

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

*This report was produced by White & Case LLP in February 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?**

Palau<sup>1</sup> acceded to the CRC on 4 August 1995.<sup>2</sup> As at the date of this report, Palau has not signed or acceded to any of the Optional Protocols to the CRC.

The CRC and other international conventions are not sources of legal authority in Palau unless Palau's legislative body, the Olbiil Era Kelulau ("OEK"), enacts the relevant articles of the Convention into the Palau Code.<sup>3</sup>

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

The CRC does not take precedence over national law.<sup>4</sup>

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

The CRC has not been incorporated into national law.

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

The CRC may not be directly enforced in the courts unless the relevant articles of the Convention have first been enacted into the Palau Code by the OEK.<sup>5</sup>

However, with respect to articles of the CRC that are not enacted into the national legal code, the CRC can be used to provide interpretive guidance.

Additionally, the CRC could be indirectly enforced in the courts if a particular United States common law rule embodying the CRC is not contrary to Palau's written laws or recognised local customary law. Palau Code lists the United States common law to be one of the sources of legal

---

<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> See *Initial report of Palau to the UN Committee on the Rights of the Child*, CRC/C/51/Add.3 23 March 2000, para. 7. Available at:

[http://www.law.yale.edu/rcw/rcw/jurisdictions/oceania/micronesia/palau/Palau\\_CRC.htm](http://www.law.yale.edu/rcw/rcw/jurisdictions/oceania/micronesia/palau/Palau_CRC.htm).

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

authority in Palau. However, one exception to applying the United States common law is that criminal prosecution must be in accordance with the written law of Palau or its recognised local customary law not in conflict with the written law.<sup>6</sup>

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

No such examples were found in the CRIN legal database<sup>7</sup> or the Pacific Islands Legal Information Institute database of Palau cases.

## 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 can bring cases in domestic courts to challenge violations of their rights only if they are represented (see part II.B below). Under the Palau Constitution, the government is prohibited from depriving life, liberty or property without due process of law,<sup>8</sup> and it is possible to challenge deprivation of liberty through a writ of *habeas corpus*.<sup>9</sup> There is no independent body capable of making complaints on behalf of children.

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?

The law prohibits a minor (children under the age of 18) from filing a civil action in his or her own name. A representative, “such as a general guardian, committee, conservator, or other like fiduciary”, may sue on behalf of a child. In the absence of a duly appointed representative, the child may sue by a next friend or guardian ad litem. The court must appoint a guardian ad litem for a child not otherwise represented in an action.<sup>10</sup> However, there have been exceptional cases in which the court has permitted a minor to pursue an independent legal action involving personal injury.<sup>11</sup>

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

Typically, a representative would bring cases on behalf of infants and young children who have not reached the age of 18 (see part II.B above).<sup>12</sup>

---

<sup>6</sup> Palau National Code, Title 1, Section 303.

<sup>7</sup> Available at <https://www.crin.org/en/library/custom-search-legal>.

<sup>8</sup> Palau Constitution, Art. VI, Section 7.

<sup>9</sup> Ibid.

<sup>10</sup> Palau Rules of Civil Procedure for the Courts of the Republic of Palau (“Palau R. Civ. P.”), Rule 17(c), available at: <http://www.palausupremecourt.net/upload/P1408/1213071923103.pdf>.

<sup>11</sup> *Initial report of Palau to the UN Committee on the Rights of the Child*, para. 37.

<sup>12</sup> Palau R. Civ. P., Rule 17(c).

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

The Palau Constitution guarantees the right to counsel.<sup>13</sup> According to the Constitution, if the accused is unable to afford counsel, he/she will be assigned counsel by the government.<sup>14</sup> According to the government of Palau, state-funded lawyers are provided to represent juvenile offenders.<sup>15</sup> Similarly, the US Department of State reports that if detainees cannot afford a lawyer, a public defender or a court-appointed attorney is available.<sup>16</sup>

In practice, in 2013 only 15% of cases received legal aid in the criminal, common and civil divisions of the Palau Supreme Court.<sup>17</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)?

No condition or limit specific to children or their chosen legal representative was found.

