

ACCESS TO JUSTICE FOR CHILDREN: **PAPUA NEW GUINEA**

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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?

The CRC was ratified by Papua New Guinea (“PNG”)¹ on 2 March 1993.² As at the date of this report, PNG has not ratified any of the Optional Protocols to the CRC.

Under the Constitution of PNG, an international treaty must be “given the status of municipal law by or under a Constitutional Law or an Act of the Parliament” in order for it to form part of national law.³ The CRC has not been incorporated in this way, and so it is not directly applicable in PNG’s courts.⁴

B. Does the CRC take precedence over national law?

No. Where the Convention conflicts with domestic law, domestic law must be applied.⁵

C. Has the CRC been incorporated into national law?

The CRC has been partially incorporated into national law. The Lukautim Pikinini (Child) Act 2009 (“LPA”)⁶ provides for the general protection of all children under the age of 18 years and establishes Pikinini Courts to hear complaints under the Act, though it does not explicitly incorporate all articles of the CRC. In particular, the LPA provides that “a child shall have the right to exercise or demand the exercise of... all the rights set out in any domestic laws and the Convention on the Rights of the Child”.⁷ The Juvenile Justice Act 2014⁸ establishes a juvenile justice system, including Juvenile Courts, for children aged between 10 and 17 years who are charged with or alleged to have

¹ 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.

² International Labour Organisation, ‘Papua New Guinea: Legislation’, available at: http://www.ilo.org/ipec/Regionsandcountries/Asia/png/WCMS_IPEC_CON_TXT_PNG_HOM_EN/lang-en/index.htm.

³ Constitution of the Independent State of Papua New Guinea (“Constitution”), section 117(7), available at: http://www.paclii.org/pg/legis/consol_act/cotisopng534/.

⁴ CRIN, ‘Papua New Guinea: national laws’, 2013, available at: www.crin.org/node/32311.

⁵ Ibid.

⁶ Available at: http://www.paclii.org/pg/legis/num_act/lpa2009235/.

⁷ LPA, section 5.

⁸ Available at: http://www.paclii.org/pg/legis/num_act/jja2014191/.

committed an offence.⁹ Other provisions relevant to children's rights can be found in the Constitution and other legislation.¹⁰

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

No, parties cannot claim relief directly under the CRC. Instead, a party must seek relief under national law. Section 39 of the Constitution provides that a court may consider international conventions (such as the CRC) in determining whether a law or act is “reasonably justifiable in a democratic society”.

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

Yes, the CRC and other international instruments have been cited by domestic courts. For example, the CRC was cited in *State v. Noimbuk*, where the court held that the defendant's act of child abuse had not only breached national law but also “transcended international [boundaries] and gone into violating an international law.”¹¹ The court also called for the government to enact legislation under Article 19 of the CRC to give greater power to the courts to ensure greater protection for children.¹² To date nothing has been done and there appears to be singularly little reference to the CRC in cases before the courts, although the best interests of the child principle is fairly consistently applied in cases such as contested parental custody and adoption.

In *State v. Tuanis*, the court cited Article 20 of the CRC to avoid prolonged forced incarceration of a child's mother, which in the court's view would be an abuse of the child's rights.¹³ In another case, the Supreme Court of PNG stated that the “Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and European Convention for the Protection of Human Rights and Fundamental Freedom... have influenced our Constitution and continue to guide the manner in which the provisions of the Constitution may be interpreted”, and that PNG must comply with international standards.¹⁴

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 or their representatives may bring civil suits in a District Court or National Court (see part IV.A below). They may also bring complaints to court about violations of their constitutional rights or judicial review proceedings (see part III.A below).

⁹ Ibid., section 3.

¹⁰ See CRIN.

¹¹ *State v. Noimbik*, Papua New Guinea District Court of Justice, [2007] PGDC 63; DC587 (3 January 2007). A summary of the decision is available at: www.crin.org/node/7026.

¹² Ibid.

¹³ *State v. Tuanis* [2013] PGNC 70; N5120 (15 March 2013). A summary of the decision is available at: www.crin.org/node/38972.

¹⁴ *Christopher Haiweta, Leader of the Opposition v. Paias Wingti, Prime Minister; and Attorney-General; and National Parliament* [1994] PNGLR 197.

Under the Family Protection Act 2013 (“FPA”),¹⁵ any person, including a child, who has suffered acts of violence (whether physical or psychological) from a family member, may apply for a protection order against such family member in front of a District Court.

