

# **ACCESS TO JUSTICE FOR CHILDREN: GUYANA**

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## **I. What is the legal status of the Convention on the Rights of the Child (CRC)?**

### **A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?**

Guyana ratified the CRC on 14 January 1991. Since then, the government of Guyana has amended its Constitution and passed several major laws that seek to protect the rights recognised in the CRC (described in detail in parts I.C and V below).

Guyana also ratified the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict in 2010.<sup>1</sup>

### **B. Does the CRC take precedence over national law?**

Article 8 of the Constitution of Guyana declares the Constitution to be the supreme law of the land, and any other law that is inconsistent with the Constitution is void to the extent of the inconsistency.<sup>2</sup> Although the CRC has been incorporated into the Constitution (see part I.C below), the Constitution also permits the elected assembly to divest itself of certain rights promulgated by international treaties. Thus, the CRC does not take precedence over national law.

### **C. Has the CRC been incorporated into national law?**

The CRC has been directly incorporated into national law through article 154A of the Constitution of Guyana. Article 154A guarantees that “every person, as contemplated by the respective international treaties set out in the Fourth Schedule to which Guyana has acceded is entitled to the human rights enshrined in the said international treaties, and such rights shall be respected and upheld by the executive, legislature, judiciary and all organs and agencies of Government . . . .”<sup>3</sup> The CRC is listed on the Fourth Schedule to the Constitution.<sup>4</sup>

However, paragraph 6 of article 154A allows the state to divest itself of certain rights promulgated by international treaties by a two-thirds vote of the elected members of the elected assembly.<sup>5</sup> Moreover, direct incorporation only covers rights that are not “any fundamental right under this Constitution.”<sup>6</sup> There is substantial overlap between the

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<sup>1</sup> UN Committee on the Rights of the Child, *Concluding observations on the combined second, third and fourth periodic reports of Guyana*, CRC/C/GUY/CO/2-4, 18 June 2013, p. 2. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGUY%2fCO%2f2-4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGUY%2fCO%2f2-4&Lang=en).

<sup>2</sup> Constitution, available at: <http://legalaffairs.gov.gy/information/laws-of-guyana/389-chapter-00101/file>.

<sup>3</sup> *Ibid.*, article 154A(1).

<sup>4</sup> *Ibid.*, Fourth Schedule.

<sup>5</sup> *Ibid.*, article 154A(6).

<sup>6</sup> *Ibid.*, article 154A(2).

rights protected by the CRC and those termed fundamental in the Guyana Constitution, including rights to non-discrimination, protection of life, freedom from torture, guarantees of expression, access to the media, assembly and association, rights to privacy and freedom of thought, conscience and religion. Second, whereas positive obligations are imposed on States Parties to take “appropriate measures” to implement the CRC, the corresponding obligation in Article 154A(3) is to take “reasonable measures”, having regard to the “socio-cultural level of development of the society” and its “available resources”. In other words, the obligation is so fenced in by prevailing economic and cultural factors that it is potentially quite weak.<sup>7</sup>

D. Can the CRC be directly enforced in the courts?

The CRC is not directly enforceable in courts. Article 154A(1) of the Constitution states that the rights set out in the CRC shall be respected and upheld by the judiciary, and are enforceable in the manner prescribed in the article. Article 154A(4) provides that a child can enforce their rights under the CRC via the Human Rights Commission, a non-judicial body which has yet to be established (see part V below).

Articles 154A and 39 of the Constitution provide Guyana’s courts with latitude to consider the provisions of the CRC when deciding cases involving children. Article 39 provides that a court should pay “due regard” to international law, conventions, covenants and charters when interpreting the fundamental rights provisions of the Constitution.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

There is at least one instance of a domestic court applying the CRC or other relevant international instruments. *Twyon Thomas v. AG*<sup>8</sup> is one of the first cases to apply Articles 39(2) and 154A of the Constitution. This was a claim for constitutional redress in relation to the unlawful detention and torture of a 14-year-old boy. Roxane George J, in finding multiple constitutional violations and awarding damages, recognised that Article 39(2) gave the court the power to examine “a wide spectrum of human rights learning” beyond the incorporated conventions, including the decisions and recommendations of human rights bodies. In the course of her judgment she had regard to many different sources of international human rights law, including the CRC, ICCPR, and CAT.<sup>9</sup>

## II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

Children and their representatives are entitled to bring civil cases in Guyana’s courts to challenge violations of their rights. There are three main avenues for doing so.

