




PILON

Reviewing implementation of special measures for vulnerable witnesses

March 2023



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

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Chair's foreword

Tālofa lava. I am pleased to present to my Pacific colleagues our research benchmarking Pacific jurisdictions' use of special measures to support vulnerable witnesses to give evidence in sexual and gender based violence matters.

For a number of years our Working Group has been exploring the value of special measures. This has included publishing the [*Model Provisions and Explanatory Text: Supporting vulnerable witnesses in cases involving sexual and gender based violence*](#) (Model Provisions). The Model Provisions provide practical law reform drafting guidance to implement special measures.



To build on this work, our report has moved on to **examining successful approaches** to implementing special measures for vulnerable witnesses. We have been gathering evidence through interviewing and surveying our Working Group members. We have learned that across the Pacific important steps are being taken to ensure justice is being served in prosecutions for sexual and gender based violence offences.

My hope in sharing these approaches is that you may appreciate four things:

1. the widespread use of special measures **in legislation or court guidance documents**
2. the extent to which special measures have been implemented **in practice** (including in the absence of legislation)
3. the **barriers** preventing special measures from being implemented and the way forward
4. an encouragement for jurisdictions to **reflect on their areas of strength** and consider where they can do more to improve the court experience for vulnerable witnesses, so that the court hears the best available evidence.

I encourage you all to use this research to consider and lobby for similar measures in each of your jurisdictions. Continue to reach out to your PILON SGBV Working Group for both support and encouragement. Together with all of you, I am proud to continue to lead this Working Group and its efforts to generate discussion and action on improving the Court experience for some of our more vulnerable Pacific family members.

To conclude I would like to thank each of the SGBV Working Group members who contributed to this research.

Su'a Hellene Wallwork

Attorney General, Samoa
Chair of the PILON SGBV Working Group

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Top photo: Child-friendly room at Solomon Islands ODP
Bottom photo: High Court, Solomon Islands – CCTV remote room

Context

SGBV is a global epidemic, with the social costs of this violence harming not only victims and families but societies at large. In the Pacific, Pacific Islands Forum (PIF) leaders recognised the importance of human security in protecting the rights, health and prosperity of Pacific people under the [***Boe Declaration on Regional Security***](#), with the Boe Declaration Action Plan including a commitment to eradicating violence against women. Further, as part of the [***Pacific Leaders Gender Equality Declaration***](#), PIF leaders also committed to progressively implement essential legal services for women and girls who are survivors of violence. Informed by these commitments, the work of PILON's SGBV Working Group reflects our region's dedication to providing justice and appropriate support for those affected by this violence.

The shadow pandemic of SGBV

Efforts to eradicate violence against women faced new barriers during the COVID-19 pandemic. Across the world a 'shadow pandemic' emerged, with the health and economic impacts of COVID-19 accompanied by significant increases of SGBV. Police, prosecutors, women's support services, courts, victim support services and health care officials faced unprecedented challenges, both because their resources were diverted to immediate COVID-19 relief and because lockdown restrictions often prevented them from providing inperson services.

Overcoming pandemic challenges

As discussed in [***PILON's 2020 webinar on addressing the effects of COVID-19 on SGBV***](#), service-providers had to overcome significant accessibility and technological challenges to protect vulnerable witnesses. Some jurisdictions adapted to the challenges posed by COVID-19 by facilitating the first taking of evidence in SGBV matters using CCTV – which is one of the special measures referred to in the Model Provisions. If these innovations can be retained post-COVID-19 this will contribute to improving access to justice for a range of vulnerable witnesses, including those who are unable to travel to the court room.

Low reporting continues

Despite the increase of SGBV during the height of the COVID-19 pandemic, reporting rates remain low and conviction rates even lower. One explanation for this is that witnesses can feel intimidated by the process of making a report to police and then giving evidence in court. In trials of sexual and gender based offences, a vulnerable witness can feel distressed by the prospect of seeing the defendant. They may feel uncomfortable disclosing personal information, such that they freeze, forget to mention important details, or do not wish to proceed with giving evidence. This can affect the quality of evidence that is put to the court and the court's ability to examine the evidence and reach a just and fair verdict. Indeed, witnesses giving incomplete evidence or being unwilling or unable to give evidence is a critical barrier to achieving justice.

“Despite the increase of SGBV during the height of the COVID-19 pandemic, reporting rates remain low and conviction rates even lower.”

PILON supports prosecutors to improve the process

To address this issue, the PILON SGBV Working Group seeks to support prosecutors to mitigate the harms the trial process can cause for vulnerable witnesses, such that the safety of vulnerable witnesses is prioritised while still safeguarding a fair trial for the accused. As expressed in PILON's [*General Principles for Obtaining the Best Evidence in SGBV Matters*](#), protecting witnesses' safety, privacy and dignity not only maximises their ability to give reliable evidence, but it also improves trust in the criminal justice process. This in turn increases the likelihood that witnesses report SGBV allegations and stay engaged throughout the trial process.

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. **From page 3 of the General Principles**

The usefulness of special measures

It is in this context that special measures are relevant. Special measures are practical tools designed to support vulnerable witnesses to give their full evidence to the best of their ability.

Special measures may relate to how evidence is given (for example, in a closed court or via CCTV). They may also relate to how the court environment is set up, with arrangements to make the witness feel safer and more confident. The special measures may also involve directions to the jury that seek to address misconceptions about the evidence of witnesses, such as the notion that children are inherently less reliable witnesses than adults. Importantly, these special measures are designed so the court receives the best available evidence and can reach the most just and fair verdict.

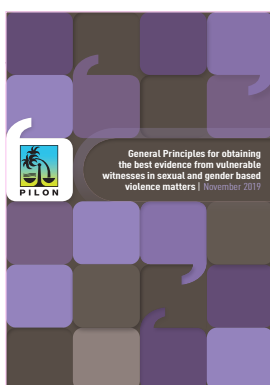
Special measures are practical tools designed to support vulnerable witnesses to give their full evidence to the best of their ability.

Taking special measures beyond the courtroom

Beyond the courtroom, these special measures can be adapted by police, prosecutors, witness support officers and other law and justice officials to guide their own interactions with vulnerable witnesses throughout the prosecution process. Above all else, the use of special measures furthers a witness-centred, trauma-informed approach to the handling of SGBV matters.

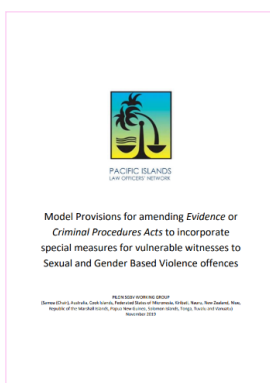
Earlier work of PILON

This report adds to a significant body of work by the PILON SGBV Working Group which aims to ensure the court hears a complete account of the evidence in SGBV matters. This body of work has developed alongside widespread legislative reforms across the Pacific. Within this body of work, the report acts as an updated benchmark of each jurisdiction's implementation of special measures since the 2019 snapshot.



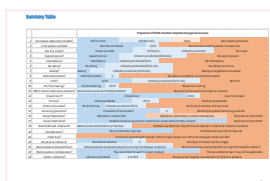
The General Principles (2017)

In recognition of the importance of improving how evidence is obtained in SGBV matters the PILON SGBV Working Group developed General Principles for obtaining the best evidence from vulnerable witnesses in sexual and gender based violence matters. These General Principles were endorsed by PILON in its 2017 Annual Meeting, and later republished and made available to the public in 2019. From there the SGBV Working Group began to focus on how to support jurisdictions in undertaking law reforms to provide for special measures.



The first Model Provisions (2019)

To that end, the Working Group developed the Model Provisions for amending Evidence or Criminal Procedures Acts to incorporate special measures for vulnerable witnesses to Sexual and Gender Based Violence offences (2019 Model Provisions).



The first Implementation Snapshot (2019)

Alongside this work, PILON prepared a snapshot of the implementation of special measures in legislation across the Pacific region. Incorporating further feedback and input from the PILON SGBV Working Group, this snapshot was presented to the PILON Annual Meeting in November 2019. Work on an updated snapshot continued into 2020, with jurisdictions invited to provide updates on their use of special measures. However, this project was disrupted by the COVID-19 pandemic, preventing the presentation of any updated report until now.



The Model Provisions (2021)

In 2021, the SGBV Working Group published the *Model Provisions and Explanatory Text: Supporting vulnerable witnesses in cases involving sexual and gender based violence* (the Model Provisions). This document, referred to as the Model Provisions throughout this report, updated and built on the 2019 Model Provisions. The *Model Provisions* continue to be a useful and reader-friendly resource for strengthening laws and facilitating access to justice in SGBV prosecutions.

Workshops and webinars (2019-2022)

Alongside the work in developing the Model Provisions the PILON SGBV Working Group also ran related workshops and webinars. These events examined the practical use of special measures, including the lessons learned and challenges faced by jurisdictions.

A workshop was held in March 2019 to explore the use of special measures in the courtroom, including making applications for a court to use its inherent powers to make special measures available. The workshop was attended by more than 80 Pacific judicial officers, prosecutors, public defenders and police.

More recently, across 2022 the PILON SGBV Working Group held four webinars addressing lessons learned in using special measures. This series considered the practical realities for smaller jurisdictions, perspectives from the bench and the role of witness support officers. These events provided useful information on how special measures can be, and are, incorporated into legal systems, while yielding insight into jurisdictions' use of special measures in practice. The webinars signalled the importance of building rapport with the vulnerable witness and developing practical solutions in the absence of legislation. You can view the webinars on the [PILON website's SGBV page](#).



Group photo from the 2019 Workshop: Quality Evidence without Re-Victimisation

Visual scribing of PILON's first 2022 webinar on special measures

THE SPECIAL MEASURES SERIES: LESSONS LEARNED

WEBINAR #1

SEXUAL & GENDER-BASED VIOLENCE is a GLOBAL EPIDEMIC ... and it HAS INCREASED DURING the PANDEMIC

SPECIAL MEASURES HELP SUPPORT WITNESSES through the SYSTEM

e.g. VIDEO CONFERENCE INADMISSIBILITY of SEXUAL HISTORIES

THEY INCLUDE ALTERNATIVE WAYS of GIVING EVIDENCE

- IN ROOM w- BLOCKED VIEW SCREEN / PARTITION
- VIDEO CONFERENCE
- PRE-RECORD

GET TO KNOW the VICTIM ESP. for CHILDREN ... then PROSECUTION DECIDES & APPLIES

PRESSURES OUTSIDE the COURTROOM

WHERE they are STAYING

WORKING TOGETHER

THOUGH REPORTING & CONVICTION RATES REMAIN LOW

IT WILL take a COORDINATED APPROACH to CREATE a SEAMLESS JOURNEY through the SYSTEM

GUIDE without RETRAUMATISING

WE MUST UNDERSTAND the IMPACT of THESE CRIMES

WE MUST DO BETTER

- SPECIALISED TRAINING
- TRAUMA-INFORMED APPROACH

IMPACT on TESTIMONY

FAMILY PERSUASION

BUILDING RAPPORT with VULNERABLE WITNESSES

CHILDREN, WOMEN CASE BY CASE

RAPPORT

- o HAVE a PRE-MEETING to UNDERSTAND INDIVIDUAL NEEDS
- o ENCOURAGE COUNSELLING
- o REFER to SOCIAL SERVICES
- o EXPLAIN the PROCESS & ANSWER QUESTIONS
- o EXPLAIN SPECIAL MEASURES

e.g. COURT ROOM VISIT, PRESENCE of CHILD SUPPORT, DE-ROBING of COUNSELS and JUDGE, USE of SCREENS & PRE-RECORDING, CHILD-FRIENDLY ROOMS.

IT'S NOT ONE SIZE FITS ALL!

ASK WHAT WORKS!

POTENTIAL for VICTIM SUPPORT MANUAL

PILON Sexual and Gender Based Violence Working Group JESSAMY GEE '22

Visual scribing of PILON's second 2022 webinar on special measures

THE SPECIAL MEASURES SERIES: PRACTICAL REALITIES

WEBINAR #2

WITH... CHIEF PROSECUTOR CUTTY WASE

DEPUTY SOLICITOR GENERAL ANNABEL MAXWELL-SCOTT

SPECIAL MEASURES HAVE NOT BEEN USED BEYOND CHILD SEX CASES

"SPECIAL CONDITIONS FOR SPECIAL CIRCUMSTANCES"

WE PROSECUTORS PLAY A SIGNIFICANT ROLE IN IMPLEMENTING SPECIAL MEASURES

COVID-19 HAS ALLOWED CHANGES FOR CRIMINAL PROCEDURES

VICTIMS SISTER ACTED AS INTERMEDIARY TO HELP EXPLAIN QUESTIONS

PERPETRATOR WAS CONVICTED

EVERYONE KNOWS EACH OTHER

LAW OFFICERS OFTEN KNOW VICTIMS & PERPETRATORS

CONFLICT OF INTERESTS?

