

# ACCESS TO JUSTICE FOR CHILDREN: KIRIBATI

*This report was produced by White & Case LLP in January 2015 but may have been subsequently edited by Child Rights International Network (CRIN). CRIN takes full responsibility for any errors or inaccuracies in the report.*

## **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?**

The Government of Kiribati<sup>1</sup> acceded to the CRC on 11 December 1995.<sup>2</sup> Although it initially entered reservations to the CRC upon accession, these were all withdrawn in 2014.<sup>3</sup> Kiribati acceded to the first and second Optional Protocols to the CRC on children in armed conflict and the sale of children respectively, on 16 September 2015.<sup>4</sup>

The CRC must first be given the force of law in Kiribati by means of an Act of the Maneaba ni Maungatabu (“Kiribati Parliament”) in order to form part of the laws of Kiribati.<sup>5</sup>

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

The CRC does not take precedence over national law. If domestic legislation and the Convention explicitly contradict each other, domestic courts would have to apply domestic legislation.<sup>6</sup>

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

The CRC has not been incorporated into the national law of Kiribati, but the courts are able to use the provisions of the Convention when interpreting ambiguities in domestic legislation.<sup>7</sup>

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<sup>1</sup> Comments on this report provided by Dr Sue Farran, Professor of Laws, Northumbria University, Adjunct Professor at the University of the South Pacific and Associate of the Centre for Pacific Studies, St Andrews University, October 2015.

<sup>2</sup> UN Treaty Collection, ‘Convention on the Rights of the Child’, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

<sup>3</sup> *National report of Kiribati to the Human Rights Council*, Universal Periodic Review, A/HRC/WG.6/21/KIR/1, 4 November 2014, para. 37. Available at:

<http://www.ohchr.org/EN/HRBodies/UPR/Pages/KISession21.aspx>.

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[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-b&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en);  
[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-c&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en).

<sup>5</sup> See *Republic v. Iaokiri* [2004] KIHIC 142; Criminal Case 25 of 2004 (16 June 2004), available at: <http://www.paclii.org/ki/cases/KIHIC/2004/142.html>.

<sup>6</sup> *Summary record of the 1166th meeting*, CRC/C/SR.1166, 22 September 2006, para. 26. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSR.1166&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSR.1166&Lang=en).

<sup>7</sup> *Ibid.*

In 2013, Kiribati enacted the Children, Young People and Family Welfare Act, which aims to support the development, protection and wellbeing of children.<sup>8</sup> It provides that decisions and actions in relation to children must take into account, amongst other things, that the rights of children under the CRC “should be promoted and respected to the extent possible”.<sup>9</sup> While the Government claims that it has incorporated the CRC into its national legislation through this Act,<sup>10</sup> the Act does not fully address the CRC’s provisions, and national laws still need to be enacted and modified to fully incorporate the Convention.

In 2014 the Te Rau N Te Mweenga Act to provide for the protection of victims of domestic violence, the prevention and elimination of the crime of violence within domestic relationships and for related purposes was passed. The Act states that its objects are to enact provisions that are consistent with the CRC and the Convention on the Elimination of all Forms of Discrimination Against Women.<sup>11</sup>

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

The CRC cannot be directly enforced in the Kiribati courts. In 2004, the High Court refused to enforce the CRC until it is “given the force of law in Kiribati by means of an Act of the [Kiribati Parliament].”<sup>12</sup>

According to the Government during its review by the Committee on the Rights of the Child in 2006, parties to legal proceedings could use the CRC to support their legal arguments, although it does not have the same status as domestic legislation. The Convention would be invoked by the courts only if there were two possible interpretations of a domestic law, in which case the court’s duty is to favour the interpretation that is consistent with the Convention.<sup>13</sup>

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

The CRC has been cited in the High Court decisions in *Republic v. Iaokiri*<sup>14</sup> and *Republic v. Utimawa*,<sup>15</sup> though the Court did not apply the CRC in either case.

## 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?

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<sup>8</sup> Children, Young People and Family Welfare Act 2013, available at: [http://www.paclii.org/ki/legis/num\\_act/cypafwa2013365/](http://www.paclii.org/ki/legis/num_act/cypafwa2013365/).