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<sup>7</sup> Comments provided by Dr Arif Bulkan, Deputy Dean, Faculty of Law, UWI St Augustine, Trinidad and Tobago, August 2015.

<sup>8</sup> (Unreported, 11 June 2011, HC Guy).

<sup>9</sup> Comments provided by Dr Arif Bulkan, Deputy Dean, Faculty of Law, UWI St Augustine, Trinidad and Tobago, August 2015.

First, a child can sue for damages in the Magistrate's Court or High Court. The court action must be brought in the child's name by a next friend who is an adult. Additionally, the next friend must agree to pay the court costs if they are ordered against the child.<sup>10</sup>

Second, the child or any adult can petition the Child Care and Protection Agency (CPA). The Protection of Children Act requires that any individual who knows that a child is being harmed must report the violation to the Director of the CPA or a social worker. A social worker will then be assigned to investigate the case and to potentially bring an action before a Magistrate's Court to seek an appropriate remedy.<sup>11</sup>

Third, children can make complaints about violations of their rights to the Rights of the Child Commission (ROCC).<sup>12</sup> Similar to the CPA, the ROCC is tasked with investigating complaints and seeking a remedy, whether through mediation or negotiation, or by suing the alleged offender on the child's behalf.<sup>13</sup> However, in its 2013 Concluding Observations on Guyana, the UN Committee on the Rights of the Child expressed concern that the ROCC "does not have a fully functional complaints mechanism for children and has only dealt with a limited number of direct complaints to date", and recommended that the State ensure that the ROCC "is able to receive, investigate and address complaints by children in a child-sensitive manner".<sup>14</sup> Moreover, the establishment of the ROCC was attended by some controversy.<sup>15</sup>

- B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

A child can make complaints about violations of their rights to the ROCC or the CPA by themselves. Children can sue for damages in civil court, but such cases must be brought with the help of a next friend or guardian who is an adult.<sup>16</sup>

- C. In the case of infants and young children, how would cases typically be brought?

A case involving a young child or infant would likely be brought by an adult reporting the violation to a social worker or the director of the CPA. The social worker would then investigate and seek the help of the court to find a remedy for the violation. Alternatively, a next friend or guardian of the child could bring the complaint to the ROCC or bring a civil action in the Magistrate's Court.

- D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

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<sup>10</sup> See Guyana Legal Aid Clinic, 'Under 18s and the law', available at: <http://www.legalaid.org.gy/node/25>.

<sup>11</sup> George, Roxane, 'Protecting the Children of Guyana', Help & Shelter Inc., 27 November 2010, available at: <http://www.hands.org.gy/newlegislation>.

<sup>12</sup> Constitution, article 212V(e).

<sup>13</sup> Ibid., articles 212U(1), 212V(b), 212V(e).

<sup>14</sup> UN Committee on the Rights of the Child, paras 18-19.

<sup>15</sup> See Stabroek News, 'Vidya Kissoon resigns from child rights commission', 2010, available at: <http://www.stabroeknews.com/2010/archives/04/23/vidya-kissoon-resigns-from-child-rights-commission/>.

<sup>16</sup> See Guyana Legal Aid Clinic, 'Under 18s and the law'.

Under article 144(13) of the Constitution, the state has a duty “to ensure every person charged with a criminal offence is given a fair trial and accordingly to make provision for legal aid to be given in suitable cases”. However, this article also expressly states that persons are not entitled to legal representation at public expense, and the qualification of legal aid for “suitable” cases has historically been interpreted as applicable only to capital charges.<sup>17</sup>

The Protection of Children Act empowers the courts to issue orders granting state-assisted legal representation.<sup>18</sup>

- E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

There appear to be no further conditions or limitations.

### **III. How can children’s rights violations be challenged before national courts?**

- A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

See part II.A above.

