



lawyers for
children & young people

Roundtable on Children's Rights in Scotland: using the law and human rights to advance policy

SUMMARY




On 26 October 2016 Clan Childlaw held a Roundtable on Children's Rights in Scotland to look at ways of using the law and human rights to advance policy.


Chaired by Clan Childlaw's Principal Solicitor Alison Reid, the event formed part of a project Clan Childlaw is running with the support of the Baring Foundation and the Legal Education Foundation, which seeks to highlight the benefits of using the law, legal processes and human rights to progress policy issues to tackle discrimination and disadvantage in relation to children in Scotland.


Around 60 representatives of voluntary organisations, the legal profession and others working in children's rights came together to hear inspiring presentations by Michael Gowan MSYP, Jennifer Twite (Just for Kids Law), Fiona Jones (Clan Childlaw), Juliet Harris (Together (Scottish Alliance for Children's Rights)) and Morag Ross QC, and take part in cross-sectoral group discussions on realising children's rights through legal processes.

Member of the Scottish Youth Parliament Michael Gowan challenged us to listen to children and young people and place their views at the centre of our work in accordance with Article 12 of the United Nations Convention on the Rights of the Child (UNCRC). The Scottish Youth Parliament (SYP) contributed to the reporting process that culminated in the UN Committee on the Rights of the Child's Concluding Observations on the UK, which were published in June 2016. Among the many issues raised by the SYP before the UN Committee were child poverty, raising the minimum age of criminal responsibility, votes at 16 and access to justice. Michael pointed out that the idea of engaging with justice can be intimidating for children and young people and called for the very real obstacles to them accessing justice to be tackled.

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Next up was **Jennifer Twite, Barrister and Head of Strategic Litigation (Youth Justice) at Just for Kids Law** in London, who runs their test cases in the area of youth justice. Jennifer inspired the room with an account of **Just for Kids Law's experience of using law and communications to create social change**. Making the most of technology and communications tools, reaching people with personal stories in the media, and garnering support from constituent groups and the public can all help to create the conditions for change. Civil society can influence the legislative and political process by drafting legislation, rules, policy or regulations and lobbying, while in some circumstances litigation can be the most immediate and impactful campaigning tool. Involvement in litigation can take different forms: organisations can bring cases themselves or on behalf of a young person, they can intervene in cases brought by others, or provide evidence for one of the parties. Jennifer's presentation contains lots of useful tips and details of Just for Kids Law's cases and campaigns and can be found on our website.

Turning to recent experience in Scotland, **Fiona Jones from Clan Childlaw** gave a fascinating account of Clan Childlaw's experience of **intervening in two court cases**, the Christian Institute v Lord Advocate (the 'Named Person case') and AB v HMA. Both interventions brought the children's rights' perspective to the fore. Fiona outlined the background to the interventions, the process of seeking permission to intervene from the Court of Session and the Supreme Court and the practicalities involved. The point of an intervention is to assist the court and bring a different perspective to the case. Intervening is still fairly unusual in Scotland. In the Named Person case, Clan Childlaw argued – as it had during the passage of the legislation - that the information sharing provisions of the Children and Young People (Scotland) Act 2014 were incompatible with a child's rights under Article 8 ECHR. The Supreme Court agreed and as a result the Scottish Government is now revising the Act so as to comply with Article 8. Fiona's presentation is on our website where you can also find the text of Clan Childlaw's intervention and articles explaining the case.

Juliet Harris, Director of Together (Scottish Alliance for Children's Rights), then provided her invaluable and inspirational take on **how voluntary sector organisations can use human rights law to advance policy**. Setting out why human rights law is important to children, Juliet recalled that: 1) children are rights-holders and must be recognised as such, 2) law can be a powerful conduit for change, and 3) law is an important basis for budget allocation and spending to deliver services. The UNCRC Concluding Observations are an important tool to inform policy. Voluntary sector organisations can use law to influence policy by responding to government consultations, by using the public, media and parliamentary advocacy to put pressure on governments to legislate on particular issues, and by using strategic litigation to address gaps in legislation, change laws or further interpret a legal provision. Strategic litigation allows voluntary sector organisations to set the agenda rather than always follow government's agenda. She gave examples of changes brought about by strategic litigation across the world and referred to the judicial review brought by the Humanist Society Scotland in relation to religious observance in schools. That case was launched following the inclusion of the recommendation in the UNCRC Concluding Observations that children be given the right to withdraw from religious observance in schools (since the Roundtable, the Scottish Government has announced that it is going to consult on this issue and as a result the judicial review proceedings have been paused for three months). Juliet called on voluntary organisations to work together and in partnership with children, legal professionals and the national human rights institutions to achieve change.

