

Children's Rights Strategic Litigation Toolkit



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(CCYP/2022/04) laid before the Scottish Parliament by the Commissioner for Children and Young People in Scotland in pursuance of Section 12 of the Commissioner for Children and Young People (Scotland) Act 2003 on 14/10/2022

INTRODUCTION

We have developed this Strategic Litigation Toolkit to ensure that we use our powers in a way that is consistent with the Commissioner's role to promote and safeguard children's rights, and in compliance with the United Nations Convention on the Rights of the Child (UNCRC). It will also make sure that we are accountable, transparent and that our decisions are clear and fair.

The toolkit explains the Commissioner's powers, sets out how we involve children and young people in strategic litigation and the principles that underpin this work.

We also share the set of tools we have developed. The tools help us decide which cases we can get involved in as well as provide reasons for those decisions.

This decision-making tool was authored by Shauneen Lambe and Aoife Nolan, drawing on the research of the Advancing Child Rights Strategic Litigation (ACRiSL) project (www.acrisl.org). Work on the toolkit was supported by an ESRC Impact Acceleration Account grant.

We want to thank our Young Advisers, Ibukun, Lewis and Sophie, for working with us to develop this toolkit alongside Clare Parkinson, Speech and Language Therapist. Their valuable contributions to this toolkit enabled it to be much clearer.

PART ONE - THE COMMISSIONER'S LEGAL POWERS

Who is the Commissioner?

The Children and Young People's Commissioner Scotland works with their team to protect the human rights of children and young people. The powers given to the Commissioner are set out in law. The Commissioner for Children and Young People (Scotland) Act 2003 makes clear that the Commissioner's role is 'to promote and safeguard the rights of children'.

The Commissioner's mandate relates to all children, under the age of 18, and all care experienced young people, under the age of 21, who are in Scotland – it does not matter what their nationality or immigration status is.

What is strategic litigation?

Since 2017, an important part of the office's work has been 'strategic litigation'. At the Commissioner's office, we understand strategic litigation to mean legal cases that seek to bring about positive legal and/or social change so children and young people can enjoy all of their rights. One way in which this can happen is where a court's decision establishes an important point of law or where it leads to a change in a policy or practice affecting children and young people's lives.

Even though back in 2017 the Commissioner's office did not have any legal powers to start court cases, there were still different ways in which we could be involved in strategic litigation:

- We could ask the Court for permission to make formal submissions (an 'intervention'), on an existing case. This is called being an intervener.
- We could provide information to a party in a case which can be referred to when arguing a case. This is called a statement.

What is changing?

A new law called the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill will give the Commissioner more powers to get involved in legal cases. This new law has not yet been finalised, but when it is, our work around strategic litigation will increase.

How will we decide what cases to take?

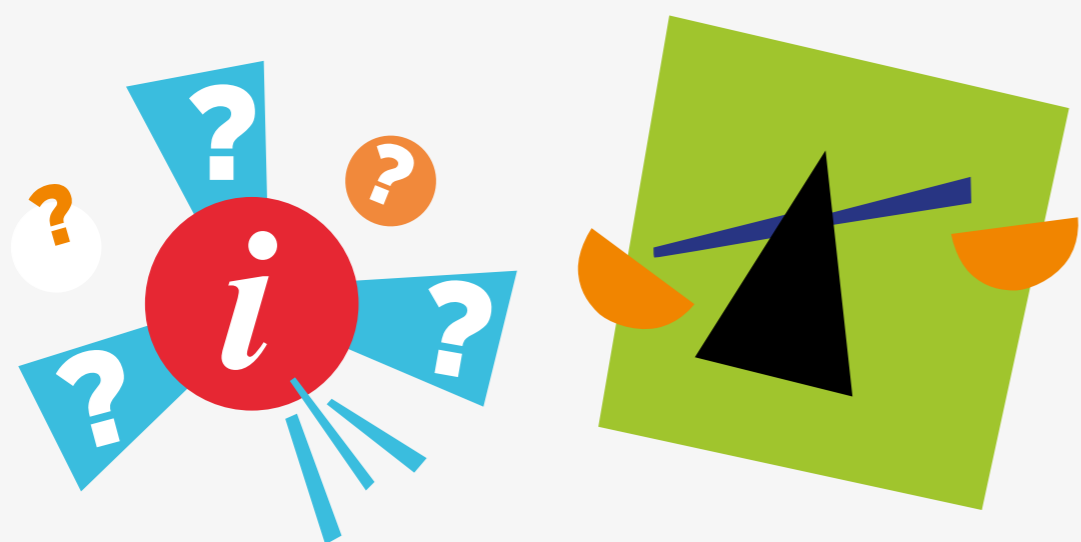
There are lots of cases that the Commissioner's office could try to bring to the courts, so we have to be selective and choose cases that:

