

# Training Pack

INNOVATING EUROPEAN LAWYERS  
TO ADVANCE THE RIGHTS OF  
CHILDREN WITH DISABILITIES



**Belgium**



**Bulgaria**



**Czech Republic and  
Slovakia**



**Ireland**



**Lithuania**



**Poland**



**Romania**



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## A. Overview: What are Human Rights?

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Human rights are basic, fundamental rights that all people are entitled to simply by virtue of being a human being, such as the rights to liberty and life. They are universal – meaning they belong to each person regardless of their nationality, place of residence, sex, sexual orientation or gender identity, nationality, race and ethnicity, religion, language or other status. People who have labels of disability or mental health issues are also entitled to the full range of human rights, without discrimination.

Human rights are based on core principles, including: universality, equality, non-discrimination, and are set out and guaranteed by law, such as in international treaties.

## B. Key Texts

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Key human rights texts include:

- Universal Declaration of Human Rights (“UDHR”)
- International Covenant on Civil and Political Rights (“ICCPR”)
- International Covenant on Economic, Social and Cultural Rights (“ICESCR”)
- UN Convention on the Rights of Persons with Disabilities (“CRPD”)
- UN Convention on the Rights of the Child (“CRC”)
- UN Convention on the Elimination Discrimination Against Women (“CEDAW”)
- UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”)
- International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”)
- European Convention on Human Rights (“ECHR”)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“ECPT”)
- Charter of Fundamental Rights of the European Union
- Revised European Social Charter

These texts set out which human rights are guaranteed. They also place obligations upon states (this means governments, parliaments and judiciary in each country) to **respect, protect, promote and fulfill** human rights.

Depending on the ratification status, as well as on the system applicable in the country (monistic or dualistic), the rights from these and some other international instruments may be directly applicable in the national legal system. Furthermore, most national constitutions will also have provisions on fundamental human rights.

The CRC and CRPD are two of the key international treaties safeguarding the rights of children with mental disabilities (“cwmd”). The CRC, adopted in 1989, sets out the civil, political, economic, social and cultural rights to which children everywhere are entitled.<sup>1</sup> These rights apply to each child, no matter where or who they are. Under the CRC, which is the most widely ratified international treaty (with only the USA and Somalia still remaining non-parties to the Convention) children are acknowledged as human beings with a distinct set of rights, and not simply passive objects of care.<sup>2</sup> Article 23 of the CRC specifically addresses children with mental and physical disabilities. A UN treaty body called the Committee on the Rights of the Child (“CRC Committee”), composed of 18

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<sup>1</sup> All EU Member States have ratified the CRC.

<sup>2</sup> See <http://www.unicef.org.uk/UNICEFs-Work/UN-Convention/> (accessed 14 May 2016).

independent experts, monitors the implementation of the CRC. The Committee evaluates reports submitted by State Parties to the Convention and also serves a quasi-judicial role in considering individual complaints.

The CRPD, the newest UN treaty, entered into force upon its twentieth ratification in May 2008<sup>3</sup>. It represents a paradigm shift, moving away from the **medical model of disability** which views people with disabilities as objects (of treatment, management, protection, charity and sometimes pity and fear), and towards the **social model of disability** which regards people with disabilities as subjects of the full range of human rights on an equal basis with others, and where people's capacity to make decisions is presumed. One substantive area demonstrating this 'paradigm shift' is the right to live in the community.<sup>4</sup> The CRPD specifically references the CRC and the rights of children with disabilities in Preamble para. (r), Article 3(h), Article 4(3), Article 6 and Article 7. Like the CRC, the CRPD established a new UN treaty body called the Committee on the Rights of Persons with Disabilities. The Committee evaluates reports submitted by States party to the Convention (and shadow reports submitted by non-governmental organisations), as well as serving a quasi-judicial role considering individual complaints.

Other pertinent international texts particularly relevant in the EU are the:

- i. EU Victims Directive (2012/29/EU)<sup>5</sup> which establishes minimum standards on the rights, support and protection of victims of crime, ensuring that persons who have fallen victim of crime are recognised, treated with respect and receive proper protection, support and access to justice.
- ii. Council of Europe guidelines on child-friendly justice<sup>6</sup> which are guidance to help states establish judicial systems which respond to the specific needs of children to ensure their effective and adequate access to and treatment in justice systems, ranging across the civil, administrative and criminal spheres.
- iii. Draft standards on integrated child-protection systems from DG-Justice European Commission<sup>7</sup> which will establish standards for systems which offer protection and response services, and care management, to protect children from violence.

## C. Key Rights

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Cwmd face a double disadvantage because of their age and their disability. Their situation falls within the intersection of rights of the child and rights of persons with disabilities. Intersectional (or multiple) discrimination is a specific phenomenon in the theory of human rights, which is an approach to an individual's identity that recognises that different identity categories can intersect and co-exist in the same individual in a way which creates a qualitatively different experience when compared to any of the individual characteristics involved. In practice this means that a child with disability will have a different experience than a child without disability and an adult with disability, and that their experience is not just a combination of the two. Experiences of children with disabilities are specific, and hence more complex than just a sum of these two identities. Children, just as the rest of persons with disabilities, enjoy all the rights not only from the CRC and the CRPD, but from all the other international and national human rights instruments. CRC and CRPD are, however, to be seen as a *lex specialis* to these other instruments.

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<sup>3</sup> To date, 27 of the 28 EU Member States have ratified the CRPD: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en) (accessed 11 September 2016). Ireland has yet to ratify the Convention, although has committed to doing so before the end of 2016: oral statement of the Minister of State of the Irish Department of Justice and Equality with special responsibility for Disability Issues Finian McGrath TD, <http://www.justice.ie/en/JELR/Pages/SP16000149>, 22.06.2016 (accessed 11 September 2016).

<sup>4</sup> The ITHACA Toolkit, [https://www.thl.fi/documents/189940/1878598/2.4\\_Ithaca\\_Toolkit\\_English.pdf/bbd4594f-a221-48be-822a-9c5fac843454](https://www.thl.fi/documents/189940/1878598/2.4_Ithaca_Toolkit_English.pdf/bbd4594f-a221-48be-822a-9c5fac843454)

<sup>5</sup> [http://ec.europa.eu/justice/criminal/victims/index\\_en.htm](http://ec.europa.eu/justice/criminal/victims/index_en.htm)

<sup>6</sup> <http://www.coe.int/en/web/children/child-friendly-justice>

<sup>7</sup> [http://ec.europa.eu/justice/fundamental-rights/rights-child/protection-systems/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/rights-child/protection-systems/index_en.htm)

The key rights examined in this training are:

1. Living and being included in the community
2. Education
3. Health
4. Freedom from abuse
5. Access to Justice

These are all underpinned by a cross-cutting principle: **non-discrimination**. The starting point therefore is the acknowledgement of **equality before and under the law**, and that all people are entitled to full enjoyment of all human rights and fundamental freedoms without discrimination.

The principle of non-discrimination is set out in Article 5 of the CRPD, which prohibits disability-based discrimination. This term means “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights [...] including denial of reasonable accommodation” (see Definitions, Article 2).

Note that the person discriminating need not intend to discriminate: it is enough that the effect of their action or policy places a person with a disability in a disadvantageous situation. Denial of reasonable accommodation constitutes discrimination, and this means the “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.

Article 2 of the CRC also prohibits discrimination “of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” Article 14 of and Protocol 12 to the ECHR set out the right to non-discrimination, as does Article 21 of the EU Charter of Fundamental Rights.

People with disabilities do not just face discrimination based on their actual or perceived impairments. The CRPD also recognises “multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.” For children with disabilities, these include discrimination faced by children with disabilities who are also Roma/Ethnic Travelling, LGBT, Jewish, Muslim, immigrants and so on.

The five core rights are now introduced in turn, looking at the nature of the right, their sources in international human rights law, and an interesting fact about each.

## 1. Living and being included in the community

### **Nature of the right**

Every child has the right to live in their family or in a family-type environment, and to be supported to live in a safe and inclusive community.

### **International human rights standards**

Article 19 of the CRPD sets out “the equal right of all persons with disabilities to live in the community, with choices equal to others”. This includes choice about where and with whom to live, as well as the right to be provided with disability-related supports, and access to public services. Article 23 CRC is an older test that is less specific on disability, merely noting that children with

disabilities “should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community”.

Included in this right is the notion that children should be brought up in their biological family, or failing that, in a family-type arrangement. Article 23 of the CRPD sets out that, “a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.” Article 9 of the CRC provides that “a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”

The ECHR also sets out the right to respect for private and family life, home and correspondence under Article 8. The right to liberty is set out under Article 5, imposing a corollary obligation on states not to arbitrarily deprive people of their liberty. An important case is *Stanev v. Bulgaria* (2012), which established that it was unlawful for a guardian to authorise the placement of a man with a mental health issue into a social care institution against his will, depriving him of his liberty, and denying him access to justice. This case may be relevant for the situation of children with disabilities, as adults placed under guardianship are, legally speaking, put in the same position as children, and cannot make legally-effective decisions for themselves.

### **Did you know?**

The rights above are violated when cwmd and their families are denied support services which would allow them to continue living in the community. Consider the case of David, Štěpán and Miroslav, three Czech boys with autism, learning difficulties and behavioural issues.<sup>8</sup> As they got older, their families found it increasingly difficult to support them without help and sought support services locally to allow their sons to continue living at home. Specifically, they sought assistance from a local social services provider that wanted to build a small specialist centre near the boys. The provider’s request for financial assistance was denied by the regional authority, who instead used its finances to rebuild a pavilion at a residential children’s institution. The families took legal action.

Initially, the regional court dismissed the claims, holding no one has a legal right to receive social services. The Supreme Administrative Court however quashed this decision, holding that cwmd have an enforceable right to receive social services for the purpose of ensuring that they could continue to live with their families in the community.

