney General, Samoa
Chair of PILON SGBV Working Group

Introduction

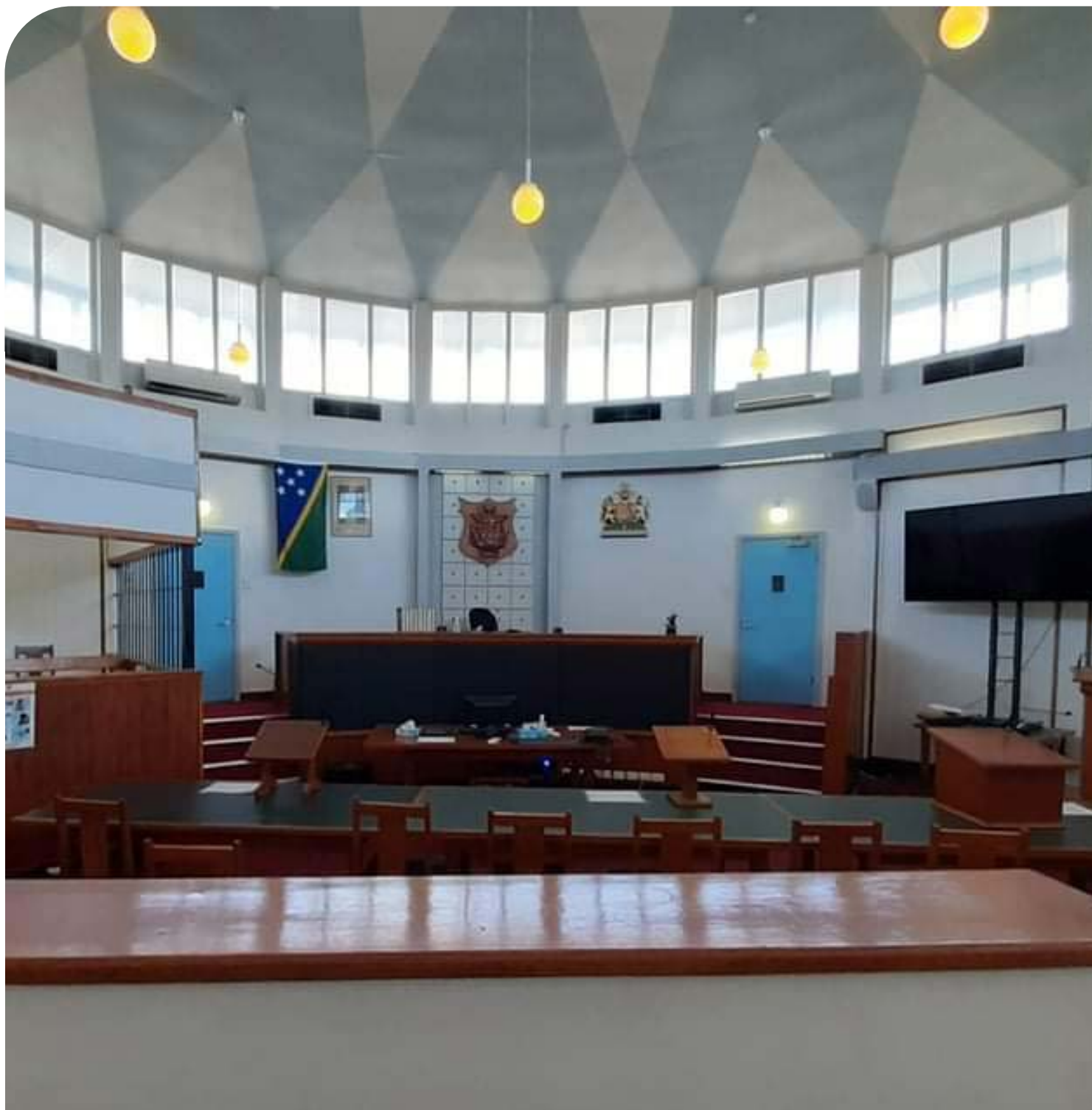
Giving evidence in Court is stressful and can be daunting for many people at the best of times. The rituals and processes of the judicial system can be bewildering, confusing and intimidating, particularly for children. The courtroom is designed to project power and authority, which can be demoralising and particularly damaging for victims of sexual violence, who may already experience feelings of powerless and blame as a result of the offending. The adversarial system and cross-examination in particular, can be a hostile environment, which in many cases, given the presence of the alleged perpetrator, can lead to further abuse and re-victimisation. In sexual violence matters in particular, the nature of the evidence is typically intimate and intensely personal, involving in-depth questioning about sexual organs, private acts and topics that are uncomfortable to discuss openly in a room full of strangers. This situation amplifies the distress and intimidation that would normally be expected of any participant. The higher the distress levels, feelings of humiliation or pressure that a witness feels, the more likely it is that they will fail to give all the pertinent evidence, demonstrate confusion or be incapable of communicating clearly, impacting the quality of evidence that is put to the Court to help it reach a just and fair verdict.

Special measures for witnesses in sexual and family violence matters (and children generally) are designed to overcome some of these stressors, which can cause additional disadvantage to these particular witnesses. By doing so, this will assist the Court to receive the best available evidence and result in a process which is fairer for all parties. Most importantly, the special measures are designed to assist vulnerable witnesses in actively participating in the proceeding by giving their evidence to the best of their ability. The ultimate aim of any judicial proceeding should be to achieve justice – and these Model Provisions are designed to contribute to that end.

PILON SGBV Working Group: Samoa (Chair), American Samoa, Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands, Tonga, Tokelau, Tuvalu and Vanuatu.