<sup>9</sup> Ibid.

<sup>10</sup> *National report of Kiribati to the Human Rights Council*, para. 38.

<sup>11</sup> Te Rau N Te Mwenga Act, section 3(f).

<sup>12</sup> See *Republic v. Iaokiri*.

<sup>13</sup> *Summary record of the 1166th meeting*, para. 29.

<sup>14</sup> See CRIN’s case summary, available at: [www.crin.org/node/40801](http://www.crin.org/node/40801).

<sup>15</sup> See CRIN’s case summary, available at: [www.crin.org/node/40802](http://www.crin.org/node/40802).

Children through their representatives may bring civil, constitutional or judicial review cases to court to challenge children's rights violations (see part III.A below). Private prosecutions are also permissible in Kiribati.<sup>16</sup>

Any person may make an application for a care and protection order for a child under the Children, Young People and Family Welfare Act, but only with the leave of the Magistrate's Court.<sup>17</sup> However, according to the Act, the intervention of the Magistrate's Court should be used only in circumstances where the family and community are unable to appropriately safeguard the child.<sup>18</sup> Children and their representatives must first bring their cases to the Director of the Ministry of Women, Youth and Social Affairs ("Director"), who seeks the appropriate remedy for the child, rather than the courts. The Act is generally structured for all cases to be handled by the Director,<sup>19</sup> and only the Director can seek protective orders from the Court without the Court's leave.<sup>20</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?**

To the extent that children are able to take their cases directly to courts, a guardian would have to give approval to bring the case. Under the High Court (Civil Procedure) Rules 1964 ("High Court Rules"), children when suing as plaintiffs must do so by a "next friend".<sup>21</sup> Children do not appear in person in court, but instead appear either by a guardian ad litem<sup>22</sup> or an appointed special guardian.<sup>23</sup> The rules do not clarify the distinction between a guardian ad litem and a special guardian. Next friends and guardians of children are specifically authorised to give consent for evidentiary or other procedures.<sup>24</sup>

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

Cases would be brought by the child's next friend or guardian ad litem, or the Director under the Children, Young People and Family Welfare Act (see parts II.A and B above).

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<sup>16</sup> See Criminal Procedure Code 1977, section 72, available at:

[http://www.paclii.org/ki/legis/consol\\_act/cpc190/](http://www.paclii.org/ki/legis/consol_act/cpc190/).

<sup>17</sup> Children, Young People and Family Welfare Act, section 35(b).

<sup>18</sup> Ibid., section 6(e).

<sup>19</sup> See, e.g., Ibid., section 18 (stating that concerns from wellbeing of children are reported to the Director or police); section 23 (stating that if a magistrate court finds child is in need of care, the court refers the case to the Director); section 25 (stating that the Director may "seek appropriate care and protection orders" from a Magistrate's Court).

<sup>20</sup> Ibid., section 35.

<sup>21</sup> "Next friend" is not defined in the Kiribati legislation. A general legal definition of "next friend" is the phrase used for a person who represents in an action another person who is under a "disability" to maintain a suit on his/her own behalf; High Court (Civil Procedure) Rules 1964 ("High Court Rules"), O. 17, r. 14, available at:

[http://www.paclii.org/other/Western%20Pacific%20High%20Court%20\(Civil%20Procedure\)%20Rules%201964.html](http://www.paclii.org/other/Western%20Pacific%20High%20Court%20(Civil%20Procedure)%20Rules%201964.html).

<sup>22</sup> Ibid., O. 17, r. 17.

<sup>23</sup> Ibid., O. 17, r. 18.

<sup>24</sup> Ibid., O. 17, r. 20.

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

No formal legal aid services are available in Kiribati. However, legal services can be obtained through pro bono services (see part IV.C below).

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)?