Additionally, under article 153 of the Constitution, any person, including a person acting on behalf of another who is not acting in his/her own name (e.g. a child) or on behalf of a group, may apply to the High Court for redress if any of the fundamental rights provisions under articles 138 to 151 of the Constitution has been, is being, or is likely to be contravened in relation to him/her. The fundamental rights provisions apply to all individuals and include protection of the right to life and personal liberty, freedom of conscience and expression, and protection from discrimination, slavery, forced labour and inhuman treatment.<sup>19</sup> Certain provisions specifically address the rights of children.<sup>20</sup>

A legal challenge can be brought against an administrative act or omission by making an application to the High Court for relief under the Judicial Review Act.<sup>21</sup> The act or omission against which relief is sought must have a public element in the sense that it affects public law rights, obligations or expectations.<sup>22</sup> The Court may grant relief “to a person whose interests are adversely affected by an administrative act or omission”, or “to a person or group of persons if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case”.<sup>23</sup> Where a person or group of

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<sup>17</sup> Comments provided by Dr Arif Bulkan, Deputy Dean, Faculty of Law, UWI St Augustine, Trinidad and Tobago, August 2015.

<sup>18</sup> George, Roxane.

<sup>19</sup> Constitution, articles 138 to 151.

<sup>20</sup> See CRIN, ‘Guyana: national laws’, available at: <https://www.crin.org/en/library/publications/guyana-national-laws>.

<sup>21</sup> No. 23 of 2010, section 3(1), available at: [http://www.oas.org/juridico/english/mesicic3\\_guy\\_judicial.pdf](http://www.oas.org/juridico/english/mesicic3_guy_judicial.pdf).

<sup>22</sup> Ibid., section 3(2).

<sup>23</sup> Ibid., section 4(1).

persons adversely affected by an administrative act or omission is unable to file an application for judicial review “on account of poverty, disability, or socially or economically disadvantaged position, any other person or group of persons acting bona fide” may apply for relief.<sup>24</sup>

Furthermore, any person may submit a complaint to the Ombudsman, who is empowered under the the Constitution to investigate official government actions or actions taken by government officials in exercise of their official duties. In December 2013, the Office of the President appointed Former Justice Winston Moore as Ombudsman, a position vacant since 2005.<sup>25</sup>

Article 154A of the Constitution provides that any person may apply to the Human Rights Commission (HRC)<sup>26</sup> for redress if any of their rights under an international treaty, including the CRC, has been or is about to be violated.<sup>27</sup> As at August 2015, the HRC is yet to be operationalised. The HRC is an entity with limited powers and resources but tasked with an ambitious range of functions. It consists of the heads of all the other commissions so it has no independent or fresh membership; it is tasked with an unrealistic mandate of judicial, administrative, executive and even legislative (insofar as it is to deal with policy and education) functions, and it is poorly resourced. For these reasons, the impact of the HRC - whenever it is operationalised - is likely to be limited.

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Individuals or groups of individuals, including children, and NGOs may submit petitions to the Inter-American Commission on Human Rights (IACHR),<sup>29</sup> on their behalf or on behalf of third persons, regarding alleged violations of the American Declaration of the Rights and Duties of Man<sup>30</sup> and other Inter-American human rights instruments.<sup>31</sup> A petition can only be lodged after domestic remedies have been exhausted, and normally must be filed within six months after the final judgment.<sup>32</sup> The

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<sup>24</sup> Ibid., section 4(2).

<sup>25</sup> US State Department, ‘Guyana 2013 human rights report’, available at: <http://www.state.gov/documents/organization/220659.pdf>.

<sup>26</sup> Under the Constitution, the HRC is meant to be an umbrella commission and secretariat to the four other commissions, which includes the ROCC: *Combined second to fourth periodic report of Guyana to the UN Committee on the Rights of the Child, CRC/C/GUY/2-4*, 27 January 2012, para. 77. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGUY%2f2-4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGUY%2f2-4&Lang=en).

<sup>27</sup> Constitution, article 154A(4).

<sup>28</sup> Comments provided by Dr Arif Bulkan, Deputy Dean, Faculty of Law, UWI St Augustine, Trinidad and Tobago, August 2015.

<sup>29</sup> The Inter-American Commission on Human Rights is one of two bodies within the Organisation of American States (OAS) for the promotion and protection of human rights. The other human rights body is the Inter-American Court of Human Rights. The Commission benefits from a “dual role” as its mandate is found in both the Charter of the Organisation of American States, and in the American Convention on Human Rights (ACHR). As an OAS Charter organ, the IACHR performs functions in relation to all OAS Member States. As an organ of the Convention, its functions are applicable only to States that have ratified the ACHR: Charter of the Organisation of American States, Chapter XV, available at: [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm); American Convention on Human Rights, ‘Pact of San Jose, Costa Rica’, Chapter VII, available at: [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm).

