

## **Summary report: ‘Making Change Happen: Using the courts to make rights a reality’, held on 1<sup>st</sup> June 2017 in Edinburgh City Chambers**

This is a summary of some key points raised by speakers, workshop leaders and participants during the Human Rights Consortium Scotland (HRCS) and Equality and Human Rights Commission (EHRC) event ‘Making Change Happen: Using the courts to make rights a reality’. Participants came from a broad spectrum of civil society organisations spanning issues such as disabled people’s rights, race, environment, women’s rights, homelessness and others. Several legal experts also attended the event and contributed their insight to the discussions.

### **Strategic litigation in Scotland**

“Litigation means taking cases to court. Strategic litigation is a method that can bring about significant changes in the law, practice or public awareness via taking carefully-selected cases to court. The clients involved in strategic litigation have been victims of [wrongs] that are suffered by many other people. In this way, strategic litigation focuses on an individual case in order to bring about social change”<sup>1</sup>.

The use of strategic litigation by civil society organisations in Scotland is a relatively new and rare occurrence. Statistics show that in 2015/16 there were 496 judicial review petitions in Scotland altogether, and only 103 that were not related to immigration<sup>2</sup>. In contrast, in England and Wales in 2015, there were 4680 judicial reviews not related to immigration (in England and Wales, immigration cases are dealt with by the Upper Tribunal). Very few civil society organisations have been involved in pursuing or supporting judicial review. Many participants present had used lobbying means such as meetings, media and activism to bring about social or policy change but many spoke about their lack of awareness or experience in using any judicial means to get change. However they also spoke of their enthusiasm for learning more about this potential tool and employing it where other means had failed.

### **What legal avenues are open to organisations?**

The event and this report focus upon public law challenges. Speakers outlined that there are several avenues open to organisations who want to use strategic litigation. Firstly, it is

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<sup>1</sup> [http://mdac.info/en/what-wedo/strategic\\_litigation](http://mdac.info/en/what-wedo/strategic_litigation)

<sup>2</sup> <http://www.gov.scot/Publications/2017/03/5915/40>

possible for them to be the **claimant in a judicial review**<sup>3</sup>. The judicial review process is a means of challenging public body decision-making, where a public body has acted illegally, has adopted an unfair process or where a decision of the public body is so unreasonable that it is considered irrational. It is possible to bring an action for judicial review in the Court of Session based on an alleged breach of one of the rights set out in the European Convention on Human Rights. Furthermore, it is possible to raise judicial review proceedings to seek a declaration that an act of the Scottish Parliament is incompatible with a Convention Right. If it is held to be incompatible, it will be invalid.

An organisation can be a claimant for judicial review where the court recognises that they have sufficient 'standing', that is that they have 'sufficient interest in the subject matter of the application'.

Secondly, organisations can **support individuals who are taking a judicial review**. Organisations may seek out individuals willing to pursue judicial review that would have strategic implications (see below for considerations around this) or individuals may already be pursuing a judicial review and seek the organisation's support. This support might be financial, emotional support, information or advice, or practical support such as lifts to court without any individual 'victim'.<sup>4</sup>

Organisations can also **intervene in a case** which is already ongoing. This Public Interest Intervention is usually in writing although sometimes by oral intervention. Organisations will be given permission to intervene where the court is satisfied that they raise an issue that is of public interest. Public Interest Interventions should not be considered lightly because they can extend the time in court bringing additional lengthiness and cost, but they also enable organisations to use their own expertise to strengthen cases.

Depending on the issue, it may be that simply **obtaining a 'legal opinion' from an advocate or QC** and publicising this can be very effective in bringing change. A 'legal opinion' sets out how an issue sits with previous cases and legal principles and can include for example, the likelihood of a successful court challenge. Participants spoke about using the threat of judicial review based on a legal opinion as being very effective in speeding change. Legal opinions can be helpful in getting good outcomes for individuals but if communicated well, 'legal opinions' can also help to bring about wider social or policy change.

### Why use strategic litigation?

Speakers and workshop leaders raised a range of reasons for organisations to get involved in using strategic litigation. When other forms of influence such as meeting with policy makers and politicians, media work, activism, consultation responses and other aspects of lobby and campaigning work have not been successful, then litigation is another tool in the toolkit to use to get change.

Carla Clarke from CPAG noted that civil society organisations are 'uniquely placed to recognise systemic problems'. Whilst writing a letter of complaint or other means of raising

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<sup>3</sup> For more information about judicial review in Scotland, see [http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB\\_16-62\\_Judicial\\_Review.pdf](http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-62_Judicial_Review.pdf)

<sup>4</sup> Read more at <http://publicinterest.info/?q=judicial-review/standing> and <https://www.equalityhumanrights.com/en/legal-work-scotland/legal-work-scotland/strategic-human-rights-and-equality-litigation>

an individual's problem with a public service can sometimes achieve change for that individual, using test cases can get more far-reaching and significant change for a bigger number of people. A successful test case can set down a marker that causes significant change in policy, guidance, legislation or practice.

Using strategic litigation can also result in giving an issue a higher profile when used in conjunction with effective communications and media work. Particularly where policy makers do not want to discuss a certain issue, raising the issue in court can sometimes mean that doors are opened to discussion.

In addition, where there are statutory duties and/or policy guidance but the reality on the ground does not reflect this, litigation can help to bring about real change in practice - not just on paper. For example, local authorities have a statutory duty to provide temporary accommodation to a homeless person but for various reasons this does not always happen.