## 2. Right to education

### **Nature of the right**

Regardless of the nature or degree of their impairment, each child has the right to be educated in an inclusive educational environment.

### **International human rights standards**

Article 24 of the CRPD says that education should be directed to the “full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity” (Article 24(1)(a)), and “[t]he development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential” (Article 24(1)(b)). Of significance well beyond the field of disability, the Convention draws a thread between education and participation in a free society

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<sup>8</sup> MDAC, Czech Supreme Court enforces legal right for children with disabilities to live in the community. Available at : <http://www.mdac.org/en/news/czech-supreme-court-enforces-legal-right-children-disabilities-live-community>

(Article 24(1)(c)).

To implement these goals, governments must firstly “recognize the right of persons with disabilities to education”. The verb “recognize” means that governments must pursue law reform to establish in domestic law that each person with a disability, “can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live (Article 24(2)(b)). The government also needs to establish a legal prohibition on excluding people with disabilities from inclusive education (Article 24(2)(a)). These provisions build on the right to education in Article 28 of the CRC, a treaty adopted 17 years before the CRPD. The right to education is also set out in Article 2 of Protocol No. 1 to the ECHR.

Significantly, the CRPD requires an end the placement of children with disabilities in separate or segregated educational provision, including special schools. Instead of this, there is an obligation on states to provide individualised support and reasonable accommodations (Articles 24(2)(c), (d) and (e)) to children with disabilities so that they can be fully included in the general education system.

In August 2016 the CRPD Committee adopted their General Comment no. 4 on inclusive education. General comments are authoritative interpretations of provisions of international treaties, and the one on inclusive education gives a detailed description of what is expected from the States in respect of ensuring inclusive education for all.<sup>9</sup>

### **Did you know?**

Education is regarded as an economic, social and cultural right. These sorts of rights must be implemented on the basis of “progressive realisation” (Article 4(2) of the CRPD). This means that this year education needs to be rolled out to more children in a better way than last year, and that next year will achieve greater results than this year. At the same time, discrimination on the basis of disability (as well as on any other prohibited ground) is not subject to progressive realisation – it is immediately applicable. For example, if a child with a disability needs a teaching assistant to learn in a school, but is denied because the school says it has insufficient resources, this could constitute a failure to provide reasonable accommodation and breach the principle of non-discrimination. So a lawyer can creatively use international human rights law to persuade a court to order a local authority to put in place accommodations immediately to implement the child’s right to non-discrimination, even though the area of law is education which is an economic and social right subject to progressive – rather than immediate – realisation.

## 3. Right to health

### **Nature of the right**

Children with disabilities are entitled to the same access to healthcare as other children. They are also entitled to receive habilitative and rehabilitative services for their specific impairments.

### **International human rights standards**

Children with disabilities have the “right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability” (Article 25 of the CRPD), and are entitled to health services including, “early identification and intervention” as well as “services designed to minimize and prevent further disabilities, including among children” (Article 25(b)). Healthcare should be provided close to people’s communities, including in rural areas (Article 25(c)) and people with disabilities should be, “provided with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes” (Article 25(a)).

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<sup>9</sup> CRPD Committee General Comment no. 4 on inclusive education, UN Doc CRPD/C/GC/4. Available at: <http://www.ohchr.org/Documents/HRBodies/CRPD/GC/RighttoEducation/CRPD-C-GC-4.doc>



Rehabilitation is also set out in the CRPD. Governments must, “take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life” (Article 26) that “[b]egin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths” (Article 26(1)(a)). Such services should “[s]upport participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.” (Article 26(1)(b)). Crucially, health treatments should be provided to children with disabilities on the basis of “free and informed consent” (Article 25(d)) taking into account their “age and maturity, on an equal basis with all other children” (Article 7(3)).

The CRC also sets out the right to health of all children in Article 24, placing an obligation on governments to “strive to ensure that no child is deprived of his or her right of access to such health care services.” The EU Charter of Fundamental Rights states that, “[e]veryone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices” (Article 35).

Although a right to health has not expressly been recognised under the ECHR, it has been recognised to arise indirectly in certain circumstances under Articles 3 and 8, in conjunction with Article 14.<sup>10</sup>

### **Did you know?**

The right to health should be distinguished from the right to be healthy. There is no guarantee to be and remain healthy in international human rights law. Along those lines, according to the World Health Organization, the “right to the highest attainable standard of health” requires a set of social criteria that is conducive to the health of all people, including the availability of health services, safe working conditions, adequate housing and nutritious foods. Achieving the right to health is closely related to that of other human rights, including the right to food, housing, work, education, non-discrimination, access to information, and participation.

## 4. Freedom from abuse

### **Nature of the right**

International human rights law sets out an absolute prohibition against torture, inhuman or degrading treatment and punishment. This absolute prohibition means that, while some rights may be derogated in some specific circumstances - such as at times of armed conflict - torture, inhuman and degrading treatment can never be justified, under any circumstances. In addition, everyone with disabilities should be protected against all forms of exploitation, violence and abuse.

### **International human rights law**

The prohibition against torture or to cruel, inhuman or degrading treatment or punishment is set out in the ECHR (Article 3), the EU Charter of Fundamental Rights (Article 4) and many UN human rights treaties, including the UN Convention against Torture and Article 15 of the CRPD. In their duty to protect against “all forms of exploitation, violence and abuse, including their gender-based aspects”, governments must, “take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home” (Article 16, CRPD). The CRPD also establishes that people with disabilities have a “right to respect for his or her physical and mental integrity on an equal basis with others.” The CRC specifies that children must be protected from abuse, calling on governments to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse,

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<sup>10</sup> See, for example: ‘Health Factsheet’, European Court of Human Rights, August 2016, [http://www.echr.coe.int/Documents/FS\\_Health\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Health_ENG.pdf) (accessed 11 September 2016).



while in the care of parent(s), legal guardian(s) or any other person who has the care of the child” (Article 19, CRC), and to “protect the child from all forms of sexual exploitation and sexual abuse” (Article 34 CRC).

### **Did you know?**

The European Court of Human Rights decided the case of *Blokhin v. Russia*, in 2016. In that case a 12-year old boy with ADHD and a bladder disorder was arrested for allegedly extorting his 9-year old neighbour. In detention, he was kept in a large empty room with no furniture and had to share his bedroom with seven other boys. His bladder condition meant he had to urinate often, but when he asked to use the toilet he was forced to do cleaning work and to wait until other detainees needed the toilet. His health deteriorated so much in prison that when he was released, he spent three weeks in hospital. The European Court found that the treatment amounted to a violation of Article 3 ECHR.

## 5. Access to justice

### **Nature of the right**

Everyone is entitled to a remedy when their rights are violated. Everyone has the right to a fair trial if they are accused of a crime, and to be treated with fairness if they are a victim of, or a witness to, a crime. In particular, children have a right to be heard and express an opinion during proceedings.

### **International human rights law**

The right to access to justice is set out in several texts, including Article 13 of the CRPD which states that this right should be “effective”, not just a theoretical possibility. The obligation on States is to provide “procedural and age-appropriate accommodations, in order to facilitate [a person’s] effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.” Although there is no jurisprudence on the meaning of “direct and indirect participants”, the former could mean as litigants and witnesses, and the latter jurors, lawyers and judges.

Justice systems often ignore the voices of children, and Article 12 of the CRC sets out the right of each child to be heard. This provision requires that justice systems provide each child with, “the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

Another aspect to accessing justice is the right to a fair trial. This is a standard civil and political right and, among other texts, is set out in Article 14 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the ECHR. The CRC added a child-specific right in its Article 40, namely that the anonymity of a child offender must be respected at all stages of criminal proceedings. In addition, case law of the ECHR has pointed out the need for independent representation as a key element in ensuring access to justice.<sup>11</sup>

With regard to accessibility, the CRPD Committee has said, “[t]here can be no effective access to justice if... the services, information and communication they provide are not accessible to persons with disabilities (art. 13). Safe houses, support services and procedures must all be accessible in order to provide effective and meaningful protection from violence, abuse and exploitation to persons with disabilities, especially women and children (art. 16)<sup>12</sup>.” Article 13(1) of the CRPD requires governments to take actions to ensure effective access to justice, “including through the

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<sup>11</sup> See, for example, *Center of Legal Resources on behalf of Valentin Câmpeanu v. Romania*.

<sup>12</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 2 – Article 9: Accessibility, 22 May 2014 (available <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/033/13/PDF/G1403313.pdf?OpenElement>)

provision of procedural and age-appropriate accommodations”. Reasonable accommodations are discussed below (section G, under the principle of non-discrimination). The CRPD Committee has said that accommodations must be provided when the authorities are notified that a person with disability needs some adjustments to enjoy rights on an equal basis<sup>13</sup>. Individual assessments must be done as soon as a child comes into contact with the justice system. Potential reasonable accommodations might include:

- child-friendly interview rooms;
- providing evidence via video-link;
- providing drinking water and short breaks;
- allowing a child to communicate with the assistance of a support person/intermediary;
- using sign language, augmentative and alternative communication methods;
- interviewing the child in familiar and comfortable settings; and/or
- allowing a person of trust to accompany the child throughout proceedings<sup>14</sup>.

The rights of victims must be balanced against the protections given to defendants. The EU Victims Directive<sup>15</sup>, the Council of Europe guidelines on child-friendly justice<sup>16</sup>, and the draft standards on integrated child-protection systems<sup>17</sup> all set standards that protect child victims and witnesses. The protections for vulnerable victims differ from the protections for vulnerable suspects.<sup>[5]</sup>

## D. Spotlight: Girl Child

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Girls with disabilities are likely to face additional and heightened barriers due to the intersection of age-based, disability-based and gender-based discrimination.<sup>18</sup> The European Union Agency on Fundamental Rights (“FRA”) has found that women with disabilities are far more likely to experience physical and sexual abuse than those without disabilities.<sup>19</sup> Nearly half of all women across the EU who have suffered at least one incident of physical or sexual violence in childhood consider themselves to be persons with disabilities.<sup>20</sup>

The UN has stressed: “Special consideration is to be given to girls (including the girl child and adolescent girls, where appropriate) because they face specific barriers to access to justice. They often lack the social or legal capacity to make significant decisions about their lives in areas relating to education, health and sexual and reproductive rights. They may be forced into marriage or

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<sup>13</sup> CRPD Committee, General Comment No. 2 – Article 9: Accessibility, para. 26, available online <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/033/13/PDF/G1403313.pdf?OpenElement>.