I CAN DO IT.

WE NEED MORE EXCEPTIONS FOR OTHER VULNERABLE PEOPLE

IN 2017 SPECIAL MEASURES USED FOR VICTIMS WITH MENTAL DISABILITY

SPECIAL MEASURES ALLOWED FOR JUSTICE TO PREVAIL

DIFFICULTY OF SMALL PLACE

WE NEED BETTER CONTROLS & EDUCATION

RE-TRAUMATISING VICTIMS

WE NEED TO ENSURE THERE IS PUBLIC ACCESS TO JUSTICE

SPECIAL MEASURES ARE NOT IN OUR LEGISLATION

BALANCED AGAINST DEFENDANTS CONSTITUTIONAL RIGHT TO CONFRONTATION

PRE-EMPTIVE ATTEMPTS TO MAKE SURE VICTIMS AREN'T RE-TRAUMATISED

DIRECT CASE TO OTHER PROSECUTORS (THERE ARE 3 OF US)

PROTOCOL LED INTERVENTIONIST APPROACH

OFTEN LAWYERS AREN'T TRAINED IN WORKING WITH VULNERABLE CHILDREN

THE COURT REALISED THE IMPORTANCE OF THIS

WE NEED MORE EXCEPTIONS FOR OTHER VULNERABLE PEOPLE

LACK OF PSYCHIATRISTS

EVERYONE KNOWS EACH OTHER

LAW OFFICERS OFTEN KNOW VICTIMS & PERPETRATORS

CONFLICT OF INTERESTS?

I CAN DO IT.

WE NEED MORE EXCEPTIONS FOR OTHER VULNERABLE PEOPLE

PILON Sexual and Gender Based Violence Working Group

Visual scribing of PILON's third 2022 webinar on special measures

THE SPECIAL MEASURES SERIES: PERSPECTIVES FROM THE BENCH

↳ PRACTICAL TOOLS TO SUPPORT WITNESSES IN COURT

JUSTICE LEILANI TU'UA-WARREN, SAMOA

"VULNERABLE WITNESS" is at the JUDGES DISCRETION, e.g. AGE, RELATIONSHIPS, ABILITY, MENTAL STATE, etc.

ALTERNATIVE WAYS OF GIVING EVIDENCE

- VIDEO → SCREEN
- EMPTY COURTROOM

ENSURE LAWYERS USE A SENSITIVE & RESPECTFUL TONE.

THE ENVIRONMENT is IMPORTANT! → ESP. FOLLOWING COULD WHERE TIME DELAYS MAY IMPACT QUALITY OF TESTIMONY

SPECIAL MEASURES IN ACTION

- SUPPORT PERSONS
- ANONYMITY
- LIMITING EVIDENCE OF SEXUAL HISTORY

WHAT WE NEED FROM PROSECUTORS

- ALERT COURT TO SPECIAL MEASURES
- TRAINING IN DEALING W/ VULNERABLE WITNESSES

SENIOR MAGISTRATE COBINNA ITUASO LA'AMAI, TUVALU

WE WANT TO CREATE THE ENVIRONMENT FOR VULNERABLE WITNESSES TO TELL THEIR STORY

GRADUATION & CELEBRATION OF CHANGE

ADDRESSING THE CAUSES OF FAMILY VIOLENCE THROUGH REHABILITATION & THERAPEUTIC MODEL

ROLE OF THE COURTS & JUDICIARY

- COURT CAN EXERCISE DISCRETION REGARDING SPECIAL MEASURES
- COURT CAN "RAISE THE BAR" FOR PROCEEDINGS TO AVOID ONGOING GRIEVANCES
- COURT CAN USE SPECIAL MEASURES AS A TOOL TO DRAW CONCLUSIONS, A MEDIUM OF SUPPORT

PERSPECTIVES ON SPECIAL MEASURES

- ADVICE IS REQUIRED FROM PROSECUTORS ON A LEVEL OF SUPPORT
- THERE IS DISCRETION & APPROPRIATELY USE SPECIAL MEASURES
- 1. SUPPORT WITNESSES BY ALLOWING THEM TO TESTIFY VIRTUALLY VIA VIDEO
- 2. VIRTUAL ASISTS W- BACKLOG/ DELAYED TRIALS/ GEOGRAPHIC MOVEMENT
- IT'S IMPORTANT TO LIMIT INAPPROPRIATE Q'S
- SUPPORT MUST CONTINUE THROUGH PRE-TRIAL & DURING TRIAL

WE NEED TO KNOW HOW CASES HAVE BEEN HANDLED FROM THE START

... THE CRIMINAL PROCEDURE CODE MUST ALSO BE UPDATED ACCORDINGLY

+ OTHER RELEVANT LAWS & PROCEDURES PRE, DURING & POST TRIAL

INFRASTRUCTURE, RESOURCES & SUPPORT ARE REQUIRED TO MAXIMISE BENEFITS

PILON Sexual and Gender Based Violence Working Group

JESSAMY GEE 2022

Visual scribing of PILON's fourth and final 2022 webinar on special measures

THE SPECIAL MEASURES SERIES: PANEL FINALE

↳ WEBINAR #4

WITH: (CHAIR) SWA HELLENE WALLWORK, MS. HELEN BENNETT, MS. MARGARET SUIFA'ASIA, MS. BOLA MASAUVAKALO, MS. DELWYN DAU, MS. LEONIE MIROI

HELEN BENNETT: "MY ROLE HAS SHIFTED SINCE I BEGAN..."

FROM: LOGISTICS

- ACCOMMODATION
- ESCORT TO COURT
- ASST POLICE

WITNESS ORIENTED

- SIT IN COURT
- SUPPORT IN COURT
- START TO END OF TRIAL HEARING
- EARLY REFERRAL IS IMPORTANT

CLEAR ROLE

- ENABLES ME TO MAKE GOOD REFERRALS
- WE'RE NOT COUNSELLORS!
- TRAINING NEEDED TO KNOW WHEN TO CALL IN SUPPORT

BOLA MASAUVAKALO: "A VERY NEW ROLE..."

- FIRST OF ITS KIND IN VANUATU
- NO DAILY ROUTINE
- DAY-TO-DAY
- ALWAYS CHANGING
- HAVE TO ADAPT!

DELWYN DAU: FEMILI, PNG

- NOT JUST SUPPORT... → LEGAL ADVICE
- CASE MANAGEMENT
- 4 MAIN POPULATIONS
- LOCATIONS
- AND ALSO SUPPORT OUR PARTNERS

LEONIE MIROI: NO SCHEDULE EITHER

- ROLE: COVERS A BROAD RANGE
- OUR COMMUNICATION IS VIA THE POLICE
- VICTIM IMPACT STATEMENT
- VERY IMPORTANT
- IMPACTS SENTENCING
- WE CAN HELP HERE
- MEET AND GREET
- OVER TIME → BUILDS TRUST
- SEE CONFIDENCE
- INTERVIEWING CLIENTS TAKES A LOT OF TIME!

MARGARET SUIFA'ASIA: IT HELPS US PROSECUTORS!

- WITNESSES RESPOND WELL TO US
- MORE SETTLED
- CONFIDENT IN COURT

BOLA MASAUVAKALO: "NEW PRACTICE DIRECTION HAS BEEN VERY GOOD!"

- INVOLVED FROM THE START
- IMPROVED THE DIRECT SERVICES
- "IDEA" FILED POLICE... NEW FORENSICS KIT FOR CHILDREN → HELP THEM TO TELL THEIR STORIES.

MS. LEONIE MIROI: PILON ENABLE MORE REGIONAL NETWORKING

- A MATTER TO TAKE UP WITH YOUR ATTORNEYS GENERAL'S OFFICE!
- SHARE OUR IDEAS
- LEARN FROM EACH OTHER
- TO GET JUSTICE

NETWORKING: BOTH NATIONAL and REGIONAL

THE VALUE OF SUPPORT FROM OTHER SERVICE PROVIDERS

SHARE OUR EXPERIENCES

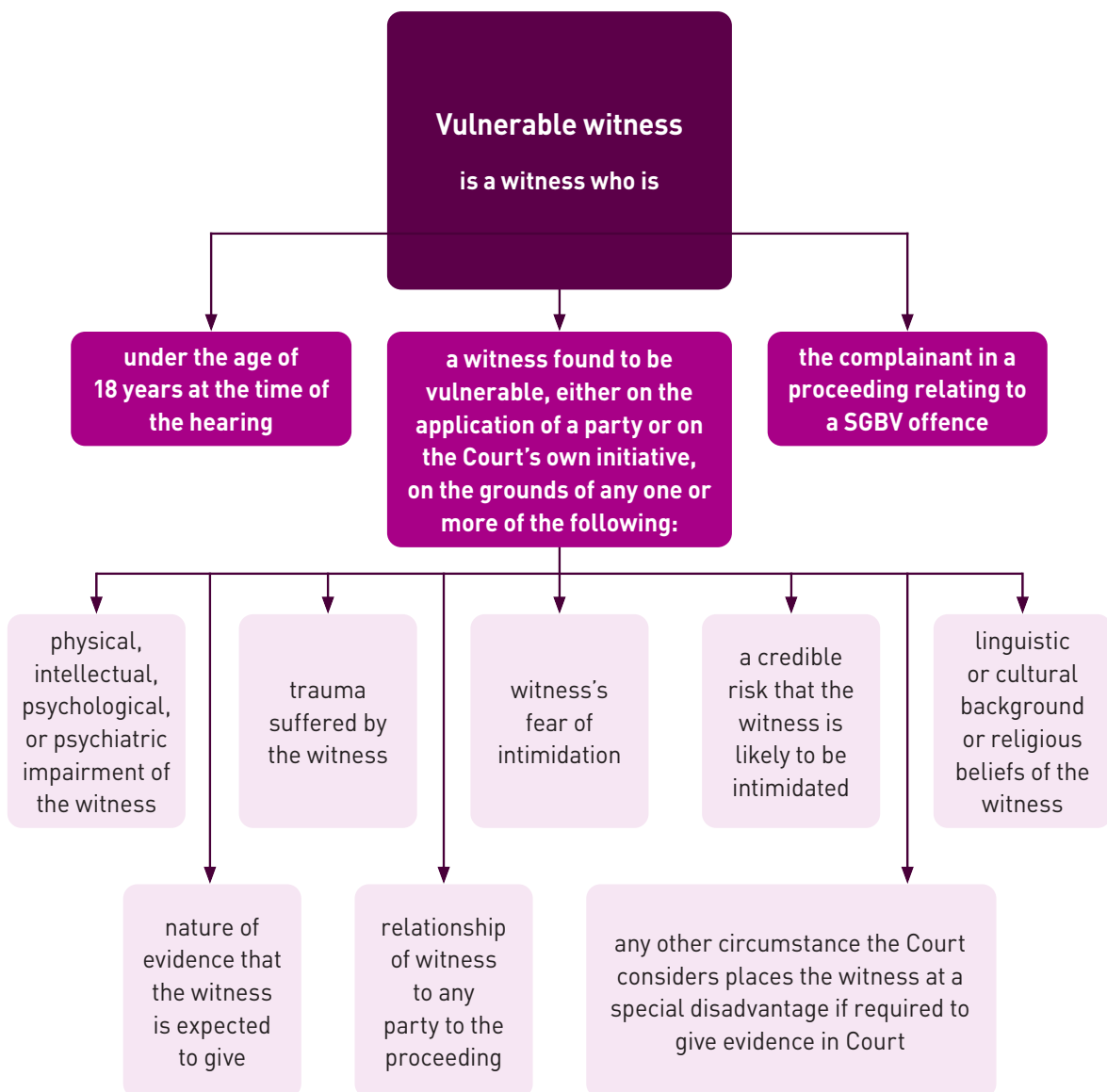
PILON Sexual and Gender Based Violence Working Group

See these four webinar recordings on PILON's Youtube Channel by searching "@PILONSecretariat1088"

Definitions

Defining 'Vulnerable Witnesses'

Building on the Model Provisions, this report defines a 'vulnerable witness' in a proceeding as follows:



Defining ‘Vulnerable Witnesses’ (continued)

Anecdotally, when describing the use of special measures in their jurisdictions PILON member representatives frequently use the term ‘vulnerable witness’ as a synonym for a child witness. This is reflected by the fact that several jurisdictions only provide for a support person to sit with the vulnerable witness in the context of a child’s testimony, with ‘support person’ defined as a parent or guardian.¹

While measures to protect child witnesses are important, not all vulnerable witnesses are children. Indeed, in jurisdictions where only children are deemed vulnerable witnesses, the special measures may not be available to persons other than children. However, many vulnerable witnesses are adults, and they may also need access to special measures to safely and confidently give their best evidence in court.

“While measures to protect child witnesses are important, not all vulnerable witnesses are children.”

