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About International Center for Advocates Against Discrimination (ICAAD):

ICAAD uses a systems approach to combat structural discrimination against women and minorities globally. We identify gaps in the societal structures that marginalize vulnerable communities using a transdisciplinary approach that combines law, technology and art. Our evidence based research utilizes teams of experts to identify specific structural discrimination policies, marshal resources and key partnerships, and provide strategic support of local NGOs with the aim of systematically uprooting discrimination within different societal sectors (e.g., legislative, judicial, law enforcement, health, faith, etc.).

Executive Summary

(1) Drawing on ICAAD's research, this submission focuses on concerns of structural discrimination impacting women; with an emphasis on violence against women. The primary conclusory observation of this report is that the Kiribati government should continue to work with UN agencies, international governments (e.g. Australia), and regional bodies to implement its *National Approach to Eliminating Sexual and Gender-Based Violence – Policy and Strategic Action Plan (2011–2021)*, and to support the passage of laws to correct specific and consistent legal failures resulting from cultural reconciliation norms. This includes government support of the consultation process and passage of the Kiribati *Te Rau N Te Mweenga* Bill 2012, also known as the Family Peace Bill currently under consultation, and the implementation of the newly passed Child, Young People, and Family Welfare law.

(I) Women's Rights Issues

(A) Violence Against Women

(1) Systematic Discrimination:

(2) Sexual and Gender Based Violence (SGBV) continues to be prevalent throughout Kiribati. In a report by Amnesty International, just over two-thirds of women reported experiencing at least one act of physical or sexual violence or both by an intimate partner. There is an overlap between physical and sexual violence with 35% of women reporting suffering both forms. In regards to sexual intercourse, around 41% of the reports regarding women having sexual intercourse because they were afraid of what their partner might do, 31% reported being forced to have sex when they did not want to and 22% reported being forced to do something sexually degrading or humiliating.¹

(3) While there has been strong governmental support and significant progress in recent years to combat this issue, traditional views of women's roles in society and customary practices such as apology and forgiveness continue to adversely affect the way community, law enforcement, healthcare providers, and the judicial system respond to such violence, as well as the prevalence of reporting by victims.

(4) The following views and practices are of particular importance:

1. Women are seen as subordinate to fathers, husbands and the *te unimane*, that is, male elders or old men.²
2. The majority of men and women believe that it is ok in some circumstances for a husband to beat his wife;³
3. Police are reluctant to interfere in the private life of the home and domestic situations;⁴

¹ AMNESTY INTERNATIONAL, *Kiribati accepts Amnesty's 21,000-plus signature petition to stop violence against women in Pacific* 9 September 2011 <http://www.amnesty.org.nz/news/kiribati-accepts-amnesty%E2%80%99s-21000-plus-signature-petition-stop-violence-against-women-pacific>

² Pacific Prevention of Domestic Violence Programme, *Update of Baseline In-Country Review Kiribati Report* January 2011, <http://www.ppdvp.org.nz/wp-content/media/2011/03/Final-Kiribati-PPDVP-Baseline-Update-25-February-2011.pdf> at vii

³ Kiribati National Statistics Office, and the Secretariat of the Pacific Community, *Kiribati Demographic and Health Survey 2009*, Chapter 13.

⁴ *Republic v Būra* [2005] KHC 69, see also *Republic v Ubaitoi* [2003] KHC 50.

4. Customary practices of apology and forgiveness can often mean cases are not reported or are withdrawn before prosecution, or that sentences are reduced after an apology has been made.
5. Myths and stereotypes about women and sexual violence can work to reduce sentences or in some cases, lead to not-guilty verdicts.

(5) Furthermore, there remain significant gaps in the legislative structure around sexual assault and domestic violence. For example, under the Penal Code (1965) [CAP67] 1968, Section 237, domestic violence is treated as a common assault; under Section 128, marital rape is not specified as a punishable crime, and under Section 129, there are no minimum sentencing standards for rape. Additionally, as indicated in the CEDAW Legislative Compliance Review of Kiribati, “sexual assault laws provide inadequate protection for the range of sexual violations perpetrated against girls and women. All sexual offences require penile penetration, (except indecent assault which only attracts an inadequate maximum 5 year sentence).”⁵

(6) As a result, as UNICEF pointed out in its mid-term feedback on recommendations, “there is a big gap that persist[s] between number of reported cases and trial carried out to ensure the perpetrators are punished for the committed violence. Serious work needs to be done with law enforcement bodies and government officials to make sure the reported case are handled properly and the perpetrators are held accountable.”⁶

(7) In Kiribati, anecdotal evidence suggests that there are low levels of reporting and high levels of case withdrawal for sexual and gender based violence. Up to 80-90% of women withdraw their complaints, often due to family pressure.⁷ It is not unusual for violence against women and girls to stay unreported due to social and cultural pressures from family members, particularly where there has been an apology and reconciliation.⁸

