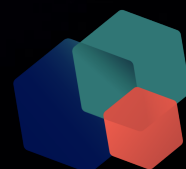


TrackGBV: Pacific Regional Analysis and Kiribati Country Report 2000-2021

SYSTEMATIC ANALYSIS OF GENDER DISCRIMINATION IN
GENDER-BASED VIOLENCE SENTENCING DECISIONS



ICAAD
Human Rights Innovation

Acknowledgements

ICAAD is deeply grateful to our law firm partner Clifford Chance LLP and the Clifford Chance Foundation for providing both pro bono and financial support to enable ICAAD to build relationships and programs across the Pacific Island region over the last five years. We would also like to acknowledge pro bono support in the form of case law analysis conducted by Manatt, Phelps, and Phillips LLP and Linklaters LLP. Finally, we'd like to thank Conduent and Tableau, our technology partners, for respectively providing a legal database platform for review and a data visualisation tool, pro bono.

To our civil society partners and colleagues in the Pacific, we owe a great debt of gratitude to those who welcomed us into the region almost a decade ago and have continued to support our work, collaborate on projects to advance gender equity, and help build each other's capacity and technical knowledge. Special thanks to the Fiji Women's Rights Movement, Vanuatu Women's Centre, SPC Regional Rights Resource Team, Pacific Women's Watch, Family Support Centre Solomon Islands, Solomon Islands Safenet Partners, Pacific Island Law Officer's Network, UN Women Pacific, Samoa's National Human Rights Institution (Ombudsman), Tuvalu Family Health Association, Banaban Women's Organization, Pacific Justice Sector Programme, Women United Together Marshall Islands, Makefu Women's Village Council (Niue), Munro Leys, University of the South Pacific, and our first friend and colleague in the region, Roshika Deo.

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EXECUTIVE SUMMARY

Society has become accustomed to seeing headlines reporting on cases of gender-based violence (GBV) that have made it to the courts where justice has not been served. Suspended sentences based on arguments grounded in rape myths and sentence reductions based on character references irrelevant to a perpetrator's violent offending are all too common. For victims/ survivors who seek justice in the courts, less than half receive an outcome unhindered by gender discrimination.

It's one thing to have an isolated example of a case with its own unique circumstances, and it's another to build an evidence base of over 20 years of case law that tracks the patterns and impacts of biased judicial decision-making, regionally and by country. TrackGBV does just that, using data and technology to support judicial policy reform with the goal of removing gender discrimination from judicial decision-making.

The TrackGBV data tracks key variables related to access to justice for women and girls and allows us to quantify the impact of contentious factors on sentencing. In many Pacific Island Countries and in countries around the world, perpetrators of domestic violence and sexual offences often receive disproportionately low sentences or no custodial sentences at all. TrackGBV aims to tell the story of how that happens in each jurisdiction.

TrackGBV began in 2013 in the Pacific Islands region. Since then, ICAAD and its law firm partners have reviewed over 5,000 cases and analysed 2,492 sentencing decisions from 2000 to 2021. To ensure timeliness and relevance, ICAAD will continue to review and add to the [TrackGBV Data Dashboard](#), accessible on the ICAAD website. Sentencing decisions allow for the identification of the presence of contentious factors (see page 6) and numerous other variables, providing a baseline to measure the quantitative impact of gender discrimination within the judiciary.

The TrackGBV data has illuminated a number of patterns in the region. Victims/ survivors who come before the courts tend to fall between the ages of 6 and 17. When it comes to access to justice, the impact of contentious factors is clear. Contentious factors were raised in 77.3% of cases regionally with a quantifiable impact on sentencing in 51.9% of cases. While the frequency and types of contentious factors raised and applied in cases vary across jurisdictions, in cases with charges similar to rape, sentences were, on average, $\frac{1}{3}$ shorter when contentious factors were raised. The TrackGBV data also points to additional procedural barriers to consistency and accountability, namely the lack of medical reports, the misapplication of first time offender status, and the lack of victim anonymity. Despite progress in some jurisdictions on reducing judicial bias and improving access to justice for women and girls, TrackGBV reveals notable gaps for judiciaries across the region.

Methodology

ICAAD reviewed 5,000 cases, analysed 2,492 applicable cases, and conducted a secondary review of 1,860 cases (75% of applicable cases). Our methodology involves training reviewers who manually analyse cases and tag corresponding variables relevant to gender-based violence (GBV) cases. Reviewers are primarily lawyers at our partner law firms including Clifford Chance; Manatt, Phelps, and Phillips; and Linklaters. Our CSO partners also review cases; Fiji Women’s Rights Movement publishes an annual report on Fiji cases focused on sexual offence sentencing decisions. And finally, our tech partner, Conduent, played a vital role in developing the platform (Viewpoint) where the case law analysis was completed, and outputs from this analysis were hosted on Tableau’s data visualisation platform.

Applicable cases for review are sentencing decisions in which the actions of the perpetrator include elements of **domestic violence** and/ or **sexual violence** and the victim was identified as female.

Gender-based violence (GBV)

An umbrella term for any harmful act that is perpetrated against a person’s will, and that is based on socially ascribed (gender) differences between males and females.
For the purposes of this report, we reviewed only cases involving GBV against people who identify as girls/ women or female specifically, of any age.