Defining ‘Guidance Documents’

In some jurisdictions, a special measure is not expressly provided for in legislation but it is provided for in **guidance documents**. Guidance documents include court benchbooks, practice directions, court guidelines and other like materials. These documents are not binding legislative requirements and instead advise judicial officers on the exercise of their power. Although these guidance documents have different practical effects if not followed, for the purposes of this research they have been included within the ‘legislation’ category, alongside laws passed by the Parliament or government. This approach reflects the fact that an explicit reference to a special measure in court guidance documents is likely to provide a stronger basis for an application for that measure to be provided than simply relying on the court’s inherent jurisdiction.

Court
Benchbook

Practice
Directions

Court
Guidelines

Other like
materials

¹ See for example [Republic of Marshall Islands Rules of Criminal Procedure](#), rule 26(b)(7)-(8), where a support person is permitted during CCTV or video recording if their ‘presence is determined by the court to be necessary to the welfare and well-being of the child’. See also Vanuatu Magistrate’s Court Benchbook, where a ‘parent or guardian may be allowed to sit with the child while the child gives evidence’ to ‘ensure the child is not distracted or frightened’.

Explanations of the Special Measures

Guided by PILON’s Model Provisions, this report considered the use of the following special measures:

Special measure	Explanation
Physical measures	
Use of a screen	A barrier is placed to shield the vulnerable witness from seeing the alleged perpetrator. In jurisdictions where the defendant has a ‘right to confront’ a witness, the screen could be a one-way screen that allows the defendant to see the witness but not the witness to see the defendant.
Alternative seating arrangements so defendant out of line of vision	Similar to the use of a screen, the court changes seating arrangements to make the witness more comfortable, this may include a set up where the witness does not have to see the defendant.
De-robing	In courtrooms where wigs and robes are typically worn, the court orders that wigs and robes are not worn while the witness is giving evidence.
Cross-examination	
Prevention of personal cross-examination by defendant	In cases where the defendant is self-represented, they are prohibited from directly cross-examining the witness. To ensure procedural fairness, courts may appoint someone to cross-examine the witness on behalf of the defendant.
Prohibition on unacceptable questions	Questions to a witness are prohibited where they are harassing, belittling, confusing, degrading or otherwise inappropriate.
How witnesses give evidence	
Pre-recorded audio-visual testimony	The evidence of the witness is recorded, in a preliminary hearing or otherwise, and then later played in court. This may be a recording of the initial police interview, or a more formal evidence-in-chief interview.
Closed circuit television	The witness gives evidence via a real-time, audio-visual transmission from outside the courtroom.
Support person	A support person sits with the vulnerable witness while they are giving evidence and offers support. This person may be close to the witness (for example, a parent or friend) or the court may provide support person services. This special measure specifically relates to the presence of a support person while the witness is giving evidence, and can be distinguished from witness support functions provided throughout the prosecution process.
Use of Intermediary	A person sits with the vulnerable witness and explains questions being asked in a way that is more accessible and less confusing to the witness. This may include language translation, using communication aids, or rephrasing questions in an age-appropriate manner. The intermediary may also explain the court process to the witness. The intermediary would then explain to the court the answers given by the vulnerable witness.

Special measure	Explanation
How witnesses give evidence (continued)	
Closed Court	While the vulnerable witness is giving evidence, the courtroom is closed to the public to protect the witness's privacy and safety. Only those expressly permitted by the court may be present. To maintain transparency, journalists may be allowed in the courtroom with specific conditions to protect the witness's identity.
Adjournment to alternate location	Court proceedings are moved to another location. This special measure recognises that the courtroom can be an intimidating environment or that the vulnerable witness may feel intimidated to travel to the courtroom.
Non-publication orders	It is prohibited to publish any identifying information about the vulnerable witness, including their name, contact details and any other identifying details. This special measure intends to protect the witness's privacy and safety, and recognises that a witness might not report a SGBV matter because of perceptions of embarrassment or fear should their experience be made public.
Admissibility and inferences	
Prohibition of sexual reputation or experience evidence	Evidence is prohibited where it goes to the witness' sexual reputation or previous sexual experience. This evidence is prejudicial and can lead to inaccurate assumptions. Moreover, one's previous sexual experience is not relevant to the issue of consent in the current case.
No adverse inference in regards to credibility of child's evidence	The defendant, lawyers and judge must not suggest or draw an inference that evidence by children is less credible than adults' evidence. The special measure aims to overcome societal norms or biases that may be prejudicial to the witness. This encourages the jury, judge and others to listen on the evidence itself without presumptions.
No adverse inference in regards to delay	The judge cannot draw an inference that a delay in making the SGBV complaint means the allegation is false. The special measure may require the judge to actively warn the jury that there may be good reasons why a witness may hesitate to make a complaint.
No corroboration requirement or requirement to warn on uncorroborated evidence	Corroborating evidence is not required to obtain a conviction for a SGBV offence. In some jurisdictions the common law or statute books contain a requirement that evidence is corroborated before a person can be convicted of a criminal offence. This special measure overrides such laws. The law may also remove any requirement for a judge to warn the jury about acting on uncorroborated evidence.

Methodology

The research comprised two phases:

Phase 1: Desktop review

The first stage of data collection looked at the laws providing for special measures in each of the 19 PILON SGBV Working Group member jurisdictions. This phase involved desk research of legislative databases and existing PILON SGBV materials (see above in 'Background'), supported by information shared at PILON events.



Phase 2: Interviews and questionnaires

The data gathered in Phase 1 was recorded in a checklist that was sent to the relevant jurisdiction to seek confirmation of accuracy and further comments (Attachment B). The checklist was accompanied by a 'legislative outline' summarising the Phase 1 research.



The checklist referred to in Phase 2 was separated into three sections asking jurisdictions to indicate:

1

whether the particular special measure was either expressly provided for in legislation, indirectly supported, or unclear/not provided for

The 'indirectly support' option refers to where a special measure is not expressly provided for in legislation, but the special measure can still be provided due to general provisions and court powers. For example, in the Cook Islands, the *Judicature Act 1980-81* gives the court the discretion to determine its own practice/procedure 'in a manner consistent with natural justice and convenience'; this provides indirect support for special measures such as screens or alternative seating arrangements.¹

2

whether the special measure was used in practice, and

3

comments/details of how the special measure was used.

Jurisdictions were asked to use the comment box to indicate if special measures were only used for a specific class of vulnerable witness (for example, children). These comments were compared across jurisdictions and have been analysed in the 'discussion' section below.

At the time of this report, 13 checklist responses were received.²

² *Judicature Act 1980-81* (Cook Islands), section 8.

Interpretation

Limitations of the data

The method of data collection relied in part on anecdotal evidence provided by representatives of the PILON SGBV Working Group, based on their experience within the court system of their respective jurisdictions. As a result, the data collected may not accurately represent the overall court system in that jurisdiction. Nevertheless, a subject matter expert who works in the court system stating that a special measure has been used in their experience is useful data in itself, especially when there is little existing research.

Another limitation of the data is that most of the representatives were prosecutors in capital or main cities. As a result, the data does not necessarily capture the criminal justice process in remote communities away from population centres.

“ The PILON SGBV Working Group welcomes any corrections or amendments to the research captured in this report. ”

Corrections welcomed

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Interpreting the data

Impact of larger respondent cohort

Five more jurisdictions were researched for this 2022 report than in the 2019 snapshot (with **Australia, New Zealand, American Samoa, Tokelau** and **Pitcairn Islands** now included). As such, an apparent increase in the number of countries and territories using a special measure may reflect the inclusion of new data from these five countries and territories. Conversely, for some special measures the percentage of jurisdictions using the special measure may appear lower at points because the overall pool is larger.

Five more jurisdictions were researched for this 2022 report than in the 2019 snapshot.

Interpreting gaps in special measures

When interpreting the data and accounting for gaps, it is important to understand the variation in legal systems across the Pacific. Some jurisdictions have judge-alone trials and do not use juries. While many jurisdictions have a common law adversarial system where two sides present evidence through examination-in-chief and cross-examination, some have an inquisitorial system led by the judge (or other decisionmaker). As a result, certain measures may not be legislated for or practised because they do not apply to a particular jurisdiction's legal system. For example, a jury direction is not required if there are no jury trials. Similarly, de-robing would not be a necessary measure if robes are not worn to begin with.

Acknowledging redundancy between special measures

Another reason why a particular special measure might not be in place is because another special measure addresses the underlying issue. For example, if a jurisdiction uses screens to prevent the witness from seeing the defendant, that jurisdiction might not consider 'alternative seating arrangements' to be necessary as an additional special measure.

Data does not pass judgement

As such, the data in this report is not a judgement on, or intended to facilitate the making of assumptions about, any jurisdiction. Instead, the aim of this report is to draw attention to potential areas for legislative reform, and to encourage greater use of special measures in practice. Indeed, the research also seeks to prompt jurisdictions to investigate whether special measures are appropriately supported by legislation and/or being used, for example by speaking to prosecutors, judges, court registrars and other law and justice officials.

Summary of Results

The following section provides a bar chart summary of the data for each special measure. The data has been separated, left to right, according to the following categories.

Yes	Indirectly Yes	No/Not applicable	Unsure
Legislation or guidance documents expressly or indirectly provide for the special measure in question or the special measure is used in practice.	Legislation or guidance documents indirectly provide for the special measure.	Special measure is not in legislation or not used in practice including because the special measure is not applicable to that jurisdiction. To illustrate, if a jurisdiction has judge-alone trials and does not use juries, jury directions will not be applicable. Similarly, derobing would not be a necessary applicable special measure if robes are not worn to begin with.	The jurisdiction's representative was unsure, there was no response for that special measure or data was not available. Further research is needed.

Interpreting the data

Accounting for gaps in special measures

When interpreting the data and accounting for gaps, it is important to understand the variation in legal systems across the Pacific. Some jurisdictions have judge-alone trials and do not use juries. While many jurisdictions have a common law adversarial system where two sides present evidence through examination-in-chief and cross-examination, some have an inquisitorial system led by the judge (or other decisionmaker). As a result, certain measures may not be legislated for or practised because they do not apply to a particular jurisdiction's legal system. For example, a jury direction is not required if there are no jury trials. Similarly, de-robing would not be a necessary measure if robes are not worn to begin with.

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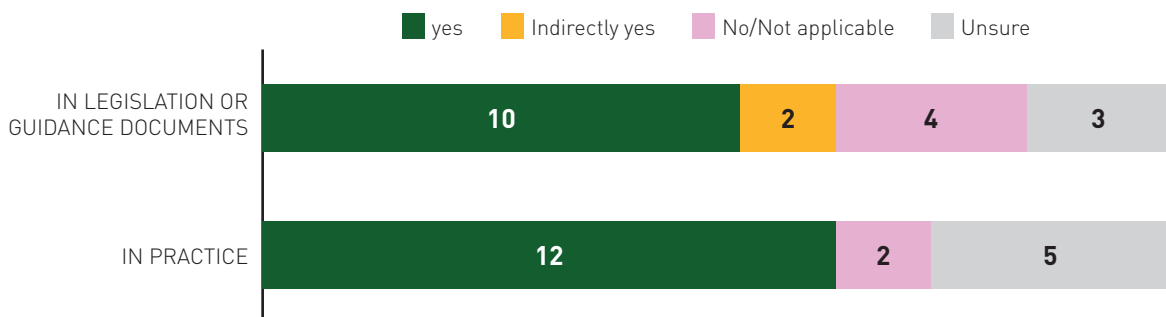
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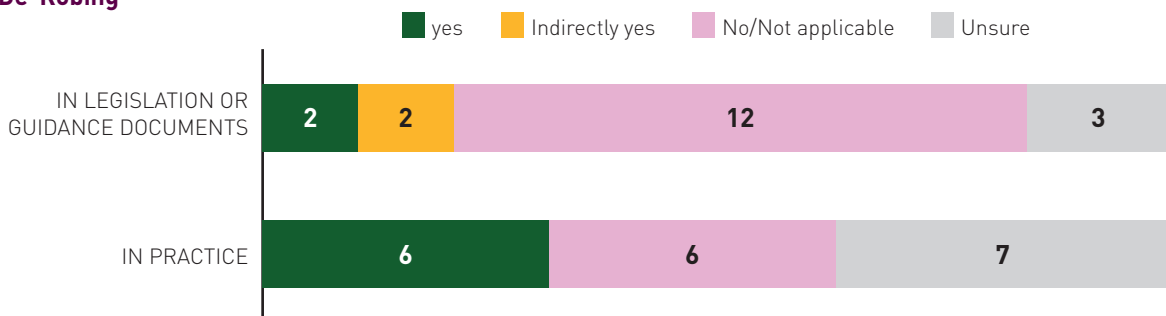
“ The data in this report is not a judgement on, or intended to facilitate the making of assumptions about, any jurisdiction. ”