Section 1 – Definitions

| Section | PILON Member Country | Explanatory Text |
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| *Any references below to a section is to the Model Provisions | | |
| This section defines key terms that are used in the Model Provisions. | | |
| <p>‘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 proceeding relates, or a recording made under Section 5 at a pre-trial hearing.</p> <p>‘closed-circuit television’ means any audio-visual facility that enables communication between the courtroom and another place;</p> <p>‘family violence offence’ - insert definition of by reference to the relevant legislation in country (eg, Penal Code, Crimes Act, Criminal Code).</p> <p>‘publish’ – includes any form of communication, including electronic communication, oral utterance, gesture or any means of which something may be communicated to a person or persons.</p> <p>‘sexual offence’ - insert definition of by reference to the relevant legislation.</p> <p>‘special measures’ are provided for under section 3.</p> <p>‘vulnerable witness’ means a witness in a proceeding who is –</p> <ol style="list-style-type: none"> under the age of 18 years at the time of the hearing; or the complainant in a proceeding relating to a sexual offence or family violence offence; or a witness found to be vulnerable, either on the application of a party or on the Court’s own initiative, on the grounds of any one or more of the following: <ol style="list-style-type: none"> the physical, intellectual, psychological, or psychiatric impairment of the witness; the trauma suffered by the witness; the witness’s fear of intimidation; a credible risk that the witness is likely to be intimidated; the linguistic or cultural background or religious beliefs of the witness; the nature of the evidence that the witness is expected to give; the relationship of the witness to any party to the proceeding; any other circumstance the Court considers places the witness at a special disadvantage if required to give evidence in Court. | Australia | <p>The definition of ‘audio-visual recording’ is significant because it sets out the parameters around what kind of evidence can be submitted to a Court under section 3(1)(e) (where it is a police interview) or section 5 (where it is made at a pre-trial hearing). In balancing the interests of a fair trial to the defendant, it is a requirement of sections 3(1)(e) and 5 that the witness can be both seen and heard in the recording. The definition is technology neutral so it can capture a recording on any medium and will be flexible to accommodate future changes to technology. It is not intended to capture material transmitted in real time (see ‘closed-circuit television’).</p> <p>The definition of ‘closed-circuit television’ (CCTV) captures audio-visual content that is transmitted to the courtroom in real time. Evidence can be given by CCTV under Section 3(1)(d). The definition is technology neutral and will capture the traditional use of CCTV or live-streamed content. It is distinguished from a pre-recorded ‘audio-visual recording’ as the conditions for admissibility set out in section 4 apply to ‘audio-visual recordings’ but not ‘closed-circuit television’.</p> <p>The definition of a ‘family violence offence’ and ‘sexual offence’ determines the class of witnesses that will be taken to be vulnerable witnesses by operation of the law under section (1) (b) and not at the discretion of the Court under section 1(c). It could be defined by reference to a Division or Part in a criminal code, or each offence provision may be listed separately. It is important to consider all provisions under which SGBV offences might be prosecuted, but not be too broad to capture unintended witnesses. It is recommended that the terminology is as consistent as possible with the corresponding statutes.</p> <p>The definition of ‘publish’ relates to the offence provision in section 7 and should be broad enough to include oral and written communications, as well as electronic communications (i.e. broad enough to encompass TV, radio, newspapers, social media, internet articles etc).</p> <p>‘Special measures’ are set out in section 3 and list the ways in which a trial procedure may be altered to reduce distress to a vulnerable witness and provide the greatest likelihood of them giving their best evidence to the Court. The witness is entitled to use the special measures set out in section 3(1) and, consistent with the Court’s independence and ability to determine its own procedures, the special measures in section 3(6) are provided at the discretion of the Court.</p> <p>Paragraph (a) of the definition of ‘vulnerable witness’ in section 1 provides that all children are considered to be a ‘vulnerable witness’. Paragraph (b) of the definition of ‘vulnerable witness’ establishes that all complainants in a proceeding concerning a ‘family violence offence’ or ‘sexual offence’ are a ‘vulnerable witness’. Victims of offences that are not listed (e.g. violent offences) or other witnesses (i.e. non-complainant) to sexual or family violence offences can still be classed as vulnerable, as appropriate, by order of the Court, under paragraph (c) of the definition of ‘vulnerable witness’, for instance if they have a disability as provided for in subparagraph (i), or have suffered a significant trauma as provided for in subparagraph (ii). They are vulnerable because giving evidence in Court may be difficult due to maturity, barriers to communication, intimidation and/or distress and without special assistance, their evidence may never be satisfactorily heard.</p> |



High Court, Solomon Islands

Section 2 – Alternative ways of giving evidence

| Section | PILON Member Country | Explanatory Text |
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| <p>This section of the Model Provisions sets out the availability of special measures for a vulnerable witness. There are two categories; those the witness is entitled to by operation of law, and additional measures that are available at the discretion of the Court. Providing an entitlement to special measures is central to the operation of the provisions, because it directs the Court to take steps to ensure that a vulnerable witness whose evidence may be harder to elicit in the absence of these model provisions has a chance to present their best evidence to the Court. Vulnerable witnesses could include children, people with disabilities, those from minority linguistic or cultural backgrounds, and complainants in sexual assault or family violence matters.</p> | | |
| <p>(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).</p> <p>(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(6) are to be applied during the giving of evidence by a vulnerable witness.</p> <p>(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.</p> <p>(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, if the Court is satisfied that any necessary equipment or facilities are not available.*</p> <p>(5) In making an order under subsection 2(2), in addition to having regard to any factor which it considers to be relevant, the Court must have regard to;</p> <p>(a) the need to ensure the fairness of the proceeding, and</p> <p>(b) the need to minimise stress on the witness.</p> <p>* Subsection 2(4) 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.</p> | Solomon Islands | <p>Section 2(1) establishes an entitlement to special measures for a vulnerable witness. The vulnerable witness may choose not to use any of the special measures and should not be compelled to do so. The special measures that a vulnerable witness is entitled to are listed under section 3(1). The legislation ensures that vulnerable witnesses have access to these measures without the need for the Court to make an order (subject to Section 2(3) – see below).</p> <p>Section 2(2) allows the Court, on its own initiative, or when an application is made by a party to the proceeding, to make an order that one or more of the special measures provided in subsection 3(6) are to be applied when a vulnerable witness gives evidence. Unlike the special measures listed in subsection 3(1), the measures listed in subsection 3(6) are not an automatic entitlement by law. They are provided at the discretion of the Court, acknowledging the Court's independence and responsibility to determine the process by which the Court will operate. This subsection allows the Court to make an order in the absence of an application by a party to the proceeding. The exercise of the Court's power under subsection 2(2) is subject to the considerations set out in subsection 2(5).</p> <p>Section 2(3) allows the Court on its own initiative or, when an application is made by a party to the proceeding, to provide that one of the special measures in subsection 3(1) is not available. Before ordering that a special measure is not available, the Court must first be satisfied that there are special reasons in the interest of justice to deny the use of one or more special measures provided in subsection 3(1) to a vulnerable witness. Special reasons should arise rarely and there should be some feature of the case that is so far out of the ordinary that the special measure is not appropriate in the circumstances, for instance where cross-examination is necessary to explore a defence or other avenue of inquiry.</p> <p>Section 2(4) allows the Court, on its own initiative, to deny a vulnerable witness one or more of the special measures to which they are otherwise entitled under subsection 3(1) if the necessary equipment or facilities are not available. This subsection takes into account that some Pacific Island countries may not have the necessary equipment and facilities required for some of the special measures provided for in subsection 3(1). This subsection of the Model Provisions is optional. It is preferable not to have an exception to the entitlement for vulnerable witnesses to the special measures listed in subsection 3(1) and this provision is included only in recognition of the limited resources in the Pacific.</p> <p>Section 2(5) sets out the matters a Court must consider when making an order under subsection 2(2) to provide a special measure. The subsection requires the Court to balance fairness to all parties in the proceeding, but also the need to minimise stress on the vulnerable witness. Subsection 2(5) provides a wide discretion to allow the Court to consider a range of factors which it considers to be relevant when making such an order.</p> |