<sup>30</sup> Available at: <https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>.

<sup>31</sup> Statute of the Inter-American Commission on Human Rights, Section IV, available at: <http://www.oas.org/en/iachr/mandate/Basics/statuteiachr.asp>.

<sup>32</sup> Rules of Procedure of the Inter-American Commission on Human Rights, Articles 31-32, available at: <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

petition must include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, the name(s) of the victim(s) if possible, and whether the petitioner wishes to remain anonymous and the respective reasons.<sup>33</sup> The victim may designate a lawyer or other person to represent him/her before the IACHR, but this is not compulsory.<sup>34</sup> When a petition is declared admissible, the IACHR attempts to reach a “Friendly Settlement” between the parties concerned. If this is not possible, the IACHR will reach a decision on the merits, which consists of non-binding recommendations to the violating State, aimed at ending the human rights violations, making reparations, and/or making changes to the law.

B. What powers would courts have to review these violations, and what remedies could they offer?

Magistrate’s Courts may award damages in civil cases.

The High Court has original jurisdiction to hear and determine any application made by any person for redress of a fundamental rights violation. The High Court “may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of articles 138 to 151 (inclusive)”.<sup>35</sup>

Under the Judicial Review Act, the High Court may grant any of the following remedies in judicial review proceedings: order of certiorari, for quashing unlawful acts; order of prohibition, for prohibiting unlawful acts; order of mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case; an injunction; a declaration; restitution or damages; an order for the return of any property; or “such other orders, directions or writs as it considers, just and as the circumstances warrant”.<sup>36</sup>

When a report is filed under the Protection of Children Act, the Director of the CPA or a social worker will be assigned to investigate the child’s circumstances and to recommend what type of protection should be provided for the child. A number of legal remedies are available. The court can order information to be produced, order that an offending party be prohibited from contacting a child for a specified amount of time, or order that a person be prohibited from residing with a child or entering the premises where a child resides.<sup>37</sup> The court may also order that a child be removed from a certain location to assist the CPA in protecting the child.<sup>38</sup> In urgent cases, the Director or social worker can remove the child and then apply to the High Court for an order to protect the child. Section 24 of the Protection of the Children Act also provides for pre-trial conferences, family conferences, mediation or other means of resolution in the best interests of the child.<sup>39</sup> In addition, any children removed from their home must receive counselling.<sup>40</sup>

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<sup>33</sup> Ibid., Article 28.

<sup>34</sup> Ibid., Article 23.

<sup>35</sup> Constitution, article 153(2).

<sup>36</sup> Judicial Review Act, section 8.

<sup>37</sup> George, Roxane.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

It is unclear whether a case may be brought without naming a specific victim.

Notably, under the Protection of Children Act, court proceedings are required to be held *in camera*. Members of the public and persons who are not connected to the case, or who are not needed, cannot be present when the court hears matters involving the protection of children.<sup>41</sup> Moreover, all court proceedings for the protection of a child are confidential.<sup>42</sup>

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Some limited forms of group litigation appear to be possible. Under article 153 of the Constitution, any person acting on behalf of a group or an association acting on behalf of its members may apply to the High Court for redress if any of the fundamental rights provisions under articles 138 to 151 of the Constitution has been, is being, or is likely to be contravened.<sup>43</sup>

Under the Judicial Review Act, a group of persons adversely affected by an administrative act or omission may file an application for judicial review with the High Court. Alternatively, if such group is unable to file an application for judicial review “on account of poverty, disability, or socially or economically disadvantaged position”, any other group of persons acting bona fide may apply for relief.<sup>44</sup> The Court may grant relief to a group of persons “if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case”.<sup>45</sup>

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

As described in part III.D above, an association acting on behalf of its members may apply to the High Court for redress if any of the fundamental rights provisions under articles 138 to 151 of the Constitution has been, is being, or is likely to be contravened.<sup>46</sup> Article 153 of the Constitution as amended appears to widen standing, and should allow not just representative actions but actions by NGOs on behalf of affected individuals. In practice, however, there is no culture or practice of public interest litigation in Guyana, and courts are very resistant to such claims. In a number of recent cases in the Caribbean, including Guyana, civil society groups were struck out of rights challenges.<sup>47</sup>

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<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Constitution, article 153(1).

