

Submission for the report of the OHCHR on article 13 of the Convention on the Rights of Persons with Disabilities

Submitted by the Child Rights International Network - CRIN (www.crin.org) 28 April 2017.

This submission focuses on access to justice for children under article 13 of the Convention on the Rights of Persons with Disabilities. In particular, it draws on our global research on access to justice for children (www.crin.org/home/law/access) and our work on children living in institutions. The research addressed the rights of all children rather than children with disabilities specifically.

In 2017 we published a guide, *When the State doesn't care: A guide to accessing justice for violations of children's rights in care institutions in Eastern and Southeastern Europe and the Caucasus* (www.crin.org/node/43219). The guide focuses on children in care institutions in general, in which children with disabilities are disproportionately represented.

1. Does your country have laws, policies or guidelines on access to justice, at any level of government, which ensure persons with disabilities, particularly women and children with disabilities:

Information included in this section refers to global trends on access to justice for children, using examples from individual countries to illustrate. Full discussion of the issues raised is available in the publications highlighted above.

a. To participate in judicial and administrative proceedings on an equal basis with others in their role as witness, juror, complainant, defendant or other, including through the provision of procedural and age-appropriate accommodations (please identify the text of those provisions):

Inadequate provisions permitting **children to be heard and participate in legal proceedings** can act as a further bar to children accessing justice. A little over a quarter of States enshrine a right of children to be heard in all matters concerning them, while a further 84 guarantee a more qualified right to be heard in certain legal proceedings. More than a quarter of States - 58 countries spread across the Americas, Asia, Africa and the Middle East and North Africa (MENA) - do not recognise the right to be heard in their legislation. The right is particularly poorly protected in Asia and MENA.

Children also commonly face serious barriers in **giving evidence**, both in terms of their right to do so at all and in the manner in which the courts permit them to do so. A quarter of States set strict minimum ages for appearing as a witness or attaching limited weight to the evidence of a child. Rigid age limits fail to recognise the evolving capacities of children, that some children will be capable of giving evidence when they are younger than others and the fact that even the youngest children are able to express their views¹ and should be able to when it is relevant to a case. Once the hurdle of being able to give evidence is overcome,

¹ Committee on the Rights of the Child, General Comment No. 7 (2005) implementing child rights in early childhood, CRC/C/GC/7/Rev.1, 20 September 2006, para. 14.

child-friendly mechanisms are required to ensure that children are able to give evidence effectively. This will particularly be the case where the child is a victim and the trial process risks revictimising the child. Yet child-friendly procedures allowing children to give evidence exist in only a third of countries.²

Guaranteeing the **privacy** of children in legal proceedings is key to ensuring that children are not revictimised while seeking redress for violations of their rights. Almost three quarters of States have legal provisions of varying quality to protect the privacy of children involved in proceedings, varying from closed door hearings³ to criminalising the publication of information identifying children involved in court proceedings. Preventing the publication of the names of children involved in criminal proceedings is a simple and widely adopted provision, although it commonly has exceptions permitting the naming of children with the approval of the court. Bangladesh, India, Nepal and the United Kingdom all have such rules. Exceptions have the potential to be seriously damaging to children involved when the decision to release their information is not made based on what is in the best interests of the child.

Strict time limits on bringing cases to court can present a serious barrier to children accessing remedies, particularly for young children who may not be able to approach the courts until they reach the age of majority. Almost 60 percent of countries do not allow for the relaxation of limitation periods for children, allowing children to bring complaints when they become able to do so: 84 countries have some form of rule permitting the relaxation of limitation periods in certain circumstances, whether tolling the limitation period until the child reaches adulthood or relaxing strict time limits for certain types of offences, most commonly sexual abuse.⁴ Many common law jurisdictions treat tolls on statutes of limitation as a matter of disability for all children. England and Wales, for example, allows the extension of a limitation period where a person “was under a disability”⁵ and classifies children as under a disability for the purposes of determining a limitation period.

Where children are in **living in institutions**, a situation in which children with disabilities are disproportionately likely to find themselves, they face increased barriers which require additional measures to ensure access to justice for these children. Where violations of the rights of children take place in these facilities, the role of the institution as the legal guardian of the child and a violator of rights creates a serious barrier to children accessing justice. The existence of these facilities and children’s placement in them may constitute a rights violation in itself,⁶ but where they exist they create additional barriers to children accessing justice for rights violations that occur within them.

² CRIN, *Rights, Remedies and Representation: A global report on access to justice for children*, 2016, p. 30-31.

³ See, for example, country reports for Samoa, Guinea, Moldova and Nauru, available at: www.crin.org/node/42362.

⁴ CRIN, *Rights, Remedies and Representation: A global report on access to justice for children*, 2016, p. 32.

⁵ Limitation Act 1980, Section 28. Available at: <http://www.legislation.gov.uk/ukpga/1980/58>.

⁶ Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014) Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014, para. 40.