- are a priority area in terms of children and young people's rights, for the work in our office (i.e., the children's rights areas we have decided to work on)
- affect children and young people who need the most help to protect their rights. (These might include care experienced children and young people, disabled children, black and minority ethnic children, children in conflict with the law, or whose liberty is being restricted)
- will lead to a large number of children and young people enjoying greater rights

We want to work with our Young Advisers and other people who work for and with children and young people ('the children's sector') to help decide which cases we should get involved in, based on the resources we have.

We also want to be able to explain to children and young people and others why we get involved in strategic litigation on certain issues and not others, so that we can be accountable, transparent and our decisions are clear and fair.

To do that we have designed a decision-making tool (a set of guidelines). This lays out a set of principles we will apply to all of our strategic litigation work, and which we will use to ask ourselves a number of questions. Those questions will help us to choose the cases we get involved in and to provide clear reasons for those choices. We will also leave space to get involved in cases that we feel we can't ignore if they come up. You can read the principles in Part Two, and see the questions we ask ourselves in Part Three.



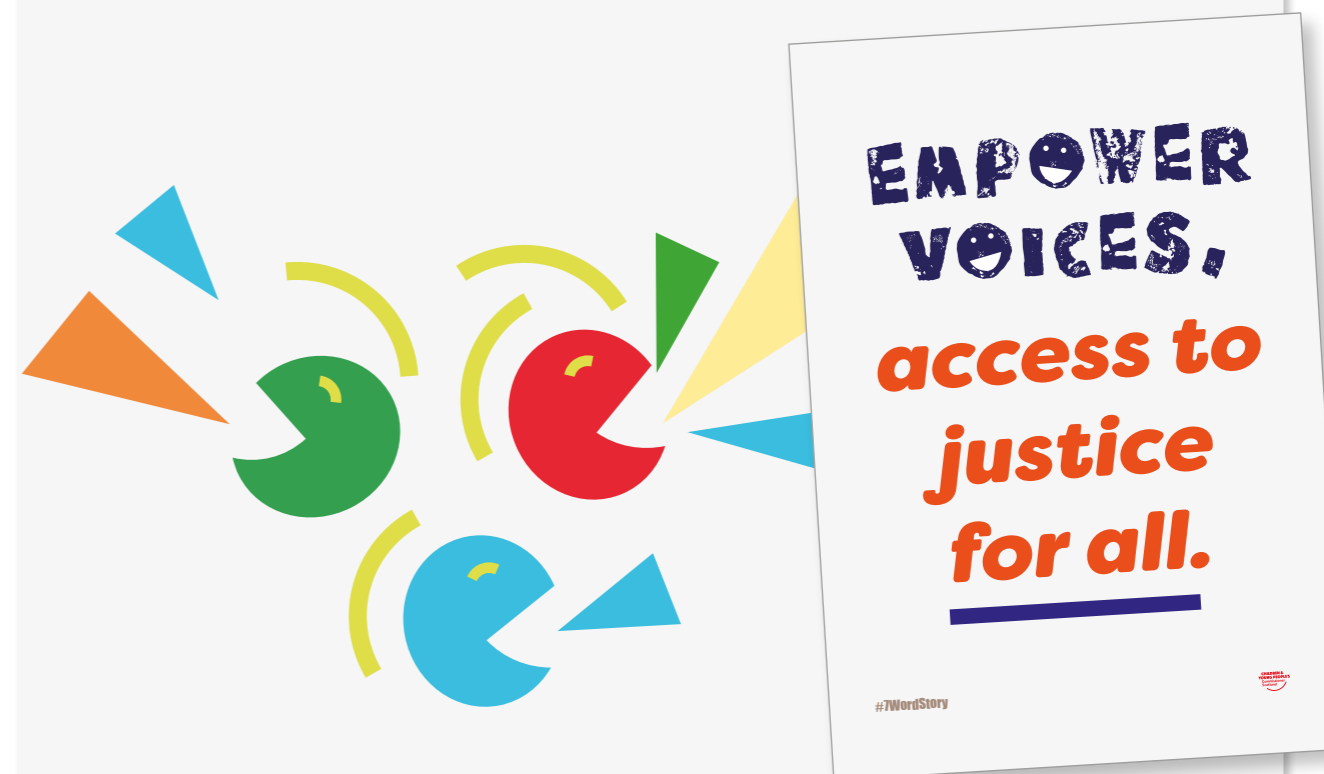
How do we involve children and young people?