Finally, a **lawyer's perspective** was shared by **Morag Ross QC**. Morag was the advocate who represented Clan Childlaw before the Supreme Court in the case AB v HMA (judgment still pending). The intervention was first submitted in writing and then Morag was allocated half an hour at the hearing to make the arguments orally. The purpose of the intervention was to highlight the children's rights issue at stake in the case, which is that a charge or conviction against a child should not prejudice them later in life (AB is prevented from using a statutory defence to a sexual offence charge made against him at the age of 19 because he was previously charged with a sexual offence at the age of 14). Due to the nature of that case it was subject to an expedited procedure meaning that the intervention was subject to a tight deadline. Morag pointed out that it can be difficult to get to know about cases in Scotland which could merit an intervention, as there is no system for monitoring cases. The Court of Session does not list upcoming cases, whereas the Supreme Court does. Organisations may need to rely on word of mouth or being contacted by the parties to a case.

Group discussions on realising children's rights through legal processes

Participants of the Roundtable broke into small groups to discuss how they are using, or could use, the law and human rights to advance policy as well as some of the challenges to this approach.

Here are **some of the points raised**:

- Organisations in Scotland have varying experience of using law and human rights to advance policy; there is a lot of interest in the possibilities of this approach
- We need to work together, develop networks between professionals across sectors, and build on contacts made today
- Better use of law and human rights will depend on better public education, especially education of young people ('a fence at the top of the cliff rather than an ambulance at the bottom')
- Once a problem is identified, need to find out if anything is being done about it - share problem with others and find solution together
- To improve implementation of policy/law, need to hold authorities to account, e.g. by referring to law and human rights when campaigning and by looking for ways to realise rights in law and enforce them in courts
- Important to identify what is legal target and what is broad aim of culture change
- Voluntary organisations can gather evidence of a generic problem, e.g. through Freedom of Information requests and statements from other NGOs or lawyers. Can then develop legal arguments with the help of a lawyer
- The law can be intimidating to adults and children more so
- There is a lack of mechanisms for children to complain about breaches of their rights
- Voluntary organisations can raise awareness of an issue in legal press and journals
- More use could be made of the Equality Act 2010
- EU law is underused – can be used to assist e.g. child migrants

Some of the points made with regard to **litigation as a policy tool**:

- One good judgment can have ripple effect – if it forces a change to legislation/policy/practice, other cases won't have to be brought to court; on the other hand, if a case is lost, it can be a setback to policy
- Important to identify the right case that can bring broader social change
- Judicial review is an important check on authorities' decision-making - now organisations can bring a case if they have sufficient interest
- Intervening in a case allows an organisation to present a different perspective to the court
- Need to know what is already being litigated on – not easy to find information about ongoing cases
- Organisations can provide specific expert reports. A judge needs well-informed, well-reasoned information
- It would help to collect examples of where pre-litigation approaches have been effective
- Justice should be more accessible and less intimidating
- Need safeguarding procedures for victims
- Potentially high costs to litigation: financial, social, emotional, time-consuming
- If you spot a case, need to consider where any individual involved can cope with litigation/spotlight
- How can litigation be funded? Legal aid, Crowdfunding, pro bono legal advice
- A lawyer's focus is on the individual client rather than on policy change
- Different judges can give different opinions on the same issue
- Concerns about bringing legal action include: capacity, resources, complexity, vulnerability of groups, confrontational nature of legal action, potential risks to organisation
- Post-litigation communication is important

Policy areas suggested by participants as ones that could be progressed through a law and human rights approach include:

- Education, e.g. disability discrimination, informal exclusions from school, access to free school meals, administration of medicines, health difficulties that are not seen as additional support needs
- Child contact: safe contact where there is domestic abuse; assuring the child's voice is heard in decisions and the child's rights are considered
- Child support/maintenance payments
- Unaccompanied asylum-seeking children and their access to services
- Legal aid decisions
- Court delays
- Equal protection against assault
- Sibling contact
- Climate change, right to clean air

Next Steps

Alongside raising awareness of techniques for using law and human rights to advance children's rights policy goals, a key aim of the Roundtable was to facilitate contact and collaboration between professionals who would like to take forward shared policy goals through legal processes. We would like to continue that work going forward. Clan Childlaw coordinates a Children's Rights Strategic Litigation Group which provides a forum for exchanging views, knowledge and experience and the opportunity for collaboration on issues of concern. We are always interested to hear about live or potential cases affecting children's rights. Anyone interested in continuing this work is invited to contact Janet Cormack (janet.cormack@clanchildlaw.org).

Finally, we would like to express our **thanks** to all those who participated in this event and to the Baring Foundation and the Legal Education Foundation for their support.

Janet Cormack, Strategic Litigation Group Coordinator, Clan Childlaw, November 2016

Annexes

Roundtable Programme

Handout: Law and human rights based approaches for tackling disadvantage and discrimination among children and young people

Chair and Speaker Biographies

Presentations