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 may bring a suit in a District Court as if they were of full age (i.e. 21 years). However, where necessary or desirable in the interest of justice, a court may appoint or require the appointment of a “next friend” or guardian *ad litem* to represent the child.¹⁶

Regarding proceedings in National Courts, a child¹⁷ must be represented by a “next friend”¹⁸ or “guardian at law”.¹⁹ The National Court Rules provide that a child “may not, except by his next friend, bring or make a claim or carry on any proceedings for relief in the Court”.²⁰ Additionally, a child “may not, except by his guardian at law (a) defend any proceedings; or (b) intervene in any proceedings; or (c) appear in any proceedings under a judgement or order.”²¹ A person may not be a next friend of a child in any proceedings in which he/she has an interest adverse to the interest of the child.²² A court may also appoint a guardian at law for a child for the purposes of the proceedings. The guardian at law must consent to act, be a “proper person” for appointment, and have no interest in the proceedings adverse to the interest of the child.²³

It is unclear whether a child must be represented in the Supreme Court, as the Supreme Court Rules do not explicitly require this. However, it is likely that the procedures in the Supreme Court would be similar to those of the National Courts (above).²⁴

In child protection hearings in a Pikinini Court or District Court under the LPA, the Court must appoint a guardian *ad litem* or legal counsel for the child party unless it is not necessary or determined otherwise by the Court in each case.²⁵

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

¹⁵ Available at: <http://cfcpng.org/wp-content/uploads/2014/06/FAMILY-PROTECTION-ACT-2013.pdf>.

¹⁶ District Courts Act 1963, section 39, available at:

http://www3.pacii.org/pg/legis/consol_act/dca1963205/.

¹⁷ The National Court Rules refer to a “disabled person”, which is defined to include “a minor”: National Court Rules, O. 1 r. 6, available at: http://www.pacii.org/pg/rules/ct_rules/ncr1983220/.

¹⁸ Defined as “a person who is a plaintiff on behalf of a disabled person”: Ibid.

¹⁹ Defined as “the guardian of a defendant who is a disabled person”: Ibid.

²⁰ Ibid., O. 5 r. 19.

²¹ Ibid.

²² Ibid., O. 6 r. 21(3).

²³ Ibid., O. 6 r. 24.

²⁴ Supreme Court Rules 2012, O. 11 Division 2 refers to a party appearing by a next friend who “ceases to be under the disability which occasioned that appearance”. This suggests that minors would need to be represented by a next friend. Available at: http://www.pacii.org/pg/rules/ct_rules/scr2012232/.

²⁵ LPA, section 63.

brought?

Civil cases would typically be brought by the child's next friend on behalf of the child (see part II.B above). Where there is a violation of the fundamental rights provided in the Constitution, NGOs would also be entitled to bring the case to court (see part III.E below). Where the violation amounts to a crime, the case would usually be brought to a court by the State through the Public Prosecutor or a State Prosecutor.²⁶ Where there is a violation of a right contained in the LPA, the case would typically be brought to court by the Director of Lukautim Pikinini.²⁷

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

The Office of the Public Solicitor ("OPS") provides legal aid to people who are unable to afford private lawyers. This is a constitutional duty imposed on the office and is available to any person, whether an adult, child or foreigner.²⁸

An applicant will be asked to provide details of his/her income and assets.²⁹ Under the Public Solicitor (Charges) Act 1976,³⁰ the Public Solicitor may charge a certain fee, depending on the individual's ability to pay. However, the Public Solicitor must not impose any charge on an individual whose income is less than the minimum wage.³¹

Children in conflict with the law are only eligible for free legal assistance from the OPS where they face serious charges or wish to appeal a custodial sentence imposed in a District Court. However, even where juveniles are eligible for legal aid, they often must wait for months to see a lawyer if they are remanded within a province without an OPS office.³² Regarding proceedings in Juvenile Courts, powers are granted to Voluntary Juvenile Court Officers ("VJCO") to act as *de facto* lawyers on behalf of juveniles. VJCOs are entitled to advise juveniles on their rights, question arresting officers and advocate for juveniles in a Juvenile Court.³³

In child protection hearings under the LPA, the Pikinini Court or District Court must appoint a guardian *ad litem* or legal counsel for the child party unless it is not necessary or determined otherwise by the Court in each case.³⁴

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

²⁶ Criminal Code Act 1974, available at: http://www.paclii.org/pg/legis/consol_act/cca1974115/.

²⁷ LPA, sections 48(2) and 58.

²⁸ 'Applying for legal aid', available at:

<http://www.paclii.org/pg/ops/Docs/POSTER2%20-%20Applying%20for%20legal%20aid.pdf>.