<sup>44</sup> Judicial Review Act, section 4(2).

<sup>45</sup> Ibid., section 4(1)(b).

<sup>46</sup> Constitution, article 153(1).

<sup>47</sup> For example, in Belize, an LGBT organisation in a case that challenged buggery laws (see *Orozco & UNIBAM v. AG*, unreported, 27 April 2012, SC Belize); and in Guyana, an LGBT organisation in a case challenging a prohibition on ‘cross-dressing’ in public (see *McEwan and others v. AG*, unreported, Sept 2013, HC Guy); Comments provided by Dr Arif Bulkan, Deputy Dean, Faculty of Law, UWI St Augustine, Trinidad and Tobago, August 2015.

**IV. Practical considerations.** Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

A child may institute a civil case for damages in a Magistrate's Court if the claim is under \$50,000 by filing a plaint in the magistrates' office. If the claim is over \$50,000, a writ of summons must be filed in the Registry of the Supreme Court.<sup>48</sup>

A case concerning a violation of a child's rights may be filed with the CPA or the ROCC. These institutions would investigate the claim and then seek the aid of the Magistrate's Court to grant an appropriate remedy.

An application to the High Court for redress under article 153 of the Constitution may be made either by way of originating motion or by way of writ of summons.<sup>49</sup>

An application for judicial review may be filed with the High Court.<sup>50</sup>

If an individual wishes to bring a private criminal case, his/her case can be heard in the Magistrate's Court by filing a complaint in the magistrates' office. The Director of Public Prosecutions has at all times the discretion to withdraw this private matter.<sup>51</sup>

The Guyanese government has promised that a Family Court will open to hear domestic matters.<sup>52</sup> It appears that the building for the court has been completed, and it should begin operating in 2014.<sup>53</sup>

There is an important geographical limitation with regard to summary courts (that is, the magisterial jurisdiction). In the latter, jurisdiction is limited by area, which means that persons must bring cases within the magistrates' district where they live. No such limitation exists in relation to the High Court, which has unlimited geographical jurisdiction and which can be invoked where, as indicated here, the value of the case is above a certain level.<sup>54</sup>

B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

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<sup>48</sup> Guyana Legal Aid Clinic, 'Going to court', available at:

[http://www.legalaid.org.gy/files/gawl/085\\_lawandyou\\_law.pdf](http://www.legalaid.org.gy/files/gawl/085_lawandyou_law.pdf)

<sup>49</sup> Fundamental Rights (Practice and Procedure) Act, section 3(1).

<sup>50</sup> Judicial Review Act, section 3(1).

<sup>51</sup> Guyana Legal Aid Clinic, 'Going to court'.

<sup>52</sup> Van Doimen, Tas, 'Family Court is still not operational', Guyana Chronicle Online, 22 November 2013, available at: <http://guyanachronicle.com/family-court-still-not-operational/>.

<sup>53</sup> Ibid.

<sup>54</sup> Comments provided by Dr Arif Bulkan, Deputy Dean, Faculty of Law, UWI St Augustine, Trinidad and Tobago, August 2015.

See part II.D above.

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practicing lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

The Children's Legal Aid Project of the Guyana Legal Aid Clinic was launched in September 2007 to provide legal aid services directly to children who need assistance with criminal and/or civil matters. Under this Project, children are automatically eligible for free legal aid.<sup>55</sup> Children may approach the clinic directly or be referred by government ministries and agencies, NGOs that provide non-legal assistance to children such as Help & Shelter and Red Thread, friends and relatives.<sup>56</sup> Although the Guyana Legal Aid Clinic indicates that it is willing to bring an action on behalf of a child, if a child seeks to bring an action directly, such action must be brought by someone who agrees to pay costs if the court finds against the child.<sup>57</sup>

There does not appear to be any prohibition on contingent or pro bono representation. The Guyana Bar Association's Mission Statement provides that one of its aims and objectives is "to ensure that there is adequate legal representation for every citizen in need of same and to promote human rights."<sup>58</sup>

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

Actions for damages (except for libel and slander) must be brought within three years after the cause of action or suit has arisen.<sup>59</sup> If by reason of the plaintiff being a child, the plaintiff is unable to bring an action, the period of limitation of the action will begin to run from the time when that "disability has ceased" (i.e. when the child reaches majority).<sup>60</sup>

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

Under the Evidence Act, "any person who is ignorant of the nature and obligation of an oath may be allowed to give evidence without oath or affirmation". The judge must determine whether the witness is of competent understanding to give that evidence.<sup>61</sup> A witness is incompetent to give evidence if, in the opinion of the judge, he/she is "prevented by extreme youth" from recollecting the matter on which he/she is to testify, from understanding the questions put to him/her, from giving rational answers to those

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<sup>55</sup> Guyana Legal Aid Clinic, 'Is legal aid free?', available at: <http://www.legalaid.org.gy/node/20>.