Section 3 – Special Measures

| Section | PILON Member Country | Explanatory Text *Any references below to a section is to the Model Provisions |
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| <p>This section of the Model Provisions sets out the kinds of special measures that can be provided for a vulnerable witness. The measures are broken into two categories; first being a list of options in subsection 3(1) providing an entitlement for the witness to use the listed special measures. Second, the special measures listed at subsection 3(6) are provided at the discretion of the Court and include a number of low cost and easy to administer measures such as removal of formal court attire, changes to seating arrangements, and adjournment to a less formal setting. This would hopefully reduce stress that can be caused by unfamiliarity with the Court environment and help the witness to feel more comfortable while giving evidence.</p> <p>Pacific jurisdictions that cannot make one or more of the measures listed in section 3(1) available may wish to consider including the measure in subsection 3(6) instead, since that subsection allows the Court to make the measure available at its discretion. The five basic special measures that should be considered as routinely available include a screen, a support person, an intermediary or interpreter, CCTV and the admission of an audio-visual recording as evidence. If including audio-visual recordings as a special measure that a witness is entitled to, Pacific Island countries should ensure that they can secure the recording (see Section 4 below).</p> | | |
| <p>(1) A vulnerable witness who gives evidence is entitled (but may choose not) to use any one or more of the following special measures:</p> <ul style="list-style-type: none"> (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 <ul style="list-style-type: none"> (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. <p>(2) If a support person is present in accordance with subsection 3(1)(b), the support person must not:</p> <ul style="list-style-type: none"> (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. <p>(3) If an intermediary is used in accordance with subsection 3(1)(c) the intermediary must not:</p> <ul style="list-style-type: none"> (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.* | <p>PNG (1-3) and RMI (4-6)</p> | <p>Section 3(1) sets out five special measures that a vulnerable witness is entitled to by operation of law. These measures must be made available to a vulnerable witness. The operation of these measures do not rely on an order of the Court, or an application to the Court and the witness may choose whether or not to use one or more of these measures.</p> <p>Paragraph 3(1)(a) allows the use of a screen to shield the vulnerable witness from seeing the alleged perpetrator. This is a simple and accessible measure to reduce feelings of fear and intimidation in the vulnerable witness. In some jurisdictions, this measure may not be available due to ‘right to confront’ provisions in a Constitution or Bill of Rights. Even where a ‘right to confront’ clause exists, Courts in these jurisdictions have found that this is not an absolute right and can be balanced with the interests of the State in the delivery of justice. One way to balance this right could be a one-way screen that allows the accused to see the witness but prevents the witness from seeing the accused. If a one-way screen is not practical, a solid screen that prevents both the accused and the witness from seeing each other would be a next best option.</p> <p>Paragraph 3(1)(b) provides for a support person to be present at the request of the vulnerable witness. The presence of a support person can help a vulnerable witness who is sharing intimate and very personal details of their life in what is, for all intents and purposes, a public space filled with strangers or even people from the community who the vulnerable witness knows. A support person can provide a friendly and reassuring face to reduce the discomfort of providing such detailed information about private and sensitive matters. The role of a support person is further set out at subsection 3(2).</p> <p>Paragraph 3(1)(c) provides that the vulnerable witness may elect to be examined through a third party, or intermediary. Intermediaries, just like interpreters, are useful where there are communication issues in play. While interpreters can translate languages, an intermediary should be able to engage in more specialised forms of communication, including age appropriate communication, or special techniques, such as communication aids and picture boards that may be used by witnesses with a disability. The role of an intermediary is further set out at subsection 3(3).</p> <p>Paragraph 3(1)(d) provides that a vulnerable witness may elect to give evidence via CCTV. Physical distance from the alleged perpetrator and the less personally confronting nature of remote participation may assist in reducing stress, nervousness and intimidation of the witness. Giving evidence through CCTV, or other forms of remote participation can also reduce the stress of the witness bumping into the defendant, or the defendant’s friends and family, outside the courtroom.</p> <p>Paragraph 3(1)(e) provides that the vulnerable witness may choose to have an audio-visual recording admitted as evidence. Audio-visual recordings can be made by police responders or during a police interview. An audio-visual recording, especially if made during the initial response to the alleged crime, can contain powerful testimony as the emotional intensity of the situation is fresh. Audio-visual recordings assist with reducing the need for the vulnerable witness to re-tell their story and re-live the trauma. It is important to have safeguards around the handling of this material as provided in Section 4, to ensure that the recording is not used to further traumatise the vulnerable witness.</p> |

Section 3 – Special Measures

| Section | PILON Member Country | Explanatory Text |
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| | | *Any references below to a section is to the Model Provisions |
| <p>(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.</p> <p>(5) If an audio-visual recording is to be admitted as evidence under subsection 3(1)(e);</p> <p>(a) the vulnerable witness must, in the audio-visual recording, identify himself or herself and attest to the truth of the contents of the audio-visual recording; and</p> <p>(b) the vulnerable witness must be available for cross-examination and re-examination at the proceeding if required by the Court, and</p> <p>(c) Section 4 applies.</p> <p>(6) If, in the opinion of the Court, distress to the vulnerable witness will be reduced, the Court may order that any one or more of the following special measures be applied:</p> <p>(a) dispensing with the wearing of wigs and robes while the vulnerable witness is giving evidence; or</p> <p>(b) planned seating arrangements for people who have an interest in the proceeding, including the level at which they are seated and the people in the vulnerable witness line of vision; or</p> <p>(c) the adjournment of the proceeding or any part of the proceeding to other premises.</p> <p>(6) If, in the opinion of the Court, distress to the vulnerable witness will be reduced, the Court may order that any one or more of the following special measures be applied:</p> <p>(a) dispensing with the wearing of wigs and robes while the vulnerable witness is giving evidence; or</p> <p>(b) planned seating arrangements for people who have an interest in the proceeding, including the level at which they are seated and the people in the vulnerable witness line of vision; or</p> <p>(c) the adjournment of the proceeding or any part of the proceeding to other premises.</p> | <p>PNG (1-3) and RMI (4-6)</p> | <p>Section 3(2) sets some rules around the involvement of a support person in the proceeding. It limits the support person's involvement to supporting the witness and not speaking for them or otherwise participating in the proceeding. The support person can be anyone nominated by the vulnerable witness, provided they are not a witness, or party, to the proceedings. The Court has the discretion to allow a support person that is a witness or a party to the proceeding in recognition of the fact that there may be limited options in Pacific Island jurisdiction.</p> <p>Section 3(3) sets out some rules around the use of an intermediary in the proceeding. It requires the intermediary to faithfully assist the witness and the Court with communication and not change or alter the meaning of any questions put to, or answers given by, the vulnerable witness. The intermediary must not participate in the proceeding in any way, except to facilitate communication. The intermediary can be anyone nominated by the vulnerable witness or the Court, provided they are not a witness, or party, to the proceeding. The Court has the discretion to allow an intermediary or interpreter that is a witness or a party to the proceeding in recognition of the fact that there may be limited options in a Pacific Island jurisdiction. However, it is preferable that the intermediary be independent and qualified to provide communication support. The term 'intermediary' has not been defined deliberately in the Model Provisions to ensure maximum flexibility in the Pacific context, acknowledging that in many instances in the Pacific availability of intermediaries could be limited and a family member, or other person connected to the proceeding, may be the only person capable of performing this role. 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).</p> <p>Section 3(4) restricts the Court to appointing a person who is a witness or a party to the proceeding as a support person or intermediary only in exceptional circumstances. The ability to do so is only in recognition of the limited resources in the Pacific and an option of last resort.</p> <p>Section 3(5) contains a number of conditions for the admission of an audio-visual recording, or part thereof, as evidence. A vulnerable witness is entitled to this measure under subsection 3(1)(e). If an audio-visual recording is to be used, the witness must identify themselves on the audio-visual recording, swear an oath or affirmation and be available for cross-examination and re-examination. This Provision also clarifies that Section 4 applies, which contains further rules around the use of audio-visual recordings.</p> <p>Section 3(6) provides for a number of special measures that may be applied at the discretion of the Court. A number of these measures are relatively easy to implement. However, implementation remains at the discretion of the Court which is important to properly manage the conduct of proceedings and preserve its independence and impartiality. These measures include not wearing wigs and other formal court dress, seating arrangements that reduce distress and the adjournment of the proceeding to a less intimidating environment, or to a place where the vulnerable witness is less likely to come into contact with the defendant.</p> |

