



Innovating European Lawyers to Advance the Rights of Children with Disabilities

Training Presentation



Co-funded by the European Union

Introduction

- Welcome
 - MDAC (www.mdac.org) is an international human rights organisation that uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide.
 - Participants to introduce themselves: name, organisation, why are you here, your expectations
- Pre-training self-evaluation

Aim

- To activate lawyers to increase access to justice for children with mental disabilities ('cwmd').

Objectives

By the end of the course, Ps will have:

- Increased **knowledge** of the forms of human rights violations faced by cwmd, the applicable international human rights law and domestic law, and the available legal avenues (domestic and international)
- Practiced specific **skills** including applying this knowledge to develop innovative legal arguments in human rights cases and representing cwmd
- Enhanced their **confidence** to represent cwmd in legal proceedings
- Developed a National Legal Innovation Strategy which aims to increase access to justice for cwmd.

Training Outline

Day 1

Session	Title
I	Introduction
II	Children's lives
Coffee Break	
III	Children and justice
IV	Key rights
Lunch	
V	Key rights
VI	Skills: Communicating with cwmd
Coffee Break	
VII	Skills: Taking instructions
VIII	Closing session

Day 2

Session	Title
IX	Recap and Introduction
X	Working w/ trauma
Coffee Break	
XI	Barriers to Rights
XII	Accommodations
Lunch	
XIII	Group work
XIV	International mechanisms
Coffee Break	
XV	Ten steps of strategic litigation
XVI	Closing session / evaluation

Session II

Children and Justice

What are Human Rights?

- Fundamental rights that each of us is entitled to simply by virtue of being a human being
- They are universal – they belong to each person regardless of their nationality, place of residence, sex, sexual orientation or gender identity, race and ethnicity, religion, language or other status.
- Human rights are set out and guaranteed by law, such as in international treaties.

Key human rights texts

- Universal Declaration of Human Rights (UNDR)
- European Convention on Human Rights (ECHR)
- Charter of Fundamental Rights of the European Union
- Revised European Social Charter
- UN Convention on the Rights of Persons with Disabilities (CRPD)
- UN Convention on the Rights of the Child (CRC)
- UN Convention on the Elimination of All Forms of 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)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)

These texts set out which human rights are guaranteed. They also place obligations upon states (governments, parliaments and the judiciary) to respect, protect and fulfill human rights.

The Rights of CWMD

- For cwmd, the rights of the child as well as the rights of persons with disabilities apply and must be considered.
- CRC and CRPD are therefore the two most important treaties safeguarding the rights of cwmd

Convention on the Rights of Persons with Disabilities (CRPD)

- The CRPD, the newest treaty, entered into force in May 2008.
- Represents paradigm shift: medical model of disability □ social model of disability
- CRPD specifically references the CRC and the rights of children with disabilities in Preamble para. (r) and Articles 3(h), 4(3), 6 and 7.
- As of September 2015, 25 EU Member States have ratified the CRPD, with the Netherlands and Sweden currently in process. Significantly, the EU has acceded to the CRPD, meaning all EU legislation and practice must be consistent with the requirements of the CRPD.
- Committee on the Rights of Persons with Disabilities monitors implementation of CRPD - evaluates State party reports (and shadow reports submitted by NGOs) and serves quasi-judicial role considering individual complaints.

<http://www.un.org/disabilities/convention/conventionfull.shtml>

Convention on the Rights of the Child (CRC)

- Sets out civil, political, economic, social & cultural rights of child
- Rights apply to each child, no matter where or who they are.
- ~~Considers children of being~~ with distinct set of rights rather than
- Article 23 of the CRC specifically addresses disabled children.
States Parties recognize that a mentally or physically disabled child 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.
- All EU Member States have ratified the CRC.
- UN Committee on the Rights of the Child monitors the implementation of the CRC.
 - evaluates reports submitted by state parties
 - serves a quasi-judicial role considering individual complaints.