<sup>14</sup> MDAC, Access to Justice for Children with Mental Disabilities: International Standards and Findings from Ten EU Member States, p. 26. Available at:

[http://www.mdac.org/sites/mdac.info/files/access\\_to\\_justice\\_children\\_ws2\\_standards\\_and\\_findings\\_english.pdf](http://www.mdac.org/sites/mdac.info/files/access_to_justice_children_ws2_standards_and_findings_english.pdf)

<sup>15</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Available online at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32012L0029>

<sup>16</sup> Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice. Available online at:

<https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/GuidelinesChild-FriendlyJusticeE.pdf>

<sup>17</sup> Standards and good practice references by respondents to online public consultation on integrated child protection systems (CPS), February 2015. Available online at: [http://ec.europa.eu/justice/fundamental-rights/files/cps\\_practices\\_standards.pdf](http://ec.europa.eu/justice/fundamental-rights/files/cps_practices_standards.pdf).

<sup>[5]</sup> See Suzan Van Der Aa, “Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU law.” *New Journal of European Criminal Law*, Vol. 7, Issue 1, 2016.

<sup>18</sup> See CPRD Draft General Comment on Women with disabilities (available <http://www.ohchr.org/Documents/HRBodies/CRPD/GC/Women/CRPD.C.14.R.1-ENG.doc>)

<sup>19</sup> See FRA, “Violence against Women: an EU survey” 2014 (available [http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf))

<sup>20</sup> MDAC, Violence against Girls and Women with Disabilities, 8 March 2014 (available <http://www.mdac.org/en/news/violence-against-girls-and-women-disabilities>)

subjected to other harmful practices and various forms of violence.<sup>21</sup> States tackling domestic and sexual violence is a key requirement under CEDAW. A Council of Europe Convention on preventing and combating violence against women and domestic violence (“Istanbul Convention”) likewise stresses the obligation upon States to fully address violence against women and girls, including prevention, protection and prosecution.<sup>22</sup> Article 39 addresses forced abortion and sterilisation.

## 1. Prosecuting Abuse

*Representative case:* Criminal prosecution of a stepfather for the rape of his 13 year old stepdaughter who had severe cognitive impairment and communication difficulties. She complained to her mother that he had shown her people having sex on her new laptop and had raped her. His semen was found on her underwear, and an analysis of her laptop showed that it had been used to access pornographic sites. Her stepfather’s defence was that it never happened, his underwear may have been in the washing with hers and that she may have accidentally accessed pornography when searching for children’s websites. The prosecution therefore depended on the girl’s evidence. She gave evidence via pre-recorded video, then was cross-examined over 5 half days in 30 minute periods over a live link with the assistance of an intermediary who was a communication expert.

- Prosecuting such cases is essential, but they hinge on evidence. It is therefore crucial that legal professionals and others working with cwmnd communicate in ways that make the evidence as reliable as possible.
- As highlighted by this case, it was not for the girl to change but for the lawyers and courts to make the effort to adapt.

## 2. Forced Sterilisation

Systemic prejudice and discrimination against women and girls with disabilities continues to result in widespread denial of their right to make decisions about their own bodies, experience their sexuality, have sexual relationships, and found and maintain families.

There are women and girls with disabilities who have been and continue to be, denied these and other fundamental human rights through the ongoing government-sanctioned practice of ‘forced/involuntary’ and ‘coerced’ sterilisation.

Forced sterilisation – that is, sterilisation in the absence of the free and informed consent of the individual concerned – including instances in which sterilisation has been authorised by a third party without that individual’s consent, is an act of violence, a form of social control, and a clear and documented violation of the right to be free from torture<sup>23</sup>.

Forced sterilisation of girls and women with disabilities is internationally recognised as a harmful practice based on tradition, culture, religion or superstition. Perpetrators are seldom held accountable and women and girls with disabilities who have experienced this violent abuse of their rights are rarely, if ever, able to obtain justice. Governments have not acknowledged this pervasive practice, nor expressed regret, nor offered redress to the women and girls affected<sup>24</sup>.

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<sup>21</sup> CEDAW General Recommendation on Women’s Access to Justice, 23 July 2015, CEDAW/C/GC/33 (para. 24) ([http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_33\\_7767\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf))

<sup>22</sup> See Council of Europe Convention on preventing and combating violence against women and domestic violence, 12 April 2011 (available <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046031c>)

<sup>23</sup> Human Rights Watch, Sterilization of Women and Girls with Disabilities: A Briefing Paper and the references contained therein, November 2011. Available online at: <https://www.hrw.org/news/2011/11/10/sterilization-women-and-girls-disabilities>.

<sup>24</sup> Women with Disabilities Australia (WWDA), Dehumanised: The forced sterilisation of women and girls with disabilities in Australia, p. 8. Available at: [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/INT\\_CAT\\_NGO\\_AUS\\_18673\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/INT_CAT_NGO_AUS_18673_E.pdf)

The practice of forced sterilisation is itself part of a broader pattern of denial of human and reproductive rights of women and girls with disabilities, which also includes systematic exclusion from appropriate reproductive health care and sexual health screening, forced contraception and/or limited contraceptive choices, a focus on menstrual suppression, poorly managed pregnancy and birth, selective or coerced abortion and the denial of rights to parenting<sup>25</sup>.

These practices are framed within traditional social attitudes that continue to characterise disability as a personal tragedy, a burden and/or a matter for medical management and rehabilitation.

## **E. Building the Skills to Represent Children<sup>26</sup>**

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### **I. Working with children**

**Building trust and rapport:** Trust and rapport between child and advocate is central to success. Evidence suggests children communicate best with those they trust and with whom they have a good relationship. To begin to establish such rapport:

- 1) Break the ice and make the child more comfortable. Begin with non-threatening topics of conversation – e.g. how the child came to the venue or the weather.
- 2) Consider your body language. Your nonverbal signals must match your verbal cues. Adopt an open posture and be welcoming, relaxed and smile. Get down on the floor with the child and play with toys.
- 3) Build effective listening skills. It is essential to develop good listening skills or communication will break down. Practice active listening – summarise or repeat back to the child what you think they mean. This format gives the child the opportunity to correct you if have you misunderstood.
- 4) Work to maintain trust when you and the child are apart. It is vital to maintain your rapport with the child during absences. Provide them with a picture of yourself and your contact details.

**Communicating effectively:** Before you begin speaking with the child, ensure you have her or his attention. Find out what the child would like you to call them and what they would like to call you. (First names are often easiest.) Speak in plain language, avoiding jargon or legal terminology. Speak in short sentences and offer one piece of information in each sentence. Show interest in the child, making it clear that this is more than just a job.<sup>27</sup> Ask the child to explain what they have understood/reflect back, rather than asking “do you understand?” Ensure any documents are in easy-to-read format.

In legal proceedings, take time to explain what will happen at each stage. Allow the child thinking time to provide the child space to process information and to consider their response. Offer him or her support in reading and understanding the meaning of documents in court. Allow the child to sit next to their advocate, carer, or family member and ensure the child can hear proceedings clearly.

### **II. Representing children with mental disabilities<sup>28</sup>**

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<sup>25</sup> Ibid, p. 10.

<sup>26</sup> See “Skills Training”, Access to Justice for Children with Mental Disabilities website: <http://mdac.org/A2J-training-site/skills-training/>

<sup>27</sup> Save the Children, “See Me, Hear Me: A guide to using the UN Convention on the Rights of Persons with Disabilities to promote the rights of children p. 89 and references contained therein. Available online at:

[http://www.savethechildren.org.uk/sites/default/files/docs/See\\_Me\\_Hear\\_Me\\_internals\\_final\\_1.pdf](http://www.savethechildren.org.uk/sites/default/files/docs/See_Me_Hear_Me_internals_final_1.pdf).

<sup>28</sup> For further advice on communicating with cwmd, particularly children with autism, see Ruth Marchant, “Double Jeopardy? Child Witnesses with Autism, 2012 (available at <http://www.triangle.org.uk/files/2015-12/double-jeopardy-child-witnesses-with-autism-ruth-marchant-june-2012.pdf>).

Effective communication, trust and rapport: To establish effective communication and break the initial tension, use non-verbal activities and games (pass the ball, build with blocks), draw pictures or read a story with the child. Identify communication issues, recognising that specific supports and accommodations may be necessary to communicate with the child and to facilitate their communication. Be aware that you may need to establish an effective, unique way of communicating and listening with this specific child. It may be helpful to use timelines, pictures and examples the child understands.

Accept that there may be moments of silence and acknowledge any feelings that are being expressed and give them validity. Allow time for more frequent breaks, as children with communication difficulties may tire more easily. Ensure you maintain the rapport that is built during absences and provide the child with a concrete notion that you will speak again. For example, in one case social workers who were helping a child with learning disabilities who had been a victim of sexual exploitation gave the girl their mobile number and created a timeline so that she could count down the days to their next visit.<sup>29</sup>

Practicing a positive, non-prejudicial attitude: Access to justice for cwmd starts with professionals in the field believing in their potential – practice a positive, non-prejudicial attitude. As noted by England’s Crown Prosecution Service: “Reliability and credibility (of witnesses) can be influenced by how a victim/witness is treated. If people with learning disabilities or mental health problems are taken seriously and listened to, they may feel more confident and less anxious, and therefore be able to give their best evidence in court.”<sup>30</sup> As bias is often unconscious, consider taking an unconscious bias training or a disability equality training course.