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

| Section | PILON Member Country | Explanatory Text *Any references below to a section is to the Model Provisions |
|---|----------------------|--|
| <p>Section 4 creates a framework for the use of, and access to, audio-visual recordings in a Court proceeding. Pre-recorded audio-visual recordings of evidence can lessen or eliminate the need for complainants or other vulnerable witnesses to give evidence in person at trial (subject to the Court requiring that the witness attend to be cross-examined or re-examined). However, to ensure a defendant's right to representation and a fair trial, the defendant and their counsel must be able to have access to and consider the content of any audio-visual recordings. It is important that there are strong measures in place relating to the security and use of audio-visual recordings. The framework set out in section 4 is important, both for evidential and fair trial reasons, to ameliorate stress for vulnerable witnesses and avoid any risk of further victimisation that could occur if the recording was to fall into the wrong hands. It is also important to have a clear process and framework around audio-visual recordings to ensure they are used consistently in trials and pre-trial hearings and between different Judges and Courts.</p> | | |
| <p>(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.</p> <p>(2) The prosecutor must provide to the accused person, or their lawyer, within a reasonable time before the start of the proceeding or as directed by the Court;</p> <p>(a) written notice that the prosecutor intends to produce the audio-visual recording as evidence; and</p> <p>(b) a copy of a transcript of the audio-visual recording; and</p> <p>(c) details about where the accused person and their lawyer may view the audio-visual recording prior to the proceeding.</p> <p>(2A) If section 4(2) is not complied with, the audio-visual recording may only be admitted as evidence with the leave of the Court and where it is in the interests of justice to admit the evidence.</p> <p>(3) An accused person or 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 one or both of them.</p> <p>(4) In considering whether to make an order under subsection 4(3), the Court must have regard to;</p> <p>(a) whether such an order is in interests of justice, and</p> <p>(b) the nature of the evidence contained in the audio-visual recording, and</p> <p>(c) the ability of the accused person or their lawyer to view the audio-visual recording or to otherwise access the content of the audio-visual recording through other means, including by way of a transcript of the audio-visual recording.</p> <p>(5) Subject to subsection 4(6), an original audio-visual recording must not be edited or otherwise changed in any way.</p> <p>(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.</p> <p>(7) A person commits an offence if the person, without authority;</p> <p>(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.</p> <p>(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;</p> <p>(a) in connection with the investigation of, or a proceeding for, an offence in relation to which the audio visual recording is prepared (including a re-hearing, re-trial or appeal in relation to the proceeding); or</p> <p>(b) with the permission of the Court.</p> <p>(9) The penalty, upon conviction, of an offence against subsection 4(7) is [insert appropriate penalty; ie fine and/or imprisonment for a period not exceeding one year].</p> | New Zealand | <p>Section 4(1) sets out the framework for the management of audio-visual recordings that are to be submitted as evidence under subsection 3(1) or section 5 of the Model Provisions. Section 3(1) provides that vulnerable witnesses are entitled to use an audio-visual recording as evidence (with some limited exceptions). Section 5 provides for the admission of an audio-visual recording as evidence at a pre-trial hearing.</p> <p>Section 4(2) ensures that the defendant has access to the contents of the audio-visual recording ahead of its use at trial. This provision is intended to ensure procedural fairness to the defendant. It requires that the prosecution provide written notice that an audio-visual recording is to be produced as evidence, a transcript of the recording and an opportunity to view the recording within a reasonable time prior to trial.</p> <p>Section 4(2A) provides for the Court to allow an audio-visual recording to be admitted as evidence in circumstances where the conditions in subsection 4(2) are not complied with, but only if it is in the interests of justice to do so.</p> <p>Section 4(3) prevents the defendant from obtaining a copy of the audio-visual recording. Defendants could use the audio-visual recording to perpetrate further harm to the victim, by sharing the recording or sharing it on social media. Some defendants also appear to take pleasure in watching the victim's suffering. These audio-visual recordings are often very powerful and contain raw emotions and trauma and could be very damaging to the vulnerable witness if privacy and security are not maintained. The Court may order that an audio-visual recording can be provided to the defendant and/or their lawyer, but in doing so the Court must consider all the matters set out in Section 4(4).</p> <p>Section 4(4) sets out the matters that the Court must take into account before providing a copy of an audio-visual recording to the alleged perpetrator and/or their lawyer. It is intended that an audio-visual recording should only be provided to the defendant in exceptional circumstances, in consideration of the nature of the recording, where it is not practical to provide access in accordance with section 4(4) and if it is in the interest of justice to do so.</p> <p>Section 4(5) mandates that recordings are not edited or changed in any way except in accordance with subsection 4(6).</p> <p>Section 4(6) provides the Court with the power to give permission to edit an audio-visual recording, but only to the extent that inadmissible or irrelevant evidence is omitted. An application must be made to the Court for determination of the admissibility or relevance of the evidence in question and the permitted edits that may be made.</p> <p>Section 4(7) creates an offence for unauthorised handling of an audio-visual recording. The penalty provision for the offence is contained in subsection 4(9).</p> <p>Section 4(8) sets out the circumstances in which handling an audio-visual recording is authorised. A person handling the audio-visual recording under the authority provided by subsection 4(8) does not commit an offence under subsection 4(7). This includes persons handling the audio-visual recording in relation to the investigation or prosecution of the offence which is the subject of the recording, and those who have been authorised by the Court to handle the recording.</p> |