²⁹ District Courts Act, section 39.

³⁰ Available at: http://www.paclii.org/pg/legis/consol_act/psa1976243/.

³¹ *Ibid.*, sections 2-3.

³² Mark Evenhuis, 'When Justice Harms: Juvenile Justice in Papua New Guinea', *Alternative Law Journal* (2011) 36(3) (2011), available at: <https://archive.org/details/WhenJusticeHarmsAltLJ363>.

³³ *Ibid.*

³⁴ LPA, section 63.

agree to a case being brought)?

In proceedings in the National Court, a next friend must act by a solicitor.³⁵ A person may not be made a next friend without his/her consent.³⁶ A person cannot take any steps in any proceedings as next friend for a child unless he/she has filed a consent to act and a certificate by his/her solicitor stating that the next friend has no interest in the proceedings adverse to that of the child.³⁷

Under Section 61 of the LPA, parents are usually aware of a case being brought where it involves their child, since the notice of the child protection hearing would be served on them before the child protection hearing. Notwithstanding this, their permission is not required.

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?

Children through their representatives may bring human rights proceedings to enforce their rights and freedoms under Part III Division 3 of the Constitution.³⁸ This includes the right to life, freedom from inhuman treatment, freedom of expression, conscience, thought, religion, assembly and association, among others.

The following persons are entitled to commence such proceedings in the National Court:

- (a) a person whose human rights or freedoms are adversely affected by any act or omission of the government, private person or company;³⁹
- (b) a person acting on behalf of a child who is qualified under (a) above;
- (c) a person or body, whether public or private, who has an interest in the protection and enforcement of human rights and freedoms;⁴⁰
- (d) a person representing an international body whose principle function is to protect human rights and freedoms under international laws and conventions, declarations, recommendations or decisions of the UN General Assembly concerning human rights and freedoms; and
- (e) any other person or body who has a sufficient interest in the protection and enforcement of human rights and freedoms, approved by the National Court.⁴¹

³⁵ National Court Rules, O. 6 r. 20(2).

³⁶ Ibid., O. 6 r. 21(4).

³⁷ Ibid., O. 6 r. 21(6).

³⁸ Constitution, section 57: “a right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament.”

³⁹ This includes a governmental body or a person exercising public power or performing public functions, and any of a company’s officers or employees exercising private powers or performing private functions: Human Rights Rules 2010; National Court Rules O. 23 Part 8 r. 6.

⁴⁰ This is defined as “an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question”, but this “does not limit the persons or classes of persons who have such an interest”: Constitution, section 57(2).

⁴¹ Ibid., section 57(1); Human Rights Rules; National Court Rules O. 23 Part 8 r. 6.

Furthermore, any judge may commence proceedings on his/her own initiative where he/she is aware of a breach of basic rights.⁴² Any person, body or authority, including any member of the public, may bring any alleged or suspected human rights breach to the attention of the National Court by submitting Form 127.⁴³

Alternatively, an application to enforce constitutional rights under section 57 of the Constitution may be made to a Judge of the Supreme Court, if it is not made in the National Court.⁴⁴

Children through their representatives may apply to the National Court for judicial review of administrative acts. Relevantly, they may make an application for an order in the nature of *mandamus*, prohibition, *certiorari*, declaration or injunction in accordance with Order 16 of the National Court Rules (see part III.B below).

Finally, children may submit complaints about violations of their rights by public bodies to the Ombudsman Commission of PNG. The Ombudsman Commission, which was established by the Constitution, may investigate, on its own initiative or on an individual complaint, the administrative actions and decisions of government departments and agencies, the conduct of PNG leaders, and discriminatory practices. After investigation, the Ombudsman Commission writes a final report containing findings, opinions and recommendations about the matter.⁴⁵ Currently there is a small human rights unit within the office of the Ombudsman Commission.

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

The Supreme Court and National Court have the power to review applications for enforcement of human rights under the Constitution. The Court may make “all such orders and declarations as are necessary or appropriate” to enforce human rights, including orders for compensation.⁴⁶ Relief is not limited to cases of actual or imminent infringement of the guaranteed rights and freedoms; if the Court thinks it proper to do so, relief may be given in cases in which there is a reasonable probability of infringement, or in which an action that a person reasonably desires to take is inhibited by the likelihood of, or a reasonable fear of, an infringement.⁴⁷

⁴² Human Rights Rules; National Court Rules O. 23 Part 8 r. 8.