Physical measures

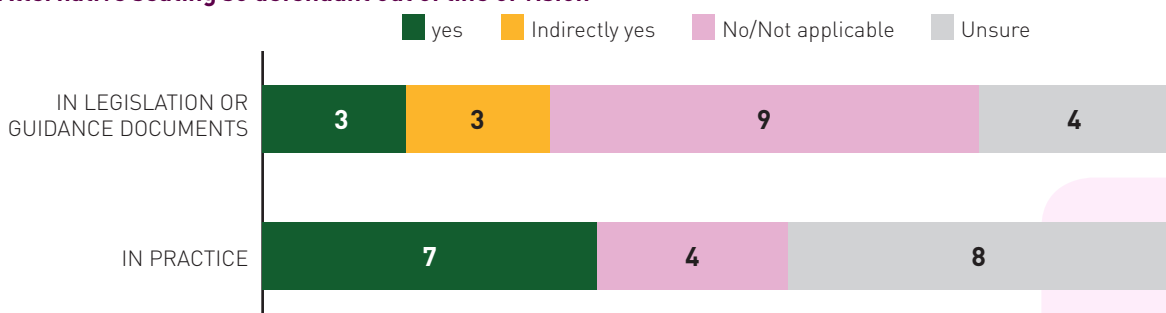
Use of a screen



De-Robing

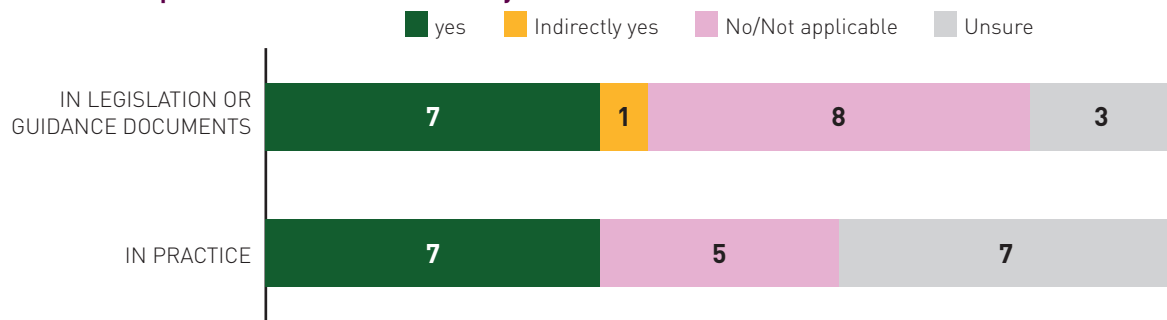


Alternative seating so defendant out of line of vision

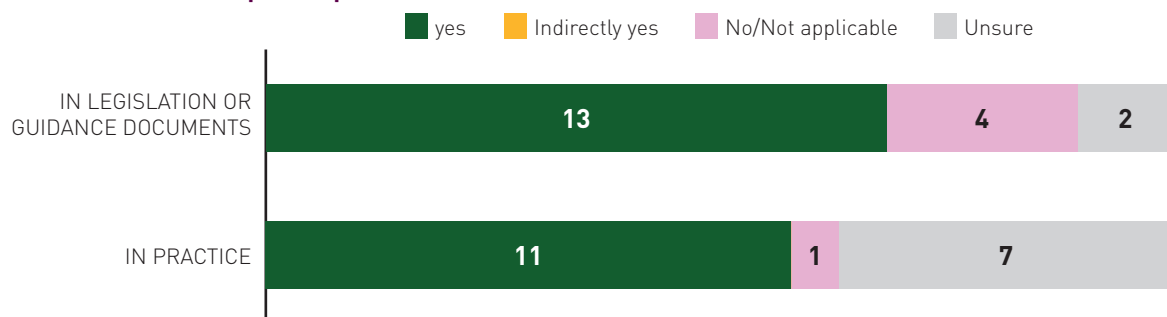


Cross-examination

Prevention of personal cross-examination by defendant

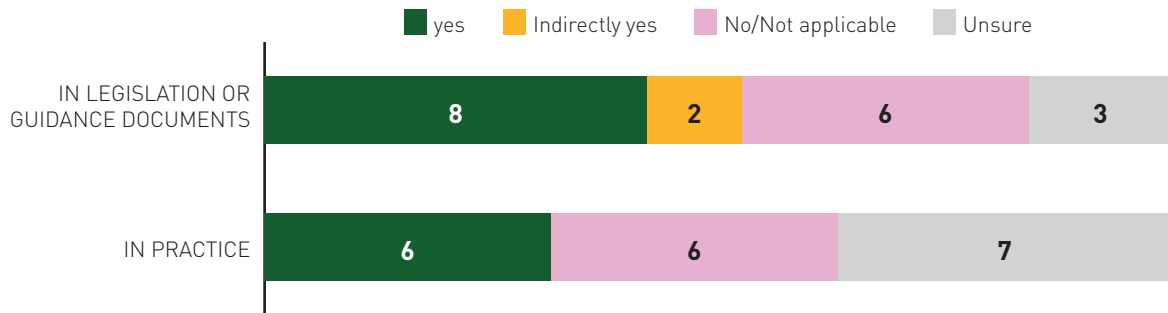


Prohibition on unacceptable questions

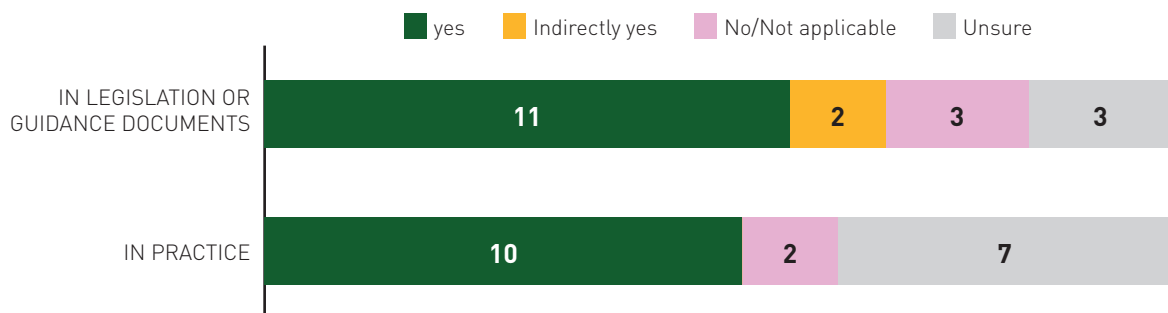


How witnesses give evidence

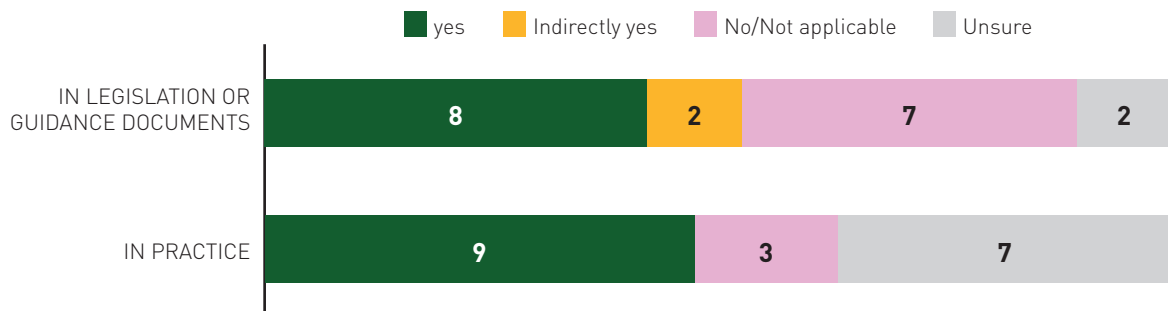
Pre-recorded audio-visual testimony



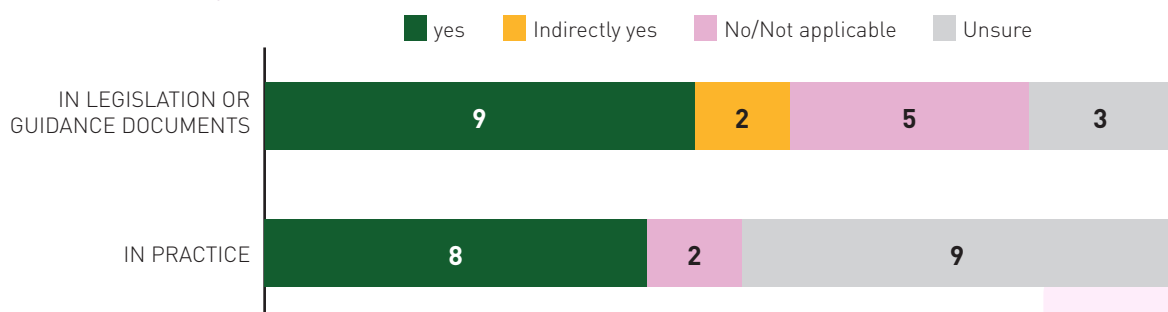
Closed circuit television



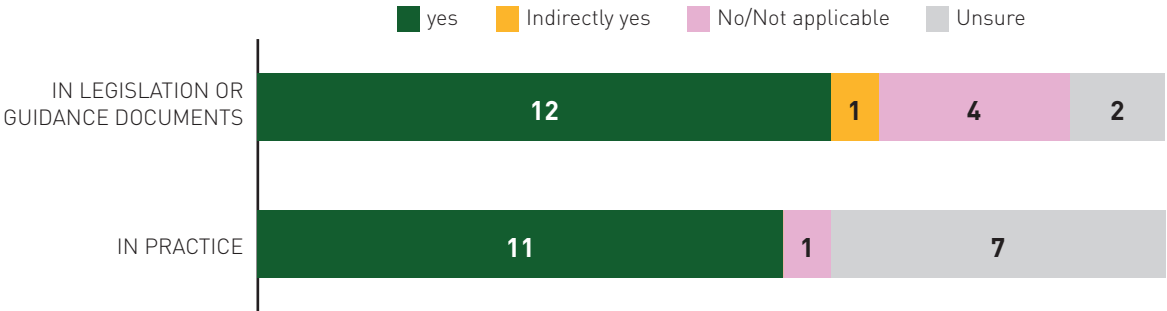
Support person



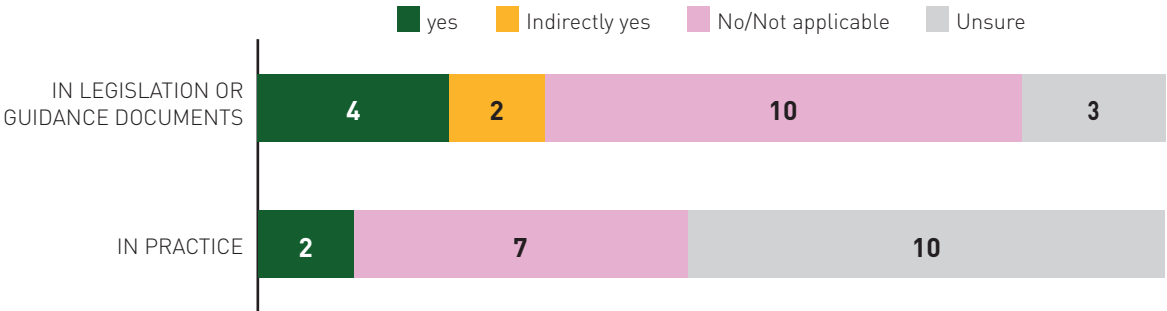
Use of Intermediary



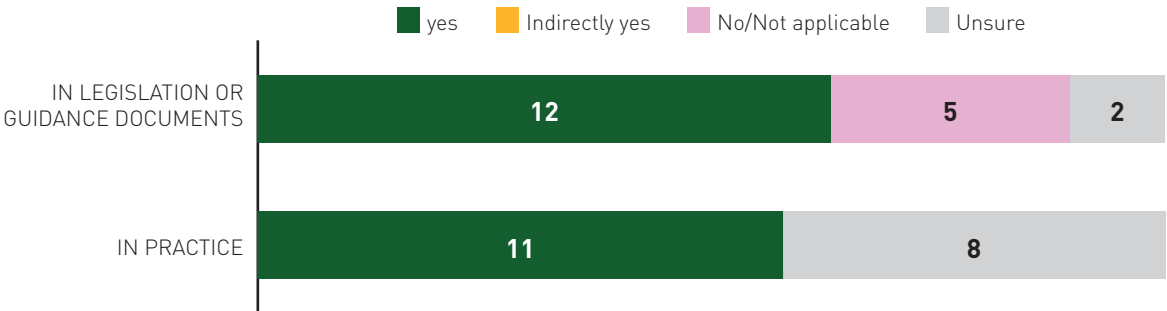
Closed Court



Adjournment to alternate location

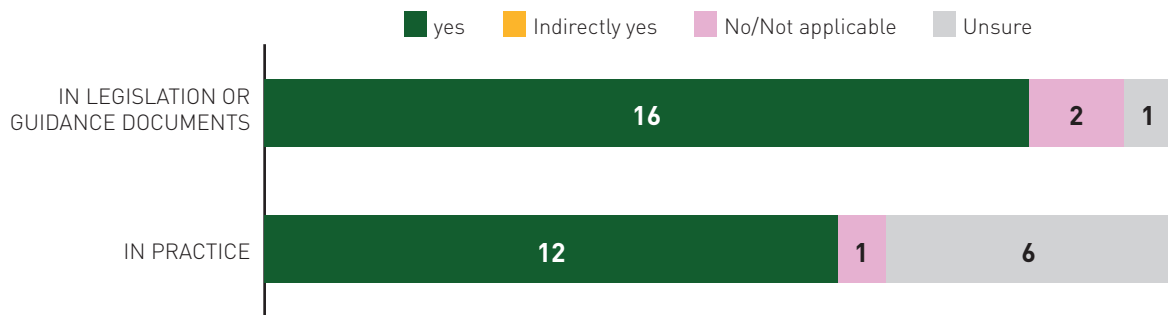


Non-publication orders

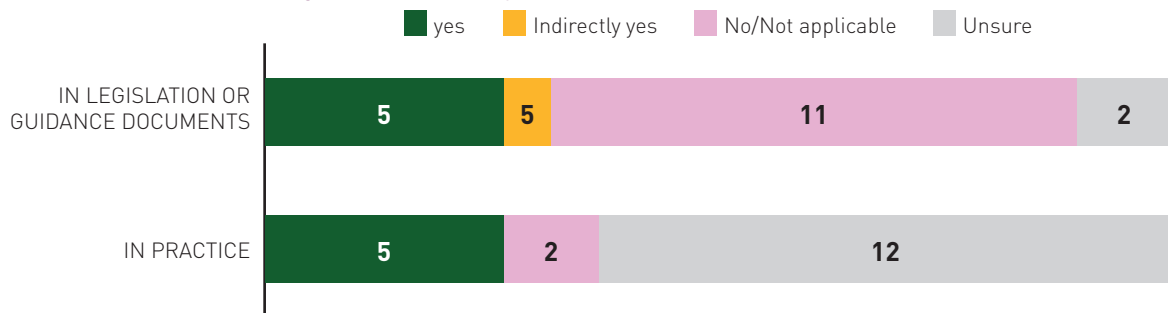


Admissibility and inferences

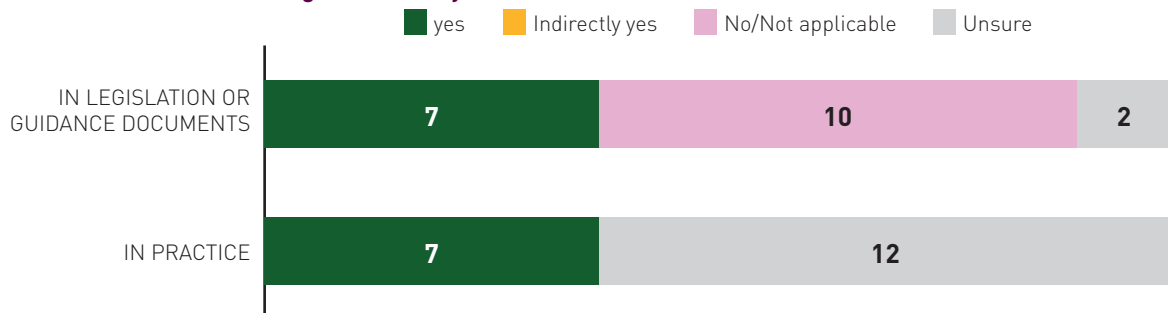
Prohibition of sexual reputation or experience evidence



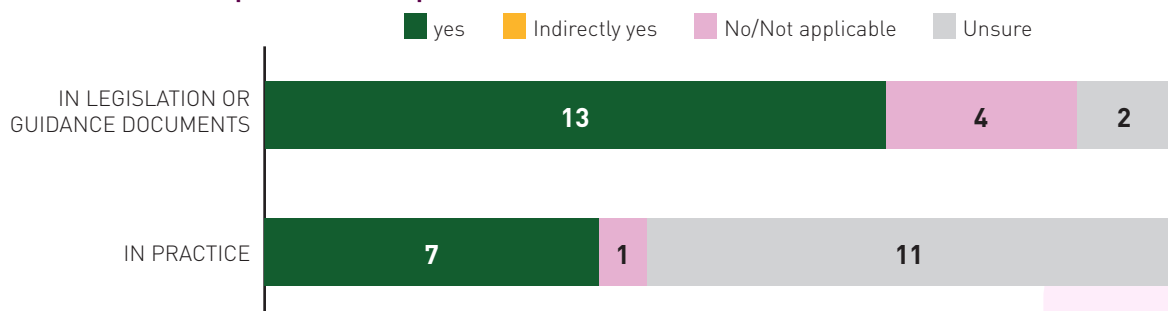
No adverse inference in regards to credibility of child's evidence



No adverse inference in regards to delay



No corroboration requirement or requirement to warn on uncorroborated evidence



Discussion

Broader trend of increased use

The research suggests that special measures are being used more widely across the Pacific than they were in 2019. Even accounting for the 5 new countries and territories included in this report which were not included in the 2019 snapshot, jurisdictions originally researched in 2019 have generally reported increased use of special measures, whether in legislation or in practice.

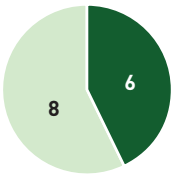
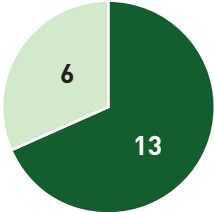
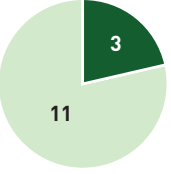
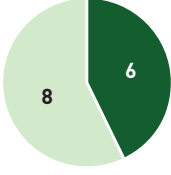
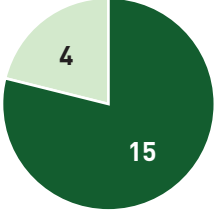
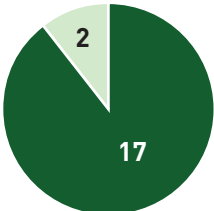
To illustrate the change over time, the below table displays the differences between the 2019 and 2022 data, specifying the jurisdictions that have been newly recorded as using each special measure (legislation or practice).

The report will then step through various noticeable trends since 2019.

Table 2 – Summary of changes since 2019

Special measure	2019	2022	Change and new additions
PHYSICAL MEASURES			
Use of a screen			▲ 3
Alternative seating so defendant out of line of vision			▲ 2
De-robing			▲ 1

Special measure	2019	2022	Change and new additions
CROSS-EXAMINATION			
Prevention of personal cross-examination by defendant			▲ 6
Prohibition on unacceptable questions			▲ 9
Review of defence's proposed questions	N/A – not examined		
HOW WITNESSES GIVE EVIDENCE			
Pre-recorded audio-visual testimony			▲ 6
Closed circuit television			▲ 5
Support person			▲ 4

Special measure	2019	2022	Change and new additions
HOW WITNESSES GIVE EVIDENCE (continued)			
Use of Intermediary			▲ 7
Closed court			▲ 7
Adjournment to alternate location			▲ 4
Non-publication orders			▲ 9
ADMISSIBILITY AND INFERENCES			
Prohibition of sexual reputation or experience evidence			▲ 6

Special measure	2019	2022	Change and new additions
No adverse inference in regards to credibility of child's evidence			▲ 5
No adverse inference in regards to delay			▲ 4
No corroboration requirement or requirement to warn on uncorroborated evidence			▲ 7

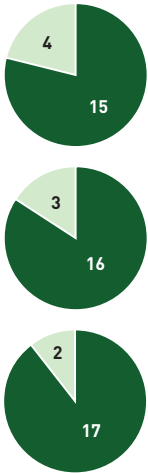
More jurisdictions are protecting the privacy of vulnerable witnesses

An important trend reflected in the data is an increase in the use of special measures to protect the privacy of vulnerable witnesses. Fifteen out of 19 jurisdictions have **non-publication orders**, which prohibit the publication of a vulnerable witness’s name and other identifying details.

Similarly, 16 of 19 jurisdictions allow for a **closed court** so only a select few people can remain in the courtroom during the vulnerable witness’s evidence.

Complementing these special measures is the widespread **prohibition of sexual reputation or experience evidence** (17 of 19 jurisdictions), which protects vulnerable witnesses from humiliating and irrelevant inquiries into their sexual past. These inquiries are often used to try to damage witness credibility. Not only are these special measures used widely in the Pacific, there has been an increased use of these measures since 2019.

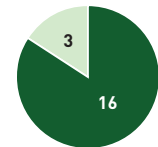
