

ACCESS TO JUSTICE FOR CHILDREN: VANUATU

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I. What is the legal status of the Convention on the Rights of the Child?

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

The CRC was ratified by Vanuatu¹ through the *Convention on the Rights of the Child (Ratification) Act 1992*, which came into effect on 3 May 1993. Where no further legislation is required to implement the CRC, its provisions are part of the national legal system.² The circumstances in which treaties require ratification can be found in Article 26 of the Constitution 1980. The Vanuatu Ombudsman has held that the CRC is binding in Vanuatu.³

Vanuatu ratified the Optional Protocols to the CRC on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography in 2007.⁴

B. Does the CRC take precedence over national law?

Vanuatu's courts have not explicitly addressed the issue of the place of treaties in the national legal hierarchy. The Constitution is clearly the highest legal authority,⁵ but it is not clear whether treaties have superior authority to other national legislation.

See Section I.E. below for more information on how domestic courts have used the CRC.

C. Has the CRC been incorporated into national law?

Ratified treaties automatically become part of national law and so the CRC has been incorporated. However, only parts of the Convention that do not require specific legislation in order to be implemented may be directly applied.⁶ In *Molu v. Molu*, the court held the CRC was binding on the Republic of Vanuatu without any

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 See *Molu v. Molu* [1998] VUSC 15. Summary and link to full judgment available here: <http://crin.org/node/7048>

³ Office of the Ombudsman Public Report on the discriminatory criteria of the Vanuatu national examinations board for admission to year 7, 13 August 1999 (Discriminatory Criteria of the Vanuatu National Examinations Board for Admission to Year 7 [1999] VUOM 13, available on paclii.org.

⁴ 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=ind&mtdsg_no=iv-11-c&chapter=4&lang=en.

⁵ Constitution of Vanuatu, Article 23

⁶ *Molu v. Molu* [1998] VUSC 15.

reservations. The Supreme Court endorsed that view in 2012.⁷

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

Some provisions of the CRC can be directly applied in Vanuatu's courts. For example, the Supreme Court has directly applied Article 3(1) of the Convention, as "no specific legislation is required to implement it as opposed to other Articles of the said Convention"⁸ and Article 21 in the context of adoption proceedings.⁹ A range of articles in the CRC have been applied by the courts and they seem increasingly willing to do so. For example, Article 5 has been referred to in the case of a child offered as part of customary compensation;¹⁰ Article 34 was applied in *Public Prosecutor v. Molisingi* [2015] VUSC 47 regarding the imprisonment of child offenders;¹¹ Article 37 was applied in *Public Prosecutor v. Malikum* [2010] VUSC 11. Further the Vanuatu Ombudsman has found Vanuatu in breach of the CRC regarding the detention of a child in an adult prison.¹²

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

In addition to the cases mentioned above, the CRC was also applied in the 1998 case of *Nauka v. Kaurua*. The court applied Article 3(1) of the CRC in relation to a child custody dispute between a separated husband and wife and their four children.¹³

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?

There are a number of general mechanisms by which it is possible to challenge rights violations, but domestic law contains very few provisions that specifically address the right of children to challenge rights violations.

Any person who alleges that their rights under the Constitution have been violated may apply to the Supreme Court to enforce that right.¹⁴ See Section III.A for more details.

Any person can bring a criminal complaint before the courts where he or she "believes from reasonable and probable cause that an offence has been committed by

⁷ *Tally v. Tally* [2012] VUSC 122.

⁸ *Molu v. Molu* [1998] VUSC 15.

⁹ *Re: Adoption Act 1958 *UK), Child M* [2011] VUSC 350. Available at: <http://www.paclii.org/vu/cases/VUSC/2011/16.html>; see also on adoption *In re MM, Adoption Application by SAT* [2014] VUSC 78.

¹⁰ *Public Prosecutor v. Nawia* [2010] VUSC 52

¹¹ See also *Public Prosecutor v. Kaloran* [2015] VUSC 29 and *Public Prosecutor v. Markmoi* [2015] VUSC 94.

¹² Detention of 12-year-old child in Santo prison [2002] VUOM 2, available on [paclii.org](http://www.paclii.org)

¹³ *Nauka v. Kaurua* [1998] VUSC 15. Available at: <http://www.paclii.org/vu/cases/VUSC/1998/53.html>. See also more recently *Tally v. Tally* [2012] VUSC 12.