Section 5 – Giving evidence at pre-trial hearing

| Section | PILON Member Country | Explanatory Text |
|---|----------------------|---|
| <p>This section of the Model Provisions provides for a vulnerable witness to give evidence at a pre-trial hearing, before the main trial takes place. Pre-trial hearings can help vulnerable witnesses by</p> <ul style="list-style-type: none"> (i) minimising a decline in memory caused by delays in the main trial and also allowing a person to begin therapy earlier, without a risk of impacting memory (ii) lessening the stress of giving evidence at the trial in a very public forum, with many people observing (iii) helping to facilitate pre-trial decisions by the defendant as to whether to plead guilty and whether the prosecution will need to proceed (iv) assisting with the efficient scheduling and conduct of the trial, and (v) reducing the risk of re-traumatisation, including through stress caused by delays in hearings (for example, a vulnerable witness may be repeatedly told that the trial is scheduled for hearing at which they will need to give evidence, only for it to be repeatedly delayed). | | |
| <p>(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.</p> <p>(2) In making an order under subsection 5(1), the Court may give such directions, with or without conditions, as it sees fit.</p> <p>(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.</p> <p>(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 subsection 3(1) and can apply to the Court for an order to use the special measures in subsection 3(6).</p> <p>(5) Subject to section 4, an audio-visual recording of the vulnerable witness' evidence at a pre-trial hearing under this section must be admitted in evidence at the proceeding for which the pre-trial hearing was held, as if the vulnerable witness gave the evidence at the proceeding in person.</p> <p>(6) If an audio-visual recording of a vulnerable witness' pre-trial evidence is admitted, into evidence under subsection 5(5) in the proceeding to which it relates the vulnerable witness is not required to attend the proceeding to give further evidence (including cross-examination or re-examination) unless the Court orders otherwise.</p> <p>(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.</p> | Australia | <p>Section 5(1) allows any party to a proceeding to apply for a vulnerable witness to give evidence at a pre-trial hearing. This would include allowing a special advocate, or independent children's lawyer to apply on behalf of a child. The Court may also decide on its own motion, without an application by a party, that a vulnerable witness should give evidence at a pre-trial hearing.</p> <p>Section 5(2) allows the Court to make directions about the conduct of the pre-trial. This provides the Court with control and flexibility to account for the specific circumstances of the case in the management of the pre-trial hearing. For instance, the Court may order that the pre-trial hearing is to occur in a less formal setting or that special restrictions apply to ensure that the defendant and the vulnerable witness do not see each other.</p> <p>Section 5(3) provides that the pre-trial hearing is to be recorded in a way that the vulnerable witness can be both heard and seen when the recording is played at trial. In the past, a number of jurisdictions allowed only the evidence-in-chief to be pre-recorded. However, it is now common practice in many jurisdictions for the entirety of the vulnerable witnesses' pre-recorded evidence, including the cross and re-examination, to be admissible at trial.</p> <p>Section 5(4) ensures that any special measures available to a vulnerable witness in section 3 are also available at a pre-trial hearing.</p> <p>Section 5(5) provides that an audio-visual recording of testimony given at a pre-trial hearing must be admitted into evidence as if the person was giving testimony directly at trial. This allows the judge and/or jury to have the benefit of hearing the evidence in as like a manner as possible to an ordinary trial. Having the audio-visual recording presented in this way assists the decision maker to make assessments about credibility and consistency in the same way that they would in a normal criminal trial.</p> <p>Section 5(6) provides the Court with the flexibility to require a witness who has provided evidence by audio-visual recording of a pre-trial hearing to attend for cross or re-examination if there are special circumstances and it is necessary to ensure a fair trial (see Section 5(7)). The default position is that the vulnerable witness is not required to attend, unless the Court orders otherwise. Section 3(5) requires that the person be available for cross-examination or re-examination in order for the evidence to be admitted. This is not a requirement to attend, but to be available in the event a Court orders attendance. If a vulnerable witness does attend for cross-examination or re-examination, special measures are available to them in the same way as they would be in the proceeding. For example, as per section 3(1) and 3(6), a screen could be put up or they could be cross-examined/ re-examined in a separate room.</p> <p>Section 5(7) limits the circumstances in which a Court can order a vulnerable witness who has provided evidence by audio-visual recording of a pre-trial hearing to attend for cross-examination or re-examination to situations where there are special circumstances and it is in the interests of justice to make the order.</p> |

Section 6 – Evidence to be given in closed Court

| Section | PILON Member Country | Explanatory Text |
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| <p>The general principle of open justice serves many purposes, including transparency, legitimacy, public awareness and demonstration of fairness. It helps to ensure that the power of the Courts is exercised fairly and as a safeguard from decisions based in impartiality and prejudice. The closing of a proceeding to the public may not necessarily be a power available to the Court within its inherent jurisdiction.</p> <p>In the Northern Pacific, and other jurisdictions that have a Bill of Rights, the right to a public trial may be protected by a provision similar to the sixth (right to a public trial) and fourteenth (due process) amendments of the US Constitution. It is important to balance the language of this Model Provision in jurisdictions that have these rights enshrined. To avoid constitutional challenge, consideration should be given to modifying the language to give a discretion to the Court to close the proceeding to the public, and not that the proceeding is closed as a matter of course.</p> <p>Jurisdictions may also wish to consider the interaction of this Model Provision with any witness protection provisions that might be available in their jurisdiction.</p> | | |
| <p>(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:</p> <ul style="list-style-type: none"> (a) the Judge; (b) the jury; (b) the prosecutor; (c) the defendant and any corrections officer; (d) any lawyer engaged in the proceeding; (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;* (h) any person whose presence is requested by the vulnerable witness; (i) any person expressly permitted by the Judge to be present. <p>* 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.</p> | American Samoa | <p>Section 6(1) provides for the closing of the Court to the general public during any proceeding, including a pre-trial hearing, while a vulnerable witness gives evidence, including evidence given by audio-visual recording. The subsection contains a list of people that may be present in the courtroom. The list includes people who are involved in the conduct of the proceeding, people who are requested to be there by the vulnerable witness and any person that the Judge expressly permits to be present in the courtroom.</p> <p>Under section 6(1)(g), journalists who are reporting on the matter may also be present in the courtroom. This is subject to the restrictions set out in section 7 of the Model Provisions, which prohibits publishing the identity of a vulnerable witness.</p> |

Section 7 – Prohibition on publication of identity

| Section | PILON Member Country | Explanatory Text |
|---|----------------------|--|
| <p>Section 7 of the Model Provision, protects vulnerable witnesses from being identified through any publication, in order to encourage them to come forward with their complaints and seek help from the relevant authorities. Victims of sexual offences can be often stigmatised by society through no fault of their own. A victim who knows they would be publicly identified may be discouraged from reporting the matter due to the perceptions of embarrassment about the experience, or feeling devalued in the eyes of society. Other vulnerable witnesses may be intimidated or not want their involvement to be widely known. Importantly, the Section contains the ability for a vulnerable witness who is over the age of 18 years to consent to being identified. This is important as some victims of SGBV may want their story to be heard and may feel silenced if they do not have the ability to consent to being identified. Children, under the age of 18 years are not able to provide consent.</p> <p>The purpose behind the prohibition of the publication of the identity of vulnerable witnesses is to protect the witness's privacy and safety.</p> | | |
| <p>(1) A person commits an offence if the person publishes, in relation to a vulnerable witness:</p> <ul style="list-style-type: none"> (a) the name of the vulnerable witness; or (b) information that discloses, or could reasonably lead to the disclosure of, the identity of the vulnerable witness; or (c) the contact details of the vulnerable witness, including the private or business address, email address or telephone number. <p>(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.</p> <p>(3) The penalty, upon conviction, of an offence against subsection 7(1) is [insert appropriate penalty; ie fine and/or imprisonment for a period not exceeding one year].</p> | Tonga | <p>Section 7(1) makes it an offence for a person to publish identifying information about a vulnerable witness, including their name, contact details and any other information that could reasonably identify the witness. The broad provision in (b) is especially important in the context of small island jurisdictions, as even the smallest details can be enough to identify a person in a small or tight-knit community.</p> <p>Section 7(2) provides a defence to prosecution for publication of identifying details of a vulnerable witness. The defence only applies if the witness is 18 years or older and their consent was obtained. Although the general operation of this section is to protect the witness, some witnesses may want their names published in order to raise awareness about the issues of sexual violence or to regain some power that was taken from them by the assault.</p> <p>Section 7(3) sets out the penalty that applies to the offence contained in subsection 7(1). This should be proportionate and consistent with the relevant country's penalty scheme.</p> |