⁴³ Human Rights Rules; National Court Rules, O. 23, r. (9)(1); The Supreme and National Courts of PNG, ‘About Human Rights Track’, available at: <http://www.pngjudiciary.gov.pg/home/index.php/national-court/civil-cases/equity-division/human-rights-track>.

⁴⁴ Supreme Court Rules, O. 6, r. 1.

⁴⁵ For more information, including information on how to make a complaint, see Ombudsman Commission, ‘Making a complaint’, available at: <http://www.ombudsman.gov.pg/making-a-complaint>; see also Organic Law on the Ombudsman Commission, available at: <http://www.ombudsman.gov.pg/legislation/organic-law-on-the-ombudsman-commission>.

⁴⁶ Constitution, sections 57(3), 58.

⁴⁷ Ibid., section 57(5).

The Supreme Court can also provide opinions on whether laws made or proposed by the Parliament are constitutional.⁴⁸ All acts (whether legislative, executive or judicial) that are inconsistent with the Constitution are, to the extent of the inconsistency, invalid and ineffective.⁴⁹

In judicial review proceedings, the National Court has the power to make orders of *mandamus* (mandatory order), prohibition (prohibiting order), *certiorari* (quashing order), declaration or injunction.⁵⁰ It may also issue writs of *habeas corpus* (order for review of detention).⁵¹ In civil proceedings, the National Court may “make such order as the nature of the case requires”.⁵²

District Courts may order “good behaviour bonds”, also known as “protection orders”, and may order that compensation be paid for violations of children’s rights.⁵³

A Pikitini Court may order measures to ensure the safety of the child, such as temporary or permanent child protection orders. The Court also has the power to determine where to place the child to ensure his/her safety and care. In certain circumstances, the Court may decide to place the child with someone other than a parent or guardian. However, in such circumstances, the Court should give consideration to the desirability of keeping families together and maintaining cultural and community connections.⁵⁴

The FPA enables a court to order the defendant to pay compensation to the complainant if he or she has, as a result of an act of domestic violence, suffered personal injury, damage to property or financial loss.⁵⁵

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?

For human rights enforcement applications filed in the National Court, it appears that the name of the applicant (e.g. child’s representative, or other person or body with an interest in the protection and enforcement of human rights and freedoms) is required, though not the name of the child victim.⁵⁶ A statement of alleged or suspected breach of human rights (Form 127) requires the person, body or authority making the statement to either name or describe the people involved.⁵⁷ For applications to the Supreme Court to enforce constitutional

⁴⁸ The Supreme and National Courts of PNG website, ‘About Supreme Court’, available at: <http://www.pngjudiciary.gov.pg/home/index.php/supreme-court>.

⁴⁹ Constitution, section 11.

⁵⁰ National Court Rules, O. 16.

⁵¹ Ibid., O. 17.

⁵² Ibid., O. 12, r. 1.

⁵³ US State Department, ‘Papua New Guinea 2013 human rights report’, 2013, available at: <http://www.state.gov/documents/organization/220434.pdf>.

⁵⁴ LPA, sections 59-60.

⁵⁵ Family Protection Act, section 21.

⁵⁶ See forms in Human Rights Rules; National Court Rules, O. 23.

⁵⁷ Ibid.

rights, both the names of the child and his/her representative are required.⁵⁸

In civil proceedings, the name and address of the plaintiff, if he/she is a minor, are required, as well as the name and address of his/her next friend.⁵⁹

Section 49 of the LPA allows a magistrate to issue a warrant to search, where it appears to him, on a complaint made before him on oath, that there are reasonable grounds to believe that a person is committing an offence against a provision of the LPA or that a provision of the LPA is being contravened. This section does not require the child to be identified by their name for such proceedings to be initiated. In addition, Section 50 of the LPA provides that when a magistrate issues a warrant to arrest, i.e. when there is reasonable cause to believe that a child has been or is being ill-treated or neglected, the warrant may or may not specify the name of a particular child.

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

Representative actions are permitted in PNG where there are numerous persons with the “same interest” in proceedings to be litigated. The proceedings will be commenced by any one or more of them as representing all or some of them. The judgment or order in the proceedings will be binding on all the persons, but will not be binding against any person not a party to the proceedings except with the leave of the National Court.⁶⁰

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?