Domestic violence

“All acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.”¹

Sexual violence

“Engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; engaging in other non-consensual acts of a sexual nature with a person, or causing another person to engage in non-consensual acts of a sexual nature with a third person.”²

¹ Council of Europe, Convention on preventing and combating violence against women and domestic violence (2011), Article 3.

² Council of Europe, Convention on preventing and combating violence against women and domestic violence (2011), Article 36.

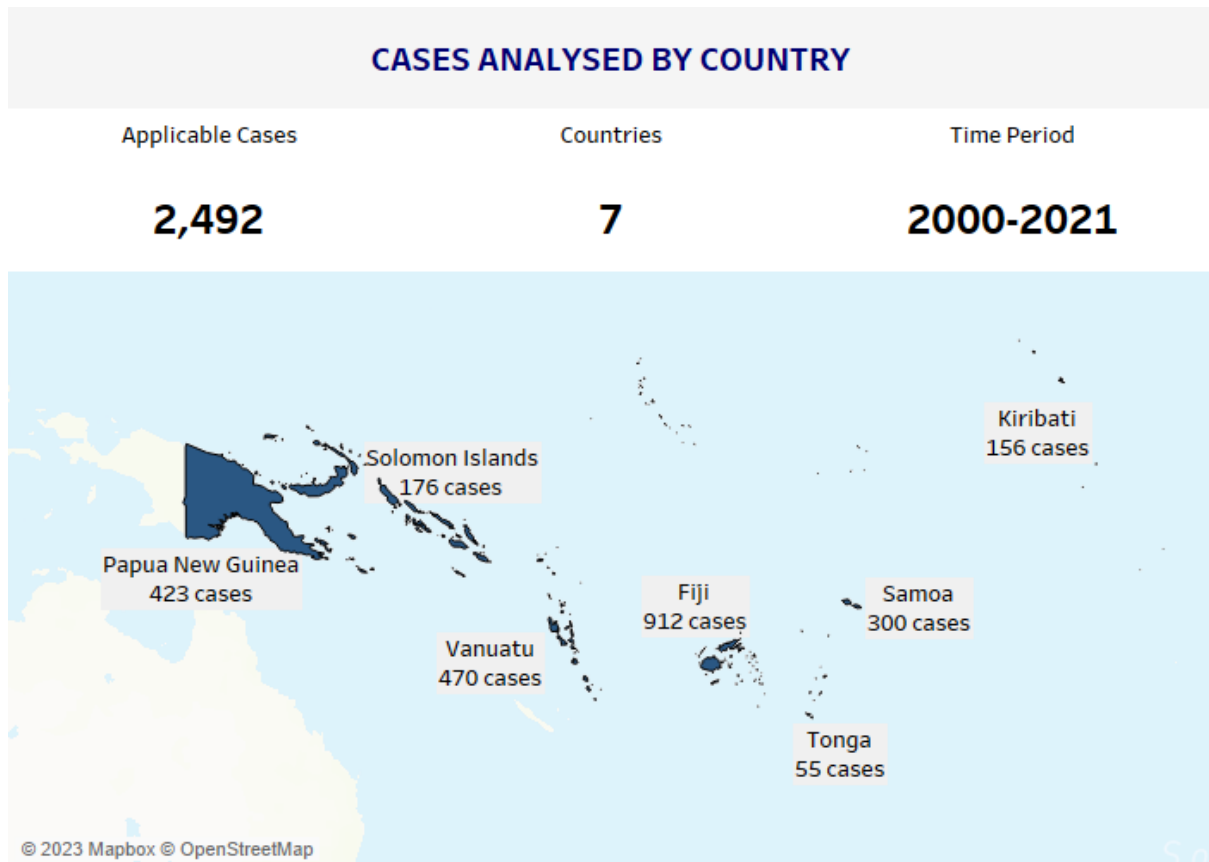
Applicable cases are reviewed against **51 variables** including the use of contentious factors by the judicial officer and defence, and whether they were raised and/ or used to justify a reduction in the sentence. The three categories of contentious factors are:

Gender Stereotypes	Stereotypical attitudes and beliefs regarding gender and the way in which men and women should interact within society. Gender stereotypes also include rape myths: prejudicial, stereotypical or false beliefs regarding rape, and characteristics of rape victims and rapists.
Customary Practices	<p>This includes forms of out-of-court justice and reparation including payment of compensation, formal apology, and reconciliation. It also includes where customary practices are used as justification for criminal acts which undermine equal protection under the law for female victims/survivors (eg: accusations of witchcraft, or bride price).</p> <p>It is important to note that customary practices are not the same as customary values. Customary values that may <i>underpin</i> customary law and practices can include reciprocity, harmony, respect, and more. Customary practices can change while still upholding customary values.</p>
Other Contentious Factors	This includes any other factors which unjustly privilege the interests of the perpetrator over the interests of the victims/ survivors. For example, considering the fact that the perpetrator participated in church or community activities as a mitigating factor.

For more detailed information on the TrackGBV methodology, please refer to our handbook.³ The up-to-date TrackGBV Dashboard can be explored at this link: <https://icaad.ngo/trackgbv-dashboard/>. The following report provides a narrative and in-depth analysis of the Pacific region and the specific patterns in seven Pacific jurisdictions from 2000-2021.