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

Other important texts

- **EU Victim Directive (2012/29/EU)** - establishes minimum standards on the rights, support and protection of victims of crime
http://ec.europa.eu/justice/criminal/victims/index_en.htm
- **Council of Europe guidelines on child-friendly justice** –to help states establish judicial systems which respond to the specific needs of children to ensure their effective and adequate access to/ treatment in justice systems (civil, administrative or criminal).
<http://www.coe.int/en/web/children/child-friendly-justice>
- **Draft standards on integrated child-protection systems** – DG-Justice – establishes standards for systems which offer protection and response services, and care management, to protect children from violence.
http://ec.europa.eu/justice/fundamental-rights/rights-child/protection-systems/index_en.htm

Session III

Key rights

Overarching Principle: Non-Discrimination

- *Disability-based discrimination* = any distinction, exclusion or restriction based on disability which impairs the enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with others.
- Includes denial of *reasonable accommodation*
 - *Reasonable accommodation* = necessary/appropriate adjustments, not imposing disproportionate/undue burden, needed to ensure person with disabilities can enjoy their rights and fundamental basis on equal basis with others
- Case of Ela Grebeciova – 10 year old with learning disabilities and hearing impairment. Local school refused to allow her to attend on basis they would not be able to cope with her disabilities. Slovak Supreme Court held she had right to individualised support to allow her to be educated alongside her peers in mainstream school; any denial of such support (reasonable accommodation) would amount to unlawful discrimination.

Key Rights for CWMD

- Right to live in the community
- Right to education
- Right to health
- Freedom from abuse
- Right to access to justice and a fair trial

Right to live in the community

- Every child has the right to live and be supported to live with their family in the community.
- Article 19 of the CRPD sets out that each person, irrespective of their disability or level of impairment, has the right to live in the community.
- Article 23 of the CRC sets out “children 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.”
- Violated when children are presumptively institutionalised or denied community support services which would allow them to continue living in the community.

Right to education

- Regardless of nature or degree of their impairments, children have a right to education that is inclusive.
- Article 24 CRPD, Article 28 CRC, ECHR Protocol 1, Article 2.
- Specifically Article 24 of the CRPD establishes “*the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels.*”
- Nonetheless, local education authorities exclude cwmd from education, or place them in special/segregated schools.
- Representative Case: Jan Hrazdira is a boy with autism and mild intellectual disability. He was placed in a segregated school which was damaging his prospects and making him isolate himself. Based on a professional opinion that an integrated school would benefit him, he applied for a mainstream school and was denied – on account that they could not provide the needed in-classroom support and as other parents had complained. He applied to 14 other schools and denied entry to each.

Right to health

- Cwmd have the right to enjoy the highest attainable standard of health and access to health services without discrimination.
- Article 25 CRPD, Article 242 CRC, Article 35 Charter of Fundamental Rights
- Article 25 CRPD: *“persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.”*
- Yet healthcare providers often do not provide services to cwmd.
- *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, no. 47848/08 (17 July 2014) – Valentin was a boy with HIV and learning disabilities who lived in an institution for disabled children his entire childhood. When he reached the age of 18, he was moved to a social care institution but his medical record and his antiretroviral medication for HIV were not taken with him. He died in a government-run hospital, malnourished and with nurses refusing to care for him, ignorantly thinking that they could catch HIV from touch.
- *Forced sterilisations and abortions*: With respect to girls and young women with mental disabilities, their opportunity to become sexually active or to have children is taken from them. Health care providers assume that they lack the capacity to consent to invasive and irreversible interventions such as abortions and sterilisations, or override their refusal to consent.

Freedom from abuse

- Torture, inhuman or degrading treatment are prohibited and cwmd have a right to be free from exploitation, violence and abuse.
- Articles 15, 16 and 17 CRPD; Articles 19, 24 and 37(a) CRC; Articles 1, 2, and 16 CAT; Article 3 ECHR; Article 4 Charter of Fundamental Rights
 - Art. 15 CRPD “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*”
 - Art. 37(a) CRC “*no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.*”
- Unicef estimates that children with disabilities are 3 to 4 times more likely to experience physical and sexual violence, including neglect, than non-disabled children.
- Their impairments, higher reliance on care, social isolation, and the stigma attached to disabilities are all factors increasing the risk of violence against cwmd.
- *Blokhin v. Russia* – Ivan Blokhin was a 12-year old boy with ADHD and a bladder disorder, who was arrested for allegedly extorting his 9-year old neighbor. In detention, Ivan was made to spend his days in a large empty room with no furniture and to share his bedroom with 7 other boys. Despite his bladder disorder, when he asked to use the toilet, he was made to do cleaning work and to wait until others needed the toilet. Ivan spent three weeks in a hospital after his release due to the deterioration of his disabilities.
 - ECtHR found that the lack of adequate medical treatment constituted inhuman or degrading treatment.