These numbers illustrate that jurisdictions recognise that the privacy given to vulnerable witnesses may affect their engagement with the prosecution and trial process. Indeed, protecting the privacy of vulnerable witnesses is connected to increased reporting of allegations relating to SGBV. If a vulnerable witness knows they would or may be publicly identified as part of the trial process, they may feel discouraged from reporting the matter due to the perceptions of embarrassment about the experience, stigma from society, fears of intimidation, or concerns that their experience could be distorted into false rumours. Moreover, if a vulnerable witness sees their experience represented in the media or otherwise circulated throughout society, this could be retraumatising. As such, special measures that protect vulnerable witnesses’ privacy may result in witnesses feeling more comfortable reporting, in turn leading to more prosecutions of matters involving SGBV.



“ Jurisdictions recognise that the privacy given to vulnerable witnesses may affect their engagement with the prosecution and trial process ”

Jurisdictions are acting on unacceptable questions

Sixteen out of 19 jurisdictions reported that they have measures in place to prevent unacceptable lines of questioning. This represents nine additional jurisdictions since the 2019 snapshot. The widespread use of this special measure shows that jurisdictions are widely aware of the fear and anxiety many vulnerable witnesses experience during cross-examination.



Importantly, the nature of the proceeding can influence whether a question is unacceptable, and in SGBV matters, a question need not be plainly insulting in order to cause unnecessary distress for the vulnerable witness. As SGBV matters often require vulnerable witnesses to recall deeply upsetting memories, needlessly repetitive questions—even if neutrally phrased—can overwhelm, belittle and degrade a witness. For this reason, several countries provide a wide definition of unacceptable questions. In Samoa, for example, there is a prohibition on ‘any question that the Judge considers improper, unfair, misleading, **needlessly repetitive, or expressed in language that is too complicated for the witness to understand**’.³

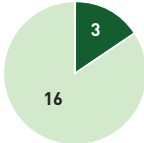


This special measure encourages prosecutors to turn their minds to the special context of SGBV matters when deciding to raise and sustain objections about questions.

³ Evidence Act No. 47 2015 [Samoa], subsection 73(1).

Some jurisdictions are preventing unacceptable questions by reviewing the defence’s proposed questions

While surveying for measures to prevent unacceptable lines of questioning, survey responses also noted procedures not discussed within the Model Provisions. Specifically, some jurisdictions provided for a **review of the defence’s proposed questions**. This was only observed within two jurisdictions, being the Cook Islands and Tonga.



This kind of review refers to a process where the defence lawyer tells the judge the questions or topics they intend to put to the witness in cross-examination; the judge or another appointed person then reviews the questions to ensure they are not harassing and inadmissible. Rather than generally prohibiting unacceptable questions, the court takes active steps to remove any possibility of specific questions being asked. This process recognises that even if an unacceptable question is objected to and struck out by the court, the question can still harm the vulnerable witness and stop them from giving their best evidence simply because it was said out loud. In the words of Cook Islands former Deputy Solicitor-General Annabel Maxwell-Scott, ‘by the time you stand up [to object] it is too late’. In the Cook Islands, prosecutors enact this measure by asking for the defence counsel’s questions to be vetted by the court. However, they reported that the availability of this process is reliant on the decision of each judge.



On the other hand, Tonga’s use of this kind of process has come from the judiciary itself. There, the courts have introduced ‘Ground Rules Hearings’ in SGBV cases involving children, where the questions from the prosecution and the defence are examined before the trial and the court adjudicates whether they are appropriate to put to the vulnerable witness.



Although this approach to addressing unacceptable questions is rare, jurisdictions that frequently witness harassing and hostile cross-examination of vulnerable witnesses may be influenced by Cook Islands and Tonga’s approach.

Jurisdictions are finding ways to implement special measures in practice

By examining the use of special measures *in practice*, the research undertaken and data collected illustrates various ways that jurisdictions have implemented special measures in the absence of legislation.