### 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?

A constitutional violation is civil in nature while a violation of domestic law is either criminal or civil in nature. An action is commenced by filing a complaint with the court.<sup>18</sup> Upon filing the complaint, a plaintiff must serve defendants within 120 days of the filing of the complaint.<sup>19</sup> Proof of service is required.<sup>20</sup>

Criminal cases are brought by the Office of the Attorney General, and some individuals accused of misdemeanours are given criminal citations issued by police officers.<sup>21</sup>

---

<sup>13</sup> Palau Constitution, Art. VI, Section 7.

<sup>14</sup> Ibid.

<sup>15</sup> *Summary record (partial) of the 692nd meeting of the UN Committee on the Rights of the Child*, CRC/C/SR.692, 29 January 2001, para. 38. Available at:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSR.692&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSR.692&Lang=en).

<sup>16</sup> US Department of State, 'Palau 2013 human rights report', available at:

<http://www.state.gov/documents/organization/220432.pdf>.

<sup>17</sup> Palau Judiciary, 'Court annual report 2013', available at:

<http://www.paclii.org/pw/other/court-annual-reports/CourtAnnualReport2013.pdf>.

<sup>18</sup> Palau R. Civ. P., Rule 3.

<sup>19</sup> Ibid., Rule 4.

<sup>20</sup> Ibid., Rule 3.

<sup>21</sup> Michael J. Rosenthal, Speech, The Palau Restorative Justice Program, at International Association of Youth and Family Judges and Magistrates, XVI World Congress 2002.

Children are covered by the Family Protection Act, RPPL 8-51 2012,<sup>22</sup> which provides for increased penalties for child abuse.<sup>23</sup>

As stated above, the CRC or any other international instrument must be incorporated into the written law of Palau in order to be actionable.

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

Palau courts have power delegated by the Palau Constitution to hear and resolve civil and criminal violations.<sup>24</sup> Palau courts may award damages, or order injunctions or restraining orders to restrain acts (preliminary and permanent).<sup>25</sup>

Additionally, most matters pertaining to family law are in fact handled not by the courts, but by the family and clan. Decisions of clan elders with respect to family law are granted legal recognition.<sup>26</sup> Criteria used in reaching decisions in the customary system will vary from clan to clan but are believed to most commonly reflect the principle of “best interests of all concerned” rather than the “best interests of the child” (see part V below).

The International NGO Humanium states that “[f]or less serious, non-criminal transgressions the Ministry of Justice lays out a three-step alternative: pardon, restitution, and community service. The child who committed the infraction and the victim are often given an opportunity to meet. If both parties agree, the child accepts his or her responsibility, and the victim explains the consequences of the child’s actions. Then, they decide on the method of reparation, either restitution (if necessary) or community service.”<sup>27</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?

It is possible to challenge a law or action without naming a specific victim by bringing a class action (see part III.D below). Furthermore, cases involving children tend to maintain the anonymity of the child.<sup>28</sup>

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

---

<sup>22</sup> This was regarded as a positive move in the UN Periodic Review Report 2011: see <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights3May2011am.aspx>.

<sup>23</sup> Penalty for Child Abuse, RPPL 8-32 2011.

<sup>24</sup> Palau Constitution, Art. X, Section 14.

<sup>25</sup> Palau R. Civ. P., Rules 64-70.

<sup>26</sup> Palau National Code, Title 21, Section 103.

<sup>27</sup> <http://www.humanium.org/en/palau/>.

<sup>28</sup> See, e.g., *In re Adoption of SNF* [2012] PWSC 7; Civil Appeal 11-035 (12 May 2012).

A civil case alleging a constitutional violation or statutory violation regarding children's rights can be brought as a class action under Rule 23 of the Rules of Civil Procedure. One or more members of a class may sue as representative parties on behalf of all only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the representative parties are typical of the claims of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. When a person sues as a representative of a class, the court must determine by order whether to certify the action as a class action. An order certifying a class action must define, amongst other things, the class and the class claims, and must appoint class counsel.<sup>29</sup> Other requirements for class actions such as impracticability of joinder, common questions of law or fact, typicality of claims and protection of the interests of the class apply.<sup>30</sup>

Courts have the power to oversee the class action proceedings and give clear, consistent pronouncements of the law.<sup>31</sup> The judgment of a class action must, at a minimum, include and describe the members of the class. For a specific type of class action, the judgment must include and describe those to whom the notice is directed, who have not requested exclusion and who the court finds to be members of the class.<sup>32</sup>

Alternatively, multiple persons may join in one action as plaintiffs under the Palau Rules of Civil Procedure if they assert any right to relief jointly, severally, or in respect to the same occurrence(s), and if any question of law or fact common to all these persons will arise in the action.<sup>33</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?