³ *Sexual and Gender-Based Violence in the Pacific Islands: Handbook on Judicial Sentencing Practices*, ICAAD & Clifford Chance, 2018.

TRACKGBV: PACIFIC ISLANDS



Regional Summary

Across the Pacific Islands region, contentious factors were raised in 77.6% of GBV cases with those contentious factors impacting the final sentence in 51.4% of decisions. The TrackGBV data tracks key variables related to access to justice for women and girls and allows us to quantify the impact of contentious factors on sentencing. While the frequency and types of contentious factors raised and applied in cases vary across jurisdictions, the impact of contentious factors when applied is clear. On average, in cases with charges similar to rape, sentences were $\frac{1}{3}$ shorter when contentious factors were raised. This section provides an overview of TrackGBV data from 2000-2021 with recommendations for training, institutionalising best practices, and promoting accountability in Pacific judiciaries.

Contentious Factors

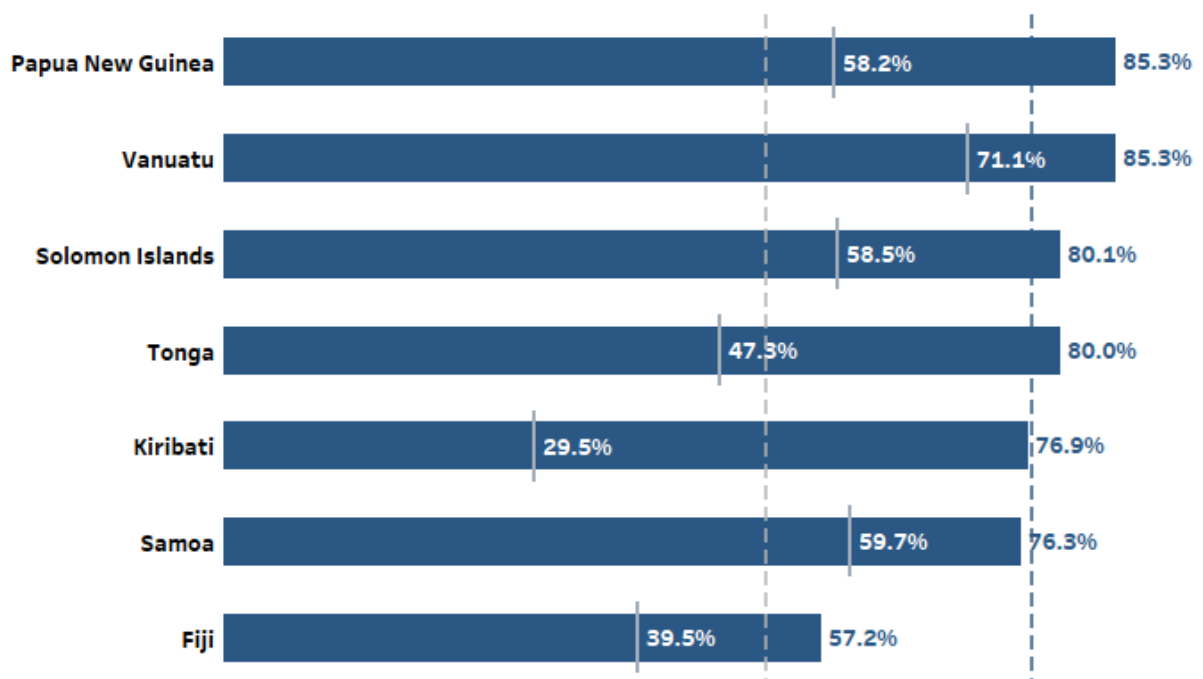
Across the region, contentious factors were raised in 77.6% of cases, with those contentious factors impacting the final sentence in 51.4% of decisions. **For victims/ survivors who seek justice in the courts, less than 1 in 2 receive an outcome unhindered by gender discrimination.**

The frequency and types of contentious factors vary across jurisdictions. Vanuatu has the highest rate of both contentious factors raised and those impacting final sentences. While Papua New Guinea has the same frequency of contentious factors raised, it has a lower rate at which those factors impact decisions. Kiribati has the lowest rates of these jurisdictions; however, 29.5% of decisions still feature gender discrimination in the form of contentious factors.

Contentious Factors Raised vs. How Frequently they Impact Decisions

Contentious Factors Raised (Regional Average) ----

Decision Impacting Contentious Factors (Regional Average ---)



In terms of change over time, four of the seven jurisdictions have seen a decrease in both impacting contentious factors and contentious factors raised: Fiji, Kiribati, Solomon Islands, and Tonga. Fiji witnessed the greatest change over time, going from 55.6% of cases with impacting contentious factors in 2010-2014 to 31.3% in 2015-2021. The time period from 2015 to 2021 marked ICAAD's engagement with the Fiji judiciary, which involved co-designed directives with the former Chief Justice and Chief Magistrate, as well as the training of key stakeholders with the TrackGBV Dashboard. Additionally, ICAAD presented to all the offices of the attorney general from the Pacific region at the Pacific Island Law Officers' Network