¹⁴ Constitution of Vanuatu, Article 6(1)

any person”.¹⁵ The judicial officer who receives the complaint is then empowered to formalise any charge, where necessary, and may issue a summons or warrant to compel an alleged offender to appear before an appropriate court.¹⁶

Where a person has been detained, the Supreme Court can exercise its powers of habeas corpus to bring an individual before the court to determine the legality of his or her detention.¹⁷ Claims for habeas corpus are governed by the Civil Procedure Rules.¹⁸

Island Courts are empowered to address issues relating to customary law and exercise both criminal and civil jurisdiction.¹⁹

The Ombudsman is empowered to enquire into the conduct of any government agency, defect in any law or administrative practice, suspected discriminatory practice, any breach of the Leadership Code and to undertake mediation.²⁰ The Ombudsman may undertake any of these actions either on receipt of a complaint or on his or her own initiative.²¹ Following a complaint, the Ombudsman has the power to make recommendations and, if appropriate, to refer the matter to the Public Prosecutor.²²

However, to date, only four matters recorded in the Ombudsman’s reports relate to children and international human rights conventions. The relevant reports relate to the premature death of newborn twins,²³ detention of a 12 year-old child in Santo Prison,²⁴ discriminatory criteria of national examination boards,²⁵ and discrimination within the Citizenship Act.²⁶

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?

Persons under the age of 18 do not have legal capacity under Vanuatu’s law.²⁷ Therefore, children can only start or defend legal proceedings by acting through a litigation guardian²⁸ and must act through that guardian throughout legal

¹⁵ Criminal Procedure Code, Section 35

¹⁶ Criminal Procedure Code, Section 36(1)

¹⁷ Criminal Procedure Code, Section 228(1). Available at:

http://www.paclii.org/vu/legis/consol_act/cpc190/.

¹⁸ See Civil Procedure Rules, Part 16 Division 2. Available at:

<http://www.paclii.org/vu/rules/CPRRules2002/CPRMain.html>. Note, however, there is no reported case of habeas corpus having ever been granted in Vanuatu.

¹⁹ Island Courts Act, Sections 7, 8 and 10. Available at: http://www.paclii.org/vu/legis/consol_act/ica164/.

²⁰ Ombudsman Act, No. 27 of 1998, Section 11(1). Available at:

http://www.paclii.org/vu/legis/consol_act/oa114/.

²¹ Ombudsman Act, No. 27 of 1998, Section 11(2).

²² Ombudsman Act, No. 27 of 1998, Section 31.

²³ [1997] VUOM 8; 1997.3. Available at: <http://www.paclii.org/vu/ombudsman/1997/8.html>.

²⁴ [2003] VUOM 2; 2003.02 Available at <http://www.paclii.org/vu/ombudsman/2003/2.html>.

²⁵ [1999] VUOM 13; 1999.13. Available at: <http://www.paclii.org/vu/ombudsman/1999/13.html>.

²⁶ [1999] VUOM 8; 1999.08. Available at: <http://www.paclii.org/vu/ombudsman/1999/8.html>.

²⁷ Civil Procedure Rules, 3.8(1). A child is defined as a person under the age of 18 in Part 20 of the Civil Procedure Rules. Available at: http://www.paclii.org/vu/legis/consol_sub/cpr216/. 18 is the age of majority but a number of different age limits apply to different activities such as the age of marriage.

²⁸ Civil Procedure Rules, 3.8(3)

proceedings.²⁹ However, proceedings can be brought in the name of a child.

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

All children are considered to lack legal capacity and so must act through legal guardians. Where children are the centre of a dispute between parents it may be desirable, although not always possible, to appoint a guardian ad litem to represent their views.³⁰ See Section II.B. for more information.