<sup>56</sup> Guyana Legal Aid Clinic, 'Children's legal aid', available at: <http://www.legalaid.org.gy/children>.

<sup>57</sup> Guyana Legal Aid Clinic, 'Under 18s and the law'.

<sup>58</sup> Guyana Development Gateway, 'Guyana Bar Association', available at: <http://www.guyanagateway.org.gy/?q=node/65>.

<sup>59</sup> Limitation Act, section 8.

<sup>60</sup> Ibid., section 12(1).

<sup>61</sup> Evidence Act, section 71.

questions, or from knowing that he/she ought to speak the truth.<sup>62</sup>

According to the Protection of Children Act, children over 12 years old are allowed to express their opinions or views regarding their care and custody, unless they are unable to do so. The opinions and views of children under 12 years old shall be heard and considered in coming to any decisions once the child is sufficiently mature and can understand the proceedings.<sup>63</sup>

The Evidence (Amendment) Act of 2008 and the Criminal Law (Procedures) (Amendment) Act of 2008 allow for video interviews and the use of paper committals in criminal court.<sup>64</sup>

F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

Section 28 of the Protection of Children Act states that intervention proceedings are to be completed in the shortest possible time.<sup>65</sup> However, the US State Department notes that there is a large backlog of civil cases due to the delays, inefficiencies, and alleged corruption in the Magistrate's Court system.<sup>66</sup>

G. Appeal. What are the possibilities for appealing a decision to a higher court?

There are three levels of courts in Guyana: the Magistrate's Courts, the High Court, and the Court of Appeal. Matters can be appealed to higher courts for review.<sup>67</sup> The procedure for appeal is prescribed by the rules of the High Court.<sup>68</sup>

Finally, decisions in civil and criminal matters as well as decisions concerning fundamental rights under the Constitution can be appealed to the Caribbean Court of Justice (CCJ), which is the highest court of appeal for Guyana.<sup>69</sup> An appeal is commenced by filing a notice of appeal within 21 days of the grant of leave to appeal by the court below or special leave by the CCJ, depending on the nature of the case.<sup>70</sup> In all proceedings before the CCJ, a party must have an attorney-at-law on the record.<sup>71</sup> An applicant who is a "poor person" may be exempt from providing security for costs or paying any court fees.<sup>72</sup> Decisions of the CCJ are final and binding.<sup>73</sup>

H. Impact. What are the potential short-term and long-term impacts of a negative

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<sup>62</sup> Ibid., section 49(1).

<sup>63</sup> George, Roxane.

<sup>64</sup> *Combined second to fourth periodic report of Guyana to the UN Committee on the Rights of the Child*, p. 17.

<sup>65</sup> George, Roxane.

<sup>66</sup> US State Department, 'Guyana 2012 human rights report', available at:

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204456#wrapper>.

<sup>67</sup> High Court Act, sections 71-72.

<sup>68</sup> Ibid., section 74.

<sup>69</sup> Agreement Establishing the Caribbean Court of Justice, Article XXV, available at:

[http://www.caricom.org/jsp/secretariat/legal\\_instruments/agreement\\_ccj.pdf](http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf).

<sup>70</sup> Ibid.; Caribbean Court of Justice (Appellate Jurisdiction) (Amendment) Rules, 2008, Rules 10.1, 10.2, 11.1, available at: <http://www.caribbeancourtjustice.org/wp-content/uploads/2011/06/ccjapprules.pdf>.

<sup>71</sup> Caribbean Court of Justice (Appellate Jurisdiction) (Amendment) Rules, 2008, Rule 4.1.

<sup>72</sup> Ibid., Rule 10.17.

<sup>73</sup> Agreement Establishing the Caribbean Court of Justice, Article XXII.

decision? Is there a possibility for political backlash or repercussions from a positive decision?