Section 8 – Personal cross-examination of vulnerable witnesses

| Section | PILON Member Country | Explanatory Text *Any references below to a section is to the Model Provisions |
|---|----------------------|---|
| <p>Self-represented defendants in South-West Pacific</p> <p>Direct cross examination of a vulnerable witness by an alleged perpetrator can cause a higher level of intimidation and stress in a witness who is vulnerable. In crimes involving sexual assault there are typically a number of factors that can exacerbate the stress and intimidation of a witness, including the private nature of the acts that constitute the crime, the likelihood that the offender is known to the witness prior to the crime and the focus on the issue of consent and credibility of the witness. For children, the nature of questioning under cross-examination can lead to unreliable responses. The sight of the alleged perpetrator can cause the witness to relive the trauma of the offence and heighten the emotional impact of giving evidence. Sometimes a vulnerable witness will be intimidated, or afraid of repercussions to themselves or their family and friends. The power imbalance that can often be part of SGBV can play itself out in Court, with the alleged perpetrator continuing the abuse and intimidation throughout the trial process. These higher levels of intimidation and stress can be compounded by direct communication between the vulnerable witness and the alleged perpetrator and can impact the ability of a vulnerable witness to provide their best evidence to the Court.</p> <p>There is a need to balance the concerns about intimidation and trauma to a vulnerable witness with the need for a fair trial and an opportunity for the defendant to test or challenge the witnesses' evidence. The purpose of cross examination is to discredit the witness or raise a defence. This opportunity is integral to due process and a fair trial. This provision balances these two concerns by allowing the questions to be put to the vulnerable witness but not in such a way that the vulnerable witness is directly communicating with the alleged perpetrator and exposing them to an increased risk of harm.</p> <p>To preserve the independence of the judiciary, it may not be appropriate for a judge to ask the questions on behalf of the defendant. An independent court-appointed interlocutor or lawyer would be the most desirable option. The Model Provisions are created with the limited resources of the Pacific in mind, and note that a Judge could be considered as an option for this role in circumstances where an independent interlocutor is not available. It is important to note that the independent interlocutor, lawyer or Judge is not representing the defendant, but is acting as the defendant's mouthpiece. The independent interlocutor or Judge can refuse to put inappropriate, or abusive, questions to the vulnerable witness.</p> <p>Pro-se defendants in the Northern Pacific</p> <p>This section of the Model Provisions prohibits a self-represented defendant from directly cross-examining a vulnerable witness. In the Northern Pacific, where US jurisprudence is followed, a defendant alleged perpetrator may have a constitutional right to confront a witness testifying against them. Although this is a fundamental right, it is not an absolute right and has been construed as subject to limitation by some Courts to preserve the integrity of the trial process. There exists the risk that vulnerable witnesses may commit perjury and give false testimony, or they may refuse to testify at all, if they come face to face with their alleged perpetrator. This section seeks to balance the need to protect the integrity of the trial process by supporting a vulnerable witness, but to some extent, it also preserves the defendant's right to confrontation by allowing the defendant's cross-examination questions to be put to the vulnerable witness by some other person. This section may not always be appropriate, or may need to be modified to suit the constitutional context.</p> | | |
| <p>(1) A defendant in any proceeding, including any pre-trial hearing, is not entitled to personally cross-examine a vulnerable witness.</p> <p>(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:</p> <ul style="list-style-type: none"> (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.* <p>(3) In respect of each such question, the Judge may:</p> <ul style="list-style-type: none"> (a) allow the question to be put to the vulnerable witness; or (b) require the question to be put to the vulnerable 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 vulnerable witness. <p>(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.</p> | FSM and Kiribati | <p>Section 8(1) prohibits a defendant from direct cross-examination of a vulnerable witness. The prohibition extends to any proceeding, including a pre-trial hearing. This section is particularly relevant for defendants who are self-represented or pro-se and do not have legal counsel to put the questions to the witness.</p> <p>Section 8(2) provides three options for a defendant who is prohibited from direct cross-examination of a witness. The cross-examination questions that the defendant wishes to ask can be relayed to the vulnerable witness by a lawyer engaged by the defendant, or, if the defendant fails or refuses to engage a lawyer, the Judge may appoint someone else for that specific purpose – this could be a lawyer, court staff or other person. As a last resort, the Judge may put the questions to the witness.</p> <p>Section 8(3) provides for the discretionary power of the Judge to allow, amend or refuse to allow a self-represented or pro-se defendant's cross-examination questions to be put to the vulnerable witness. If the question is to be amended, it may be rephrased by the Judge or an intermediary appointed to assist with communication with the vulnerable witness under section 3(1)(c) of the Model Provisions. The provision ensures that the Court exercises control over the questions being put to the witness.</p> <p>Section 8(4) upholds the paramount duty of the lawyer to the Court to ensure that a trial is fair and clarifies that this duty overrides any request by a defendant to put an inappropriate question to a vulnerable witness that would conflict with this duty.</p> |