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

Article 5(2)(a) of the Constitution of Vanuatu provides that any person charged with a serious offence is entitled to a lawyer and Article 56 of the Constitution requires the Parliament to provide for the Office of the Public Solicitor (OPS), whose function it is to provide legal assistance to “needy persons”. The Public Solicitor is appointed by the President on advice of the Judicial Service Commission.³¹

The term “needy person” is not explicitly defined in national law, but in deciding whether it applies in any given case, the following criteria must be considered: “the means of the person to meet the probable cost of obtaining alternative legal assistance, the availability of such assistance and the hardship which might result to the person if compelled to obtain legal assistance other than by the Public Solicitor”.³² If the Public Prosecutor turns down an application for legal assistance, an applicant can apply to the Supreme Court, which is empowered to direct the OPS to provide a person with legal assistance.³³

There is no explicit limitation on the types of proceedings for which the OPS may provide legal assistance. Up to date information on the activities of the Public Solicitor is not readily available, but as of 2000, the OPS had staff of two lawyer and two secretaries, which commentators noted effectively narrowed the definition of a need person to those in custody in respect to criminal cases and the occasional civil case.³⁴

In criminal appeal proceedings, the court and appeal court judges have the discretion to assign an advocate to an appellant where “it appears desirable in the interests of the justice that the appellant should have legal aid and that he has not sufficient means to enable him to be represented.”³⁵

E. Are there any other conditions or limits on children or chosen legal

²⁹ Civil Procedure Rules, 3.8(4). See for example *S, An Infant v. Moti* [1999] VUSC 39.

³⁰ *Fisher v. Fisher* [1991] VUCA 2, especially when there are no facilities such as welfare officers or welfare reports.

³¹ Constitution of Vanuatu, Article 56.

³² Public Solicitor Act, No. 24 of 1984, Section 5(2). Available at: http://www.paclii.org/vu/legis/consol_act/psa189/.

³³ Public Solicitor Act, No. 24 of 1984, Section 5(1) and (3)

³⁴ See Hill, E.R., “Clinical Legal Education in a Developing Island Jurisdiction - A Unique Environment” [2002] LegEdRev 10; (2000) 11(2) Legal Education Review 253. Available at: <http://www.austlii.edu.au/au/journals/LegEdRev/2000/10.html>.

³⁵ Criminal Procedure Code, Section 201(1)

representatives bringing cases (e.g. would a child's parents or guardian have to agree to a case being brought)?

No further barriers to children bringing cases could be found. However, there may be customary barriers which inhibit children when bringing complaints to either formal or informal forums.

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 challenge be brought?

Any person who alleges that their rights under the Constitution have been violated may apply to the Supreme Court to enforce that right.³⁶ These rights can only be enforced vertically - that is against the State³⁷ - there is no provision to allow a victim of a violation of his or her constitutional rights to enforce that right against individuals or private entities.³⁸

See Section II.A above for more details on other judicial mechanisms.

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

The Supreme Court has jurisdiction to hear and determine any civil, criminal or customary law case.³⁹ In cases related to the enforcement of constitutional rights, the Supreme Court can issue whatever orders, writs or directions necessary to enforce the right, including the payment of compensation.⁴⁰ In practice, the Supreme Court has set aside laws that it has ruled inconsistent with the Constitution,⁴¹ used its authority to quash the decisions of public bodies,⁴² ordered public bodies to take actions to meet their legal obligations,⁴³ and nullified customary law that conflicts with the Constitution.⁴⁴

The Court can also exercise pre-legislative scrutiny of bills. Where the President considers that a bill is inconsistent with the Constitution, he or she may refer it to the Supreme Court. No bill can enter into force if the Supreme Court considers it

³⁶ Constitution of Vanuatu, Article 6(1) and 53(1)

³⁷ Miranda Forsyth, 'Is there Horizontal or Vertical Enforcement of Constitutional Rights in Vanuatu? *Family Kalontano v. Duruaki Council of Chiefs*' (2005) 9(2) *Journal of South Pacific Law*. Available at: <http://www.paclii.org/journals/fJSPL/vol09no2/10.shtml>

³⁸ Ibid.

³⁹ Judicial Services and Courts Act, No. 54 of 2000 and 4 of 2003, Section 28(1). Available at: http://www.paclii.org/vu/legis/consol_act/jsaca280/.

⁴⁰ Constitution of Vanuatu, Article 6(2)

⁴¹ See, for example, *Bohn v. Republic of Vanuatu* [2013] VUSC 42. Available at: <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2013/42.html>.

⁴² See, for example, *Michel v. Public Service Commission* [1998] VUSC 10. Available at: <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/1998/10.html>.

⁴³ See, for example, *Masdan v. Electoral Commission* [2002] VUSC 22. Available at: <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2002/22.html>.