Non-governmental organisations (NGOs) are not permitted to file an action when the case involves children's rights violations. It may be possible for an NGO to apply to intervene in proceedings when its claim and the main action have a question of law or fact in common. In exercising its discretion the court will consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.<sup>34</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,

---

<sup>29</sup> Palau R. Civ. P., Rule 23.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid., Rule 20.

<sup>34</sup> Ibid., Rule 24.

administrative, etc.)? What would the initial filing process entail?

Article X of the Constitution vests the judicial power of Palau in a judiciary consisting of a Supreme Court, a National Court, and inferior courts of limited jurisdiction.<sup>35</sup> The courts' judicial power extends to all matters in law and equity and to all persons physically within Palau. The courts, other than the Supreme Court, may be divided geographically, but they have not been so divided, and there are no state courts. The Supreme Court consists of a Trial Division and an Appellate Division.<sup>36</sup>

A case involving a violation of children's rights can be filed with a National Court unless the national government or a state government is a party, in which case, a case is filed with the Trial Division of the Supreme Court of Palau.<sup>37</sup> As discussed above, a plaintiff must file a complaint with the appropriate court to commence an action and serve a defendant within 20 days.<sup>38</sup> These procedural rules are not relaxed solely because the case involves children's rights.

- 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?

See part II.D above.

Court fees may be waived by the court of proper jurisdiction if the petitioner or plaintiff requests such a waiver using the appropriate form. The fee waiver form is available at the Office of the Clerk of Court and on the judiciary website under 'Forms': <http://www.palausupremecourt.net/>. In practice, in 2013 no fees were waived.<sup>39</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 Supreme Court of Palau permits attorneys to provide pro bono legal services for an individual or an organisation.<sup>40</sup> The Legal Services Corporation, funded by the United States government, provides free legal services. No further information regarding eligibility is provided on its

---

<sup>35</sup> Palau Constitution, Art. X.

<sup>36</sup> Michael A. Ntomy, *South Pacific Islands Legal Systems* 573 (1993).

<sup>37</sup> *Ibid.*

<sup>38</sup> Palau R. Civ. P., Rule 3.

<sup>39</sup> Palau Judiciary.

<sup>40</sup> See Supreme Court of the Republic of Palau, 'Attorney Application for CLE Credit', available at: <http://www.palausupremecourt.net/upload/P1408/1213113236460.pdf>.

website.<sup>41</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?

The prosecution must bring the case within six years after the commission of a crime, except in the case of rape.<sup>42</sup> For civil actions, the statute of limitation is generally 2 years.<sup>43</sup>

There is a special provision that allows a minor to file a civil action within two years after reaching the age of majority.<sup>44</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?

According to the Rules of Evidence of Palau, all relevant evidence is admissible.<sup>45</sup> This includes affidavits, documents, witness testimony, and expert witness testimony.<sup>46</sup> There is no legal minimum age for testifying in court, however, admission of a child's testimony is at the discretion of the presiding judge.<sup>47</sup> In practice, the Attorney General and the courts make every effort to avoid requiring a child to give testimony in court.<sup>48</sup>

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

A constitutional principle of a speedy trial applies under the Palau Constitution.<sup>49</sup> In practice, for the cases disposed in 2013, it took on average: 125 days to dispose a criminal case; 326 days to dispose a civil case; and 105 days for a juvenile case. The Palau Supreme Court does not have a current time standard for the average duration of a case.<sup>50</sup>

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

A party may appeal from the Court of Common Pleas and the Trial Division of the Supreme Court to the Appellate Division of the Supreme Court, the only court in Palau with appellate review and thus the highest court.<sup>51</sup> The

---

<sup>41</sup> [www.lsc.gov](http://www.lsc.gov).

<sup>42</sup> Palau National Code, Title 17, Section 107.

<sup>43</sup> Ibid., Title 14, Section 403.

<sup>44</sup> Ibid., Title 14, Section 406.

<sup>45</sup> Rules of Evidence, Supreme Court of the Republic of Palau ("Palau R. Evid."), available at: <http://www.palausupremecourt.net/upload/P1408/13613041813865.pdf>.