A person may only apply for a care and protection order under the Children, Young People and Family Welfare Act with the leave of the Magistrate's Court.<sup>25</sup> The High Court Rules require the written consent of the next friend.<sup>26</sup> Before the name of any person shall be used in any action as next friend of any infant, such person shall sign a written authority to the advocate for that purpose, and the authority shall be filed with the Registrar of the Court in which the cause or matter is proceeding.<sup>27</sup>

### **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.

A child through his/her representative may apply to the High Court for redress of violations of his/her fundamental rights and freedoms under sections 3 to 16 of the Constitution. In the case of a person who is detained, any other person who alleges such a violation in relation to the detained person may make such an application.<sup>28</sup> These rights include: the right to life and personal liberty, freedom from discrimination (on certain grounds), torture and inhuman treatment, and freedom of expression, assembly, association and movement.<sup>29</sup>

A child through his/her representative may apply for a prerogative writ - that is, an order of mandamus, prohibition or certiorari (see part III.B below) - as remedies in judicial review, with leave of the High Court (see part IV.A below).<sup>30</sup>

A civil claim may be brought in the High Court or Magistrates Court, depending on the amount of the claim (see part IV.A below).

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

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<sup>25</sup> Children, Young People and Family Welfare Act, section 35.

<sup>26</sup> High Court Rules, O. 17, r. 20.

<sup>27</sup> Ibid., O. 17, r. 19

<sup>28</sup> Constitution of Kiribati 1980 ("Constitution"), section 17(1), available at: <http://parliament.gov.ki/content/constitution-kiribati>.

<sup>29</sup> Ibid., sections 3 to 16.

<sup>30</sup> High Court Rules, O. 59, r. 3.

The High Court can hear and determine any application regarding violations of individual fundamental rights and freedoms under the Constitution. It 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 the constitutional provisions protecting those rights.<sup>31</sup> Laws that are found to be inconsistent with the Constitution are, to the extent of the inconsistency, void.<sup>32</sup>

The High Court may issue any of the following remedies in judicial review proceedings: certiorari, for quashing unlawful acts; prohibition, for prohibiting unlawful acts; mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case; or an injunction.<sup>33</sup>

Magistrates' Courts can impose limited amounts of fines or terms of imprisonment in criminal proceedings, and limited amounts of damages in civil proceedings.<sup>34</sup> Magistrates' Courts may not impose imprisonment on any child under the age of 14 years.<sup>35</sup>

In child protection proceedings, Magistrates' Courts may grant care and protection orders, which include supervision orders, restraining orders, temporary or permanent custody orders, and maintenance orders.<sup>36</sup>

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?

A challenge would likely have to involve one or more child victims. There is no provision in the Constitution or applicable civil procedure rules that allow for challenging a law or action without naming a specific victim.

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

Group litigation by way of representative actions is permitted in Kiribati. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue on behalf or for the benefit of all persons so interested.<sup>37</sup> Similarly, all persons may be joined in one action as plaintiffs where their actions concern common questions of law or fact.<sup>38</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?

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<sup>31</sup> Constitution, Chapter 2, § 17(2).

<sup>32</sup> Ibid., section 2.

<sup>33</sup> High Court Rules, O. 53, 56 and 61.

<sup>34</sup> See Magistrates Court Ordinance, Part IV, Schedules 1, 2, available at: [http://www.paclii.org/ki/legis/consol\\_act/mco285/](http://www.paclii.org/ki/legis/consol_act/mco285/).

<sup>35</sup> Ibid., section 26.

<sup>36</sup> See Children, Young People and Family Welfare Act, Division 5.

<sup>37</sup> High Court Rules, O. 17, r. 9.

<sup>38</sup> Ibid., O. 17, r. 1.

There is no provision that either allows or prevents a challenge from a non-governmental organisation.<sup>39</sup>

**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?

Applications for redress for violations of constitutional rights should be submitted to the High Court.<sup>40</sup>

Applications for prerogative writs (mandamus, certiorari or prohibition) may only be made with leave of the High Court. An application for such leave shall be made *ex parte* (i.e. on the application of one party alone) to the Court, and must be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.<sup>41</sup> When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application must be made by notice of motion.<sup>42</sup>

Civil or criminal proceedings are commenced in either a Magistrate's Court or the High Court. This depends on the amount of the claim in civil cases, or the type of offence in criminal cases.<sup>43</sup> Magistrates' Courts have jurisdiction within the limits of the district within which they are situated.<sup>44</sup> For civil cases every action in the High Court must be commenced by a writ of summons indorsed with a statement of claim or relief or remedy sought in the action.<sup>45</sup>

The Children, Young People and Family Welfare Act provides that applications for care and protective orders may be made with the leave of the Magistrate's Court, or by the Director.<sup>46</sup> Child protective hearings are civil in nature and occur at a different time and place to any related criminal matters.<sup>47</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?