⁴⁴ See *Public Prosecutor v. Buleuru* [2004] VUSC 126. Available at: <http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2004/126.html>.

inconsistent with a provision of the Constitution.⁴⁵

In judicial review proceedings, complainants may challenge the lawfulness of any Act of Parliament, subsidiary legislation, order or by law made by a person empowered to make such legislation or of a decision. In resolving these cases, the court may make the following orders:

- A mandatory order: requiring a named person to take a specific action;
- A prohibiting order: preventing a person from taking a specific action;
- A quashing order: preventing a decision from being given force;
- Require a decision-maker to reconsider an issue;
- Direct a decision-maker to reconsider an issue in accordance with the court's decision.

Island courts are empowered to order compensation and restitution of property in civil cases and are limited to criminal fines of less than VT 24,000⁴⁶ or a sentence of imprisonment of 6 months or less.⁴⁷

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?

The Ombudsman has been willing to address violations of children's rights on a collective basis (see Section II.A. above) and both the Ombudsman and the courts anonymise children in their reports.

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

In civil proceedings, courts have the power to join claims if a common question of law or fact is involved in all the claims; the claims arise out of the same transaction or event; or for any other reason the court considers that the claims should be considered in a single proceeding.⁴⁸ In such proceedings the court can appoint a representative of the relevant parties, but all interested people must be parties to the suit.⁴⁹

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?

In civil procedure, only "persons" can become party to proceedings. For the purposes of the Civil Procedure Rules, a "person" is defined to include the State of Vanuatu and the Government of Vanuatu, but there is no specific mention of NGOs or other interested organisation being able to file or intervene in proceedings. Claims based on constitutional rights can be brought by anyone who alleges that his or her

⁴⁵ Constitution of Vanuatu, Article 16(4)

⁴⁶ At the time of writing, this was equivalent to UK£ 150 or \$US 250.

⁴⁷ Island Courts Act, Sections 11 and 13

⁴⁸ Civil Procedure Rules, 3.3(1). Available at:

<http://www.paclii.org/vu/rules/CPRRules2002/CPRMain.html>.

⁴⁹ Civil Procedure Rules, 3.12

right has been or is likely to be infringed.⁵⁰ Anyone who considers “that a provision of the Constitution has been infringed *in relation to him*” may apply to the Supreme Court for redress. This wording does not seem to foresee NGOs filing constitutional challenges on matters of public interest.

At the time of writing, no case could be found in which an NGO or civil society organisation had brought a case on behalf of children or intervened in such a case.

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?

Part 2 of the Civil Procedure rules details how to start civil proceedings. Children are required to start and defend proceedings through a litigation guardian, but the filing process is not otherwise altered to enable children to bring cases.⁵¹

The procedure for launching a case through Island Courts is laid out in the Island Courts Act, but the Act contains no specific reference to procedural amendments for children.⁵²

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 question or demonstrate a likelihood of success)? Would child complainants or their representative be expected to pay court costs or cover other expenses?

In addition to the Office of the Public Solicitor (see Section II.D above), free legal advice is offered through a number of non-governmental organisations, universities and community centres.⁵³

Court fees are set out under Schedule 1 of the Civil Procedure Rules.⁵⁴ There is no exemption for child complainants in the corresponding rules.

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?

Legal advice is offered by the Vanuatu Women’s Centre, for women and children experiencing domestic violence and child abuse. There is also a family protection

⁵⁰ Constitution of Vanuatu, Article 6(1).

⁵¹ See Civil Procedure Rules, Part 2 and 3.8.

⁵² See Island Court Rules, particularly Rule 1. Available at:

http://www.paclii.org/vu/legis/consol_sub/icr213/.

⁵³ See Hill, E.R., “Clinical Legal Education in a Developing Island Jurisdiction - A Unique Environment” [2002] LegEdRev 10; (2000) 11(2) Legal Education Review 253.

⁵⁴ Available at:

http://www.paclii.org/vu/Vanuatu_Civil_Court_Practices/TAB_8_Costs_and_Fees/2_CPR_Sched_1.pdf/

unit in the Vanuatu Police in four provinces. However, many of these services are only available in the capital city.⁵⁵ There is a Child Desk Officer in the Department of Women's Affairs but it is not clear to what extent this is a source of information or assistance.

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?