### **III. Top Tips for Communicating with CWMD**

1. Recognise a communication challenge and adjust your communication to suit the child.
2. Ensure a child friendly environment and make sure that all the necessary preconditions are met in advance (calm and cozy environment: a room, a park, at child’s home – anywhere where the child will feel relaxed and safe).
3. Set some ground rules.
4. Choose words carefully.
5. Do not expect eye contact.
6. Say what you mean: Use literal and simple language.
7. Repeat back for clarification.
8. Avoid risky and complex questions particularly around time.
9. Use play/art/images without leading.
10. Involve the child in the process.

### **IV. Top Tips for Taking Instructions from CWMD**

1. Make time.
2. Explain who you are and your role.
3. Deal with confidentiality. In particular explain confidentiality to the child and make sure to handle confidential information properly. Explain to the child what information will need to be shared.
4. Don’t assume a child lacks capacity.
5. Explain the process and the players.
6. Follow the top tips for communication.
7. Take instructions in a non-leading way.
8. Ensure they understand when they have a choice.

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<sup>29</sup> See <http://www.bbc.co.uk/news/uk-england-cambridgeshire-25659042>

<sup>30</sup> Crown Prosecution Service, Supporting witnesses and victims with a learning disability, July 2009. Available at: [https://www.cps.gov.uk/publications/docs/supporting\\_victims\\_and\\_witnesses\\_with\\_a\\_learning\\_disability.pdf](https://www.cps.gov.uk/publications/docs/supporting_victims_and_witnesses_with_a_learning_disability.pdf)

9. Emphasise that you may not be able to get what they want.
10. Explain the result.

## **F. Working with Trauma**

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### **Trauma**

Trauma is an adaptive response to a threat.<sup>31</sup> It triggers fear systems which are then activated and continue after the event has passed. Specifically, it affects the frontal lobe of the brain, responsible for verbal reasoning, organisation and cognitive function. As a result, trauma affects the ability to understand language, to process and think logically, and to communicate responses. In this way, trauma can significantly affect a person's ability to give evidence, follow proceedings and cooperate with procedures.<sup>32</sup>

Traumatised persons can be affected by related signals ("triggers") in their environment. Persons working with cwmd should therefore learn how to work with children with trauma, be aware of potential triggers as well as the risks of secondary traumatisation.

### **Indicators**

Indications a child may be suffering from trauma include:

- High level of anxiety including panic attacks.
- Fixed gaze or smile, may be speechless, mute or frozen.
- Malleable/suggestible – appears inattentive.
- Unable to absorb, think about or respond to information, questions and comments.
- Hyper-vigilant to surroundings and responses of others; startles easily and reacts to sounds, resulting in violent outbursts.
- Hypo-vigilant – submissive, may make little or no outward protest concerning what is happening to them and can appear uninterested/lethargic.
- Flashbacks – sensory 'hallucinations'; the re-experiencing of the traumatic event; also cognitive flashbacks: "I'm stupid", "It's my fault", or "I'm no good".
- Dissociation – splitting off, sometimes to an extreme state when various aspects of their personalities emerge. In extreme cases, children may withdraw into an elaborate fantasy world where they may assume special powers or strengths.
- Zone in and out, may become dizzy or may experience fogginess or have blank spells.
- Flat mood and may appear disinterested/disconnected.
- Appears confused by what is said or happening; does not understand common everyday expressions.
- Appears to have a short attention span; has difficulty focusing to read or write; repeats what is said to them (echolalia).
- Appears to have some difficulty in understanding questions; generally slow processing skills, responds inappropriately or inconsistently to questions; seems to focus on what could be deemed irrelevant small points rather than important issues.

### **Working with traumatised cwmd**

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<sup>31</sup> For more on trauma and on how to deal with a traumatised child, see video prepared by Dr. Éva Szeli on the topic. Available online at: [https://drive.google.com/file/d/0By3oHyelsqf\\_Y01FNGFPaXpiOEE/view](https://drive.google.com/file/d/0By3oHyelsqf_Y01FNGFPaXpiOEE/view).

<sup>32</sup> Advocate's Gateway, Toolkit 18: "Working with Traumatised Witnesses, Defendants and Parties", July 2015. Available at: <http://www.theadvocatesgateway.org/images/toolkit18workingwithtraumatisedwitnessesdefendantsandpartiesjuly2015.pdf>



In working with traumatised children, consider what may be done to reduce stress and potential triggers. Work to create a comfortable environment, using activities to build rapport and trust. Be well aware of your role and do not over-promise. You should ask about possible triggers and sources of trauma, and try to understand if there are techniques the child uses to manage triggers. Take the time necessary – check that the child understands what is being asked and the process, give them time to consider their responses to questions and listen.

### **Practical guidance in court proceedings**

- The court must identify the needs of witnesses and defendants at an early stage and adapt the process accordingly.
- Visit the courtroom in advance to familiarise the child with the setting.
- In scheduling, be aware that there may be significant dates (triggers) to avoid.
- Enlist the assistance of a trusted professional.
- Allow the child to take breaks when needed
- At each stage of the process, check to see how the child is feeling and whether they would like support.
- Adapt language and use writing, diagrams, drawings, body maps<sup>33</sup>, all of which may help externalise events.
- A visual timetable may help sequential thought.
- Doodling or repetitive drawing may help maintain attention and emotion.

## **G. Reasonable and Procedural Accommodations**

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The difference between the medical and social model of disability is in the perception of barriers. The **medical model** sees barriers as a shortcoming of an individual, and works on eliminating those barriers by trying to fix the individual. And when fixing is not possible, feasible or desired, the individual is either managed or left to their own devices and is not able to participate in society fully.

The **social model** of disability departs from the point of view that it is not the individual that needs to be “fixed” but sees the barriers in the society and aims at eliminating those barriers, so that a person with a disability can experience life on an equal basis with others.

Providing reasonable accommodations is aimed at identifying barriers which stand in the way of full and meaningful participation of cwmnd in society in general, or the enjoyment of a right in particular, and then ensuring that those barriers are eliminated.

### **Norms and Standards**

The right to reasonable, procedural and age-appropriate accommodations is enshrined in several provisions of the CRPD. As previously set out, denial of reasonable accommodation is a form of disability-based discrimination (CRPD Articles 2 and 5). More specifically, while Article 5(2) requires States to prohibit all discrimination on the basis of disability and guarantee equal and effective legal protection against discrimination, Article 5(3) requires States to “take all appropriate steps to ensure that reasonable accommodation is provided.”

The right to procedural and age-appropriate accommodations is enshrined in Article 13 CRPD which deals with the right of effective access to justice:

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<sup>33</sup> A child protection body map is used to record information about physical injuries to a child, particularly if it is felt that the injury is non-accidental or thought to be following a pattern. The body map provides a visual record of physical abuse and helps professionals to work together when deciding whether there is a safeguarding concern.



*“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”*

States have an obligation to introduce accessibility measures under Article 9. Article 9:

*“States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.”*

As the CRPD Committee has explained, “accessibility” is related to groups, whereas “reasonable accommodation” is related to an individual. This means that the duty to provide accessibility is an *ex ante* duty: States parties must put in place accessibility measures before receiving an individual request to enter or use a place or service<sup>34</sup>. On the other hand, reasonable accommodations are personal entitlements, which need to be provided when the need arises, though not necessarily at the request of a party.

The CRC has explained:

*“[E]nvironments and working methods should be adapted to children’s capacities. Adequate time and resources should be made available to ensure that children are adequately prepared and have the confidence and opportunity to contribute their views. Consideration needs to be given to the fact that children will need differing levels of support and forms of involvement according to their age and evolving capacities<sup>35</sup>.”* (

### **Examples of barriers to access to justice for children with mental disabilities<sup>36</sup>**

1. Access to information and communication – information about and during judicial processes can be complex and in complicated written formats. Children with disabilities may not be able to understand the complexity or to understand the method or style of communication, be it written or oral.
2. Physical access – to buildings or courtrooms may be difficult for children with physical impairments, while children with mental disabilities may not be able to attend hearings at set times because of lack of transport, lack of someone to accompany them, or lack of permission to leave their home or place of residence.
3. Legal barriers – denial/restriction of legal capacity on the basis of disability and/or age; restrictions on the exercise of specific rights;
4. Procedural barriers – lack of acknowledgment of competence to testify and inadmissibility of evidence on the basis of disability and/or age; long duration of hearings at set hours may be impractical for children with mental disabilities; aggressive questioning styles or cross-examination, including posing complex questions; inadequate communication methods; conducting proceedings in a formal or intimidating environment with a rigid and intimidating courtroom layout and processes; a rigid code of conduct and seating; use of professional

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<sup>34</sup> UN CRPD Committee, General Comment No. 2 – Article 9: Accessibility, UN Doc CRPD/C/GC/2. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/2&Lang=en)

<sup>35</sup> UN CRC Committee, General Comment No. 12: The right of the child to be heard, UN Doc CRC/C/GC/12, para 134(e). Available online at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>.

<sup>36</sup> For more discussion on ensuring access to justice for persons with disabilities see: MDAC, Access to Courts and Reasonable Accommodations for People with Mental Disabilities in Uganda, available at: [http://www.mdac.org/sites/mdac.info/files/access\\_to\\_courts\\_in\\_uganda.pdf](http://www.mdac.org/sites/mdac.info/files/access_to_courts_in_uganda.pdf) and MDAC, Justice for People with Mental Disabilities in Uganda: A Proposal for Reform of Rules of Court, available at: [http://www.mdac.org/sites/mdac.info/files/uganda\\_rules\\_of\\_court\\_proposal.pdf](http://www.mdac.org/sites/mdac.info/files/uganda_rules_of_court_proposal.pdf).

vocabulary; the presence of opposing parties; a complex courts structure; procedural rules on proper framing and filing of claims and evidence; rules on appearances in court; hearings; testimony; service; drawing and pronouncement of judgments, decrees, orders, convictions, sentences, appeals, etc., with varying rules in varying courts.