Guyana has a common law system based upon the English model, with some Roman-Dutch civil law influence, so any decision, negative or positive, would become part of the common law.<sup>74</sup> Cases appealed to the CCJ could have far reaching impact among the constituent nations,<sup>75</sup> but only where the statutory/constitutional provisions (if applicable) are the same.<sup>76</sup>

I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

The problems and inefficiencies in Guyana's justice system are well-documented and include: "public concern about rising levels of crime and violence, backlogs and delays in the Magistrates and High Court; quality of case presentation, poor facilities in court, police stations and prisons, perceived inadequate performance of Magistrates and Judges; prisoners being held on remand awaiting trial for many years; low awareness of citizens of their rights and responsibilities; poor access to justice for the poor and vulnerable; little victim care; outdated court rules; limited access to alternative dispute resolutions; multiple adjournments; use of outdated procedures; delays of up to seven years for a case to be completed; delays in handing down decisions, and use of outdated procedures."<sup>77</sup>

Nonetheless, the anticipated opening of the Family Court in 2014 may alleviate some of these concerns.

There are also concerns over the highly politicised or partisan environment, as demonstrated by the resignation of a prominent social activist from the ROCC in April 2010.<sup>78</sup> This situation indicates the distance between a plethora of constitutional and legislative provisions and the lack of enforcement.<sup>79</sup>

V. **Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

Certain articles of the Constitution incorporate certain provisions of the CRC. In 2003 the Constitution was amended to incorporate article 3 of the CRC. Both article 3 of the CRC and article 38B of the Constitution state that the best interest of the child must be the primary consideration in all judicial proceedings and decisions concerning children, whether undertaken by public or private social welfare institutions, administrative

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<sup>74</sup> CIA, 'The world factbook', available at:

<https://www.cia.gov/library/publications/the-world-factbook/geos/gy.html>.

<sup>75</sup> Additional information on the CCJ is available at <http://www.caribbeancourtofjustice.org/about-the-ccj>.

<sup>76</sup> Comments provided by Dr Arif Bulkan, Deputy Dean, Faculty of Law, UWI St Augustine, Trinidad and Tobago, August 2015.

<sup>77</sup> See, e.g., Kaieteur News, 'Deficiencies in the justice system continue to affect Guyana's economic development', 24 September 2012, available at:

<http://www.kaieteurnews.com/2012/09/24/deficiencies-in-the-justice-system-continue-to-affect-guyanas-economic-development/>.

<sup>78</sup> Stabroek News, 'Vidya Kissoon resigns from child rights commission'.

<sup>79</sup> Comments provided by Dr Arif Bulkan, Deputy Dean, Faculty of Law, UWI St Augustine, Trinidad and Tobago, August 2015.

authorities or legislative bodies. Article 38D of the Constitution provides that every child has the right to housing provided by his or her parents or guardian. Article 38E makes formal education compulsory for children ages fifteen and younger.

The 2003 amendments to the Constitution provided for the creation of the ROCC.<sup>80</sup> The ROCC is tasked with promoting initiatives that reflect and enhance the wellbeing and rights of children, ensuring that the rights and interests of children are taken into account at all levels of society, and ensuring that children have effective means of redress if their rights are violated.<sup>81</sup> The ROCC is also responsible for monitoring compliance and making recommendations to bring Guyana in compliance with the international instruments to which the government has acceded. These responsibilities include consulting and participating in the preparation of reports on the CRC submitted to the UN Committee on the Rights of the Child.<sup>82</sup> Guyana submitted its latest report to the Committee in 2010.<sup>83</sup>

Guyana passed a series of laws in 2009 that attempt to provide for the rights of children in consonance with the CRC. These acts include: Child Care and Protection Agency Act of 2009; Protection of Children Act of 2009; The Adoption of Children Act of 2009; and The Status of Children Act of 2009.<sup>84</sup>

The Child Care and Protection Agency Act established the CPA which is the umbrella agency responsible for the implementation of policies and decisions relating to laws governing children. The CPA has a range of functions that include investigating allegations of abuse or neglect of children, providing protection and counselling for children, and educating parents on good parenting, parental responsibilities and best practices.<sup>85</sup>

The Protection of Children Act<sup>86</sup> was passed to ensure that children are protected from threatening situations and allows for children in vulnerable and harmful circumstances to be assisted and cared for by the CPA. It considers the best interests of the child as the overriding and paramount consideration in any decision made regarding the protection of a child's rights. The Act also requires every citizen to report acts of misconduct when they have reason to know that a child is at risk. The Act outlines the procedures taken when a report is filed and the measures that courts can take to remedy abuses.<sup>87</sup>

The Adoption of Children Act incorporates article 21 of the CRC into national law, providing that any decision about the adoption of a child must be based upon a consideration of the best interests of the child above all else. The Act lays down

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<sup>80</sup> Constitution, article 212U.