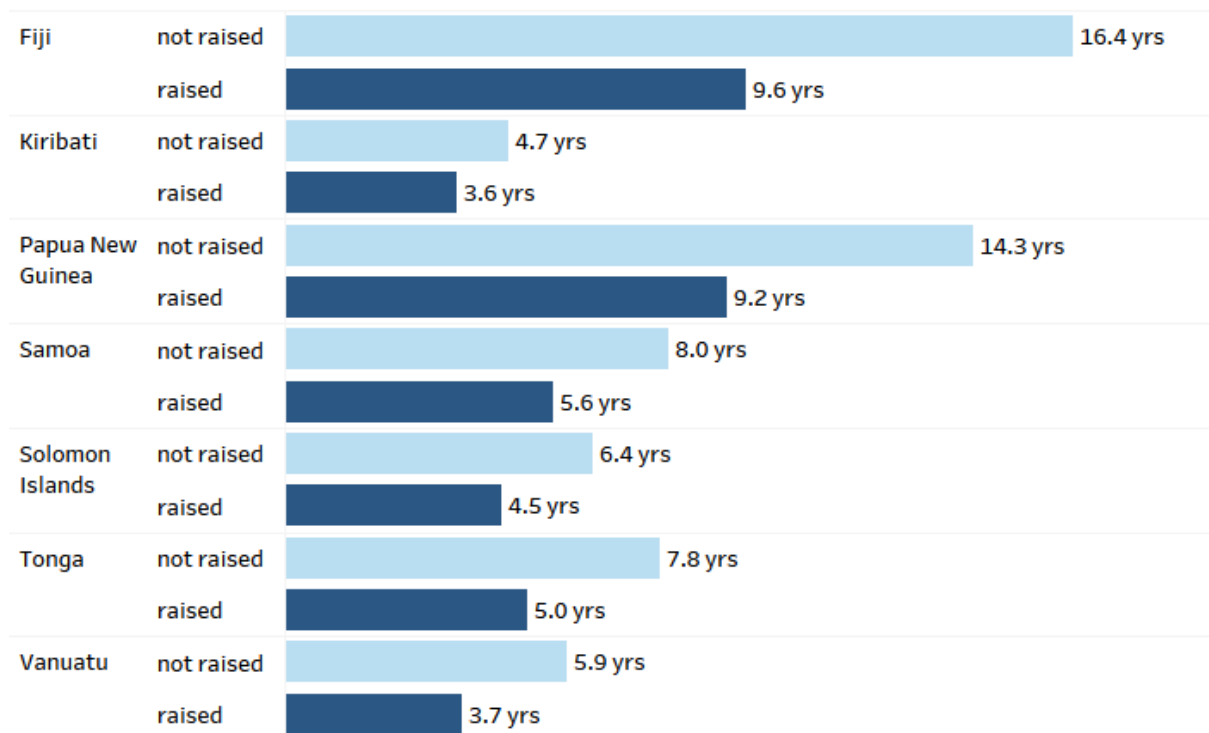
Sentencing Outcomes

TrackGBV allows us to quantify the impact of contentious factors on sentencing. While the frequency and types of contentious factors raised and applied in cases vary across jurisdictions, the impact of contentious factors when applied is clear. **In the average final sentences for charges similar to rape, sentences in which contentious factors were raised are lower in every jurisdiction than sentences without contentious factors.** In Fiji where there is the widest gap between sentences with and without contentious factors raised, the difference is 7.1 years. **On average, in cases with charges similar to rape, sentences were 1/3 shorter when contentious factors were raised.**

In addition to reduced sentences, contentious factors can also lead to no custodial sentence or partially or fully suspended sentences. This is most common in Tonga where 63.6% of sentences were either partially or fully suspended, and 18.2% of perpetrators were not given a custodial sentence.

Average Final Sentence for Charges Similar to Rape

contentious factors raised vs. contentious factors not raised



The TrackGBV data also points to additional procedural barriers to consistency and accountability, **namely the lack of medical reports, the misapplication of first time offender status, and the lack of victim anonymity.** The use of medical reports has decreased over time, with the highest proportion of medical reports not being cited in sentencing decisions in

Kiribati, Vanuatu, and Tonga. Medical reports serve as compelling evidence pointing to the severity of a crime and often have a strong influence on sentencing. There has been a slight increase in the use of medical reports in sentencing decisions in Samoa and a more significant increase in Tonga. Still, there is seemingly a regional gap in terms of integrating medical evidence into the decision-making process.

Given how many existing barriers there are for victims/ survivors seeking justice through the legal system, the frequency of the misapplication of first time offender status is notable. Our methodology tags these misapplications when there is clear evidence of past violence, and the judge still awards first time offender status, often with a large sentence reduction. In Papua New Guinea, Solomon Islands, and Tonga, first time offender status was misapplied in over 20% of cases.