No formal legal aid services are available in Kiribati. However, legal services can be obtained through pro bono services (see part IV.C below).

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<sup>39</sup> See, generally, Constitution; High Court Rules.

<sup>40</sup> Constitution, Chapter 2, section 17(2).

<sup>41</sup> High Court Rules, O. 61, r. 2.

<sup>42</sup> *Ibid.*, O. 61, r. 4.

<sup>43</sup> See Magistrates Court Ordinance, Schedules 1, 2.

<sup>44</sup> *Ibid.*, section 4.

<sup>45</sup> High Court Rules, O. 2, r. 1.

<sup>46</sup> Children, Young People and Family Welfare Act, sections 2, 35.

<sup>47</sup> *Ibid.*, section 38(a)(i).

Court and court-related costs in civil proceedings in the High Court are at the discretion of the Court.<sup>48</sup> The High Court Rules allow for the court fees to be waived, at the Court's discretion, on account of the poverty of any party or for other sufficient reason.<sup>49</sup>

- 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 practising 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 Office of the People's Lawyer claims to provide free access to justice for the people of Kiribati who are disadvantaged or unable to access representation.<sup>50</sup> The Office of the People Lawyer's website explains that it represents its clients in land, civil and criminal matters and acts for them in the Magistrates' Courts and High Court as well as the Court of Appeal. It also provides out-of-court legal advice.<sup>51</sup> However, the office was unresponsive to requests for more information about its services.<sup>52</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?

Although the Children, Young People and Family Welfare Act provides for expedited proceedings,<sup>53</sup> there is no provision that defines a time limit for bringing violations.

Applications for leave to apply for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of it being quashed must be made no later than six months after the date of the proceeding or such shorter period as prescribed by law.<sup>54</sup> The High Court has the power to extend time limits for bringing a case under the High Court Rules, in the interests of justice.<sup>55</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?

Where, in any legal proceedings, any child under the age of 14 years called as a witness does not in the opinion of the court understand the nature of an oath or affirmation, his or her evidence may be received, though not given upon oath or affirmation, if, in the opinion of the court, that witness possesses sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. However, if the child gives false evidence in such circumstances that he/she would, if the evidence

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<sup>48</sup> High Court Rules, O. 65, r. 1.

<sup>49</sup> Ibid., O. 68, r. 2.

<sup>50</sup> Office of the People's Lawyer, Kiribati, available at: <http://peopleslawyerkiribati.wordpress.com/our-services-2/>.

<sup>51</sup> Ibid.

<sup>52</sup> For an historical view, see G Powles and M Pulea (eds), *Pacific Courts and Legal Systems*, University of the South Pacific and Monash University, 1988, 233.

<sup>53</sup> See Children, Young People and Family Welfare Act, section 36.

<sup>54</sup> High Court Rules, O. 61, r. 3.

<sup>55</sup> Ibid., O. 64, r. 5.

had been given on oath, have been guilty of perjury, he/she will be guilty of a misdemeanour offence.<sup>56</sup>

The Evidence Act of 2003 removed the requirement for corroborating evidence to prove a violation of children's rights.<sup>57</sup> For example, in *Republic v. Iaokiri*, the defendant was convicted of sexual assault purely on the testimony of a 15-year-old girl.<sup>58</sup>

In civil cases, when taking evidence from a child, consent is given by the next friend, guardian, or other person acting on behalf of the child.<sup>59</sup> The court has wide discretion to direct the manner in which evidence is presented.<sup>60</sup> The court could thus direct the child's evidence to be presented by affidavit and keep the child from being subjected to cross-examination.<sup>61</sup> However, there are no special rules compelling a court to so act.