Use of a court’s inherent jurisdiction

Firstly, courts often have the discretion to implement special measures using their inherent jurisdiction, which is generally understood as a court’s power to shape its own procedures in the absence of fixed rules. The implementation may be by the court’s own initiative or on application by parties. In Vanuatu, for example, the Supreme Court has ‘all jurisdiction that is necessary for the administration of justice’⁴ and judicial officers will often impose special measures such as screens including where no application has been made. Similarly, the representative from the Solomon Islands commented that courts are amenable and open to applications for removal of wigs and robes in the absence of legislation. Indeed, for several jurisdictions the data suggests the majority of their special measures are only available in practice.



Applying for the court’s discretion

A consequence of special measures being subject to the court’s discretion is that their availability may depend on the particular judge. The representative from American Samoa noted in their response that whether sexual reputation evidence is prohibited will depend on the decision of the particular judge following discussion by parties. The representative from Fiji has also experienced varied results in seeking to convince the court to provide special measures for adult SGBV victims. As shared by Fijian Principal State Prosecutor Juleen Fatiaki in the first webinar in the PILON SGBV Working Group’s Special Measures Webinar Series, the Fijian Office of the Director of Public Prosecutions convinced the court in one matter that an adult woman was a vulnerable witness by virtue of the nature of the offence. Since this case some judges have followed this ruling and some have not. This example demonstrates that prosecutors may still be able to provide vulnerable witnesses with special measures by making applications under courts’ discretionary powers.



Grounding an argument in the Constitution

Beyond a court’s inherent jurisdiction, prosecutors may also be able to draw on their jurisdiction’s constitution to convince the court to use special measures. In the second webinar in the Special Measures Series, Marshallese Chief Prosecutor Cutty Wase explained that he persuaded the court to allow an adult vulnerable witness’s sister to attend as a support person. When asked by the court for the legal basis of his request, he successfully put forward an argument grounded in the *Constitution of the Republic of the Marshall Islands*, specifically the constitutional mandate of the court to allow and ensure public access to justice.⁵



⁴ *Judicial Services and Courts Act* (Vanuatu), subsection 28(1)(b).

⁵ *Constitution of the Republic of the Marshall Islands* (RMI), article 6, subsection 1(2).

Importing legislation from another jurisdiction

In certain jurisdictions there is provision for incorporating legislation from another jurisdiction. For example, in the Cook Islands, the *Criminal Procedure Act 1980-81* permits New Zealand law to be imported where no special provision is made in the Criminal Procedure Act.⁶ This importation clause is regularly used as a basis for using special measures in matters involving children. The same is true in Tokelau, where commissioners are able to adapt the principles of New Zealand rules to guide their discretionary powers.



Benefits of applying anyway

Across these examples a clear theme emerges: where a special measure is not expressly legislated, there can be benefit in applying to the court for special measures to be used anyway. If the prosecutor makes the case, whether based on the court's inherent jurisdiction or innovative arguments drawn from the Constitution or other laws, the court may be receptive to implement the special measure.

“Where a special measure is not expressly legislated, there can be benefit in applying to the court for special measures to be used anyway.”

⁶ *Judicature Act 1980-81* (Cook Islands), s 3.

Support persons and intermediaries are helping vulnerable witnesses give evidence

Use of support persons is widespread

Another common special measure used across jurisdictions is the use of a **support person**. A support person helps the vulnerable witness communicate their evidence by comforting them and providing a friendly and reassuring face. Twelve out of 19 jurisdictions were recorded as having this special measure, whether in legislation or in practice.

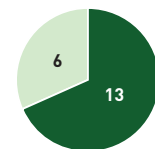
In several jurisdictions a support person is a parent or guardian for a child witness, such as in the Republic of the Marshall Islands (RMI) where a child can testify while sitting on the lap of a family member or with a family member nearby.⁷ However, the support person can be a professional provided by the court such as in Papua New Guinea (PNG), where the Salvation Army have a desk at the National Court premises and provide assistance to vulnerable witnesses. Other jurisdictions may find it worthwhile to look into providing similar support services at the court.



Intermediaries are also common

In contrast to support persons (who focus on making the witness feel more comfortable and confident), the role of an **intermediary** is to assist a vulnerable witness with their comprehension of the court process and the communication of their evidence.

Thirteen of 19 jurisdictions reported having this special measure, representing an increase of seven jurisdictions since the 2019 snapshot. An intermediary is more than merely an interpreter, and their role may involve special techniques to help the vulnerable witness communicate. This is reflected in jurisdictions' legislation, such as in Vanuatu where the Chief Justice's Practice Directions allow for a 'qualified suitable intermediary, such as, but not limited to, an interpreter for children with hearing, sight, speech or other disabilities'.⁸



The increased use of support persons and intermediaries across the Pacific highlights an important theme: jurisdictions recognise that using special measures lead to better evidence. If the witness feels more comfortable because of their support person, or more properly understands the questions because of their intermediary, they will speak more freely and give the Court the best available evidence to make a just verdict.

“ If the witness feels more comfortable ... or more properly understands the questions ... they will speak more freely and give the Court the best available evidence ”

⁷ *Marshall Islands Rules of Criminal Procedure* (RMI), rule 26(b)(6)-(7).

⁸ *Chief Justice's Practice Directions in Relation to Children Who Are in Contact with the Court Process* (Vanuatu), subsection 18(e)(v).

COVID-19 resulted in more CCTV evidence in practice

As explored in the introduction of this report, COVID-19 created significant challenges for the global fight against SGBV, not least because resources and time were diverted towards pandemic responses. In Nauru, for instance, consultations for special measures reforms were put on hold due to the pandemic.

However, COVID-19 also prompted members to implement new special measures, most notably remote evidence by audio-visual link (CCTV). Throughout survey comments, various jurisdictions signalled their increased use of CCTV. For example, the representative from Kiribati stated in their survey response that video screens were put in place during the coronavirus period while the response of the representative from the Federated States of Micronesia revealed that televisions were set up in courts to enable virtual court hearings. The response from the Solomon Islands also revealed their courts have set up audio-visual facilities as part of their COVID-19 communication measures. Interestingly, these jurisdictions already provided for CCTV in their 2019 research – what changed since then is that jurisdictions increased their use in practice.

Indeed, COVID-19 may have provided the impetus for jurisdictions to normalise the use of remote audio-visual testimony for vulnerable witnesses. In his webinar presentation, Marshallese Chief Prosecutor Cutty Wase revealed that after COVID-19, the court realised the need for vulnerable witnesses to give their best evidence with RMI subsequently amending its laws to extend video/audio conferencing to adults with intellectual or mental impairments. This experience was also reflected in other jurisdictions, such that the COVID-19 adjustments helped courts realise the benefits of remote evidence for vulnerable witnesses.



COVID-19 adjustments helped courts realise the benefits of remote evidence for vulnerable witnesses.

Screens are a commonly accepted special measure

One of the most common special measures used in jurisdictions is the use of a screen, with 13 out of 19 jurisdictions deploying the special measure. This typically involves placing a partition around the vulnerable witness to block them from seeing the defendant. The special measure makes the vulnerable witness feel more comfortable by reducing feelings of fear and intimidation caused by seeing the defendant. In the third webinar of the special measures series, Assistant Attorney General of Samoa Iliganoa Atoa explained that a screen is an effective special measure that is commonly used, easy to implement and usually accepted by judges. For jurisdictions considering special measures to adopt, a screen can be a practical and relatively low-cost way to make a substantial difference to a vulnerable witness' level of comfort.

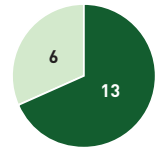
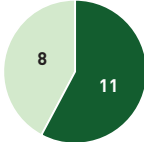


Photo above: Example of screen (supplied by a respondent)

Prohibiting personal cross-examination of complainants – an area for possible action

Eleven of 19 jurisdictions indicated that defendants cannot personally cross-examine the vulnerable witness. For the jurisdictions yet to adopt this special measure, a guarantee that the vulnerable witness will not be personally confronted by their alleged perpetrator goes some way to reducing levels of intimidation and distress in witnesses.



Recognising that some jurisdictions provide the defendant with a right to personally confront a witness testifying against them,⁹ courts may still provide a means for the defence to put their case to the vulnerable witness via an intermediary or the judge themselves.

This is an area that has improved since the 2019 research, with several jurisdictions such as Vanuatu and Nauru indicating that direct cross-examination does not take place. Other jurisdictions may wish to prioritise adopting this prohibition as personal cross-examination by the defendant can cause distress for vulnerable witnesses.



⁹ Constitution of the Republic of the Marshall Islands (RMI), article 2, section 4.

Barriers for implementing special measures

Resourcing

A key barrier raised by many jurisdictions is resourcing. Six jurisdictions expressly commented that resourcing was an issue, with several identifying particular technical challenges with CCTV and prerecorded evidence where specialised equipment is required.

Indeed, resourcing issues may result in a jurisdiction having legislated for a special measure but not providing it in practice. For example, the representative from Samoa revealed that remote CCTV evidence is provided in legislation but not preferred in practice due to the required technical support and time to set up.



This issue also extends to facilities; for some members, the courtroom may not have an accessible space for vulnerable witnesses. In their survey response, the representative from the Cook Islands raised the issue of a lack of waiting rooms or specific entrances in the courtroom for vulnerable witnesses. Similarly, the representative from Samoa noted issues finding a child friendly space for children to give remote evidence.



Moreover, as observed by the representative from Tonga, special measures may require specialised training for judicial officers, law enforcement and relevant agencies. In particular, pre-recorded police interviews require training for the police to ensure the recordings are admissible as evidence.



This barrier highlights the importance of sharing practical and technical advice through networks such as PILON. This barrier also underscores the need for training in the implementation of special measures. For jurisdictions with limited resources, they may wish to prioritise special measures that are simple and cost-effective to adopt, such as allowing a support person or the use of screens.

Political will

Another barrier raised by several jurisdictions is that lawmakers might not have the political will to legislate special measures.

This barrier may be due to competing priorities; one jurisdiction expressed as a 'big problem' that their government is not focusing on law enforcement and therefore it is difficult to detect the need to improve their laws. This may be due to limited resourcing. Another jurisdiction observed there is a lack of resources to conduct law reform projects around special measures that are not legislated for. This points to the circular relationship between these two key barriers.

There is also a potential issue where jurisdictions believe the provision of select special measures is sufficient, notwithstanding that going further and legislating a full suite of special measures would better help accommodate particular witnesses' needs. Indeed, one jurisdiction signalled that there is 'little political will for reform as the current system (although lacking) is working'.

This barrier reinforces the importance of prosecutors and other judicial officers applying for the court's discretion in the absence of legislated special measures.

In terms of pushing for legislative reform, it may be useful to emphasise the core benefits of special measures, including an increase in SGBV reporting and prosecutions and providing the best possible evidence for the court. By having conversations about these core law and justice benefits, legal officers may help improve the political will to implement special measures.

Way forward

Several jurisdictions shared exciting updates on planned law reform: If other jurisdictions have taken steps to increase the use of special measures, they are invited to email the PILON Secretariat at pilon@pilonsec.org.

Updates on planned law reform



The representative from **Nauru** reported that the *Criminal Procedure Act 1972* is being revised with the intention to include more special measures, and to consider extending certain special measures to vulnerable witnesses over 18. Nauru noted that special measures are only legislated specifically for children and they are looking to expressly provide for measures in their *Criminal Procedure Act*.



The representative from **Kiribati** shared the work of their Justice Committee in Relation to the Elimination of Violence Against Women. They shared that the Committee's implementation plan includes looking to improve court layout so witnesses are not affected by seeing the accused.



The representative from **Solomon Islands** indicated that they have taken the first step to consult with police authorities on the special measure of obtaining audio-visual recordings of vulnerable witnesses' evidence, work which may ultimately form part of future special measures reform.



The representative from **Samoa** indicated that Samoa is exploring ways to increase the use of pre-recorded video testimony in practice, as a measure to deal with issues encountered by vulnerable child witnesses.



The representative from **New Zealand** has indicated that new legislation will come into force on 20 December 2022 that entitles witnesses in SGBV matters to give evidence in alternative ways without any application or supporting evidence required. (*Sexual Violence Legislation Act 2021* (New Zealand)).

Prioritising a witness-centred approach

A key message throughout the PILON SGBV Working Group's work on special measures is the importance of taking a trauma-informed and witness-centred approach. Many vulnerable witnesses in SGBV cases report that their experience of the adversarial court process is disempowering and can aggravate their trauma. One way to give the witness back some sense of control over their story can be to communicate with them and where appropriate seek their views to ensure the process is attuned to their circumstances and wishes.

Indeed, there is no one size fits all approach to special measures. As the Tokelaun representatives noted, how a witness behaves will depend to a large extent on culture; the reactions of a 'vulnerable witness' in one jurisdiction should not necessarily be anticipated in another. This observation underscores the importance of giving the witness control over how special measures are used.