Right to Access Justice & Fair Trial

- Access to justice means the ability to seek and obtain an effective remedy for a violation of one's rights or fundamental freedoms.
- Set out in Art. 8 UNDHR; Art. 13 CRPD; Art. 13 ECHR; Art. 47 EU Charter on Fundamental Rights
- Right to be heard is an important aspect –Art. 12 CRC *“the child shall in particular be provided 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.”*
- Also coupled with right to a fair trial: Art. 14 ICCPR, Art. 6 ECHR, Art. 40 CRC
- Barriers to accessing justice:
 - 1) Denial of the right to be informed
 - 2) Nonexistence or inaccessibility of complaints mechanisms
 - 3) Discriminatory failure of police/prosecutor to investigate/prosecute
 - 4) Failure to accommodate
 - 5) Failure to take measures to protect victims and women

Spotlight: Girl Child

- Girls with disabilities are likely to face additional and heightened barriers due to the intersection of age-based, disability-based and gender-based discrimination.
- UN: “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 subjected to other harmful practices and various forms of violence. ” (CEDAW General Recommendation on Women’s Access to Justice, 23 July 2015, CEDAW/C/GC/33)
- Texts:
 - Convention on the Elimination of Discrimination against Women (CEDAW) requires States to tackle domestic and sexual violence.
 - Council of Europe Istanbul Convention (on preventing and combating violence against women and domestic violence) – requires States to fully address violence against women and girls, including prevention, protection and prosecution.
- Issues: abuse; forced sterilisation

Sessions VI & VII

Skills: Communicating with cwmd
&
Taking Instructions

Access to justice and effective participation through communication

- Not assuming incapacity – the importance of access.
- Enhanced requirements on lawyers to learn advanced communication skills in this context.
- Learning how to recognise communication needs including interpretation.
- Cultural and language awareness.
- Available tools and guidance.

Working with Children

- Building trust & rapport
 - Break the ice
 - Consider your body language
 - Practice active listening
 - Work to maintain trust when apart
- Effective communication
 - Ensure you have child's attention
 - Find out what they would like to be called and what they would like to call you
 - Use plain language and easy read documents
 - Speak in short sentences with one piece of information
 - Ask them to relay back what they've understood

Representing CWMD

- Consider using non-verbal activities and games to break the initial tension
- Identify communication issues, recognizing that specific supports and accommodations may be necessary to communicate with the child and to facilitate their communication.
 - Work closely with social workers, communication experts and intermediaries to establish an effective method of communication.
 - Recognise that you may need to establish an unique way of communicating and listening with this specific child.
- Use timelines, pictures and examples the child understands.
- Accept that there may be moments of silence and give any feelings that are expressed validity.
- Allow time for more frequent breaks
- Ensure you maintain the rapport that is built during absences and provide the child with a concrete notion that you will speak again.
 - Perhaps give the child your mobile number and create a timeline so that s/he can count down the days to your next visit.
- Practice a positive, non-prejudicial attitude

Top 10 Tips for Communicating

1. Recognise a communication challenge and adjust your communication to suit the child.
2. Set conditions for good communication.
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.

Ten Tips for Taking Instructions

1. Make time.
2. Explain who you are and your role.
3. Deal with confidentiality.
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.
9. Emphasise that you may not be able to get what they want.
10. Explain the result.

Practical exercises

CWMD who can communicate:

- Dealing with time – the difficulties children have with expressions of timescales and ‘before/after’ concepts.
- Gratuitous concurrence – children who may consistently agree. Avoiding ‘yes and no’ answers

Session XIII: Working with Trauma

The following materials have been adapted from a toolkit produced by The Advocate's Gateway.

The Advocate's Gateway, Toolkit 18: Working with Traumatised Witnesses, Defendants and Parties, July 2015.

Dealing with trauma and secondary trauma

- Enhanced requirements on lawyers to learn about and recognise trauma.
- Available tools
- Cultural and language awareness
- Recognising how lawyers deal with secondary stress.
- Available tools.

What is Trauma?*

- Trauma is an adaptive response to a threat.
- It triggers fear systems which are then activated and continue after the event has passed.
- Specifically, it can significantly affect the frontal lobe of the brain, responsible for verbal reasoning, organisation and cognitive function.
- Traumatized people are affected by related signals in their environment.