Constitutional rights are enforceable in the Supreme Court or the National Court on application “by any person who has an interest in its protection and enforcement”.⁶¹ The Supreme Court has accepted that NGOs may have an interest in the protection of human rights, and has accordingly reviewed cases filed by NGOs where constitutional rights have been infringed. The rights of any interested party to bring an action before the court are referred to in the *Somare* rules.⁶²

For example, in the case of *Miriam Wilingal*, Individual and Community Rights and Advocacy Forum (ICRAF), a local human rights NGO, made an application to the Supreme Court under section 57 of the Constitution to enforce the rights of an 18-year-old girl who was given against her will to another tribe as compensation to settle a tribal dispute. ICRAF sought a declaration that the customs and actions were inconsistent with the Constitution and repugnant to the general principles of humanity and thus unlawful. The Supreme Court decided in favor of ICRAF's application and granted the claimant her freedom.⁶³

⁵⁸ Supreme Court Rules, Form 6.

⁵⁹ National Court Rules, writ of summons and originating summons.

⁶⁰ *Ibid.*, O. 5 r. 13.

⁶¹ Constitution, section 57.

⁶² From the case *Re Petition of MT Somare* [1981] PNGLR 265.

⁶³ Freda Talao, ‘Papua New Guinea: Country report on human rights’, available at: <http://www.upf.pf/IMG/pdf/07-DH-Papua-New-Guinea.pdf>.

Furthermore, under the FPA, an application for a protection order may be made by any person on behalf of the complainant, if the complainant has given written consent for that person to make the application.⁶⁴ Since a protection order may be issued where the defendant is “likely to commit an act of violence” against the complainant,⁶⁵ NGOs would be able to file applications for such orders where children are in danger of potential violence from a family member.

Interventions in the Supreme Court are permitted by any person who has an interest in proceedings concerning the interpretation or application of a constitutional provision, but only following a court order and once an application to intervene has been filed.⁶⁶

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?

Supreme Court

An application to enforce constitutional rights under section 57 of the Constitution may be made in accordance with form 6 of the Supreme Court Rules.⁶⁷ It must include, among other things, the name of the person making the application, the circumstances giving rise to the application, and the relevant constitutional rights provisions.⁶⁸

National Court

A human rights proceeding may be commenced in a National Court by a writ of summons, originating summons, or by filing a human rights enforcement application, and must identify, as far as practicable: (a) the right or freedom that has been allegedly infringed or of which there is a reasonable probability of infringement; and (b) the orders, declarations or other relief that is sought.⁶⁹ The application may be made by filling in Form 124 and giving it to: a Clerk of the District Court, the Assistant Registrar in the applicant’s town, a Judge of the National Court in the applicant’s Province, or the Registrar of the National Court.⁷⁰

An application for judicial review may be made only with leave of the National Court. An application for leave must be made by originating summons ex parte to the National Court, except in vacation when it may be made to a Judge in chambers, and must be supported by a statement, setting out, amongst other

⁶⁴ Family Protection Act, section 7.

⁶⁵ Ibid., section 16.

⁶⁶ Supreme Court Rules, O. 4 Divisions 7-8.

⁶⁷ Ibid., O. 6 r. 3.

⁶⁸ Ibid., O. 6 r. 3, form 6.

⁶⁹ Human Rights Rules; National Court Rules, O. 23 Part 8 r. 7.

⁷⁰ Ibid., Form 124.

things, the name and description of the applicant.⁷¹ The Court will not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.⁷² When leave has been granted to make an application for judicial review, the application shall be made by originating summons to the Court.⁷³

Civil cases involving claims over K10,000 and certain criminal cases may also be commenced in the National Court.⁷⁴ All cases are commenced by instituting an originating process, which comes in different forms. In civil cases, the lawyer or the plaintiff files the appropriate summons according to the National Court Rules at the registry and pays the filing fee.⁷⁵

District Courts

District Courts have civil jurisdiction over matters which do not exceed K10,000, where the court consists of one or more principal magistrates, or K8,000, where the court consists of one or more magistrates.⁷⁶ District Courts have jurisdiction over matters under the LPA in areas where no Pikinini Court has been established. Civil cases may be filed in any District Court near the plaintiff, which are usually located in the provincial or district centres. The plaintiff must file an affidavit, complaint, summons to a person upon complaint, proof of service and other supporting documents before their case can be listed for hearing.⁷⁷

Pikinini Courts

Pikinini Courts cover offences against children under the LPA.⁷⁸ In areas where no Pikinini Court has been established,⁷⁹ the District Court may exercise its jurisdiction in that area as if it were a Pikinini Court.