Top photo: High Court, Solomon Islands - CCTV remote room

Bottom photo: Magistrates Court room, Solomon Islands

Section 9 – Unacceptable questions

| Section | PILON Member Country | Explanatory Text *Any references below to a section is to the Model Provisions |
|---|----------------------|--|
| <p>The prospect of giving evidence for a vulnerable witness can be one of the most feared and anxiety-inducing parts of the trial process. Sometimes the questions asked of a vulnerable witness during the examination process can be deeply personal and cause further distress. This can be due to the private, violent or upsetting nature of the crime, or the nature of the questions asked, for example, challenging the credibility of the witness. Giving the Court the ability to disallow unacceptable questions can help to minimise the distress that a vulnerable witness will experience when giving evidence.</p> <p>Vulnerable witnesses are also more at risk of misunderstanding questions or being adversely affected by the nature of questions asked. Unacceptable questions have been shown to mislead and confuse vulnerable witnesses thereby undermining the accuracy and completeness of their evidence. Allowing the Judge to disallow unacceptable questions can minimise these risks and protect the quality and integrity of evidence given by a vulnerable witness.</p> <p>The purpose of this section is to:</p> <ul style="list-style-type: none"> protect vulnerable witnesses from being asked questions that are too complex or designed to belittle, degrade or break a witness. minimise the distressing consequences of giving evidence about what is likely a traumatic experience for vulnerable witnesses, especially complainants in SGBV offences. protect the integrity of the evidence given by a vulnerable witness. | | |
| <p>(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.</p> <p>(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:</p> <ol style="list-style-type: none"> the age or maturity of the witness; or any physical, intellectual or psychological impairment of the witness; or the linguistic or cultural background or religious beliefs of the witness; or the nature of the proceeding; or in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding. | Cook Islands | <p>Section 9(1) provides that in relation to a vulnerable witness, the Judge has the discretion to intervene and disallow or direct that there is no obligation to answer, a question or line of questioning that the Judge deems to be improper, unfair or misleading, needlessly repetitive, or expressed in language that is overly complicated.</p> <p>Section 9(2) provides a non-exhaustive list of things the Judge may take into account when deciding whether a question or line of questioning is to be disallowed or not obligatory to answer. They include age, disability, culture, the nature of the proceeding and whether a hypothetical question is based on other available evidence.</p> |

Section 10 – Evidence of sexual reputation

| Section | PILON Member Country | Explanatory Text *Any references below to a section is to the Model Provisions |
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| <p>Prohibitions on allowing the introduction of evidentiary material seeking to address the propensities or the sexual reputation of a complainant or other vulnerable witnesses relating to a SGBV offence are well established in many jurisdictions.</p> <p>Consideration of a person's sexual reputation is not evidence, but is instead based on gossip and rumour and has no probative value. It is too far removed from the evidence of the case to be of any relevance and can give rise to unwarranted and dangerous assumptions. A person may have a reputation for being promiscuous, but may never have engaged in sexual activity.</p> <p>Such evidence is purely prejudicial and not based on fact and therefore should be inadmissible in all circumstances.</p> | | |
| (1) Evidence of the sexual reputation of a vulnerable witness is not admissible. | Niue | Section 10 (1) prohibits , under any circumstances the introduction of evidence of the sexual reputation of a vulnerable witness . |

Section 11 – Evidence of sexual experience

| Section | PILON Member Country | Explanatory Text *Any references below to a section is to the Model Provisions |
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| <p>Evidence of sexual experience is different to evidence of sexual reputation. Sexual experience is based on the actual sexual experience of the vulnerable witness and not rumours, gossip or innuendo about the sexual activities of the witness, which is reputation and is addressed under section 10 of the Model Provisions. Generally speaking, evidence of sexual experience should not be admissible, as it is not relevant to the issue of consent in the alleged offence. This provision is known as a ‘rape shield’ provision and it prevents the vulnerable witness from being humiliated and re-traumatised by detailed inquiries into their sexual past that has no relevance to the proceeding. Having to recount past sexual history that is irrelevant can be a deterrent to reporting the crime and can also be used to suggest that the victim is morally flawed and not deserving of justice.</p> <p>A person may have consented to sexual activity with the alleged perpetrator, or others, in the past, but this is rarely, if ever, relevant to whether the person consented in the particular instance that constituted the alleged offence.</p> <p>Jurisdictions may consider amending this Model Provision to only admit evidence about previous sexual experience with the defendant, and not with third parties, as this is never be considered to be of direct relevance to a matter.</p> | | |
| <p>(1) In a proceeding involving a sexual offence, evidence related to the sexual experience of a vulnerable witness is not admissible, except by order of the Court.</p> <p>(2) In an application under subsection 11(1), the Court 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.</p> | Vanuatu | <p>Section 11(1) prohibits the admission of evidence in relation to sexual experience, except in circumstances where the Court permits it.</p> <p>Section 11(2) requires the Court to be satisfied that the evidence of sexual experience is directly relevant to the facts of the case, or to sentencing, that it should be admitted in the interests of justice. This is generally known as a heightened relevance test.</p> |

Section 12 – Evidence of complaint generally admissible

| Section | PILON Member Country | Explanatory Text *Any references below to a section is to the Model Provisions |
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| <p>Section 12 ensures that evidence about a complaint of sexual violence is admissible as evidence, regardless of when the complaint occurred or to whom it was made, and its proximity to the time of offending. This hearsay evidence, when received from a person that heard the complaint from the victim, may, depending on the circumstances, provide some corroboration to the allegation. It remains open to the Court to exclude such evidence if it would cause an unfair disadvantage to the defendant.</p> | | |
| <p>(1) This section applies to a proceeding in relation to a sexual offence.</p> <p>(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.</p> <p>(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.</p> <p>(4) No inference shall be drawn that a delay alone in making the complaint indicates that the allegation is false.</p> | Nauru | <p>This section overturns the common law rule of recent complaint. At common law, evidence relating to credibility is generally not admissible, however the exception to this rule is evidence of complaint. Historically it was thought that a victim of a violent crime, such as a rape, should raise the alarm at the first available opportunity. Under this approach, the longer the delay in reporting the offence, the less likely it was that the victim would be considered credible. However, it is common for victims of sexual violence to delay making a complaint due to fear, embarrassment, intimidation, confusion or distress. The section is intended to overcome traditional assumptions that a delay in making a complaint means it is less credible, a common feature of complaints about sexual violence.</p> <p>For example, exceptions to hearsay rules may require that for hearsay evidence to be admitted, the complaint must be recent, or close in time to the offence. This exception to the hearsay rule would allow a mother to provide evidence of a child’s complaint (provided the child gives evidence) only in circumstances where the child makes a recent complaint, that is, soon after the abuse occurred. Section 12(2) extends the exception to the hearsay rule by not requiring proximity between the offence and the time that the complaint is made.</p> <p>Section 12(1) restricts the application of Section 12 to a proceeding in relation to a sexual offence. Sexual Offence is defined in Section 1 of the Model Provisions.</p> <p>Section 12(2) provides for the admissibility of a complaint about the alleged offence made prior to a statement to police, regardless of when such a complaint is made.</p> <p>Section 12(3) allows the Court to exclude a previous conversation, or record of the complainant telling someone about the alleged offence, which would be permissible under section 12(2); but only if the Court is satisfied that it would be unfair to the defendant to admit the earlier discussion or complaint as evidence.</p> <p>Section 12(4) directs the decision-maker to ensure that they do not discredit the complaint merely because it took a long time for the victim to come forward with the complaint. Other issues may lead to an indication that an allegation is false, but the belief in the falsity of the claim should never be based on the amount of time taken to report the crime. This subsection should be considered in conjunction with section 15(2) which requires a judge to tell a jury that there may be good reason for a delay in making a complaint and this does not mean the complaint is untrue.</p> |