5. Traumatization and re-traumatization – children, victims of sexual and gender-based or other violence.
6. Stigma, stereotypes and prejudice – credibility; corroboration; failure/refusal to investigate; use of derogatory language which introduces stigma and prejudice, shames and intimidates the individual in question and discourages their participation.

### **Purpose of accommodations**

Accommodations aim to ensure equality, redress structural and historical discrimination, respect the principle of full and effective participation, the right to a fair trial, including the right to be heard, and are related to the principle of equality of arms, among others. They aim at removing legal, procedural and other barriers to access to justice for children with mental disabilities. Generally the right to accommodations is also enshrined to a certain extent in national legislation and/or constitutional guarantees, for example, of non-discrimination and equality or to a fair trial. The object is not to ease the process for or favour people with mental disabilities during court proceedings. Rather, it is to enable them to participate fully in this process to the same extent as everyone else without having restrictions or limitations placed on their participation due to their impairment.<sup>37</sup> Provision of accommodations must be accompanied, where relevant, by necessary safeguards to protect against abuse.

### **The right to accommodations and accessibility guarantees**

Providing accommodations and accessibility guarantees may prolong proceedings. Consequently, courts and tribunals may not initially be receptive. It will therefore be important to emphasise the legal obligations and human rights issues early.

### **Examples of reasonable, procedural and age-appropriate accommodations to be made available to cwmd who may need and wish to avail of them**

- Taking testimony in chambers or an environment that is safe and familiar to the child, for example, in child-friendly interview rooms.
- Video-recording testimony so as to avoid repeat questioning.
- Holding hearings *in camera*.
- Visiting the courtroom prior to proceedings.
- Video-link testimony or use of screens in court.
- Short, concise, simple questioning and asking questions sequentially and one at a time.
- Use of easy-to-read and easy-to-understand language by all the parties involved in the proceedings.
- Hearings in the absence of formal court apparel.
- Providing water.
- Psychologist/social worker in court to call for an adjournment in the event of triggering a person with a psychosocial or intellectual disability
- Assistive devices, augmentative or alternative communication (“AAC”) methods, such as pictorial representations, idiosyncratic verbal or non-verbal communication with and without an interpreter as appropriate, or questioning or providing testimony through an intermediary who can facilitate communication between the individual and the court. Judges

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<sup>37</sup> Bizchut, the Israel Human Rights Center for People with Disabilities, “The right of persons with intellectual, psychosocial and communication disabilities to access to justice: Accommodations in the criminal process” (2015), p. 4, available online at <http://bizchut.org.il/he/wp-content/uploads/2015/01/Booklet-The-right-of-persons-with-disabilities-to-access-to-justice.pdf> (accessed 10 June 2015) p.7

and other justice system professionals should recognise and give weight to non-verbal forms of communication such as play, body language, facial expressions, drawing and painting.<sup>38</sup>

- Waiving or flexibility in interpretation of complex procedural rules such as strict application of rules regarding framing, drafting or filing of complaints, service or appeal.
- Waivers or flexible interpretation of rules regarding time limits – procedural errors should not be relied upon to deny justice to a cwmd.
- Waiver or flexibility in procedural rules for presentation of testimony and order of testimony: Short adjournments during testimony and/or longer adjournments or resetting hearing dates in light of health status.
- Allowing children to take personal items on the stand with them.
- Ensuring access to a support person to provide individual assistance in reading, understanding and filling out paperwork, understanding and participating in court procedures and to provide emotional support throughout the proceedings.
- Establishment of a simple, easily accessible mechanism for a child with a disability to request support in the form of reasonable, procedural or age-appropriate accommodations from the court, e.g. making available a liaison person to explain the possibilities on filing a claim.
- Requiring courts to specifically ask whether a child with a disability requires accommodations.
- Flexible procedures to accommodate children who have difficulty quantifying things, telling time, giving effective descriptions or with limited language skills.

By definition, this list cannot be exhaustive as accommodations must be tailored to the individual child in question. The accommodations required in any given case must be determined on an individual basis taking into account the child's particular needs and characteristics. However, ultimately, court procedures and processes must be sufficiently flexible to respond to the needs of all children with disabilities to ensure their full and effective participation and their right to access to justice. Accommodations must be made available to children engaged in legal processes in any capacity: as victims, witnesses or defendants. They should be provided from the beginning of the legal process but capable of being introduced or modified throughout the legal process as the need arises.

### **Working with others to remove barriers and provide accommodations**

Representing cwmd and seeking accommodations on their behalf will require support from other professionals including social workers, medical staff, magistrates, police, prosecutors, etc. With the child's best interest in mind, such cooperation will demand effective communication and information sharing, respect, joint planning and coordination. However, it is important to emphasise that, when dealing with sensitive topics, in particular topics of children's rights, people working with children need to be careful to comply with the requirements of the child's data protection. The new EU General Data Protection Regulation<sup>39</sup> provides for special protection of children's data, in view of their particular vulnerabilities. The Regulation also requires the use of adapted language in communication with children.

## **H. Remedies**

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### **Remedies**

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<sup>38</sup> UN CRC Committee, General Comment No. 12: The right of the child to be heard, UN Doc CRC/C/GC/12. Available online at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>.

<sup>39</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Available at: [http://ec.europa.eu/justice/data-protection/reform/files/regulation\\_oj\\_en.pdf](http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf).

Remedies are the relief an individual is entitled to once it is established that his or her substantive rights have been violated. They are the means by which the violation of a right is prevented, redressed or compensated. They are usually declared by a court of law or a quasi-judicial body, but can be agreed to in settlement or imposed by automatic operation of the law. They are intended to ensure adequate response for the harm suffered by the victim. In the case of children who suffer rights violations, the remedies might include:

- removing the child from an unsafe situation;
- ensuring protection from abuse;
- a declaration by a court or relevant committee that the child's rights have been violated;
- prosecuting an alleged perpetrator;
- facilitating the release of a child from an institution;
- giving a child access to education;
- securing community services or healthcare for the child; or
- securing compensation for a child (usually to be placed on trust).

For most violations, there will be more than one remedy available. Some of those remedies will be the 'hard law' traditional legal remedies, which provide an individual with an enforceable decision or a final finding. Most remedies at the domestic level will fall into this category, such as a civil claim or a criminal complaint. At the international level these remedies are exception rather than a rule, and require a stronger international commitment from the States. Examples of such remedies are ECtHR and CJEU.

Others will be 'soft', sometimes called quasi-judicial remedies, which will not necessarily result in an enforceable decision, but may improve the individual's situation significantly. At the domestic level examples of a soft remedy are complaints to equality bodies or various committees and commissions. At the international level examples of soft remedies are special procedures or individual complaints to UN treaty bodies.

Choice of remedies is in legal jargon often referred to as the choice of a forum.

### **Domestic remedies**

Having assessed which remedy would be the most appropriate for the violations at hand, the advocate must decide which legal avenue to pursue as not every avenue may be able to provide the remedy sought. Domestic avenues may provide more immediate, concrete remedies whereas international avenues may only offer declarations of illegality and exert pressure on uncooperative governments. The advocate will need to determine which is most appropriate, while recognising that in certain circumstances it might be possible and recommended to pursue parallel avenues (e.g. submitting more than one complaint).

Domestically, various avenues will exist. To determine which will provide the most effective remedy, one must consider, among other factors:

- The subject matter: education, healthcare, social care or access to justice;
- The type of decision being challenged and whether a specific appeal right has been triggered;
- What the individual wants to achieve through seeking redress;
- The urgency and sensitivity of the issue; and
- Financial resources available.<sup>40</sup>

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<sup>40</sup> See Luke Clements, *Disabled Children: Legal Handbook* (2016) §11.2 (available <http://www.lukeclements.co.uk/new-edition-disabled-children-legal-handbook/>)

As time limitations may exist, first identify the decision or failure being challenged and the date it occurred to determine whether a claim can still be brought. One must then consider the time it may take for a claim to be considered and whether it will provide the appropriate remedy (i.e, if the matter is urgent, certain avenues of redress might allow for interim relief). Possible domestic avenues likely will include:

- Administrative complaints/referral mechanisms;
- National human rights institutions; equality bodies; ombudsperson offices;
- Judicial proceedings: local court, appeal court, constitutional court (if it exists), supreme court

One should also consider the non-legal dispute resolution options available.

If there is the intention to pursue international avenues, special attention needs to be given to the requirements of each of the international mechanisms regarding admissibility criteria, in particular that relating to exhaustion of available and effective domestic remedies and deadline for submission of the complaint, if there is any.<sup>41</sup>

### **International protection**

If the domestic remedies do not produce the desired outcome, regional or international avenues may be available. These mechanisms can be used to challenge decisions and failures of public bodies and officials as well as state practice, laws and policies. Most international mechanisms will require the complainant to have pursued and exhausted domestic remedies.

#### 1. Regional - European mechanisms

Europe has set out the rights of individuals in the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights and established regional human rights bodies where complainants can bring claims after exhausting all domestic remedies or having been prevented from seeking justice.

#### *European Court of Human Rights ("ECtHR")*

The ECtHR, part of the Council of Europe, monitors state party compliance with the ECHR and its additional protocols. The ECtHR declares judgments against Member States of the Council of Europe on alleged violations of the Convention after complaints are lodged by individuals or other states. The Council of Europe's Committee of Ministers is responsible for supervising enforcement of the ECtHR's judgments. The Council of Europe's Commissioner for Human Rights can submit written comments and take part in hearings as a third party, on behalf of one of the applicants, but cannot submit applications him/herself.