Children have a right to be heard in care and protection proceedings in the Magistrate's Court. Before making care and protection orders, the Court must give the child an opportunity to express his or her views, and must give those views due consideration having regard to the age and understanding of the child.<sup>62</sup> Child protection hearings may be conducted with as little formality and legal technicality as the circumstances of the case permit. They must be: conducted in a manner conducive to the active participation of all persons involved in the proceedings, including the child, and in language that is appropriate to the child's age and understanding; held in private and attended only by persons directly involved in the proceedings; and in a room that is furnished and designed in a manner aimed at putting children at ease.<sup>63</sup>

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

According to the Children, Young People and Family Welfare Act, when an application for care and protection orders is filed, the registrar of the Magistrate's Court must ensure that the time and place for hearing the application is immediately fixed, having regard to the principle that it is in the best interests of the child for the application to be heard as early as possible.<sup>64</sup> Furthermore, child protection hearings "must be concluded as expeditiously as possible in order to minimise the effect of the proceedings on the child or young person and the family".<sup>65</sup>

Information about the actual timing for resolution of cases involving children could not be found. However, general information concerning all court cases in Kiribati is available. According to statistics from 2012, 35% of cases in the High Court, 69% of cases in the Court of Appeal, and 76% of cases in the Magistrates' Courts (where

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<sup>56</sup> Evidence Act 2003, section 3, available at: [http://www.paclii.org/ki/legis/num\\_act/ea200380/](http://www.paclii.org/ki/legis/num_act/ea200380/).

<sup>57</sup> See *Republic v. Iaokiri*.

<sup>58</sup> *Ibid.*

<sup>59</sup> High Court Rules, O. 17, r. 20.

<sup>60</sup> *Ibid.*, O. 39, rr. 2-3.

<sup>61</sup> *Ibid.*

<sup>62</sup> Children, Young People and Family Welfare Act, section 40(2).

<sup>63</sup> *Ibid.*, section 38.

<sup>64</sup> *Ibid.*, section 36.

<sup>65</sup> *Ibid.*, section 38(1)(f).

around 97% of cases are filed) were resolved within one year.<sup>66</sup> It is unclear how long the remainder of the cases took to be resolved.

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

In civil or criminal cases, decisions of Magistrates' Courts may be appealed to the High Court in certain circumstances.<sup>67</sup> Any party involved in proceedings under the Children, Young People and Family Welfare Act may appeal any order or refusal to grant an order<sup>68</sup> to the High Court,<sup>69</sup> which has "full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the [High Court] as a Court of first instance".<sup>70</sup> Decisions of the High Court may be appealed to the Court of Appeal in certain circumstances.<sup>71</sup>

Finally, decisions can be appealed to the Judicial Committee of the Privy Council in the United Kingdom, which is the highest court of appeal for Kiribati in cases where it is alleged that the rights of any Banaban or of the Rabi Council under Chapter III or IX of the Constitution have been or are likely to be infringed. Appeals are made directly to the Judicial Committee.<sup>72</sup>

H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Kiribati's judicial system is modelled on English common law, which is based on judicial precedent, whereby courts are bound to follow earlier court decisions on the same material facts. Therefore negative decisions may have long-term impacts. However, the Court of Appeal or the High Court may, while treating its own decisions as normally binding, depart from a previous decision "when it appears right to do so".<sup>73</sup>

According to a 2013 report by the US State Department, the Government of Kiribati generally respected judicial independence.<sup>74</sup> However, some experts have stated that

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<sup>66</sup> In 2012, of the 470 cases filed in the High Court, 164 were disposed of (35%). Of the 13 appeals filed in the Court of Appeal, nine were disposed of (69%). Of the 5,695 cases lodged in the Magistrates' Courts, 4,318 were disposed of (76%). The Chief Justice of the High Court has stated that the aim is to achieve a 90 to 100% case disposal rate: see 'Annual address delivered at the formal opening of the court commencing the 2013 legal year of the High Court of Kiribati on 1 February 2013 by the Honourable Chief Justice Sir (Gilbert) John Baptist Muria Kt', 2013, available at:

<http://www.paclii.org/ki/court-annual-reports/Chief-justice-address-2013.htm>.