Juvenile Courts

Juvenile Courts are criminal courts specifically established to hear and determine all indictable offences for juveniles. However, Juvenile Courts do not have the jurisdiction to hear cases involving homicide, rape or offences punishable by death or life imprisonment, which are instead to be tried by the National Court.⁸⁰ Juvenile Courts are closed courts and typically seek to impose non-custodial sentences. However, should the gravity of the crime warrant a custodial sentence, a Juvenile Court may order the juvenile to be imprisoned in a

⁷¹ Ibid., O. 16 r. 3.

⁷² Ibid.

⁷³ Ibid., O. 16 r. 5.

⁷⁴ The Supreme and National Courts of PNG, 'About National Court', available at: <http://www.pngjudiciary.gov.pg/home/index.php/national-court/about-national-court>.

⁷⁵ See Ibid.

⁷⁶ District Court Act, section 21.

⁷⁷ Magisterial Services of PNG, 'The civil court process', available at: <http://www.magisterialservices.gov.pg/how-to-go-to-court.aspx>.

⁷⁸ LPA, section 37.

⁷⁹ Ibid., section 37(3)(a).

⁸⁰ Magisterial Services of PNG, 'The Juvenile Court', available at: <http://www.magisterialservices.gov.pg/juvenile-court.aspx>.

Juvenile Remand Centre.⁸¹

While there is provision for the appointment of special Juvenile Court Magistrates and the establishment of Juvenile Courts under the Juveniles Courts Act 1991, often these courts are not established.⁸² In such cases the National Court has jurisdiction but should be mindful of the Juveniles Courts Act 1991.

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?

The filing of a human rights enforcement application in the National Court or human rights application in the Supreme Court is free of charge.⁸³ As to whether a filing fee should be paid by any plaintiff filing a writ or summons, the Registrar of the National Court will exercise his/her discretion, taking into account the nature of the proceedings and whether, in his/her opinion, payment of a filing fee might be a hardship to the plaintiff.⁸⁴ No fees or charges are payable to a District Court in relation to the making of an application for a protection order under the FPA.⁸⁵

In all other relevant cases, plaintiffs/applicants are expected to pay registration fees when filing a case in a District Court, National Court or Supreme Court.⁸⁶ The amount of such fees will be provided upon filing, as it will depend on the nature of the form lodged with the court.⁸⁷ However, a child complainant or their representatives may be eligible for legal aid from the OPS, as stated under part II.D, to cover such costs.

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?

There are NGOs in PNG that provide legal advice on a pro bono basis where children's rights have been infringed. In particular, ICRAF is a local NGO whose staff comprises lawyers and paralegals to legally assist women and children who have been victims of acts of violence. ICRAF also provides legal advice in children's and human rights matters. The Salvation Army helps children in conflict with the law by working with the police and courts, and

⁸¹ Ibid.

⁸² See *State v. A Juvenile M* [2005] PGNC 141.

⁸³ Human Rights Rules; National Court Rules, O. 23 Part 8 r. 7(6); The Supreme and National Courts of PNG, 'Fees', available at:

<http://www.pngjudiciary.gov.pg/home/index.php/supreme-court/acts-rules/76-fees>.

⁸⁴ Ibid.

⁸⁵ Family Protection Act, section 25.

⁸⁶ The cost for filing is K2.00 for commencing a case in front of the District Courts: see the Magisterial Service of PNG website at: <http://www.magisterialservices.gov.pg/how-to-go-to-court.aspx>; filing fees for the National Court are set out in the National Court Rules and Supreme Court Rules.

⁸⁷ See the Supreme and National Courts of PNG, 'Fees', for more details.

providing social support services to child victims and witnesses of violence before, during and after trials.⁸⁸ Generally however there are concerns that there are very limited legal aid resources.

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?

Proceedings in respect of torts cannot, in principle, be brought more than six years after the cause of action arose.⁸⁹ However, when a person's right of action accrues when they are less than 21 years old, the action may be brought at any time within six years of the person turning 21.⁹⁰ Therefore, where the violation of a child's rights constitutes a tort, the child will be able to bring civil action to court six years from the date he/she turns 21.

Under the Criminal Code Act, prosecution must be commenced within six months after the relevant offence was committed.⁹¹ The Criminal Code Act does not provide for any extension of the time period where the victim is a child.

The LPA applies to children in need of protection, meaning that the violation must currently be occurring or must be likely to occur at the date of action. It does not contain provisions that would allow children to seek civil damages for violations that occurred when they were children.

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?