<sup>81</sup> *Ibid.*, articles 212U(1), 212V(b), 212V(e).

<sup>82</sup> *Ibid.*, articles 212V(c), 212V(d).

<sup>83</sup> *Combined second to fourth periodic report of Guyana to the UN Committee on the Rights of the Child.*

<sup>84</sup> Despite repeated attempts to contact the Guyana Government and NGOs we were unable to find copies of these laws. The summaries that follow were taken from secondary sources.

<sup>85</sup> *Combined second to fourth periodic report of Guyana to the UN Committee on the Rights of the Child*, p. 15.

<sup>86</sup> We were unable to obtain a copy of the Protection of Children Act. The following summary and all sections cited from the act were obtained from a PowerPoint presentation entitled "Protecting the Children of Guyana." The PowerPoint was composed in November 2010 by Roxane George, Judge of the High Court of Guyana.

<sup>87</sup> George, Roxane.

principles for making adoption orders and regulates the process to avoid interference with a child's right to privacy, family, and a home.<sup>88</sup>

The Status of Children Act incorporates the sections of article 2 of the CRC dealing with non-discrimination into national law. Specifically, it is an act to repeal and re-enact the provisions of the Children Born out of Wedlock Act 1983. It provides for presumptions of parentage and parentage testing procedures.<sup>89</sup>

Two additional pieces of legislation were enacted in 2011 to complete Guyana's modern legislative framework for children's rights and protection: the Child Care and Development Services Act of 2011 and the Custody, Contact, Guardianship and Maintenance Act of 2011.<sup>90</sup> The Child Care and Development Services Act sets out the minimum standard of care in foster homes and orphanages.<sup>91</sup> The Custody, Contact, Guardianship and Maintenance Act makes the best interests of the child the primary consideration when the Court is making any decision with respect to custody, contact, guardianship, and maintenance claims.<sup>92</sup>

Despite the adoption of these constitutional amendments and legislation, the UN Committee on the Rights of the Child has voiced concern that Guyana has not yet undertaken a comprehensive review of its laws to ensure full compatibility with the CRC, including finalising the necessary reforms of its judiciary and legislation for the establishment of a Family Court.<sup>93</sup> The Guyana Partnership for Human Rights has also expressed concern that supporting mechanisms are not in place to provide the enabling environment to ensure implementation of the CRC.<sup>94</sup>

The UN Committee on the Rights of the Child has also voiced concern that the government has not adopted its 2008 Juvenile Justice Bill. It found that this failure results in legislative ambiguity with respect to the full protection of the rights of children in conflict with the law.<sup>95</sup>

It has proven difficult to obtain access to the primary sources of law in Guyana via the internet or through legal aid societies, NGOs or direct requests to the government. Additionally, legal opinions are not readily available or searchable, nor are codes of civil procedure or rules of the court. These factors would likely complicate any legal action undertaken by a person unfamiliar with Guyana's legal system.

*This report is provided for educational and informational purposes only and should not be construed as legal advice.*

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<sup>88</sup> *Combined second to fourth periodic report of Guyana to the UN Committee on the Rights of the Child*, p. 15.

<sup>89</sup> Kertzious, Margaret, Halley-Burnette, Hazel, and Persaud, Anand, 'The Guyana Partnership for Human Rights alternative report June 2012', 18 June 2012.

<sup>90</sup> 'Government of Guyana Contributions to the OHCHR Study on Children Working and/or Living on the Streets', 2 October 2011, p. 4.

<sup>91</sup> *Combined second to fourth periodic report of Guyana to the UN Committee on the Rights of the Child*, p. 16.

<sup>92</sup> *Ibid.*

<sup>93</sup> UN Committee on the Rights of the Child, p. 2.

<sup>94</sup> Kertzious, Margaret, Halley-Burnette, Hazel, and Persaud, Anand.

<sup>95</sup> *Ibid.*