To submit an application to the ECtHR, begin by filling out an application form (available at <http://www.echr.coe.int/Pages/home.aspx?p=applicants>). The application then goes through administrative filters to determine its admissibility. The application must be brought by a person, non-governmental organisation or group of individuals who claim to be the victim of a human rights violation by one of the Member States to the Convention (can also be someone with a close relationship to the victim). Generally, complaints must be brought after all domestic remedies have

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<sup>41</sup> European Convention of Human Rights limits the submission of the application to the six months' time limit after the final domestic decision. Should a remedy not be used, the complaint will be rejected for non-exhaustion of domestic remedies. Should a remedy deemed non-effective or ineffective be pursued, the time limit might be lost, while waiting for the outcome of such a remedy. Hence, it is critical to be well informed about remedies and the Court's standard in that regard.

been exhausted and within 6 months of the final domestic decision.<sup>42</sup> If a more immediate response is necessary, interim measures can be requested under Rule 39 of the ECtHR Rules of Court.<sup>43</sup>

### *Court of Justice of the European Union (“CJEU”)*

The CJEU interprets the Charter of Fundamental Rights of the EU (which gained legal status equal to all treaties within EU law on the Treaty of Lisbon’s entry into force in 2009). When EU law is engaged, the law must be interpreted in accordance with Charter rights. Article 24 of the Charter is relevant to children, and it reads as follows:

- “1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
- 2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.*
- 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”*

There are two ways of getting cases before the CJEU:

- i. **Referral by a national court** – A national court can refer questions regarding EU law for a preliminary ruling to the CJEU if the answers are necessary to resolving a case per Article 267 of the Treaty on the Functioning of the European Union (“TFEU”). Hence, including a claim under the Charter in a complaint to a national court may spur reference to the CJEU and put additional pressure upon the national government, which will be aware their law could come under review.
- ii. **Infringement proceedings** – The European Commission can take a Member State to the CJEU for breaching a provision of Union law under Article 258 of the TFEU. However, the European Commission can only bring such proceedings if it is aware of the breach (i.e. an initial letter setting out the breach and providing supporting evidence).

### *European Committee of Social Rights (“ECSR”)*

The European Committee of Social Rights monitors State compliance with the European Social Charter. The European Social Charter (“ESC”) spells out the social and economic rights that State parties must guarantee (e.g. related to employment, housing, health care, education, and welfare) and complements the ECHR, which primarily addresses civil and political rights. The European Social Charter has been signed by all 47 members of the Council of Europe. The ECSR considers collective complaints lodged by Member States or international NGOs such as MDAC.

Questions to ask before pursuing this avenue:

- Has the country submitted itself to the collective complaints mechanism?
- Which version of ESC has it ratified?
- Which articles has it accepted?

Note that for a complaint to the ECSR there is no specific requirements for exhaustion of domestic remedies, or a time limit for submission. However, apart from Finland, which has accepted that

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<sup>42</sup> The Court has published a detailed Admissibility Guide, which is available in a number of languages. See European Court of Human Rights, Practical Guide on the Admissibility Criteria. Available online at: [http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/admi\\_guide](http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/admi_guide)

<sup>43</sup> See European Court of Human Rights, Rules of Court. Available online at [http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf)



national NGOs may complain, only a limited number of international NGOs, who are accredited with the Council of Europe, may submit a complaint.<sup>44</sup>

## 2. International avenues

Each UN human rights treaty has a “treaty body” set up under it. These bodies consist of independent experts who enforce the treaty and monitor its implementation by State parties. Treaty bodies can also serve a quasi-judicial role – they are able to hear individual complaints and give redress. There are three potential mechanisms<sup>45</sup> by which a treaty body can review challenges against a State Party’s implementation:

- i. Individual communications;
- ii. State-to-state complaints; and
- iii. Inquiries.

Most relevant in this context are individual complaints.

### *Individual complaints*

An individual or group claiming a treaty violation can bring a complaint by themselves or through a representative. Treaty bodies only accept complaints against national governments and only related to violations of international treaties. It is critical to note that a complaint cannot be brought against a country unless it has ratified the protocol establishing the complaints mechanism<sup>46</sup>.

Each treaty body’s complaints mechanism operates on its own terms – they do not all have the same powers to receive, review or respond to complaints, so the specific procedures of each body must be reviewed. Any treaty body can review complaints that are submitted by children. The process of bringing a complaint entails the following:

- First, set out the case for review, providing details of the alleged violation, the victim(s) and the author of the complaint (a model complaint form can be used<sup>47</sup>).
- Submit the complaint to the Petitions Unit of the United Nations Office of the High Commissioner of Human Rights<sup>48</sup>.
- The Petitions Unit reviews the complaint to ensure it is complete and may contact the author for additional information. Once complete, the Petitions Unit will forward it to the relevant treaty body to determine whether it is admissible.
- The treaty body decides whether the case should be registered and transmitted to the State party concerned. If so, it forwards the complaint to the State party with supporting documentation. The State then has 6 months in which to provide a response.
- Once complaint, response and all supporting documents have been received, the treaty body begins its review.
- The decision will be shared with all involved and is final. Decisions on the merits cannot be altered or appealed.

Although each treaty body has its own specific procedures, in general the complaint must be brought as soon as possible after exhaustion of domestic remedies. Interim measures may be available in

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<sup>44</sup> MDAC is one of such organisations and has already submitted a few complaints to the Committee.

<sup>45</sup> “Potential” as it depends on what provided is under the treaty and any adjoining protocols and whether the country has ratified/acceded the treaty and/or protocols.

<sup>46</sup> To quickly check whether what UN treaties your country has ratified, please check here: <http://indicators.ohchr.org/> or here: [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx). To make sure that the treaty is fully applicable, check for any possible declarations or reservations here: <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

<sup>47</sup> Model complaint form available at [http://www.ohchr.org/Documents/HRBodies/ComplaintFormOPICPR\\_CAT\\_CERD.doc](http://www.ohchr.org/Documents/HRBodies/ComplaintFormOPICPR_CAT_CERD.doc) (accessed 11 September 2016).

<sup>48</sup> Further details available at

<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#proceduregenerale.>



urgent or sensitive cases. Decisions of treaty bodies, while having considerable weight, do not have binding legal force.

Note that treaty bodies usually have lower standards on admissibility than the ECtHR. While the ECHR, as well as the UN treaty bodies, contain non-competition clauses (meaning that a complaint can only be submitted to one mechanism at a time), under certain conditions the same complaint may be successfully brought to one mechanism after having failed before another.

#### a. UN Committee on the Rights of Persons with Disabilities

Under the Optional Protocol to the CRPD, the UN Committee on the Rights of Persons with Disabilities (“CRPD Committee”) may consider individual communications alleging violations of the Convention by States parties. The essential question must therefore be: Has the country at issue ratified the Optional Protocol? There is no time limit for submission of complaints, but it is best to do so as soon as possible after exhaustion of domestic remedies.

#### b. UN Committee on Rights of the Child

An individual complaints procedure for the CRC is provided under the 3<sup>rd</sup> Optional Protocol to the Convention. Hence, the key question must again be whether the country at issue has ratified this protocol? In this instance, a complaint must be submitted within one year of exhausting domestic remedies (unless the complainant can demonstrate why this was not possible). Special child-friendly procedures exist for complaints brought under this Convention.

#### c. Other committees and avenues

- Committee against Torture (“CAT Committee”) monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee may consider individual communications relating to States Parties who have made the necessary declaration under Article 22 of the Convention.
- Committee on the Elimination of Discrimination against Women (“CEDAW Committee”).
- Committee on the Elimination of Racial Discrimination (“CERD Committee”).
- Human Rights Committee– violations of the International Covenant on Civil and Political Rights (“ICCPR”).
- Committee on Economic, Social and Cultural Rights (“CESCR Committee”) – violations of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).

#### *Inquiry procedure: addressing systemic violations*

Rather than addressing an individual violation, inquiries are a mechanism for addressing widespread violations by a State party. While inquiries may not offer an immediate remedy for a specific child, they may put pressure upon a government when domestic avenues are not producing results.

Inquiries may only be conducted in relation to States parties that have recognised the treaty body’s competence to conduct them. Meaning, State parties may not allow for inquiries and opt out at the time of signature, ratification or accession to the Optional Protocol by making a declaration that they do not recognise the competence of the Committee in question to conduct inquiries. Specifically, Article 13(7) of the 3<sup>rd</sup> Optional Protocol to the CRC, for example, provides for an inquiry procedure. Likewise, Article 8 of the Optional Protocol to the CRPD establishes an inquiry procedure and also allows for an opt-out.

An inquiry may be initiated if the Committee receives reliable information indicating that the rights contained in the Convention it monitors are being systematically violated by the State party. The procedure is confidential and the cooperation of the State party shall be sought at all stages of the proceedings. In addition, the inquiry procedure does not require identification of victims directly so there is greater anonymity.

### *Special procedures*

Special procedures are used by the UN Human Rights Council to monitor, investigate and enforce human rights in a specific thematic area or particular country. They consist of individuals (Special Rapporteurs) or groups of experts (Working Groups) who have the power to respond to individual complaints of human rights violations. Thus the possibility exists to submit information to a Special Rapporteur for their follow-up. The relevant thematic areas for cwmd include: Disability, Health, Education, Torture and Violence against Women<sup>49</sup>.

The process entails providing the details of the alleged victim, the alleged perpetrators and what occurred with date and location. The Special Rapporteur can then communicate with the government at issue via letter, urgently appealing for action or seeking follow-up. *This mechanism does not require the State at issue to have ratified or acceded to an international human rights treaty nor does it require the exhaustion of domestic remedies.*

Special procedures are not judicial or quasi-judicial mechanisms, but may serve to place additional pressure and be used in conjunction with the legal avenues. For example, this process can be done in parallel to domestic proceedings and may prove helpful to put on pressure and as evidence in domestic proceedings

## **I. Strategic Litigation**

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“Strategic litigation” is a method, used in conjunction with other tools, of taking carefully-selected cases to court to bring about significant change in law, policy or public awareness, as well as seeking justice for the client. The clients involved in strategic litigation have been victims of human rights abuses that are suffered by many other people. In this way, strategic litigation focuses on an individual case in order to bring about social change. Strategic litigation is also known as “impact litigation”, “public interest litigation” or “test-case litigation”.