The Evidence Act 1975⁹² provides for the protection of vulnerable and intimidated witnesses. This covers children under the age of 18 years. In criminal proceedings, if the court determines that the giving of evidence may be diminished due to fear of distress in connection with testifying in the proceedings, it has the power to use special measures to protect the witness. These can include a screen restricting the view of the witness, planned seating arrangements,⁹³ a closed court or the examination of a witness through an intermediary.⁹⁴

In practice, this means that the magistrate or judge can make the following practical directions to ensure that children are protected:

⁸⁸ UNICEF, 'Annual report 2013 – Papua New Guinea', 2013, p. 10, available at: http://www.unicef.org/about/annualreport/files/Papua_New_Guinea_COAR_2013.pdf.

⁸⁹ Frauds and Limitation Act 1988, section 16, available at: http://www.paclii.org/pg/legis/consol_act/fala1988230/.

⁹⁰ Ibid., section 22.

⁹¹ Criminal Code Act 1974, section 624, available at: http://www.paclii.org/pg/legis/consol_act/cca1974115/

⁹² Available at: http://www.paclii.org/pg/legis/consol_act/ea197580/.

⁹³ This was put in practice in the case of *State v. Juvenile RB* [2010] PGNC where the complainant of sexual assault was a child under 12.

⁹⁴ Evidence Act 1975, section 37B. Guidelines for the admissibility of evidence from children were established in *Rolf Schubert v. The State* [1979] PNGLR 66 and *Johnson Beraro v. The State* [1988-89] PNGLR 562 and are still referred to.

- tell the public to leave the court while the child gives his/her evidence;
- allow the child to have a support person with him/her while he/she testifies;
- allow the child to give evidence behind a screen in court, or directly to the magistrate in his/her room;
- grant an adjournment if it is in the interests of the child witness; and/or
- allow the child witness to give evidence through closed circuit television or similar communication technology, including videotaped interview.

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

It is unclear how long a court will take in making a decision as to whether there has been a violation of a child's rights. The Supreme Court Rules provide for pre-hearing conferences in all matters before the Supreme Court. At such pre-hearing conferences, the judge will consider and determine or give such directions as may be necessary to ensure the prompt disposition of the matter.

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

The Pikitini Courts may refer matters of law or special cases to the National Court. Any conviction, order or adjudication under the LPA may be appealed in front of the National Court. The applicable procedure will be the same procedure that applies to District Court appeals as discussed below.

Decisions made in the District Court can be appealed to the National Court. This may be done by filing a Notice of Appeal within one month of the decision. After 40 days, a court or magistrate has the same authority to enforce the conviction, order or adjudication as if it had not been appealed against.⁹⁵

Decisions of the National Court may be appealed to the Supreme Court. The Supreme Court is the final court of appeal and deals with both civil and criminal appeals, as well as appeals in judicial review proceedings. The Supreme Court Act 1975⁹⁶ and Supreme Court Rules provide for the court's powers and procedures on an appeal from the National Court. The Supreme Court also enjoys the power to review decisions of the National Court (when an appeal is not available) and to consider references on constitutional issues, given to it by the Constitution.⁹⁷

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?

As the PNG legal system is based on English common law, PNG courts adhere to the doctrine of precedent, whereby lower courts would be bound to follow the decisions of higher courts, such as the Supreme Court.⁹⁸ Therefore negative

⁹⁵ District Courts Act, sections 219-238.

⁹⁶ Available at: http://www.paclii.org/pg/legis/consol_act/sca1975183/.

⁹⁷ The Supreme and National Courts of PNG, 'About Supreme Court'.

⁹⁸ Chambers & Partners, 'Papua New Guinea – law and practice', 2014-2015, available at:

decisions could potentially have a long-term impact. In certain situations, however, the Supreme Court has the power to review its own previous decisions and overrule any case authority.⁹⁹

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

According to the US State Department, courts “had difficulty enforcing judgments”.¹⁰⁰ No further information is available on this issue.

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 law

Customary law, which is derived from the customs of the various indigenous peoples of PNG, forms part of the underlying law of PNG.¹⁰¹ Customary law applies unless it is, among other things, inconsistent with a written law, or its application and enforcement would be contrary to the basic rights guaranteed by Part III Division 3 of the Constitution.¹⁰² Other rules concerning the application of customary law are provided in the Underlying Law Act 2000.

Limited access to justice

Due to the geographical terrain of PNG, most of the country’s population live in isolation and do not have access to basic services, including legal services. For example, the government provides legal aid to the general public through the OPS. However, this is confined to a few major centres in the country, thus limiting accessibility to the majority of rural-based people. They also do not have the necessary financial capacity to meet vital expenses when pursuing human rights violations in towns and cities, such as the cost of transportation, upkeep in urban areas and fees to secure legal services.¹⁰³

There is also a reluctance to use the formal justice system. Communities often resort to mediation and pay compensation, without involving the courts, to resolve issues of family and sexual violence (see ‘Village Courts’ below).¹⁰⁴ This results in a high rate of reoffending.¹⁰⁵

There is increasing concern that detainees in the Australian asylum seekers’ centre

<http://www.chambersandpartners.com/guide/practice-guides/location/241/7317/1550-200>.