Section 13 – Evidence of corroboration

| Section | PILON Member Country | Explanatory Text *Any references below to a section is to the Model Provisions |
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| <p>SGBV offences are often committed in a private setting, with only the victim and alleged offender as witnesses. Often, there is no physical corroborating evidence of an assault, especially if there has been a delay in reporting. In many jurisdictions the common law, or statute books, contain a requirement for corroborating evidence before a person is to be convicted of a criminal offence. This is especially the case if the statute book has not been updated for some time. This section of the Model Provisions is intended to override any common law 'hangovers' and update statutes to establish that corroboration is not required to obtain a conviction for a sexual offence. Jurisdictions could also consider abolishing this requirement for most other criminal offences.</p> <p>This Provision is also intended to support prosecutors when considering the prospects of success of a case. Cases involving uncorroborated evidence may not proceed if the prosecutor assesses that there will be no prospects of success based on the uncorroborated testimony of a vulnerable witness. Although, in some circumstances, this decision is warranted, this provision is intended to provide additional support and encouragement for prosecutors to proceed with a matter, even if evidence is uncorroborated.</p> | | |
| (1) In a proceeding involving a sexual offence , no corroboration is necessary for the defendant to be convicted. | Tonga | <p>Section 13(1) abolishes any statutory requirement for corroborating evidence to obtain a conviction for a sexual offence.</p> <p>If a jurisdiction conducts jury/assessor based trials for serious criminal matters, this subsection should be considered in conjunction with subsection 15(3) of the Model Provisions which deals with directions to the jury about the dangers of convicting on the basis of uncorroborated evidence.</p> |

Section 14 – Appeals

| Section | PILON Member Country | Explanatory Text *Any references below to a section is to the Model Provisions |
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| <p>The use of an audio-visual recording in an appeal is beneficial for helping the vulnerable witness to not re-live the trauma of going to Court. If evidence can be re-used it will prevent the witness from having to unnecessarily re visit the trauma by re-telling their story, sometimes many years after the offence has occurred. Victims of SGBV may suffer emotional trauma for many years after the abuse has ended and it is not helpful for their recovery to require them to re-live the abuse wherever it can be avoided.</p> | | |
| <p>(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 proceeding, an audio visual recording of the original evidence of the vulnerable witness.</p> <p>(2) An audio-visual recording of a vulnerable witness' evidence may also be admitted into evidence at an appeal.</p> <p>(3) If an audio-visual recording is admitted as evidence in an appeal, or at a new trial, the vulnerable witness is not required to attend the proceeding to give further evidence (including cross-examination or re-examination), unless the Court orders otherwise.</p> <p>(4) The Court must not make an order under subsection 14(3) unless satisfied that it is in the interests of justice to make the order.</p> | Tuvalu | <p>Section 14(1) provides that if there is an appeal against a conviction in a matter and a new trial is ordered, if a vulnerable witness has given evidence by audio-visual evidence, that evidence may be used in the retrial.</p> <p>Section 14(2) provides that an audio-visual recording may also be admitted as evidence during an appeal.</p> <p>Section 14(3) provides that if a vulnerable witness' audio-visual evidence is admitted into evidence on appeal, or at a new trial, the vulnerable witness is not required to attend the appeal or new trial to provide further evidence, unless the Court orders their attendance.</p> <p>Section 14(4) provides that a Court must only order a vulnerable witness to attend the appeal to give further evidence only if it is in the interests of justice to do so.</p> |

Section 15 – Judicial directions

| Section | PILON Member Country | Explanatory Text |
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| <p>Section 15 of the Model Provisions applies to jurisdictions that have trial by jury or assessor. Where there is no trial by jury or assessor, jurisdictions may wish to consider provisions, where appropriate, that provide a Court must, or must not, take certain matters into account. Many of these directions to the jury are important to overcome societal norms and biases that may be prejudicial in matters involving SGBV offences. For example, delays in complaint make the person less believable or that the evidence of children is inherently unreliable.</p> | | |
| <p>(1) In a proceeding where a vulnerable witness has provided evidence in an alternative way under this Part using one or more special measures, the judge must direct the jury that:</p> <ul style="list-style-type: none"> (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. <p>(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:</p> <ul style="list-style-type: none"> (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.* <p>(3) In any proceeding relating to a sexual offence it is not necessary for a Judge to;</p> <ul style="list-style-type: none"> (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. <p>(4) A Judge may only give a warning or direction under subsection 15(3) where it is in the interests of justice to do so.</p> <p>(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:</p> <ul style="list-style-type: none"> (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. | Australia | <p>Section 15(1) sets out a number of directions that a Court must provide to a jury where a vulnerable witness has provided evidence. These directions are intended to ensure that the jury does not make any unfair inferences against the defendant or the vulnerable witness because of any special measures used in the tendering of evidence.</p> <p>Section 15(2) requires the Court to tell the jury directly that there are often good reasons for a delay in reporting a sexual offence. This is intended to help overcome some societal norms, or bias, as many people may believe that the delay means the person is not telling the truth. Research has shown that many victims of sexual offences may delay reporting the crime and this is not an indication that they are lying. This provision is intended to ensure that the jury understands that this hesitation to report is a common feature of SGBV. This provision operates in conjunction with section 12 which provides that complaint evidence is generally admissible.</p> <p>Although not included in these Model Provisions specifically, jurisdictions may wish to consider including provisions that allow the Court to warn a jury about a forensic disadvantage to a defendant as a result of a delay in complaint. Any such provision should be restricted to circumstances where there has been a real significant disadvantage – such as the death of a witness – and not just because there has been a delay. Section 12 of the Model Provisions restricts a Court from making an inference that an allegation is false based on a delay in complaint, without any other reason. It is a matter for each jurisdiction to determine whether a provision about forensic disadvantage would clarify the circumstances in which a Court can take into account a delay in complaint.</p> <p>Section 15(3) specifically sets out that it is not necessary for a judge to warn a jury about the dangers of convicting on uncorroborated evidence. At common law, judges have historically been required to issue a warning to a jury that it is dangerous to convict on uncorroborated evidence. This common law requirement has a disproportionate impact on crimes that are often conducted in private, such as SGBV. This statutory provision ensures that the common law rule requiring a warning about uncorroborated evidence is abolished, as it is recognised as having a particularly discriminatory effect in the context of offences involving sexual violence. It is consistent with Section 13 of the Model Provisions, which abolishes the need for corroborative evidence in sexual offences.</p> <p>Section 15(4) provides that a Court should only give a warning about uncorroborated evidence in exceptional circumstances and where it is in the interests of justice. This recognises the fact that there may be some circumstances where a warning is warranted, but the warning should not be given as a matter of course.</p> <p>Section 15(5) contains additional provisions and safeguards for vulnerable witnesses who are under the age of 18 years. This provision requires all participants in the proceeding, including the judge, defence counsel, prosecution and/or the defendant to not suggest to the jury that a child's evidence is less reliable, or requires more scrutiny, than that of an adult. It does not require a direction to the jury, but restricts participants to the proceeding from making inferences or suggestions to the jury so as to not to discredit a child's evidence merely because they are a child.</p> |

Level 6, TATTE Building, Sogi,
Apia, SAMOA
www.pilonsec.org



PILON