For example, a child with mental disabilities in an institution is experiencing abuse, as are many similarly-situated children in the country. Strategic litigation on this issue would challenge the abuse that the individual child is facing, and also would seek to influence or force a change to a law or policy (or their implementation) underlying the abuse in order to achieve a broader impact.

In deciding whether to pursue strategic litigation, lawyers must weigh a number of specific considerations to determine, *inter alia*, what change is sought, whether litigation is the most appropriate method of achieving that change, how litigation might do so, the risks and benefits of a litigation approach and what resources and partnerships will be necessary. In this context, it will be important to consider the other stakeholders with an interest in the issue and the potential sources of clients (e.g. university clinics, service providers, peer support organisations, trainings) (see further discussion below “client intake process”).

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<sup>49</sup> For more information about special procedures, please check here:

<http://spinternet.ohchr.org/Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM>.

The potential benefits of initiating strategic litigation include:

- **Setting precedent:** Court judgments can flesh out the scope of obligations that are under-developed at national and international levels.
- **Instigating law reform:** The powers of courts vary from jurisdiction to jurisdiction but courts may be able to declare legislation unconstitutional or unlawful, strike down a piece of legislation, put in place interim measures to fill a lacuna in the law, or require the government to remedy a breach through law or policy reform.
- **Determining the theatre of debate:** Strategic litigation can set the baseline for negotiations and advocacy around legal, policy and social change, framing the debate from a human rights perspective. Both positive and negative judicial outcomes can become crucial advocacy tools, allowing you to put pressure on political players to undertake reforms.
- **Ensuring implementation of existing laws:** In many jurisdictions, laws are improperly implemented or not implemented at all until cases brought before the courts enable the judiciary to enforce them and require other public and private authorities to respect them.
- **Awareness/Education:** Bringing strategic litigation can bring an issue into the limelight. It can legitimise and raise awareness of marginalised issues, allow you to share your message with the media, general public, political players and judiciary. By bringing attention to the issue, you may spur people to organise.
- **Empowering beneficiaries:** Strategic litigation can help victims feel a sense of power and control over their fate. It magnifies and lends credibility to their voices as well as providing them with individual remedies. A positive judgment can empower other victims to claim their rights.
- **Documenting injustice and rights violations:** It creates a record of the injustice experienced. It can highlight inadequacies and biases in legal practice and procedure that prevent victims from accessing justice.

Potential risks of instigating strategic litigation are:

- **Protracted and costly:** Strategic litigation can take years and be quite costly, sometimes involving the risk of an adverse costs award. Where a lawyer wins the case, his/her work is not over. The judgment must be enforced to achieve the strategic outcome. This may require the lawyer to work with enforcement agencies (for example at the Committee of Ministers of the Council of Europe). If the judgment is positive for the client but goes against public opinion or the government's policy positions, the case may not have the planned impact and may require other non-litigation advocacy methods.
- **Setting bad precedent:** If the case is lost, that outcome might strengthen a harmful law or practice.
- **Risk of harm:** As children are particularly vulnerable, lawyers must consider any possible negative impact the litigation may have on clients' lives. The nature of litigation can place a high burden on the child with risks of re-traumatisation during proceedings, backlash from family, friends and public authorities, no guarantee of an effective individual remedy, etc.

MDAC has developed 10 steps of strategic litigation to guide lawyers and NGOs through the process. These are:

1. Establish the overall objective and strategy for change
2. Build a 'litigation team'
3. Create case selection criteria
4. Plan and implement a client intake process
5. Develop a case plan
6. Conduct risk assessments
7. Create a client support plan
8. Collect evidence
9. Conduct litigation
10. Implement judgment, including, advocacy and follow-up litigation

To address each step in turn:

### 1. Establish the overall objective and strategy for change

Litigation will only be strategic and have real potential to achieve change if a clear objective is established at the outset. To establish the objective, lawyers, working in conjunction with other stakeholders, should articulate (1) what the issue is that the litigation seeks to address, (2) what the root causes of the issue are, and (3) what change is necessary to address those causes. For example:

- 1) **Issue:** institutionalisation of children with disabilities;
- 2) **Root cause:** discrimination in access to community-based services;
- 3) **Necessary change:** change in policy to remove discriminatory barriers (e.g. eligibility requirements) and prioritise development of accessible services for children with disabilities

To explain the process in more detail, lawyers should map the **stakeholders** in the field. Stakeholders should not be limited to child and disability rights advocates but also potentially include relevant service providers, parents/guardians, policy-makers, judges, lawyers and advocates from related areas, or economic, social and cultural rights organisations, etc. Once stakeholders with a common interest have been identified, lawyers should collaborate closely with them to identify the most pressing violations and rights involved (the issue), analyse the laws, policies and practices which underpin and enable these violations (the root cause), and brainstorm on the change necessary to eliminate them and ensure protection of children's rights (the necessary change). The issue should be a human rights violation that many other people are experiencing.

The objective which is then established could include:

- Creating progressive jurisprudence which advances the rights of cwmd;
- Requiring the implementation of laws that are not being implemented at all or inadequately;
- Repealing/reforming laws that do not comply with international human rights laws;
- Ensuring that laws are interpreted and enforced in a manner consistent with the human rights of cwmd;
- Creating pressure for policy or social change; or
- Documenting human rights violations against cwmd.

To establish the strategy for change, analyse the most effective method for achieving the change identified – it will never be litigation alone but always entail additional tools such as policy/political advocacy, media and communications, capacity-building and/or research. The resources necessary should also be considered, including: human resources, time, legal and field research, substantive expertise, communications expertise, advocacy materials, financing, travel time and costs, and interpretation/translation. Benchmarks should be set against which to assess progress. Achieving a positive judicial decision may constitute one such benchmark, but change can also be measured by:

- On-going policy change processes;
- Political and civil society discussions, advocacy, and awareness-raising campaigns which show engagement with the issue;
- Media coverage, including social media;
- References to the case law by courts in other jurisdictions;
- Influence in diplomatic or inter-governmental processes and references by international bodies; and

- References by academia and others.

Finally, risks inherent in the overall strategy should be assessed and responses developed (see below).

## 2. Build a litigation team

Form a team that can maximise impact by leveraging each member's skills and expertise. It is important that lawyers recognise that the best strategic outcomes are achieved in collaboration with other experts. Ideally, the team will comprise some or all of the following: local human rights lawyer, local NGO, international law firm, international legal and other experts, INGO (such as MDAC).

- The local lawyer is responsible for conducting domestic litigation, including finding potential pool of clients, taking instructions, sourcing witnesses.
- The local NGO provides introductions to potential clients, assists lawyer in contact and building trust, facilitates access to institutions, provides/refers client to non-legal supports.
- The international law firm can assist with research, drafting legal documents, and building arguments.
- International experts and national human rights institutions<sup>50</sup> can provide *amicus curiae* submissions, provide materials for international publicity.
- The international NGO can help frame strategic issues, support international advocacy, source international experts, input into submissions, and monitor long-term impact.

## 3. Create case selection criteria

Establish the factors that will be used to select the case. For example, MDAC's criteria:

### **Strength**

- Is there strong evidence to support the case?
- What procedural hurdles might arise to the litigation and how will these be addressed, e.g. statute of limitations, issues of standing, issues of jurisdiction?

### **Potential**

- Do the facts of the case represent a wider problem affecting other people who can potentially benefit from a positive outcome?
- Why is it important to initiate litigation on this issue now?
- Why is litigation the right action to take (rather than, e.g., advocacy or awareness-raising)?
- How easy is the case to understand for the media and the general public?

### **Added value**

- What added value does the litigation team's expertise provide to the potential arguments?
- What support can the team offer in developing the litigation strategy, including the advocacy, media and communications elements?

### **Relevance**

- What aims and objectives does the case support and how well?

### **Resources**

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<sup>50</sup> Note that some national human rights institutions also have mandates to investigate individual complaints and could be considered as a potential avenue for issuing complaints.

- What NGOs or other organisations are already carrying out advocacy, capacity-building, research, awareness raising or other activities on this issue in the country? What support might they be able to provide?
- What role can *pro bono* lawyers and international law firms play in supporting the case?

### **Ethical considerations**

- Are there likely to be negative repercussions for the client (e.g. if she lives in an institution) and if so how could these be mitigated?
- To what extent might the client's legal interests conflict with the lawyer's/organisation's strategic interest in the case?

These questions could be answered by:

- close analysis of existing evidence;
- speaking to the client, institution, friends, family, guardian or other relevant parties to see what other evidence may be available;
- brainstorming with the litigation team on evidence, procedural issues that might arise, and enforcement mechanisms;
- working with a trusted support person and/or using child- and disability-friendly techniques to interview the client to obtain information on e.g. expectations, ensuring informed consent, explaining court processes, eliciting details of violations, etc.;
- brainstorming with other stakeholders on the scope and extent of the problem and why litigation is necessary and appropriate; and/or
- having a specific case proposal form to complete.

## **4. Plan and implement a client intake process**

While many jurisdictions allow litigation to be initiated by an NGO or lawyer without a specific client if the issue touches on human rights breaches, constitutional law or an area of particular public importance, litigation on behalf of a specific client has far greater potential to achieve the desired objective. Likewise, one must set the objective first and then find the client(s), otherwise you risk not having strong objectives, facts or evidence, which could jeopardise the outcome and impact.