⁹⁹ The Supreme and National Courts of PNG, ‘About Supreme Court’.

¹⁰⁰ US State Department.

¹⁰¹ Underlying Law Act 2000, section 3, available at:

http://www.paclii.org/pg/legis/consol_act/ula2000173/.

¹⁰² Ibid., section 4.

¹⁰³ UNICEF, ‘Protection, care and support for children vulnerable to violence, abuse, exploitation and neglect in the context of the HIV epidemic in PNG’, p. 12, available at:

http://www.unicef.org/eapro/four_year_PNG_strategy.pdf.

¹⁰⁴ Ibid.

¹⁰⁵ UNICEF, ‘Annual report 2013 - Papua New Guinea, p. 3.

on Manus Island, who may include children among them, do not have access to the PNG legal system.¹⁰⁶

Village Courts

With around 85 per cent of the population unable or unwilling to access the formal justice system, the most relevant justice mechanism in communities is often the Village Court.¹⁰⁷ The primary function of Village Courts is to “ensure peace and harmony in the area for which it is established by mediating in, and endeavouring to obtain just and amicable settlement of disputes”.¹⁰⁸ They have jurisdiction in civil and criminal matters, and are authorised to apply customary law, whether or not it is inconsistent with any Act.¹⁰⁹ They determine their own procedures,¹¹⁰ and lawyers are not allowed into their proceedings.¹¹¹ The number of Village Courts has expanded rapidly since their introduction, with a total of about 3,000 throughout the country,¹¹² and they have been well accepted by the population at village level.¹¹³

Village Courts are largely unregulated and handle many human rights matters. However, anecdotal evidence suggests that officials frequently exceed their jurisdiction or make orders that contravene the protective provisions in domestic law, the Constitution and the international treaties. There are low levels of legal and rights literacy amongst village and community leaders, and many of the decisions made in the Village Courts discriminate against women and children.¹¹⁴ For example, it is reported that Village Courts, as well as District Courts, often hesitated to interfere directly in domestic matters. Village Courts regularly ordered that compensation be paid to a victim’s family in cases of domestic abuse rather than issue a domestic court order.¹¹⁵

Human Rights Commission

As at April 2015, the PNG government is currently in the process of establishing a human rights commission in the country. This was a proposal that was originally endorsed in 1997, and for which a bill was drafted in 2008. It is intended that this body will investigate human rights violations and mediate cases brought before it.¹¹⁶

¹⁰⁶ Helen Davidson and Paul Farrell, ‘Asylum seekers on Manus Island should be made aware of legal rights, Court told’, The Guardian online, 30 January 2014. The arrangements for detention of Australian asylum seekers in PNG have been subject to constitutional challenge: see *Namah v. Pato* [2014] PGSC 1. See also BBC News, ‘Australia announces inquiry into asylum child detainees’, 3 February 2014.

¹⁰⁷ UNICEF, ‘Annual report 2013 - Papua New Guinea’.

¹⁰⁸ Village Courts Act 1989, section 52, available at: http://www.paclii.org/pg/legis/consol_act/vca1989172/.

¹⁰⁹ *Ibid.*, section 57.

¹¹⁰ *Ibid.*, section 77.

¹¹¹ *Ibid.*, section 80.

¹¹² UNICEF, ‘Protection, care and support for children vulnerable to violence, abuse, exploitation and neglect in the context of the HIV epidemic in PNG’.

¹¹³ Australian Law Reform Commission website, ‘Indigenous justice mechanisms in some overseas countries: Models and comparisons’, available at: <http://www.alrc.gov.au/publications/30.%20Indigenous%20Justice%20Mechanisms%20in%20some%20Overseas%20Countries%3A%20Models%20and%20Comparisons/pa>.

¹¹⁴ UNICEF, ‘Protection, care and support for children vulnerable to violence, abuse, exploitation and neglect in the context of the HIV epidemic in PNG’.

¹¹⁵ US State Department.

¹¹⁶ Edwin Fidelis, ‘Human rights commission for PNG’, 28 April 2015, available at:

If established, this body will be another mechanism through which children may bring complaints about violations of their rights.

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