Judicial Statistics

Indicators are **High**, **Medium** or **Low** based on regional averages

	Custodial Sentences not given	Suspended Sentences partially/fully	Victim Anonymity not maintained	Medical Reports not cited	First-Time Offender misapplication	Sole Breadwinner argument used
Fiji	10.1%	16.1%	41.6%	62.8%	6.7%	19.7%
Kiribati	17.9%	19.2%	46.8%	91.0%	12.0%	4.5%
Papua New Guinea	13.9%	34.0%	70.2%	68.3%	22.3%	3.3%
Samoa	9.7%	2.3%	33.7%	69.0%	16.7%	7.7%
Solomon Islands	4.0%	9.1%	65.9%	71.6%	25.9%	12.5%
Tonga	18.2%	63.6%	52.7%	78.2%	21.4%	7.3%
Vanuatu	23.2%	21.9%	57.9%	82.1%	15.2%	10.2%

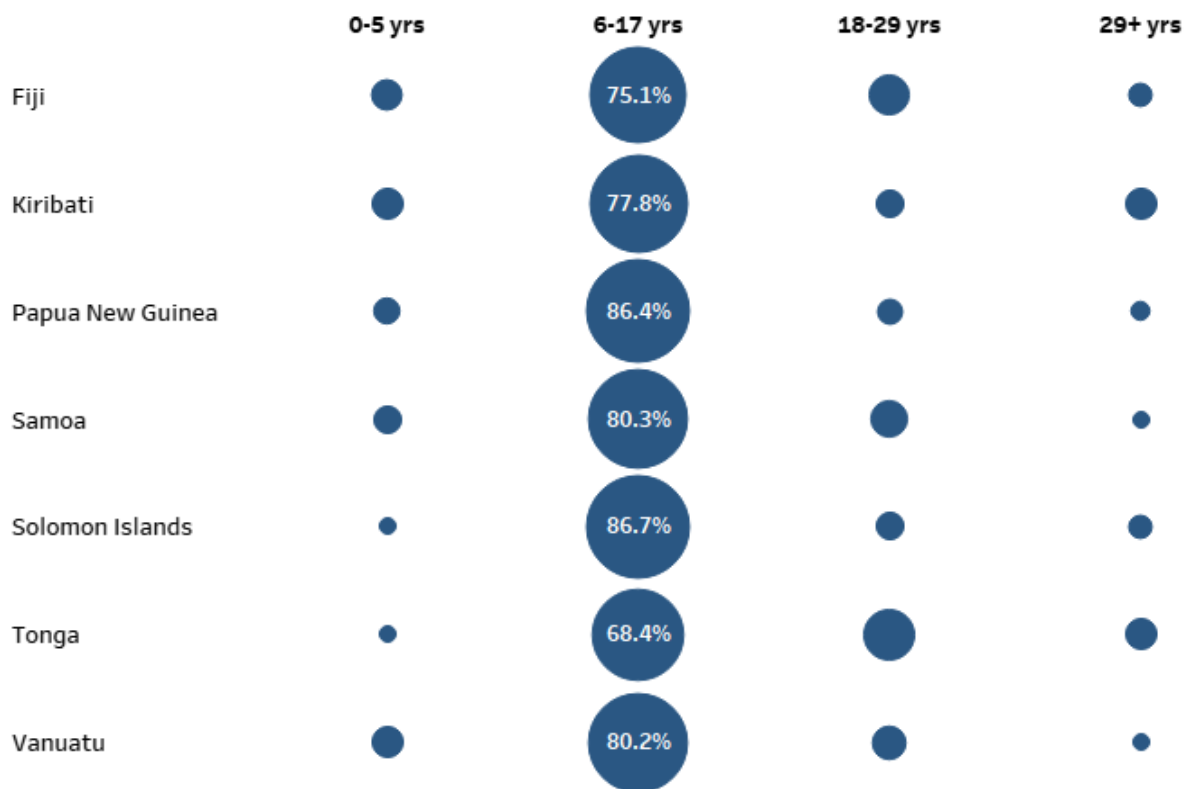
Across the region, there is also a significant proportion of cases in which victim anonymity is not protected in GBV cases. Anonymity is particularly important where communities are smaller, and people are more likely to find out about private matters. Ensuring victim anonymity is an important part of improving access to justice, as it improves the sense of safety for the victim/ survivor and trust in the system.

While TrackGBV is focused specifically on sentencing decisions, these insights point to broader implications for access to justice, policing, healthcare, legislation, and social norms. Institutionalising best practices for adjudicating GBV cases fairly can help these systems come together to improve consistency, transparency, and accountability for victims/ survivors.

Survivor Stats

Across the region, we see a high frequency of sentencing decisions involving child survivors between the ages of 6 and 17. While there may be several contributing factors⁵ that do not necessarily indicate that this age group has the highest prevalence of GBV, it is important to identify – for the development of Pacific judiciaries – the demographics of victims/ survivors coming before the courts, and that the volume of cases involving sexual violence and children is incredibly worrisome.

Percentage of Cases involving Sexual Violence based on Victim/Survivor Age



⁵ More cases concerning girls coming before the court does not necessarily mean that the greatest prevalence of GBV involves girls under the age of 18. There are several factors that influence this number including: greater reporting of violence against children, prosecutors taking violence against children more seriously, less societal pressure for children to reconcile with the perpetrator of the violence, and significant underreporting of violence against women.