As such, lawyers who pursue strategic litigation will need to proactively find clients who want to litigate their case, whose evidence is strong, and whose stories reflect the violations that the litigation aims to challenge. Ways to find clients include:

- Referrals from NGOs;
- Referrals from peer support organisations;
- Referrals from service providers such as schools, residential institutions, social workers, psychiatrists or psychologists;
- Referrals from legal aid or assistance organisations including law societies, law firms or university legal clinics;
- Field visits to places where potential clients live or spend time, e.g. monitoring children's institutions;
- Linking to existing research, capacity-building or other projects, such as those supporting hotlines;
- Training programmes or roundtables for groups of potential clients or their families; or
- Meetings or conferences with interested advocates.

When a potential client is found, the case selection criteria should be applied to determine whether their case is appropriate to take up as strategic litigation.

Litigation on the rights of any child should always be in the child's best interest, which means carefully interviewing the child and any relevant carers, guardian, family members, etc., to understand the child's circumstances and any risks for the child attendant in the litigation, considering and evaluating the potential mitigating actions. The child's will and preferences must be determined in accordance with their right to participate in decisions that affect them and their evolving capacities (Article 12 CRC). Lawyers must always adhere to their local and national ethical codes. The child (and his/her family) should be made aware that their case will be taken on in order to achieve a strategic objective as well as their own individual objectives and explicit consent given for this.

## 5. Develop a case plan

Set out a plan for the case, addressing at a minimum:

- Forum selection – Lawyers should select the best forum to achieve remedies and ensure international avenues remain available.;
- Requirements to exhaust domestic remedies;
- Available remedies;
- Necessary evidence and how to collect or create it;
- Where additional expertise may be valuable (e.g. on international law elements or from an expert in a specific subject area such as education, child rights, housing, or torture);
- What witnesses will be required;
- What human and financial resources will be necessary and have they been secured; and
- Whether any follow-up litigation may be necessary to implement a final judgment and/or achieve the overall objective, e.g. if civil litigation can only be initiated after the completion of criminal proceedings or if the litigation must initially seek a declaration of a violation from an equality body prior to initiating a civil claim.

## 6. Conduct risk assessments

Brainstorming risks with the litigation team and documenting them on paper becomes more important in strategic litigation where the risk is not solely to the individual case but to achieving a larger strategic objective. It will be useful to develop a risk management plan specific to the litigation strategy. Identify and document currently foreseeable risks for each aspect of the strategy in such a way that they can be monitored and updated during the course of the litigation. Set out actions to reduce the probability of each risk arising and to mitigate its effects if it does arise. Some relevant categories of risks:

### 1) Client-related

- Litigation-fatigue/client withdrawal;
- High support needs;
- Conflict between individual vs. strategic interests;
- Death of client;
- Change in client's mental health, social, or other circumstances;
- Reprisal/intimidation.

### 2) Legal

- Overturning previous decisions;
- Setting bad precedent;
- Falling below international standards;
- Procedural dismissal of case;
- Adverse costs awards/punitive costs.



### 3) Strategic

- Reputational;
- Lack of resources;
- Stakeholder conflicts;
- Fall-out for beneficiaries (foreseeable detrimental consequences of litigation) (e.g. institutions closes with no alternatives provided for residents);
- Political/legislative;
- Non-compliance with judgment (limited strategic impact, non-compliance of the state, post-litigation legislative change, narrow interpretation of judgment).

## 7. Create a client support plan

When litigating on behalf of cwmd, you will likely be representing a child who may be vulnerable to exploitation/abuse or has been without support for some time. While it isn't the lawyer's role to provide non-legal support, it is important that they are able to provide the child with information on accessing supports they may need. The lawyer should identify the child's needs, discuss these with the child, draft a plan for support, and then monitor and revise it as necessary. Client care and support will have a bearing upon the outcome of the litigation.

## 8. Collect evidence

Collect evidence and supporting documentation. This may require visiting and taking pictures of the places where the violations occurred, conducting interviews, submitting requests for access to documents and computer records, or filing freedom of information requests. Evidence may include:

- Medical reports or educational records/assessments;
- Photos of the institution and conditions;
- Reports of independent institutions;
- Digital evidence (e-mail correspondence, browsing history etc.);
- Statistical evidence (often necessary in cases of discrimination);
- Situation testing<sup>51</sup>;
- Victim testimony; and/or
- Testimony from other witnesses (family, other similarly-situated children, institution staff, teachers, support workers);
- Any other form of evidence appropriate for the situation.

## 9. Conduct litigation

Research, draft and edit submissions, and then file the case, coordinating with the litigation team. It may be that several complaints are filed if more than one legal or quasi-legal jurisdiction is available, e.g. criminal, civil or administrative claims. The lawyer should consider seeking submission of *amicus curiae* briefs if this will assist the court. Ensure domestic remedies are exhausted before proceeding to international avenues. Throughout the litigation, coordinate closely with those assisting with advocacy and communications.

## 10. Implement judgment including, advocacy and follow-up litigation

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<sup>51</sup> Situational testing is a particular technique of collecting evidence most often used for proving discrimination cases. To learn more about situational testing see e.g. Isabelle Rorive, Proving Discrimination Cases – the Role of Situation Testing, Centre for Equal Rights and Migration Policy Group, 2009. Available online at: [http://migpolgroup.com/public/docs/153.ProvingDiscriminationCases\\_theRoleofSituationTesting\\_EN\\_03.09.pdf](http://migpolgroup.com/public/docs/153.ProvingDiscriminationCases_theRoleofSituationTesting_EN_03.09.pdf)

While at the stage of final decision, the litigation itself is concluded, the struggle for the recognition of a right is usually far from over. Following judgment, further steps may be necessary to ensure the decision is implemented and the objective is achieved. These steps might include: follow-up litigation, policy and law reform advocacy, awareness-raising and capacity-building activities, and a media strategy.

### **1) Follow-up litigation**

Sometimes with the conclusion of one claim, further litigation might be the advised course for further action.

This additional litigation may be on behalf of the same client, to strengthen their position or expand their claim, or as the next step in ensuring that they can enjoy their rights. For example, if at the first stage of litigation a person is taken out from an institution and enabled to live in the community, but is not provided with community based services, the next stage may be to litigate to ensure that services are available.

At other times, additional litigation might be needed to reemphasise and strengthen the claim of the first client or to ensure broader and systemic solutions. For example, in a certain case a precedent is obtained for a single case, and the remedy obtained is an individual remedy for that case only. However, if there is a large number of persons in a similar situation, follow up litigation may be arranged so as to make policy-makers aware of a larger problem thereby instigating systemic, rather than individual solutions.

### **2) Policy and law reform advocacy**

Litigation becomes strategic only if it is followed by adequate advocacy and policy measures. Advocacy may take the form of various contributions to debates at national and international level, organising campaigns, protests, or in other ways attracting attention of relevant stakeholders, including decision-makers and duty-bearers. These activities need to be context-specific and coordinated with litigation. Advocacy can start at different stages of litigation, but it certainly gains momentum once litigation is final. In order to conduct successful advocacy, the final outcome of litigation does not necessarily have to be finding of a violation.

To an extent, non-legal forms of advocacy will depend on the success of litigation. If litigation is successful, the findings thereof need to be used to inform public or policy advocacy to create pressure on policy makers to undertake reforms. The possibility (or a threat) of further litigation with similar consequences may be used as argumentation in support of broader reforms as opposed to individual fixes. For example, there are thousands of children in special rather than in inclusive schools, and states can come up with a different number of excuses for maintaining such a situation which is obviously in contravention with the CRPD. Litigation may ensure that one single child is accepted into a mainstream school, but this litigation comes at a cost. In most jurisdictions the respondent party (the State) will be ordered to reimburse the costs of the proceedings to the child, and possibly also ordered to pay damages. This cost may be negligible in an individual case. However, if it is multiplied by the total number of children in special schools, the argument for inclusive education becomes financially measurable and such an argument can then be successfully used in advocating for changes of educational system.

If litigation is unsuccessful, it may point to the loopholes in the system, which fails to protect the most vulnerable and draw the attention of policy makers to the fact that cwmd cannot receive protection, even with all the international human rights law guarantees in place.

### **3) Awareness-raising and capacity-building**

Media are usually not very much interested in the issues of cwmd. They are, however, interested to see a battle between David and Goliath. When the weak take the strong to the court, this usually can attract media attention. The angle can always be spun depending on whether litigation was successful or not, but the issue of David and Goliath remains important.

At the same time, human rights gains can be made through programmes of capacity-building, particularly following successful litigation. This could target, for example, law or policy-makers, frontline service providers, members of the judiciary, lawyers, etc.

Two examples of strategic litigation:

- *MDAC v. Bulgaria*: MDAC took a collective complaint against Bulgaria to the European Committee of Social Rights (ECSR), claiming that the Bulgarian government was failing to provide education for up to 3,000 cwmd. The ECSR found in favour of MDAC, describing the Bulgarian government's efforts to educate cwmd "patently insufficient at the current rate."  
**Impact:** The Bulgarian government began reforms and closed several institutions offering no education.
- *V.I. (Moldova)* – V.I., who has mild mental disability, was placed in the care of his uncle after he witnessed his father kill his mother at age 5. At age 12, his uncle refused to continue taking care of him and he was hospitalised in a psychiatric hospital. While in hospital, he had no contact with child protection services, members of his family or any legal assistance. For almost two months, he was placed, as punishment, in a ward with adult male patients with severe mental disabilities where he was twice attacked. He consequently stayed awake all night out of fear for his safety, completely lost his appetite, and began experiencing suicidal thoughts. The case came to the attention of an MDAC partner organisation in Moldova through the Peoples' Ombudsman. **Objective of the litigation (ongoing):** secure remedies for V.I. and establish criminal and/or civil liability for torture in psychiatric hospitals as well as failure on the part of local authorities to supervise and prevent such acts.