<sup>67</sup> Magistrates Court Ordinance, Part VII, sections 66(2), 67(1).

<sup>68</sup> Children, Young People and Family Welfare Act, section 50(1).

<sup>69</sup> See High Court Rules, O. 1, r. 1, 9, O. 60, r. 1.

<sup>70</sup> See *Ibid.*, O. 60, rr. 17-18.

<sup>71</sup> Court of Appeal Act, sections 10, 19.

<sup>72</sup> Judicial Committee of the Privy Council, 'Practice direction 1', available at:

<https://www.jcpc.uk/procedures/practice-direction-01.html>.

<sup>73</sup> See Laws of Kiribati Act 1989, section 13.

<sup>74</sup> US State Department, 'Kiribati 2013 human rights report', 2013, available at:

<http://www.state.gov/documents/organization/220411.pdf>.

there have been concerns over the Government's reluctance to respect court decisions, particularly when it necessitates payment of state money.<sup>75</sup>

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

No other concerns or challenges could be identified.

- 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.

#### *National laws*

The Committee on the Rights of the Child in its review of Kiribati in 2006 noted with concern that there is no specific legislation on juvenile justice, as well as a lack of guarantees for due process. The Committee urged Kiribati to, amongst other things: develop specific and appropriate legislation on juvenile justice; ensure that due process is guaranteed, including through a hearing by a judge before deprivation of liberty is carried out; and ensure that deprivation of liberty is a measure of last resort for the shortest time possible.<sup>76</sup>

Following the review, a Juvenile Justice Act was passed in September 2015 but it is unclear whether this law is effective yet.<sup>77</sup> Under the Act a separate Juvenile Court will be established, so that children in contact with the law do not have to go through the regular court. The Court will have a child-friendly space and children will be held separately from adults. Currently children are detained in adult prison.

As indicated above, the Te Rau N Te Mweenga Act 2014 was enacted to address domestic violence, including against children. It criminalises domestic violence, and provides support and redress for all victims of domestic violence, such as through the enforcement of court orders issued in order to stop acts of domestic violence.<sup>78</sup>

#### *Customary laws and community justice*

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<sup>75</sup> Transparency International, 'Corruption and anti-corruption in Kiribati', 2013, available at: [http://www.transparency.org/files/content/corruptionqas/Overview\\_of\\_corruption\\_and\\_anti-corruption\\_in\\_Kiribati.pdf](http://www.transparency.org/files/content/corruptionqas/Overview_of_corruption_and_anti-corruption_in_Kiribati.pdf).

<sup>76</sup> UN Committee on the Rights of the Child, *Concluding observations on the initial report of Kiribati*, CRC/C/KIR/CO/1, 29 September 2006, paras 64–65. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fKIR%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fKIR%2fCO%2f1&Lang=en).

<sup>77</sup> Radio New Zealand, "Kiribati passes bill to set up youth justice system", 3 September 2015, available at: <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/201769015/kiribati-passes-bill-to-set-up-youth-justice-system>.

<sup>78</sup> *Ibid.*, para. 23; NGOs noted that corporal punishment remains lawful in Kiribati: see *Summary prepared by the Office of the United Nations High Commissioner for Human Rights*, Universal Periodic Review, A/HRC/WG.6/21/KIR/3, 27 October 2014. Available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/KISession21.aspx>.

The laws of Kiribati include customary law, which comprises the customs and usages, existing from time to time, of the natives of Kiribati.<sup>79</sup> Customary law has effect as part of the law of Kiribati, except to the extent that it is inconsistent with an enactment or an applied law that has been published.<sup>80</sup> In the absence of legislation, customary practices become the law.<sup>81</sup> Generally, customary law must be recognised and enforced by, and may be pleaded in, all courts except where its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest.<sup>82</sup> Courts must take customary law into account when considering specified matters in criminal and civil proceedings. Customary law must be applied in deciding questions in connection with matters concerning the legitimacy, legitimation or adoption of children, as well as the right to custody or guardianship of children.<sup>83</sup>