Regional Recommendations

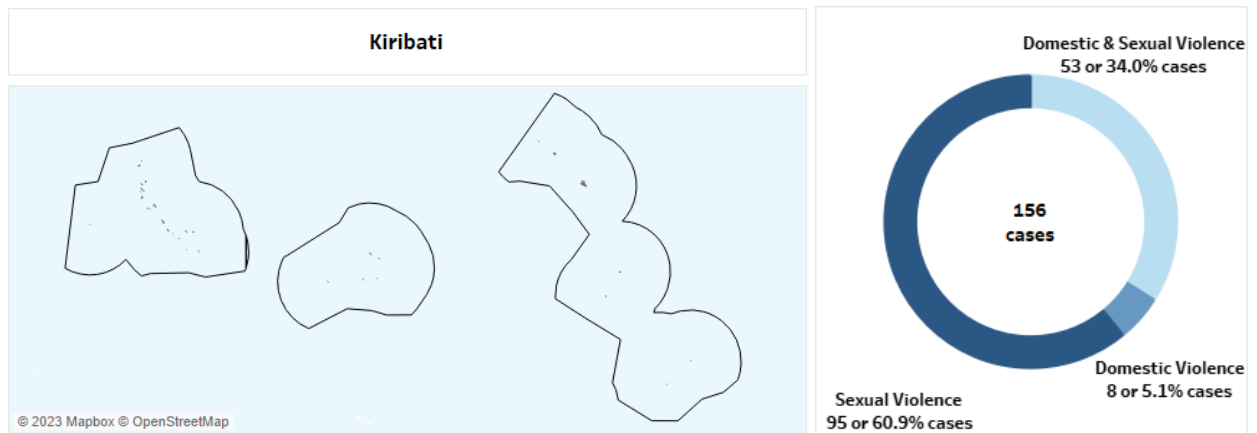
Despite progress in some jurisdictions on reducing judicial bias and improving access to justice for women and girls, notable gaps remain. Based on ICAAD's research and training, the following steps are recommended for each jurisdiction and should involve all key stakeholders, including judiciaries, lawyers, GBV related service providers, women's rights advocates, survivors, police, survivors, and healthcare professionals.

- **Review jurisdiction-specific TrackGBV data in the [TrackGBV Dashboard](#).** As explored in this report, each jurisdiction has unique challenges as it relates to gender discrimination.
- **Offer training specific to the needs of the jurisdiction.** ICAAD has collaborated with judiciaries to conduct Train-the-Trainers modules on the TrackGBV data that instils a deep understanding of gender justice for stakeholders.
 - Additionally, ICAAD has developed medico-legal training content for the Pacific that can be adapted for specific jurisdictions in order to bring together legal and medical professionals to address access to justice gaps.
- **Issue judicial directives.** Based on training outcomes, judicial administrators can show leadership in issuing judicial directives to institutionalise best practices for all judges.
- **Practice accountability.** The TrackGBV Dashboard is regularly updated with new case law allowing key stakeholders to track progress over time, and this analysis can be disaggregated. This can pinpoint finer trends in the data to support judiciaries. Judiciaries also may want to establish mentoring programs to ensure that new judges are supported to understand best practices.

In Fiji, we were able to track the impact of our substantive engagement with the judiciary and its impact on case outcomes by breaking out a time period from 2015-2021, marking that engagement. Going forward, other jurisdictions can similarly track their progress towards access to justice as a result of training and engagement with the TrackGBV data.

There are also important areas for further research that can be done by judiciaries in partnership with ICAAD. For example, in jurisdictions with a high proportion of partially or fully suspended sentences, like Tonga and Papua New Guinea, additional research should be done by judiciaries to track perpetrators who breach the terms of their suspended sentence (i.e. tracking recidivism rates) and evaluate judicial decision-making on those grounds. ICAAD's CSO partners have also raised important concerns about the process for protection orders, which is an important area of inquiry as it relates to victims/survivors' direct safety. Furthermore, the TrackGBV data disaggregates case analysis by disability and sexual orientation. While there are not enough cases for an in-depth quantitative analysis for these categories, qualitative case review can point to additional gaps in protection for vulnerable groups.

TrackGBV: Kiribati



Regionally, Kiribati has the lowest rate of contentious factors used to justify sentence reductions, at 29.5% of the 156 cases reviewed. Still, contentious factors were raised in 76.9% of cases. Kiribati also hands down comparatively low sentences for GBV related offences to other jurisdictions in the region.

The TrackGBV methodology reveals several important patterns in the case law including the prevalence of non-custodial sentences and the use of medical reports in sentencing decisions. Kiribati stands out regionally with 17.9% of GBV offenders receiving a non-custodial sentence. The use of medical reports in the courts also remains a challenge, with only 9.0% of cases citing a medical report.

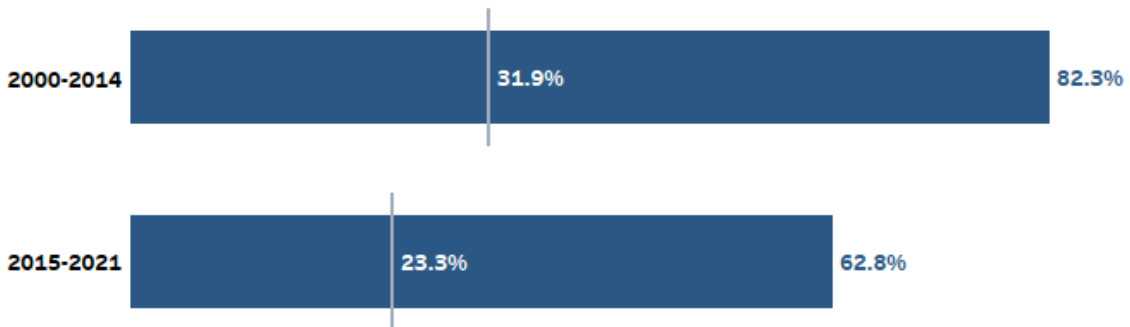


⁶ Noting the large proportion of cases in the 2000-2014 time period in comparison to that of the 2015-2021 time period, further analysis with a more granular breakdown could provide additional insights for stakeholders. This will be pursued in the next phase alongside stakeholder partners.