* The material appearing on the following 3 slides is taken from The Advocate's Gateway, "Toolkit 18: Working with Traumatized Witnesses, Defendants and Parties," July 2015.

Trauma & the Justice System

- Trauma affects the ability to understand language, to process and think logically, and to communicate responses.
- Trauma can significantly affect a person's ability to give evidence, follow proceedings or cooperate with procedures.
- Persons working with cwmd should be aware of potential triggers, how to work with persons with trauma, and the risks of secondary traumatisation.

Indicators cwmnd may be suffering from trauma

- 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.
- Appears confused by what is said/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.
- Hyper-vigilant to surroundings and responses of others
- Hypo-vigilant ('flop')
- Flashbacks
- Dissociation
- Zone in and out, may become dizzy or may experience fogginess or have blank spells.

Working with traumatised cwmd*

- Acknowledge very basic trust issues, as well as shame
- Know your role
 - Best interests model?
 - Child as decision-maker?
 - Regardless, you are not Santa. Don't pretend to be. Remember trust.
- Take your time
 - If “time is money”, then refer out.
 - The reliability and validity of testimony depends on it.

* The material appearing on this slide and the next is from a presentation by Dr. Éva Szeli “Trauma & Mental Disability Rights.” Presented at MDAC Budapest, 6 July 2016.

Interviewing

1. Create a comfortable environment

- Don't interview! Use activities to take the pressure off.
- Don't loom! Sit side by side. Match body language.
- Establish trust and safety.. Come to an agreement on the meaning of "truth".
- Be honest about the limits of confidentiality.

2. Take language development into account

- Understand "concrete" thinking and its language in younger children.
 - Keep questions simple and concise
- But don't condescend, especially with older children!
- Use open-ended questions. Verify impressions / interpretations (Ceci's story).
 - Be aware of content *and* process "demand" as a function of power.
- Use proactive, solution-focused – rather than reactive, problem-solving – language.

3. Maintain cultural awareness of ethnicity & stigma

- Acknowledge context.
- Avoid judgment and (even inadvertent) shaming.

Q and A

- What the delegates can exchange about their own approaches and systems.....
- Reflective practices.

Session XIV:
Procedural Accommodations

Identifying & Removing Barriers

- Work to identify existing/potential barriers that a child may encounter.
- Involve the child and his/her family in identifying barriers and solutions.
- It is essential that you work with others – social workers, medical staff, prosecutors – to remove barriers
 - Will require effective communication and information sharing, respect, joint planning and coordination.
- Consider bespoke approaches, involving interpreters or images. Be flexible and innovative.

Possible accommodations

- visit the courtroom prior to proceedings
- restrict attendance to the courtroom
- allow a person of trust to accompany the child throughout proceedings
- provide drinking water and short breaks
- Interview child in familiar, comfortable setting or a child-friendly interrogation room
- use pre-recorded testimony
- use a television link to the courtroom
- utilize screens to prevent child witness from seeing defendant
- allow child to communicate with assistance of a support person/intermediary
- use sign language, augmentative and alternative communication
- use exhibits as much as possible to assist the child in giving evidence

- *It is the responsibility of parents, guardians, lawyers, social workers and judges to ensure participation is guaranteed so that justice may be done.*
- *Courts and tribunals may not be receptive - emphasise the human rights issues and legal obligations*

Session XII:
International Mechanisms

- If the domestic avenues 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.
 - Regional – European mechanisms
 - International avenues

European Mechanisms

1. European Court of Human Rights (ECtHR)

- The ECtHR, part of the Council of Europe, monitors state party compliance with the European Convention of Human rights and its additional protocols.

2. Court of Justice of the European Union (CJEU)

- Interprets the Charter of Fundamental Rights, Art. 24 of which is relevant to children.
- Cases come before the CJEU by referral from national courts or as infringement proceedings

3. European Committee of Social Rights (ESCR)

- Monitors state compliance with the European Social Charter
- Considers collective complaints lodged by Member States or NGOs

International Avenues – Treaty Bodies

- 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 also serve a quasi-judicial role – they are able to hear individual complaints and give redress.
- There are three ways a treaty body can review challenges against a State Party’s implementation:
 - Individual communications
 - State-to-state complaints
 - Inquiries
- Most relevant in this context are individual complaints.