Offer special measures, do not impose

Special measures should be offered and made available but never imposed. Imposing special measures can have the unintended consequence of further traumatising the witness. For example, in Australia, the use of mandatory non-publication orders had the unintended effect of prohibiting victim-survivors themselves from speaking out about their own story even after a conviction. Following a successful civil society advocacy campaign, several Australian state and territory jurisdictions recently amended these laws so victim-survivors can speak publicly about their experiences should they wish.

“Special measures should be offered and made available but never imposed.”

Tell witnesses about special measures early

Beyond taking steps to implement special measures in court, jurisdictions should seek to inform witnesses at the early stages of the prosecution process about the availability of special measures. Many prosecution agencies have initial meetings and/or pre-testimony hearings with the vulnerable witness to get to know them and explain the trial process. These meetings are a valuable opportunity to advise the vulnerable witness of the special measures and the advantages and disadvantages of using them. This proactive communication reduces the vulnerable witness's possible feelings of anxiety and dread and empowers them to make an informed decision about the special measures they wish to use.

Use special measures in pre-trial meetings

Moreover, when prosecutors, police, witness support officers and other officials meet with vulnerable witness in the pre-trial stage, they can use their own version of the special measures to make the process less traumatising. These officials could invite a support person or intermediary during meetings. In the same way pre-recorded police interviews are used as evidence-in-chief, prosecutors can draw on police recording of the witness as much as possible rather than asking them to relive the traumatic experience again. Similar to the 'de-robing' special measure, prosecutors and witness support officers could consider dressing and speaking less formally when meeting with vulnerable witnesses.

“When prosecutors, police, witness support officers and other officials meet with vulnerable witness in the pre-trial stage, they can use their own version of the special measures to make the process less traumatising.”

Several jurisdictions already adopt this approach. For example, PNG Prosecutor in Charge, Family and Sexual Offences Unit, Mercy Tamate noted that the PNG Office of Public Prosecutions provide a special witness room with toys and couches to accommodate vulnerable children witnesses. By embedding a sensitive and flexible approach into the pre-trial process, officials help ensure they are not aggravating the harm that vulnerable witnesses have experienced.

Extending the meaning of vulnerable witness to adults

This research has indicated that children are readily accepted by courts as vulnerable witnesses but in some jurisdictions difficulty arises in seeking special measures for *adult* vulnerable witnesses. To use one example, CCTV evidence was available only for children in at least four jurisdictions.

While the implementation of special measures for children is important, the PILON SGBV Working Group's view, expressed in the Model Provisions and Explanatory Text, is that special measures should be equally available for children *and* adult vulnerable witnesses. Vulnerable adult witnesses in SGBV matters are likely to also be distressed and shaken by the trial process. Similarly to children, they are vulnerable to being insulted and humiliated by cross-examination. Indeed, defence lawyers can be *more* aggressive towards adult vulnerable witnesses, using body language and tone they would not use for children. For these reasons, jurisdictions are encouraged to consider adopting a consistent approach across children and adults.

This report has shown that various jurisdictions have already taken steps to do this. A Marshallese prosecutor successfully applied for an adult vulnerable witness's sister to act as a support person. A Fijian prosecutor convinced the court in one matter that a woman was a vulnerable witness by virtue of the nature of the offence. Moreover, Nauru is planning to take the special measures currently legislated for the children and extend it in law to vulnerable witnesses above 18 years of age. These case studies may influence other jurisdictions to also push for reform in this area, whether by advocating for new provisions or by making applications under a Court's inherent jurisdiction.

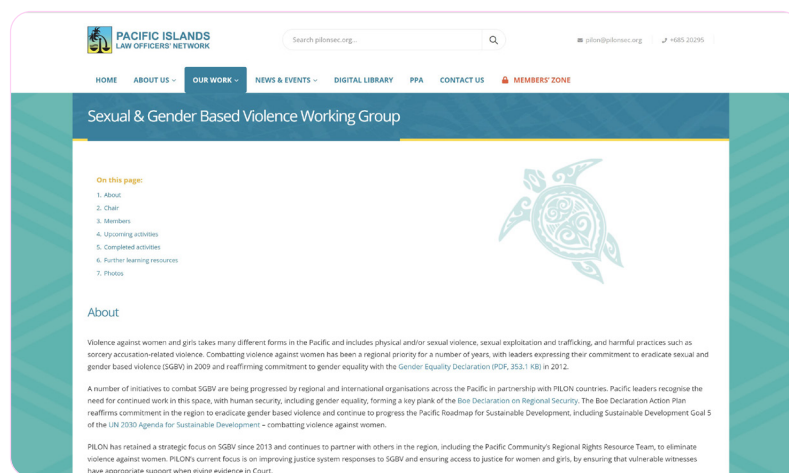
The gap between children and adult vulnerable witnesses also speaks to a larger issue: the need for a greater understanding of SGBV matters and the trauma that victim-survivors experience. If legislators, legal officers and judges are better informed about the impact of these crimes on children *and* adults, and in particular the effects of trauma, there may flow from this a wider acceptance for extending special measures to adults.

We encourage jurisdictions to consider how special measures can be expanded to cover all categories of vulnerable witness.

“ If legislators, legal officers and judges are better informed about the impact of these crimes on children and adults ... there may flow from this a wider acceptance for extending special measures to adults.”

Using PILON as a platform for sharing best practices

The PILON SGBV Working Group has a range of resources available through the [Digital Library](#). The Model Provisions are particularly valuable, as they provide draft legislative provisions for law makers to adapt into their own jurisdiction as well as the associated explanatory text justifying the use of each provision and special measure. The SGBV Working Group regularly hosts webinars and workshops which you can view via the [SGBV Working Group home page](#). This includes the recent four-part webinar series on special measures showcasing views from prosecutors, judges and witness support officers.



A valuable resource that the PILON SGBV Working Group is currently developing is *Regional Guidelines for Prosecutors and Witness Support Officers to support Vulnerable Witnesses throughout the Prosecution of Sexual Offences*. These Guidelines will provide step-by-step advice for prosecutors and witness support officers to help to reduce the trauma of witnesses at all stages of the prosecution process. Importantly, these Guidelines are designed so that other officials can 'pick up' the Guidelines and put them into practice within their resourcing circumstances.

PILON can also provide a useful platform for jurisdictions to circulate their own resources within the region. In the course of this research, the representative from Tonga noted that their courts have adopted guidelines from [The Advocate's Gateway](#), a service providing practical, evidence-based recommendations on communicating with vulnerable witnesses and defendants.¹⁰ Members may share such resources at the PILON SGBV Working Group meetings or by contacting the PILON Secretariat by using the details at the end of this report.

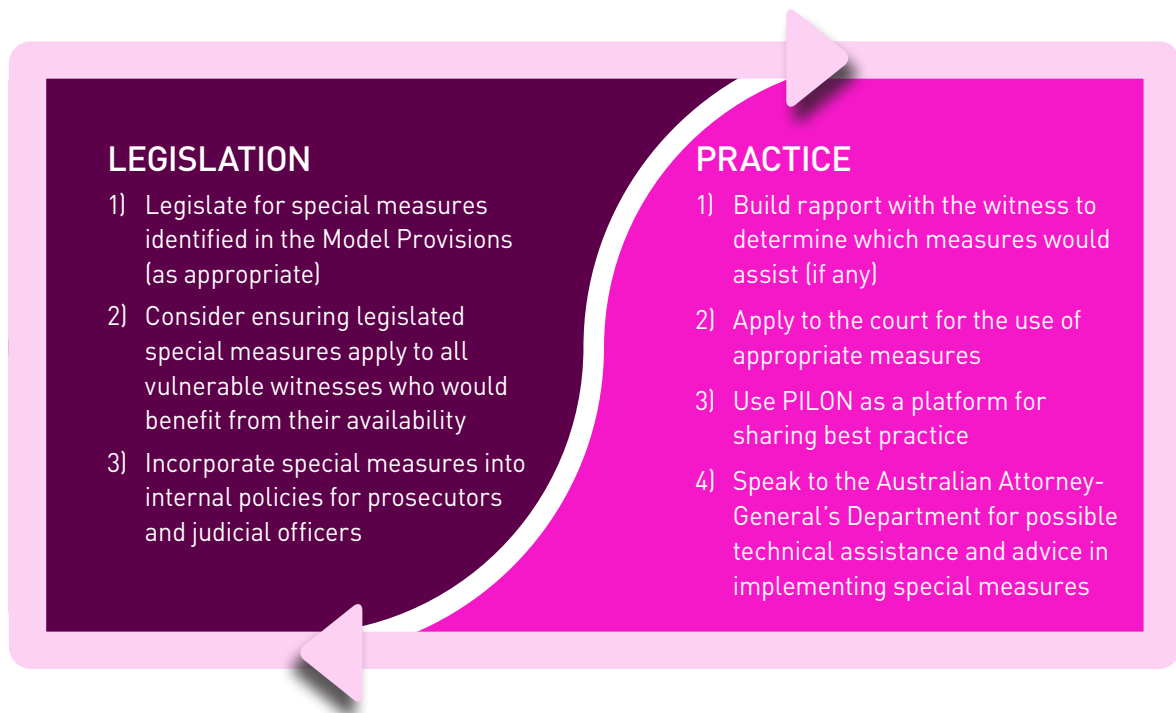
Complementing the work of PILON, the Australian Attorney-General's Department considers requests for bilateral assistance with the implementation of special measures. Jurisdictions can email the Australian Attorney-General's Department at pacific@ag.gov.au.

Members may share resources at the PILON SGBV Working Group meetings or by emailing the PILON Secretariat.

¹¹ <https://www.theadvocategateway.org/>

Summary of recommendations

This diagram summarises the steps jurisdictions can take to improve the use of special measures. Providing for special measures in legislation (and policies and guidance documents) influences their use in practice, and increasing their use in practice gives legitimacy to legislative reform.



Conclusion

Through the drafting of the Model Provisions and Explanatory Text, the provision of survey responses and engagement in PILON events, jurisdictions have shared valuable stories of special measures being used in courtrooms across the Pacific.

Whether as a result of legislative reform, compelling legal arguments or a greater understanding of vulnerable witnesses' needs, special measures are used more widely than ever before. This report provides jurisdictions with contemporaneous research on how widespread the use of specific special measures is and possibly some encouragement to think afresh about potentially expanding their use in practice or to legislate for their availability. To that end, the PILON SGBV Working Group plans to update this document in coming years to monitor changes in the use of special measures over time.

This report shows that prosecutors, law and justice officers, judicial officers, court support officers and police are seeing the difference that special measures make and are motivated to expand their use. Indeed, special measures are part of the mission to achieve justice, for they help make the court process less traumatic, increase reporting (and prosecutions) of SGBV, and assist in ensuring that courts have the best evidence to enable them to reach a fair verdict.

To borrow the words of Samoan Supreme Court Justice Leilani Tuala-Warren:

“Judges and prosecutors should never stop working towards reaching a point with every vulnerable witness where they are comfortable to tell their story in an unthreatening environment—because after all that is why we do the job we do—to ensure that justice is done.”

Appendix A: Specific legislative examples

Below are examples of special measures which are expressly and indirectly provided for by legislation and practice directions:

Use of a screen

Expressly provided for	Indirectly provided for
<p>Legislation</p> <p>Solomon Islands - <i>Evidence Act 2009</i></p> <ul style="list-style-type: none"> • Section 41(1) – Where a court considers that the capacity of the witness to give evidence satisfactorily may be limited and that limitation may be lessened by making special arrangements for the taking of that person’s evidence, the court may make such special arrangements that it sees fit in the interest of justice. • Section 41(4)(c) – Special arrangements that the court may make include the following: obscuring the witness from the view of the accused in a criminal trial. <p>Practice direction</p> <p><i>Vanuatu Practice Directions</i></p> <ul style="list-style-type: none"> • 18(e)(i) - Efforts to conceal the features or physical description of the child giving testimony or to prevent distress or harm to the child, including testifying: Behind an opaque shield 	<p>Republic of Marshall Islands - <i>Rules of Criminal Procedure 2005</i></p> <ul style="list-style-type: none"> • Rule 26(b)(1)(A)(vii) – Alternative methods includes, but is not limited to: [...] (vii) room arrangements that avoid direct confrontation between the child witness and the defendant or the finder of fact.