Limitation periods for civil proceedings are set out in the Limitation Act. In general, civil claims must be brought within 6 years of the violation, but under certain circumstances this period can be extended, including where the claimant is disabled.⁵⁶ For the purposes of the of this exception, "infants" are considered disabled, and so may bring a complaint within 6 years of ceasing to be an infant.⁵⁷ However, the definition of the infant for the purposes of the Limitation Act, is not clear.

Time limits for bringing criminal prosecutions vary according to the severity of the offence. For the most serious offences, those punishable with more than 10 years imprisonment, a prosecution must be brought within 20 years of the alleged offence.⁵⁸

A judicial review must generally be brought within 6 months of the enactment or a decision, though the court can extend this time if "it is satisfied the substantial justice requires it."⁵⁹

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?

Children are able to give evidence in criminal and civil proceedings. Evidence in criminal proceedings must generally be given under oath, but where a child "of tender years" is called as a witness and the court is of the opinion that he or she does not understand the nature of the oath, the child may still give evidence if he or she "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."⁶⁰ Criminal proceedings must generally be heard in public, but the court has the discretion to exclude the public "for reasons of decency, security of the State or where otherwise authorised by law".⁶¹

In civil proceedings, a child is still able to give testimony and where a child is required to give evidence the court must "take whatever steps are necessary to enable the child to give evidence without intimidation, restraint or influence".⁶² To

⁵⁵ See Hill, E.R., "Clinical Legal Education in a Developing Island Jurisdiction - A Unique Environment" [2002] LegEdRev 10; (2000) 11(2) Legal Education Review 253.

⁵⁶ Limitation Act, Section 10(1). Available at: http://www.paclii.org/vu/legis/consol_act/la133/.

⁵⁷ Limitation Act, Section 10(1) and (3).

⁵⁸ See Penal Code, Section 15 for full list of limitation periods for criminal offences. Available at: http://www.paclii.org/vu/legis/consol_act/pc66/.

⁵⁹ Civil Procedure Rules, 17.5(1) and (2).

⁶⁰ Criminal Procedure Code, Section 83(1) and (2).

⁶¹ Criminal Procedure Code, Section 26(1) and (2).

⁶² Civil Procedure Rules, Rule 11.10(1).

this end, the court may allow a child to give evidence screened from the rest of the court, allow the child to sit outside of the court, allow only lawyers to be present while the child gives evidence or take any other measure that may assist the child to give evidence.⁶³ It is not clear whether these child friendly measures would also be available in criminal proceedings. There are no rules excluding a child's evidence but 'trial judges may need to warn themselves of the danger of convicting an accused person on the uncorroborated evidence of the complainant' in cases where the complainant is a child.⁶⁴

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

At the time of writing, information could not be found on how long it takes for cases to be resolved.

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

Vanuatu has two legal systems: the formal legal system inherited from its colonial past and customary law. Island Courts can rule on matters of customary law, but these can be appealed through the formal legal system via the Magistrates' Court. Decisions of Magistrates may be made to the Supreme Court and finally to the Court of Appeal.⁶⁵

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?

None.

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

None.

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.

The Committee on the Elimination of Discrimination against Women has been critical of discrimination in island courts, which makes it difficult for women to assert their rights through those courts, which may reassert discriminatory gender norms.⁶⁶

⁶³ Civil Procedure Rules, rule 11.10(2).

⁶⁴ *Public Prosecutor v. Kombe* [2015] VUSC 51. Corroborating evidence however is not required if the judge is satisfied that the burden of proof is discharged: *Walker v. Public Prosecutor* [2007] VUCA 12, applied in *Public Prosecutor v. Sam* [2014] 133

⁶⁵ See *Combined initial, second and third periodic reports of Vanuatu to the UN Committee on the Elimination of Discrimination against Women*, CEDAW/C/VUT/1-3, 30 November 2005, paras 27 and 28.

⁶⁶ UN Committee on the Elimination of Discrimination against Women, CEDAW/C/VUT/CO/3, 11 June 2007, paras 38 and 39.

In the 2014 Universal Periodic Review, the UN Human Rights Council noted positively that the Vanuatu government had recently committed to developing best practices concerning juveniles,⁶⁷ and an interim National Human Rights Committee had been appointed in 2013, as a step towards establishing a national human rights institution.⁶⁸

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

⁶⁷ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review : Vanuatu*, A/HRC/26/9, 4 April 2014, para. 21, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/VUSession18.aspx>.

⁶⁸ *Ibid.*, para. 24.