Key Insights

Gender bias and gender stereotyping are both a cause and consequence of GBV as well as a barrier to the legal system's capacity to respond to it. When judges use or validate contentious factors in sentencing decisions, gender biases are legitimised at the institutional level, resulting in discrimination.

Contentious Factors Raised vs. How Frequently they Impact Decisions



In Kiribati, the prevalence and use of contentious factors have decreased significantly across the two time periods. Of the 156 cases reviewed, contentious factors were raised in 82.3% of cases between 2000 and 2014 compared to 62.8% between 2015 and 2021. The use of contentious factors to justify sentence reductions decreased from 31.9% to 23.3% over the same two time periods. The most common contentious factors relied upon were Other Contentious Factors, used alone in 32.6% of cases, and Gender Stereotypes, used alone in 23.9% of cases. The application of Customary Practices in any combination with other contentious factors increased over the two time periods from 36.1% to 40.0%.

The impact of these contentious factors on sentencing is significant. The average sentence reduction in rape cases with contentious factors in Kiribati is 2.5 years, which is significant given the comparatively low tariffs for GBV related offenses to start with. In domestic violence cases, custodial sentences were not given at all in 25% of cases. The frequency of contentious factors and impact on sentencing reduces faith in the legal system and access to justice for victims/ survivors.

In the time period from 2015 to 2021, 20.9% of cases featured a partially or fully suspended sentence. In addition to contentious factors applied in mitigation, suspended sentences resulted in large sentence reductions and sometimes no custodial sentence at all. Customary Practices are the primary category of contentious factors involved when sentences were suspended, accounting for 75.0% of suspended sentences between 2015 and 2021.

The TrackGBV data also points to additional procedural barriers to consistency and accountability including the lack of medical reports cited in sentencing. This demonstrates a medico-legal gap in the judiciary in Kiribati. Medical reports serve as compelling evidence pointing to the severity of a crime and often have a strong influence on sentencing. There was

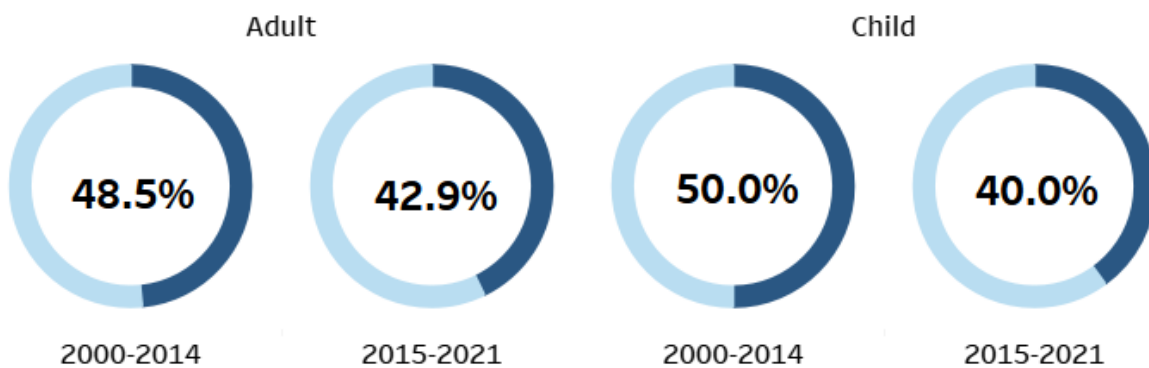
a decrease in medical reports cited, from 9.7% to 7.0%, across the two time periods, representing a major access to justice gap.

Medical Reports not cited in Kiribati



The lack of victim anonymity persists in Kiribati courts. Victim anonymity was not maintained for child victims in 47.4% of cases and for adult victims in 46.8% of cases. Anonymity is particularly important where communities are smaller, and people are more likely to find out about private matters. Ensuring victim anonymity is an important part of improving access to justice, as it improves the sense of safety for the victim and trust in the system.

Anonymity not maintained in Kiribati



While TrackGBV is focused specifically on sentencing decisions, these key insights point to broader implications for access to justice, policing, healthcare, legislation, and social norms. Institutionalising best practices for adjudicating GBV cases fairly can help these systems come together to improve consistency, transparency, and accountability for victims/ survivors.

Case Examples

Two recent cases help illustrate trends in sentencing in Kiribati. In *Republic v Tawere* [2018]⁷, the offender was charged with the rape of a girl who passed out under the influence of alcohol. In mitigation, the judge considered the offender's apology to the victim/ survivor and her family. The judge noted the precedent in *Republic v Arawaia* [2013]⁸ which suggested that an apology should have little effect as mitigation in sentencing in cases of defilement of girls under 13 years, and disregards it in this instance, minimizing the rape simply because the girl had been drinking. Victim blaming constitutes Gender Stereotypes and also contributed to giving credit to the offender's apology, constituting Customary Practices as well.⁹ The judge delivered a final sentence of two years and six months.