(8) For domestic violence in particular, case withdrawal is high and prosecution numbers are low. Indeed, the case review undertaken⁹ below had very few domestic violence cases, with the majority of gender based violence cases being against individuals who were not in a spousal relationship. According to a report by the New Zealand Police, this suggests that the community is unlikely to perceive the criminal justice system as an effective means of dealing with domestic violence.¹⁰

(9) A review of case law provides insight as to why this perception exists in relation to a variety of factors, including formal apology (*Te Kabara Bure*, or *te Kabwarabure*), reconciliation, stereotyping, rape myths, and victim blaming.

⁵ Kiribati, *CEDAW Legislative Compliance Review* (2007), p. 198, 4.2, (3), <http://iknowpolitics.org/en/2009/03/translating-cedaw-law-cedaw-legislative-compliance-nine-pacific-island-countries> at Chapter on Kiribati.

⁶ Mid-Term Implementation Assessment: Kiribati, UPR-Info, p. 13, <http://www.upr-info.org/followup/assessments/session21/kiribati/MIA-Kiribati.pdf>

⁷ AMNESTY INTERNATIONAL, *Kiribati accepts Amnesty's 21,000-plus signature petition to stop violence against women in Pacific* 9 September 2011 <http://www.amnesty.org.nz/news/kiribati-accepts-amnesty%E2%80%99s-21000-plus-signature-petition-stop-violence-against-women-pacific>.

⁸ Pacific Prevention of Domestic Violence Programme *Update of Baseline In-Country Review Kiribati Report*, at vii January 2011 <http://www.ppdvp.org.nz/wp-content/media/2011/03/Final-Kiribati-PPDVP-Baseline-Update-25-February-2011.pdf>.

⁹ We used Pacific Islands Legal Information Institute (PacLII) database which is quite limited in the cases that are uploaded. Lower level, or magistrate decisions, are not available through the database.

¹⁰ Pacific Prevention of Domestic Violence Programme *Update of Baseline In-Country Review Kiribati Report*, at ix January 2011 <http://www.ppdvp.org.nz/wp-content/media/2011/03/Final-Kiribati-PPDVP-Baseline-Update-25-February-2011.pdf>.

(2) Case Law Review:

(10) Through an online review of case law (Pacific Islands Legal Information Institute (PacLII), only High Court and Court of Appeal cases in Kiribati are available. Common assault and assault causing actual bodily harm is generally heard by Magistrates courts. Domestic violence is often considered a common assault in many Pacific Islands, and the dearth of domestic violence cases in the PacLII database may be the result of those cases originating at the Magistrate level.

(a) Apology and Reconciliation

(11) Our case review identified 59 cases of sexual and gender based violence against women and girls where apologies had taken place.

(12) The Case Law Survey looked at the following points:

1. Was an apology given?
2. Was the apology considered during sentencing?
3. Were any other cultural factors considered during sentencing and guilt?

(13) While it was not in the survey, notes were also made as to whether the apology was given to victim or their family, or both, and whether or not the apology was accepted. While all cases included an apology, it was not clear in all cases whether the apology mitigated the sentence as not all judgments draw a clear link between deliberations and the factors that affected sentencing. Often it is mentioned in the sentencing but not necessarily tied to the sentence given. In addition, it's difficult to know whether the Judge took it into account only because it was accepted and there was reconciliation or whether the fact of the apology itself was sufficient. Finally, in many cases it's not clear whether the apology was to the victim or their family. As such, it may be that we have interpreted some cases as not considering apologies as mitigating factors but in fact it may well have affected the Judge's decision.

Findings

(14) There were 59 cases of SGBV where an apology was mentioned. The vast majority of these were sexual assaults, none of which were between husband and wife. In 24 of these cases the apology was taken as a mitigating factor in sentencing (40% of cases). In another 28, while the apology was mentioned by the Judge it was not linked to sentencing. In the remaining 7 cases it was unclear whether or not the apology was considered to be a mitigating factor.

Variations in Court approaches to apology and reconciliation

(15) The approach to apologies and reconciliation is by no means homogenous across judgments. The approach appears to change from case to case and also:

1. Between Judges
2. Over time- there is a growing tendency to place less weight on apologies
3. Whether the apology is to the victim or the family of the victim
4. Whether the apology is from the accused or the accused's family
5. Whether the apology is accepted and there has been reconciliation.

While it is not possible from the data available to provide any concrete statistics on how the above affect sentencing decisions, comments by the Judges are indicative of the attitudes towards apologies. These are outlined below.