National human rights institutions (NHRIs) can fulfil the role of an independent investigatory measure and complaints mechanism in these facilities. For example, the Ombudsman of Bulgaria is empowered by the National Preventative Mechanism to access institutions without prior notice and conduct interviews with children and staff⁷ and further provisions make it an administrative offence to interfere in or obstruct the work of the Ombudsman.⁸ These kinds of mechanism combat attempts by institutions to limit external scrutiny. However, these mechanisms vary significantly in terms of their scope and effectiveness and the powers of organisations may not be effectively used, even where available.

Where NHRIs have a mandate permitting them to bring cases before the courts, they are able to pursue individual cases or more pervasive issues of policy where children's rights are violated. This measure is at its most useful where victims would struggle to bring complaints alone because of their vulnerability. The examples given below are illustrative of the ways that national human rights institutions have been empowered to address individual or structural complaints and some of the key features of these mechanisms and are by no means exhaustive:

- **Constitutional rights protection.** Public Defenders in Georgia for example, can receive complaints that state, local government authorities, public institutions or officials have violated the rights provisions of the Georgian constitution.⁹ The Public Defender of Kyrgyzstan has a similar power, as well as the authority to appeal to the Constitutional Chamber of the Supreme Court to declare unconstitutional laws concerning human rights.¹⁰
- **Class actions.** Fiji's Human Rights Commission,¹¹ the New Zealand Director of Human Rights¹² and Ireland's Human Rights and Equality Commission¹³ all have a similar power to bring proceedings on behalf of a class of persons to vindicate their human rights.
- **Anonymity for victims.** Human rights bodies in Scotland, Northern Ireland, Ireland and Slovenia, among others, can initiate court proceedings in their own name without identifying a victim.¹⁴

⁷ See Annual Report of the Bulgarian Ombudsman as National Preventative Mechanism, 2012, pp.3-4. Available at: <http://www.ombudsman.bg/documents/Report%20NPM%202012.pdf>.

⁸ Ombudsman Act, Articles 29-31.

⁹ Organic Law of Georgia on the Ombudsman of Georgia, Article 13.

¹⁰ Law on the Ombudsman of the Kyrgyz Republic, Article 8(3). English translation available at: http://www.ecoi.net/file_upload/1226_1409307712_kyrgyz-law-ombudsman-2002-am2012-en.pdf.

¹¹ Constitution of Fiji, Article 45(4)(e) and the Human Rights Commission Decree 2009, Section 12(1)(j).

¹² Human Rights Act 1993, Sections 90 and 92B. Available at: <http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html>

¹³ Irish Human Rights and Equality Commission Act 2014, Section 41(1). Available at: <http://www.irishstatutebook.ie/eli/2014/act/25/enacted/en/html>.

¹⁴ For fuller discussion, see corresponding country reports, available at: www.crin.org/node/42362.

- **Intervention in cases affecting human rights.** The Ombudsman for Bosnia and Herzegovina is empowered to intervene in ongoing cases where he or she considers that the relevant administrative act constituted a human rights violation.¹⁵

Where national law allows **NGOs to file complaints**, this provides an additional mechanism to enforce the rights of children who may not be in a position to act on their own behalf or rely on their families or legal guardians. Globally, around a half of States allow NGOs to bring cases in their own names, while a slightly larger majority of 54 percent permit NGOs the more limited power to intervene in a case that has already been filed.¹⁶ Some of these mechanisms are specifically designed to target discrimination, such as in Romania where NGOs which defend human rights or which have a legitimate interest in combating discrimination have legal standing when discrimination affects an individual at the request of that individual.¹⁷ This measure is imperfect, however, and in our research on access to justice for children in institutions in the country, NGOs reported to us that the lack of legal guardian willing to request this assistance barred them from taking action.

b. To have individual legal standing in all administrative and judicial procedures, including the right to be heard as part of their right to fair trial:

Restrictive laws on **standing** commonly prevent children from challenging violations of their rights. While almost all legal systems allow cases to be filed in the name of children, restrictions on who must file a complaint are commonly much more restrictive. Requirements that children approach the courts exclusively through a parent or guardian may exclude children who do not have this kind of support, which may be a common situation for children with disabilities in institutions. Flexible rules allowing children to at least trigger cases or for the courts to instigate actions when they are approached informally by children can avoid this barrier.

Parental consent requirements can also create barriers to children accessing justice. While most parents will have the best interests of their children at heart, overly strict requirements that children act through their parents can prevent cases reaching courts - particularly where parents are perpetrators of abuses, or where they have conflicting interests. The most restrictive measures in this regard are found in the laws of MENA countries, which in Algeria,¹⁸ Kuwait,¹⁹ the UAE²⁰ and Qatar,²¹ for example, strictly vest parental authority for initiating legal proceedings with a child's father or grandfather. The practice is not restricted to the Middle East, Niger²² too vests authority exclusively with a

¹⁵ Law on Administrative Disputes of Bosnia and Herzegovina, Article 2. Available at: www.legislationline.org/download/action/download/id/5515/file/BiH_law_administrative_disputes_2002_en.pdf.

¹⁶ CRIN, Rights, Remedies and Representation: A global report on access to justice for children, February 2016. Available at: www.crin.org/node/42383.