De-robing

Expressly provided for	Indirectly provided for
<p>Legislation</p> <p>Pitcairn Islands - <i>Evidence (Special Measures) Ordinance 2002</i></p> <ul style="list-style-type: none"> • Section 11 – A special measures direction may provide for the wearing of court robes to be dispensed with during the giving of the witness’s evidence. 	<p>Nauru - <i>Child Protection and Welfare Act 2016</i></p> <ul style="list-style-type: none"> • Section 55(1)(f) – ‘child-friendly court procedures must be promoted and applied’

Expressly provided for	Indirectly provided for
<p>Legislation</p> <p>Pitcairn Islands - <i>Evidence (Special Measures) Ordinance 2002</i></p> <ul style="list-style-type: none"> • Section 11 – A special measures direction may provide for the wearing of court robes to be dispensed with during the giving of the witness’s evidence. <p>Practice direction</p> <p><i>Vanuatu Practice Directions</i></p> <ul style="list-style-type: none"> • 16.1- Elevated seats - The Court shall ensure that appropriate arrangements for child victims or witnesses are made in the Courtroom, such as, but not limited to, providing elevated seats and assistance for children with disabilities. 	<p>Nauru - <i>Child Protection and Welfare Act 2016</i></p> <ul style="list-style-type: none"> • Section 55(1)(f) – ‘child-friendly court procedures must be promoted and applied’.

Prevention of personal cross-examination by defendant

Expressly provided for	Indirectly provided for
<p>Legislation</p> <p>Samoa – <i>Evidence Act No. 47 2015</i></p> <ul style="list-style-type: none"> • Section 80(1) - Despite any other enactment or rule of law, a defendant in a criminal proceeding that is a sexual case or a proceeding concerning domestic violence is not entitled to personally cross-examine: <ul style="list-style-type: none"> a) The complainant; b) A child (other than a complainant) who is a witness, unless the Judge gives permission <p>Practice direction</p> <p><i>Vanuatu Practice Directions</i></p> <ul style="list-style-type: none"> • 17. Cross-Examination of Child Victim/Witness/ Juvenile Offender - Where applicable, and with due regard for the rights of the accused, the Court shall not allow cross-examination of a child victim or witness by the accused. Such cross-examination may be undertaken by the defence lawyer under the supervision of the Court, who will have the duty to prevent the asking of any question that may expose the child to intimidation, hardship or undue distress. 	

Prohibition on unacceptable questions

Expressly provided for	Indirectly provided for
<p>Legislation</p> <p>Solomon Islands - <i>Evidence Act 2009</i></p> <ul style="list-style-type: none"> Section 66(1)(b) – A court may disallow a question, or inform the witness that it need not be answered, if the court considers the question put to a witness in cross-examination to be – Unduly annoying, harassing, intimidating, humiliating, offensive, oppressive or repetitive <p>Practice direction</p> <p><i>Vanuatu Practice Directions</i></p> <ul style="list-style-type: none"> 78 - Examination of a child Outlines what to avoid when questioning the child 	

Pre-recorded audio-visual testimony

Expressly provided for	Indirectly provided for
<p>Legislation</p> <p>Papua New Guinea - <i>Evidence Act 1975</i></p> <ul style="list-style-type: none"> Section 37C Where a witness is under 18 years or a complainant in a proceeding related to a sexual offence, the Court may make an order permitting a video-recording of an interview of the witness to be admitted as the evidence in chief of the witness, providing that, at the proceedings the witness – <ol style="list-style-type: none"> Identifies himself or herself and attests to the truthfulness of the contents of the recording; and Section 37D – Where a witness is under the age of 18 years, the Court may make an order that the child’s evidence be taken at a pre-trial hearing. 	<p>Cook Islands - <i>Criminal Procedure Act 1980 – 81</i></p> <p>Pre-recording</p> <ul style="list-style-type: none"> Section 35 - Notwithstanding anything in this Act, a judge or Justice, on the application of the defendant or the informant, before or at the hearing, may make an order for the taking, before any other Judge or any Justice or any officer of the Court or other person or persons, at any place either within or outside the Cook Islands, of the evidence of the defendant or the informant or any witness for the defence or the prosecution, if the Judge or Justice is satisfied that it is desirable or expedient in the interests of justice that the evidence of the defendant, the informant or the witness should be so taken. <p>Audio-visual</p> <ul style="list-style-type: none"> Section 3 - Subject to the provisions of this Act, a Court may in any proceeding admit and receive such evidence as it thinks fit, and accept and act on such evidence as it thinks sufficient, whether such evidence is or is not admissible or sufficient at common law.

Closed circuit television

Expressly provided for	Indirectly provided for
<p>Legislation</p> <p>Fiji - <i>Criminal Procedure Act 2009</i></p> <ul style="list-style-type: none"> • Section 296(1) – On application under section 295, the Judge or Magistrate may give any of the following directions in respect of the mode in which the evidence of a vulnerable complainant or witness is to be given at trial – where the Judge or Magistrate is satisfied that the necessary facilities and equipment are available, a direction that the complainant or vulnerable witness shall give his or her evidence outside the courtroom but within a Court precinct, or from some other suitable location, the evidence being transmitted to the courtroom by means of closed-circuit television or such similar quality secure audio-visual electronic means. <p>Practice direction</p> <p><i>Vanuatu Practice Directions</i></p> <ul style="list-style-type: none"> • 18(e)(iii). Measures to Protect the Privacy and well-being of Child Victims and Witnesses Efforts to conceal the features or physical description of the child giving testimony or to prevent distress or harm to the child, including testifying: Through examination in another place, transmitted simultaneously to the Courtroom by means of closed-circuit television 	

Support person

Expressly provided for	Indirectly provided for
<p>Legislation</p> <p>Nauru - <i>Child Protection and Welfare Act 2016</i></p> <ul style="list-style-type: none"> • Section 55(1) – Despite the provision of any other law to the contrary, court proceedings involving children must be taken in accordance with the following requirements: <ul style="list-style-type: none"> e) children are entitled to have a parent, guardian, legal representative or other appropriate support person agreed to by the child, present with them at all stages of the court proceedings. <p>Practice direction</p> <p><i>Vanuatu Practice Directions</i></p> <ul style="list-style-type: none"> • 13. Designation of a Support Person during the Trial Before inviting a child victim or witness to Court, the Court shall verify that the child is already receiving the assistance of a support person. 	<p>Republic of Marshall Islands - <i>Rules of Criminal Procedure 2005</i></p> <ul style="list-style-type: none"> • Rule 26(b)(6)(B) – The Court may permit a child to testify while sitting on the lap of a family member, or with a family member near, if the court finds that the child would be more at ease and better able to testify while doing so.

Use of Intermediary

Expressly provided for	Indirectly provided for
<p>Legislation</p> <p>Pitcairn Islands - <i>Evidence (Special Measures) Ordinance 2002</i></p> <ul style="list-style-type: none"> • Section 12 – A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the Court for the purposes of this section (“an intermediary”). <p>Practice direction</p> <p><i>Vanuatu Practice Directions</i></p> <ul style="list-style-type: none"> • Language, Interpreter and Other Special Assistance Measures 2. If a child needs the assistance of interpretation into a language that the child understands, an interpreter shall be provided free of charge. 	

Closed Court

Expressly provided for	Indirectly provided for
<p>Legislation</p> <p>Samoa - <i>Evidence Act No. 47 2015</i></p> <ul style="list-style-type: none"> • Section 95(1) – A Judge who makes an order under section 93 may, for the purposes of trial (as the case may be), also make any orders and give any directions that the Judge considers necessary to preserve the anonymity of the witness, including (without limitation) one (1) or more of the following directions: [...] That the court be cleared of members of the public <p>Practice direction</p> <p><i>Vanuatu Practice Directions</i></p> <ul style="list-style-type: none"> • 18(f). Measures to Protect the Privacy and well-being of Child Victims and Witnesses Holding closed sessions 	

Adjournment to alternate location

Expressly provided for	Indirectly provided for
<p>Legislation</p> <p>Papua New Guinea - <i>Evidence Act 1975</i></p> <ul style="list-style-type: none"> • Section 37B(2)(e) – If, in the opinion of the Court, the quality of a witnesses' evidence would likely to be diminished by reason of fear of distress in connection with testifying in the proceedings, the Court shall, subject to subsection (3) and (4), order that one or more of the following special measures be used for the giving of evidence by that witness - The adjournment of the proceedings or any part of the proceedings to other premises. 	<p>Pitcairn Islands - <i>Judicature (Courts) Ordinance 2012</i></p> <ul style="list-style-type: none"> • Section 15E – <ol style="list-style-type: none"> (1) A judge of the Supreme Court or a magistrate may make an order that any proceeding, or any step in any proceeding, be held – <ol style="list-style-type: none"> (a) In the Islands; or (b) In the United Kingdom; or (c) In New Zealand. (2) An order under this section may be made – <ol style="list-style-type: none"> (a) On the application of any party or intended party to the proceeding, or (b) Of the Court's own motion; and may be made either before or after the commencement of a proceeding.

Non-publication orders

Expressly provided for	Indirectly provided for
<p>Samoa - <i>Evidence Act No. 47 2015</i></p> <ul style="list-style-type: none"> • Section 94(e): A person may not publish, in any report or account relating to the proceeding, the name, address, or occupation of the witness, or any other particulars likely to lead to the witness' identification. <p>Practice direction</p> <p><i>Vanuatu Practice Directions</i></p> <ul style="list-style-type: none"> • 18(d). Measures to Protect the Privacy and well-being of Child Victims and Witnesses Assigning a pseudonym or a number to a child, in which case the full name and date of birth of the child shall be revealed to the accused within a reasonable period for the preparation of his or her defence; 	

Prohibition of sexual reputation or experience evidence

Expressly provided for	Indirectly provided for
<p>Fiji - Criminal Procedure Act 2009</p> <ul style="list-style-type: none"> • Section 130 – <p>(1) This section applies to all offences of a sexual nature for which an accused person is charged or to be sentenced for, and included all proceedings against an accused as a principal offender or an accessory to such an offence in any capacity.</p> <p>(2) In any case of a sexual nature, no evidence shall be given, and no question shall be put to a witness, relating directly or indirectly to –</p> <ul style="list-style-type: none"> (a) The sexual experience of the complainant with any person other than the accused; or (b) The reputation of the complainant in sexual matters, except by leave of the court. <p>(3) A Judge or Magistrate shall not grant leave under subsection (2) unless the Judge or Magistrate is satisfied that the evidence to be given or the question to be put is of such direct relevance to –</p> <ul style="list-style-type: none"> (a) Facts in issue in the proceedings; or (b) The issue of the appropriate sentence and, (c) That to exclude it would be contrary to the interests of justice. 	

No adverse inference in regards to credibility of child's evidence

Expressly provided for	Indirectly provided for
<p>Nauru - <i>Child Protection and Welfare Act 2016</i></p> <ul style="list-style-type: none"> • Section 55(1)(h) – ‘Children must be fully accorded the right to effectively participate in any proceedings that affect them, to express their views, and to have those views given due weight’. <p>Practice direction</p> <p><i>Vanuatu Practice Directions</i></p> <ul style="list-style-type: none"> • 7. Reliability of Child's evidence A child is deemed to be a capable witness unless proved otherwise through a competency examination administered by the Court in accordance with Section 8 of these Guidelines, and his or her testimony shall not be presumed invalid or untrustworthy by reason of his or her age alone provided that his or her age and maturity allow the giving of intelligible and credible testimony. Therefore, a child's evidence alone may be sufficient to convict a person and corroboration of the evidence of a child witness should not be required. Judges are prohibited from warning or suggesting to the assessors that children are an unreliable class of witness and that their evidence is suspect. 	<p>Kiribati - <i>Evidence Act 2003</i></p> <ul style="list-style-type: none"> • Section 12(1) This section applies to evidence of a kind that may be unreliable, including: <ul style="list-style-type: none"> (a) identification evidence; (b) evidence the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like;

No adverse inference in regards to delay

Expressly provided for	Indirectly provided for
<p>Tuvalu - <i>Family Protection and Domestic Violence Act 2014</i></p> <ul style="list-style-type: none"> • Section 50(4) – In criminal proceedings at which an accused is charged with an offence of a sexual act or an offence of an indecent nature, the Court shall not draw any inference only from the length of the delay between the commission of the sexual or indecent act and the laying of the complaint. 	

No corroboration requirement or requirement to give warning about uncorroborated evidence

Expressly provided for	Indirectly provided for
<p>Kiribati - Evidence Act 2003</p> <ul style="list-style-type: none"> Section 11 – <p>(1) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge –</p> <ul style="list-style-type: none"> (a) Warn the finder of facts that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or (b) Give a direction relating to the absence of corroboration. <p>Practice direction</p> <p><i>Vanuatu Practice Directions</i></p> <ul style="list-style-type: none"> 7. Reliability of Child’s evidence <p>A child is deemed to be a capable witness unless proved otherwise through a competency examination administered by the Court in accordance with Section 8 of these Guidelines, and his or her testimony shall not be presumed invalid or untrustworthy by reason of his or her age alone provided that his or her age and maturity allow the giving of intelligible and credible testimony. Therefore, a child’s evidence alone may be sufficient to convict a person and corroboration of the evidence of a child witness should not be required. Judges are prohibited from warning or suggesting to the assessors that children are an unreliable class of witness and that their evidence is suspect.</p>	



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