(16) An important appeal was in 2004 of *Attorney-General v Tengke; Kaurake v Republic* [2004] KICA 10 where the bench provided some guidelines as to sentencing and rape – setting a starting sentence of 5 years and adopting some of the mitigating and aggravating factors set out in a 1986 UK case *R v Billam* [1986] 1 WLR 349 (CA). The court accepted that, in this particular case a mitigating factor was ‘the acceptance of Kaurake’s (the perpetrator’s) apology by the complainant and her family.’ This makes it clear that it is the acceptance of the apology that is important, rather than the fact that the apology has been made. However, it was accepted by both complainant and family, the case does not make it clear whether an apology just to the family would be sufficient for a reduction in sentence. The UK case had already been superseded by another case by the time the Kiribati case was heard. In addition, none of the UK guidance allows the court to take into account apologies by the perpetrator, to either family or victim.

(17) It should be noted that there is only one High Court Judge on Kiribati at any one time. Chief Justice Robin Millhouse QC was the High Court Judge for more than 10 years and, as such, the majority of cases found were heard by him. Prior to Justice Millhouse, a previous judge, CJ Lussick, does appear to take it into account as a mitigating factor.¹¹ Chief Justice John Muria is the current High Court Judge. Justice Muria has considered apologies in sentencing, and appears to allow apologies to mitigate sentencing, although his judgments are shorter than those of Justice Millhouse and so he may not always mention apologies.¹² While Justice Millhouse, who was Chief Justice from 2000 to 2011, does appear to comment on the existence of apologies it is not explicitly taken into account in reducing the sentence. Indeed, in one case he quoted: “*That is a good custom in Kiribati but it cannot reduce the sentence which you deserve. Nor does the sadness which (your solicitor) says you now feel.*”¹³ However, in other cases he appears to take the apology into account.

(18) The approach to reconciliation and apology by the High Court appears to change over time, with greater emphasis on the apology needing to go to the victim, rather than the family and the apology having to come from the perpetrator themselves, rather than their family. There is a growing awareness that the apology should be to the victim, not to the family and should be given by the perpetrator.

(b) Domestic Violence and Apologies

(19) Interestingly in the case of domestic violence, of which only one case between husband and wife could be found, the court was of the opinion that the giving of an apology and forgiveness of the wife is not supposed to affect the sentence. In the case of *Toakarawa v Republic* [2006] KICA 9, Counsel for the victim “*pointed out, by reference to authority that assaults on wives are to be treated as serious matters of public concern and that a wife’s forgiveness of her husband does not affect the court’s duty to impose a sentence appropriate to the gravity of the offence.*”

(c) Stereotyping, Rape Myths, and Victim Blaming

(20) In the case of *Republic v Biira* [2005] KIHIC 69, the victim/survivor asked a stranger for a lift home in his truck. The court noted that this was foolish and held that it was in the perpetrator’s favor she got in his car

¹¹ *Republic v Teitea* [1998] KIHIC 61.

¹² See, for example, *Republic v Dan* [2013] KIHIC 28.

¹³ *Republic v Matakite* [2002] KIHIC 62.

as “this may have encouraged you to believe he had sex with you.” However the fact that he went on to use force and threats was then weighed against this.

(21) One case from 1999, *Republic v Tenamorua* [1999] KIIHC 2, illustrates views concerning provocation and victim blaming. A woman who had been in a defacto relationship for 9 years was beaten by her partner after admitting to an affair. The Judge took into account the fact that the accused was provoked by this news and reduced his sentence accordingly. Interestingly, the father of the victim gave evidence for the accused, saying it was out of character and blaming the victim for the events.

(d) Recommendations:

(22) Legislation should be introduced to outlaw discrimination on the basis of sex and gender; guarantee equal benefits or outcomes between men and women; and specify that customary law does not apply to the extent that it is discriminatory towards women.

(23) Continued SGBV training for police, judiciary and awareness raising within communities.

(24) Ensure that reconciliation and compensation paid as part of customary settlement for sexual assault or domestic violence cases should not be considered as mitigating factors.

(25) Ensure that resolution of a case under customary law does not preclude it from being brought before the formal justice system.

(26) Amend sexual assault and rape laws to ensure rape includes penetration of any orifice by any body part or object, and to ensure that cultural views and gender stereotypes are not considerations in the reasonableness of someone’s belief as to consent.

(27) Pass legislation for courts to make intervention orders to protect domestic violence victims.

(28) Develop sentencing guidelines to ensure consistency of sentencing in SGBV crimes. Create a separate offence of domestic violence with sentencing guidelines commensurate with the gravity of the crime.

(30) Enact legislation to remove 'provocation' as a mitigating factor in VAW cases; thereby avoiding further traumatizing or stigmatizing of victims during the judicial process, ensuring victims of SGBV receive adequate medical and psycho-social support and safety; and providing legal aid to all victims of SGBV.