### **Concerns when using litigation**

Participants also raised some issues that may dissuade them or other organisations from using strategic litigation. These included the potential or perceived risk to funding if the litigation is challenging the same public bodies that help to fund your organisation. However, participants were urged not to let this dissuade them as it was felt that potential media exposure and public pressure can keep funding even in light of high profile legal cases. Participants noted that such legal challenge should be accepted as part of a 'mature democracy'.

Potential disadvantages also include the financial cost (discussed further below), the length of time often involved in legal cases, reputational issues with service users or funders if the issue raised is controversial, and risk averse board members or trustees.

### **Issues to consider in using litigation to bring change**

Several key issues were raised as helpful for organisations to consider around using litigation to get change:

- Be very strategic in planning - consider exactly what you want to achieve from using litigation and any consequences on other aspects of your work or other issues. Take time to plan and consider the court action from every angle.
- Get sound advice – it is important to get legal advice from an expert in the particular field of law you will be operating in. Whilst there are some shortages of solicitors or advocates with human rights experience in Scotland, the Law Society, the HRCS, the EHRC and other organisations can provide helpful contacts. It is often useful to look specifically for legal firms or individual lawyers who include Pro Bono work in their portfolio. Often solicitors or advocates can also help to provide arguments or advice that will persuade potential supporters or partner organisations of the merits of the case.
- Be realistic and creative – does the litigation have a good chance of success? Or if it does not, could you still use the litigation to raise an issue, generate discussion or get smaller change? Will the litigation help you achieve everything you want to or can you use litigation to 'eat the elephant one bite at a time'?

- Work with others -a strategy of using litigation is often made stronger and better by working closely with other organisations. For example other organisations can provide evidence or additional cases, could intervene to bring new arguments to bear, could help to communicate about the case and its outcomes, or could help with finance.
- Consider the financial costs -where a charity is considering the use of litigation, this can involve substantial financial cost. For this reason, charity trustees have to agree to the litigation and be clear about their legal responsibilities. The cost to organisations however can be limited by the court if a Protective Expenses Order is agreed that limits or stops the petitioner from being left with the burden of legal fees. Organisations can also be creative about how they cover costs such as developing specific fundraising campaigns to meet court costs, using pro Bono advocates, using crowdfunding websites or getting financial support from other interested organisations.
- Consider the wider resource cost -pursuing a strategy involving litigation takes time and resources. Given the lengthy nature of court cases (see below) and the intensity of action and communications work required, it is important that organisations consider the impact of a litigation strategy upon their other work and priorities.
- Be careful when identifying a 'victim' – where it is necessary to have an individual take a judicial review or case, this can be very difficult particularly where the individual is vulnerable or involvement in a court case would cause them significant difficulties. For example, someone who is homeless already has significant challenges in their personal circumstance. Cases involving children can bring concerns about their protection and wellbeing, and not harming their relationships with their family. In addition, as David Hawkins from PILS said, 'not everyone wants to make legal history' and a case can involve significant media attention or controversy that can be difficult for an individual to cope with. David encouraged participants not to wait for the perfect case but for a case that is strong enough. It can sometimes be beneficial to have a group take a case instead of only one individual in order to relieve the pressure on one person and to ameliorate difficulties if they 'drop out' of the case. Working with partner organisations can help to identify appropriate individuals who could take a case and possible organisations that can help to provide emotional support for the 'victim'.
- Plan for legal timescales and processes – in September 2015, a three month limit was introduced in Scotland from the incident which is the main issue in the judicial review to the judicial review petition being brought. This is a fairly tight timescale if an organisation first wants to discuss the case internally and with other partners, wants to get a legal opinion from a QC or advocate, and raise the finance or other resources to pursue the strategic case. The organisation should also be aware of the lengthy nature of many court cases which can sometimes take months or even years to reach a conclusion.

### **Suggestions around future use of strategic litigation in Scotland**

Participants in 'Making Change Happen' suggested the following:

- There is a need for more collaboration between civil society organisations around strategic litigation. Some participants suggested that the HRCS should take on the role of shaping events or meetings around strategic litigation where organisations

could: a) share resources and information, and b) as a context for enabling greater collaboration on pursuing change through legal means. The model of CLAN Childlaw where the strategic litigation group involves representatives from interested organisations meeting four times per year around cases involving children's issues was recognised as valuable. Participants commented that it would be useful to consider ways of coordination around strategic litigation on particular issues without losing a cross-sector approach.

- It would be valuable to strengthen information sharing and networking between solicitors and advocates, and civil society organisations. As well as encouraging more use of strategic litigation, better contacts and better identification of possible cases, this may also provide more opportunities for organisations to use their particular expertise and experience in Public Interest Interventions.
- There is currently a lack of human rights legal expertise in Scotland. Participants suggested that more events and/or in-depth training around human rights for solicitors and advocates would be valuable.
- The idea of a shared pot of money or source of funding that could indemnify organisations against financial loss when pursuing strategic litigation was considered to be useful and worthy of further exploration. In addition, financial support to get a legal opinion was raised as potentially very beneficial.
- There is considerable need for more and better information and advice for civil society organisations around the use of litigation in Scotland. Participants spoke about the need for information around issues such as process, legal contacts, advice from others with experience of litigation, how to identify potential cases, detail of human rights law.
- Participants identified a need for more education around human rights laws and treaties, and what these mean in everyday life.

### **About Human Rights Consortium Scotland**

The Human Rights Consortium Scotland (HRCS) is a network of civil society organisations who work together to protect and promote a human rights-based society in Scotland.

The HRCS membership includes charities, voluntary organisations, faith groups, academic networks and professional associations. HRCS Individual Supporters come from all walks of life.

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