In *Republic v Tenamorua* [2021]¹⁰, the offender was charged with two charges of rape and one of indecent assault against his stepdaughter. The judge found a starting sentence of nine years and took a number of factors into account in mitigation including the delay in prosecution and the offender's guilty plea. The judge also accepted the impact of the offender's imprisonment on his family. He stated, "[y]ou are the only one providing food to them currently, and you subsist largely on copra and fish", which resulted in a five percent discount.¹¹ This factor is a Gender Stereotype, specifically the Sole Breadwinner Argument.

The Sole Breadwinner Argument is the notion that the perpetrator's sentence warrants reduction on the ground of his family's economic dependence on him as the sole or main source of income for the family. A systems approach to GBV allows us to distinguish the role of the courts from the role of other government institutions which are better positioned to offer social services and welfare to both victims/ survivors and offenders. For example, in *Republic v Tenamorua* [2021], other government institutions would need to ensure the offender's wife and mother have food supplies and other social welfare support as opposed to allowing this factor to affect his criminal accountability.

⁷ *Republic v Tawere* [2018] KIHC 2, <http://www.paclii.org/cgi-bin/sinodisp/ki/cases/KIHC/2018/2.html?stem=&synonyms=&query=Tawere>.

⁸ *Republic v Arawaia* [2013] KICA 11, <http://www.paclii.org/cgi-bin/sinodisp/ki/cases/KICA/2013/11.html?stem=&synonyms=&query=Arawaia>.

⁹ *Republic v Tawere* [2018] KIHC 2, <http://www.paclii.org/cgi-bin/sinodisp/ki/cases/KIHC/2018/2.html?stem=&synonyms=&query=Tawere>.

¹⁰ *Republic v Tenamorua* [2021] KIHC 4, <http://www.paclii.org/cgi-bin/sinodisp/ki/cases/KIHC/2021/4.html?stem=&synonyms=&query=Tenamorua>.

¹¹ *Ibid.*, para. 14.

Recommendations

Despite progress in Kiribati on reducing judicial bias and improving access to justice for women and girls, notable gaps remain. Based on ICAAD's research and training, the following steps are recommended for Kiribati and should involve all key stakeholders, including judiciaries, lawyers, GBV related service providers, women's rights advocates, police, survivors, and healthcare professionals.

- **Offer training specific to the needs of the jurisdiction.** ICAAD has collaborated with judiciaries to conduct Train-the-Trainers modules on the TrackGBV data that instils a deep understanding of gender justice for stakeholders.
 - Additionally, ICAAD has developed medico-legal training content for the Pacific that can be adapted for specific jurisdictions in order to bring together legal and medical professionals to address access to justice gaps.
- **Conduct a sentencing review.** Given the comparatively low sentences, the judiciary would benefit from a review of final sentence lengths for GBV related offences to potentially inform new sentencing guidelines.
- **Issue new judicial directives.** Building on training, judicial officers can issue judicial directives to institutionalise best practices for all judges. These directives may specifically address the findings from the TrackGBV data, such as:
 - Clarify and ban Gender Stereotypes, particularly rape myths and victim blaming arguments, in mitigation
 - Ensure that the lack of aggravating factors are not accounted for as mitigating factors in sentencing decisions
- **Practice accountability.** The TrackGBV Dashboard is regularly updated with new case law allowing key stakeholders to track progress over time, and this analysis can be disaggregated. This can pinpoint finer trends in the data to support judiciaries. Judiciaries also may want to establish mentoring programs to ensure that new judges are supported to understand best practices.

There are also important areas for further research that can be done by judiciaries in partnership with ICAAD. In Kiribati, the cases that have made it to the sentencing level overrepresent non-partner violence in relation to the most recent prevalence survey data. Non-partner violence accounted for 54.5% of cases, while the latest prevalence survey data has a rate of only 11.0%, compared to 67.6% of women over the age of 15 who have experienced physical and/ or sexual intimate partner violence. This may indicate a general underreporting of domestic violence cases in the courts, which is an area for further exploration with key stakeholders in Kiribati.

Next Steps

This analysis offers a deeper dive into some of the trends over time and examples from what is available on the [TrackGBV Dashboard](#). The regional analysis allows for comparison across jurisdictions and some trends over time, and the country reports look at each of the seven jurisdictions. However, stakeholders may have additional questions to support their work towards improving access to justice for women and girls.

For more information, navigating the [TrackGBV Dashboard](#) and its many features may help you to uncover the insights you are looking for. Stakeholders can highlight specific data and download PDF reports on the Dashboard. The ICAAD team is also available to collaborate in disaggregating the raw data for additional insights and to work with stakeholders to make use of this data within judiciaries and advocacy efforts.

Additionally, ICAAD is prepared and experienced in helping jurisdictions approach some of the recommendations outlined in this report including training and developing judicial directives. ICAAD has collaborated with judiciaries to conduct Train-the-Trainers modules on the TrackGBV data that instils a deep understanding of gender justice for stakeholders.

To collaborate, please contact Erin Thomas (erin@icaad.ngo).



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