<sup>46</sup> See, e.g., Palau R. Civ. P., Rule 7.

<sup>47</sup> Government of Palau & UNICEF, Palau: A Situation Analysis of Children, Youth & Women 71 (2008).

<sup>48</sup> Ibid.

<sup>49</sup> Palau Constitution, Art. VI, Section 7.

<sup>50</sup> Palau Judiciary.

<sup>51</sup> Palau R. Evid., Rule 1.

notice of appeal must be filed within 30 days after the imposition of a sentence in a criminal case or service of a judgment or order in a civil case.<sup>52</sup> Pending appeal, a judgment or a sentence of imprisonment may be stayed.<sup>53</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?

Palau has a common law system. Courts are bound by their own and higher courts' decisions under the doctrine of *stare decisis*. This means a negative or positive decision could potentially have a lasting impact for years. Its impact will depend on whether it was a lower court or a higher court that decided the case as a higher court's decision will take precedence over the decisions of a lower court.

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

With regard to enforcing a court order, no specific authority could be found which addresses the ability of a minor to enforce a judgment. Additionally, according to UNICEF, Palau's main social service agency, CoPopChi, disintegrated in 2008 and has yet to be reconstituted.<sup>54</sup> Thus, it is unknown what support a child would have to enforce any judgment obtained from a court.

With regard to the authority of Palauan courts, a positive decision by the appellate court will have more impact than one by a lower court. However, the legislative body has authority conferred by the Constitution to pass legislation that is contrary to the case law. As the Palau National Code along with the Constitution is a supreme law of the land, it will supersede the court rulings.

- 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.

#### *Customary laws*

In addition to statutory law, the recognised customary law of Palau has "the full force and effect of law so far as such customary law is not in conflict with such legal authority" specified in section 301, Chapter 3 of the Palau National Code.<sup>55</sup> In its Concluding Observations of 2001, the Committee on the Rights of the Child noted that a study undertaken by the State had revealed a number of inconsistencies between Palau's laws (both statutory and customary law) and the

---

<sup>52</sup> Ibid., Rule 4.

<sup>53</sup> Ibid., Rule 8.

<sup>54</sup> See CRIN, 'Palau: Child rights references in the Universal Periodic Review', available at: <http://www.crin.org/resources/infodetail.asp?id=25546>.

<sup>55</sup> Palau National Code, Chapter 3, Section 302.



CRC, and urged the State to address this deficit, including by considering the enactment of a comprehensive Children's Code.<sup>56</sup>

*Best interests of the child and right to be heard*

In accordance with the Palauan tradition, which places the well-being of an individual subordinate to the well-being of the group, the law specifies that court decisions be made with respect to family law for the “best interest of all concerned.”<sup>57</sup> Most matters pertaining to family law are in fact handled not by the courts, but by the family and clan. Decisions of clan elders with respect to family law are granted legal recognition.<sup>58</sup> Criteria used in reaching decisions in the customary system will vary from clan to clan but are believed to most commonly reflect the principle of “best interests of all concerned” rather than the “best interests of the child.”<sup>59</sup> For certain matters such as adoption, the standard required by law is the “best interests of the child”.<sup>60</sup>

The Committee on the Rights of the Child has recommended that the general principle of the best interests of the child be appropriately integrated in all legal provisions and under customary law, as well as in judicial and administrative decisions.<sup>61</sup> Furthermore, the Committee, concerned that traditional culture, values and attitudes may not always facilitate expression and consideration of the views of children, has recommended that Palau “develop a systematic approach to increase awareness, including among traditional leaders, of the participatory rights of children”.<sup>62</sup>

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

---

<sup>56</sup> UN Committee on the Rights of the Child, *Concluding observations on the initial report of Palau*, CRC/C/15/Add.149, 21 February 2001, paras 12-13. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.149&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f15%2fAdd.149&Lang=en).

<sup>57</sup> Palau National Code, Title 21, Section 302.

<sup>58</sup> *Ibid.*, Title 21, Section 103.

<sup>59</sup> See *Initial report of Palau to the UN Committee on the Rights of the Child*.

<sup>60</sup> Palau National Code, Title 21, Sections 401-09; Palau National Code, Title 34, Section 6107.

<sup>61</sup> UN Committee on the Rights of the Child, paras 34-35.

<sup>62</sup> *Ibid.*, paras 36-37.