The traditional response to crimes of sexual abuse is the cultural practice of te kabara bure (formal apology). Kiribati does not have mandatory prosecution or minimum sentences for sexual assault offences. In addition, legislation specifically provides for customary law to affect criminal sentencing, which may reduce a sentence further if there has been forgiveness, or even result in impunity for the perpetrator.<sup>84</sup>

According to a 2013 report by the US State Department, “[e]xtrajudicial traditional communal justice, in which village elders decide cases and mete out punishment, remained a part of village life, especially on remote outer islands.”<sup>85</sup> Corporal punishment may also be ordered by Island Councils for criminal offences and other misdeeds as part of traditional village justice.<sup>86</sup>

According to the Government during its review in 2006 by the Committee on the Rights of the Child, the vast majority of adoptions concluded in the country are customary adoptions within the extended family, without the involvement of the courts.<sup>87</sup> The courts are rarely involved in cases of customary adoption, except to register adoptions in order to ensure that adopted children have the same inheritance rights as biological children. Families trying to settle disputes over customary adoption often use traditional dispute settlement mechanisms and apply to the courts only if those mechanisms have failed. However, since the traditional mechanisms usually decide in favour of the father’s family, mothers tend to have recourse to the courts.<sup>88</sup> Moreover, as family break-ups have become increasingly common, a growing number of families in dispute over customary adoption apply to the courts for settlement. While in theory the aim is to safeguard the best interests of the child, the law is applied in an ad hoc fashion.<sup>89</sup>

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<sup>79</sup> Laws of Kiribati Act 1989, sections 4(2), 5.

<sup>80</sup> Ibid., sections 5, 11.

<sup>81</sup> *Summary prepared by the Office of the United Nations High Commissioner for Human Rights*, para 23.

<sup>82</sup> Laws of Kiribati Act 1989, Schedule 1, section 2.

<sup>83</sup> See Ibid., Schedule 1.

<sup>84</sup> *Summary prepared by the Office of the United Nations High Commissioner for Human Rights*, para. 23; *Compilation prepared by the Office of the High Commissioner for Human Rights*, Universal Periodic Review, A/HRC/WG.6/8/KIR/2, 19 February 2010, paras 27-28. Available at: <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/KISession8.aspx>.

<sup>85</sup> See US State Department.

<sup>86</sup> CRIN, ‘Inhuman sentencing of children in Kiribati’, 2011, available at: [https://www.crin.org/docs/Kiribati\\_final.pdf](https://www.crin.org/docs/Kiribati_final.pdf).

<sup>87</sup> *Summary record of the 1166th meeting*, para. 33.

<sup>88</sup> Ibid., para. 41.

<sup>89</sup> Ibid., para. 35.

Following its review in 2006, the Committee on the Rights of the Child expressed concern that domestic law, including customary law, is not in full compliance with the principles and provisions of the CRC and is frequently not implemented, particularly in remote areas. It recommended that Kiribati take effective measures to harmonise its domestic legislation, including customary law, with the provisions and principles of the CRC.<sup>90</sup>

#### *National human rights institution*

As at the date of this report, there is no independent monitoring body mandated to investigate and redress violations of children's rights, such as a children's ombudsperson or a national human rights commission. The Committee on the Rights of the Child has recommended that such a body be established to enable children to submit complaints.<sup>91</sup>

In 2014 Kiribati established the Kiribati National Human Rights Taskforce with a mandate to coordinate, monitor, evaluate and report on all human rights activities at the national level. A Human Rights Unit is in the process of establishment.<sup>92</sup> It remains to be seen whether this body will be able to receive complaints from children. The Constitution has been amended to permit the establishment of a Ministry of Women, Youth and Social Affairs.<sup>93</sup> The Human Rights Unit will be housed in this ministry.

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

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<sup>90</sup> UN Committee on the Rights of the Child, paras. 7–8.

<sup>91</sup> *Ibid.*, p. 2.

<sup>92</sup> *National report of Kiribati to the Human Rights Council*, para. 59.

<sup>93</sup> United Nations General Assembly Report of the Working Group on the Universal Periodic Review: Kiribati 13 April 2015, A.HRC/29/5.