Individual complaints

- Complaint can be brought by individual/group or through a representative.
- Only complaints against national governments and related to violations of international treaties are accepted.
- * A complaint cannot be brought against a country unless it has ratified the protocol establishing the complaints mechanism*
- Each treaty body's complaints mechanism operates on its own terms, so the specific procedures of the treaty body must be reviewed.
- *Any treaty body can review complaints that are submitted by children*
- In general, complaints must be brought as soon as possible after exhaustion of domestic remedies
- Interim measures may be available in urgent or sensitive cases
- Decisions of treaty bodies, while having considerable weight, do not have binding legal force.
- *See Training Pack for further explanation of how to bring a complaint.*

Inquiry procedure

- Inquiries are a mechanism for addressing widespread violations by a State party.
- May not offer an immediate remedy for a specific child, but may put pressure upon a government when domestic avenues are not producing results.
- Does not require identifying victims directly so there is greater anonymity.
- May only be conducted in relation to States parties that have recognized the treaty body's competence to conduct them.
- Procedure may be initiated if the Committee receives reliable information that the rights contained in the relevant Convention are being systematically violated by a State party.
- Procedure is confidential and cooperation of the State party is sought

Special Procedures

- Special procedures are used by the UN Human Rights Council to 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).
- Although not judicial or quasi-judicial mechanisms, Special Rapporteurs and Working Groups have the power to respond to individual complaints of human rights violations.
- Relevant thematic areas: Disability, Health, Education, Torture and Violence against Women.
- Process:
 - Requires details of alleged victim, alleged perpetrators and what occurred with date and location.
 - Special Rapporteur can then communicate with government at issue via letter urgently appealing for action or seeking follow-up.
- 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.
- May serve to place additional pressure and be used in conjunction with legal avenues. E.g. this process can be done in parallel to domestic proceedings and may prove helpful to put pressure on and as evidence in domestic proceedings

Session XV:
Ten Steps of Strategic Litigation

Strategic Litigation

Taking carefully selected cases to court, in conjunction with other tools, to bring about significant change in law, policy or public awareness, as well as seeking justice for the client.

Possible benefits:

Setting precedent

Instigating law reform

Determining the theatre of debate

Ensuring implementation of existing laws

Awareness/Education

Empowering beneficiaries

Documenting injustice and rights violations

Possible risks:

Protracted and costly

Setting bad precedent

Risk of harm

The 10 Steps of Strategic Litigation

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

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

Step 1: Establish the overall objective and the strategy for change

- Establish a clear objective from the outset
 - To do so, articulate:
 - The issue
 - The root cause of the issue
 - The change necessary to address that root cause
 - For example:
 - Issue: institutionalisation of children with disabilities;
 - Root cause: discrimination in access to community-based services;
 - Necessary change: change in policy to remove discriminatory barriers
 - Determine other stakeholders and collaborate to establish the objective and strategy for change.

Step 2: Build a Litigation Team

- Form team to maximise impact. Ideally including:
 - Local lawyer
 - Local NGO
 - International law firm
 - International experts
 - International NGO

Step 3: Create case selection criteria

- Establish the factors to select the case
 - For MDAC this is SPARR – Strength, Potential, Added Value, Relevance and Resources.

Step 4: Develop a client intake process

- To pursue strategic litigation, you must proactively find client.
 - Litigation on behalf of specific person has far greater potential to achieve objective.
 - Important to set objective first and then find client.
- Potential sources: NGOs, peers support organisations, service providers, university legal clinics, field visits, training programmes.
- 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.

Step 5: Develop a case plan

- Set out a plan for the case, addressing: forum selection, requirements to exhaust domestic remedies, available remedies, necessary evidence and how to collect, required witnesses, areas for additional expertise, human and financial resources, and any potential follow-up litigation required.

Step 6: Conduct risk assessment

- Develop a risk management plan - identify foreseeable risks for each aspect of the strategy for monitoring and potential mitigation.

Step 7: Create client support plan

- It is important that you be able to provide the child with information on accessing supports
- Identify and discuss their needs, draw up a plan, and monitor/revise as necessary.

Step 8: Collect evidence

- 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.

Step 9: Conduct litigation

Step 10: Implement judgment, incl. follow-up advocacy and litigation

- Following judgment, further steps may be necessary to ensure the decision is implemented and the objective is achieved.