¹⁷ Government Ordinance No. 137/2004, Article 28.

¹⁸ Family Code, Articles 81 and 82.

¹⁹ Personal Status Law (n 11), Article 209. Fathers assume guardianship, followed by the paternal grandfather or another paternal relative in the absence of the father.

²⁰ Personal Status Code 2005, Articles 32 and 34

²¹ Law No. 40 of 2004 on the Guardianship Over Minors' Funds, Article 4.

²² Code Civil, Book I, Title IX, Articles 372 and 373.

child's father when parents are married while Honduras grants almost exclusive authority to fathers in "protecting and directing [the child] and administering their property".²³

c. To have effective remedies that are appropriately proportional to the right infringed and which are tailored to their specific situation; and

Collective action - that is a legal action that allows a number of claimants or victims to bring a case or complaint together or in the public interest - can be a particularly effective way of challenging widespread or large scale violations of children's rights, while reducing the burden on any given child victim. Combined cases, group litigation, class actions and public interest litigation can all fulfil this function with varying degrees of success.

At its heart, a **class action** is a way of allowing a number of individuals to make a joint claim against a single defendant. The United States has one of the best established forms of class action and has acted as a model for other States, allowing hundreds of thousands of claimants to be represented in a single proceeding where there is a common question of law or fact, the representative of the class is appropriate and typical of all of the individuals and a class action is the most appropriate setting for the dispute.²⁴ Canada, Australia and Thailand have all adopted this form of litigation.²⁵

Public interest litigation allows a different focus, justifying bringing a case not necessarily on the joint interests of a group of victims, but the public interest in general without specifying individual victims. In South Africa, for example, the Constitution allows "anyone acting as a member of, or in the interest of, a group or class of persons", "anyone acting in the public interest" or "an association acting in the interest of its members" to bring a case alleging a violation of the Bill of Rights.²⁶ Kenya has developed an almost identical procedure.²⁷

d. To have effective access to justice in the context of disasters, migration and asylum-seeking, conflict and post-conflict situations and transitional justice, and formal or informal systems of customary, indigenous and community justice, among others:

Customary courts and traditional authorities can be a quicker more cost-effective and informal means of children seeking redress, but they also risk perpetuating traditional attitudes harmful to children. Customary justice mechanisms commonly discriminate against girls or fail to provide remedies for rights violations of girls. The practice of "*te kabara bure*" (formal apology) in Kiribati, for example, is commonly used in sexual violence cases and

²³ Civil Code of the Republic of Honduras, Article 238.

²⁴ For more information, see CRIN, Access to justice for children: United States. Linklaters, Collective actions across the globe - a review, 2011, p. 26. Available at: www.linklaters.com/pdfs/mkt/london/1103_Collective_actions.pdf.

²⁵ For full information, see respective country reports available at: www.crin.org/home/law/access.

²⁶ Constitution of South Africa, Section 38.

²⁷ Constitution, Articles 22, 258,; Draft Rules for the Protection of the Rights and Fundamental Freedoms and Enforcement of the Constitution, Rule 28.

risks reducing a perpetrator's sentence or resulting in impunity.²⁸

2. Do you have examples from your country on:

d. Legal aid programmes, public and/or private, which include the right of access to justice for persons with disabilities in their practices, including the availability of support and liaison services for courts or other judicial or quasi-judicial instances.

Legal assistance and legal aid is core to achieving access to justice for anyone, but children in particular. Despite this key role, however, functioning legal aid systems are completely absent in 42 countries worldwide, meaning that 220 million children have no access to free legal aid in any type of legal action.²⁹ The remaining countries have some form of legal aid available for children, often in very limited circumstances, while only 28 make some form of legal aid available for all types of case.³⁰ For example, Belgium exempts children from paying any cost related to judicial proceedings, including legal fees. Lithuania and Luxembourg apply financial criteria to when a child is entitled to legal aid, but exclude parental income from this decision, while Finland will only consider parental income where a child's parents are assisting a child in bringing a case.³¹ Restriction of legal aid provision to large cities is common and presents a serious practical barrier to accessing necessary legal advice and assistance.³²

Our access to justice project systematically addressed the legal aid available to children in 197 jurisdictions. The individual reports are available online at: www.crin.org/node/42362.

²⁸ Summary prepared by the Office of the United Nations High Commissioner for Human Rights, para. 23; Compilation prepared by the Office of the High Commissioner for Human Rights, Universal Periodic Review, A/HRC/WG.6/8/KIR/2, 19 February 2010, paras. 27-28.

²⁹ CRIN, *Rights, Remedies and Representation: A global report on access to justice for children*, 2016, p. 29.

³⁰ *Ibid.* Note, by this, it is meant that legal aid is available in criminal, civil, administrative, family court and any other judicial setting, though not that there are no limits on its provision.

³¹ For further discussion of these measures, see corresponding country reports at www.crin.org/node/42362.

³² For further discussion, see CRIN, *Rights, Remedies and Representation: A global report on access to justice for children*, 2016, p. 29 to 30.