The Commissioner's office seeks to engage and involve children and young people from across Scotland in every aspect of our work, with a particular emphasis on those children and young people who are harder to reach or underrepresented.

We are increasingly adopting a co-design approach, involving children and young people from inception. Too often children and young people tell us they are talked about and not with.

We have set up Young Advisers Groups. These groups help the Commissioner's office come up with key themes that they would like the Office to work on. We set these out in a Strategic Plan. Together with our Young Advisers, we map out priorities, the work the Commissioner's office does, and the way the Commissioner's office uses resources.

The issues identified by the Young Advisers then inform our work around strategic litigation.



Glossary

Here we include definitions of words lawyers and other professionals might use and what they mean to us. Some of the words have everyday meanings that are different to how they are used legally, so although some words might seem familiar, they may have a different meaning. Where possible we have tried to give examples of how the words might work in a sentence.

Breach

A children's right is breached where someone does something that interferes with that right or where someone doesn't do what they are required to do to give effect to that right.

Bringing a case/Party in a case

There are normally two different sides (parties) in a case. One party normally 'brings the case', the other defends it. Under new law the Commissioner's office will be able to bring cases to court on behalf of children in Scotland.

Care experienced

Children and young people who have been in care, usually through the children's hearing system.

Children's hearings

A legal meeting for children in need of care and protection, including those who commit offences. The hearing listens to children's views and makes decisions in their best interests.

Children's rights

Everyone has human rights, but children also have children's rights. These are important extra protections for all people under the age of 18. Children have their own rights, they are not 'possessions' of parents or carers.

An example of a children's right is the right to education.

Court of Session

The Court of Session is highest (most important) civil court in Scotland. This is where most strategic litigation takes place.

Devolved matters

Devolved matters are decisions that can be made by the governments in Scotland, Wales and Northern Ireland. In Scotland, devolved matters include health and education.

Dissemination

To spread information about a law or policy widely.

Domestic law

Each country has its own different laws, these are called domestic laws.

Domestic laws are the laws that apply and can be challenged in the courts of that country.

For example, Scots law is the domestic law enforced in Scotland.

Human rights

Human rights are a set of rules stating basic rights and freedoms that everyone is entitled to. In the UK (including Scotland) our human rights are set out in law in the Human Rights Act, and other domestic laws, as well as in international conventions like the UNCRC.

Incorporation

When an international convention (like the UNCRC) becomes directly written into a country's law it is known as 'incorporation'. When a law is incorporated it can be relied upon more than a convention.

For example, if the Scottish Government breaks a law that has been incorporated into Scots law, they can be challenged about that in a court in Scotland.

International Conventions

Legal agreements signed by governments in which they make promises to the people who live in their country. Scotland is part of the UK, so both the UK and Scottish Governments have made human rights promises to people here. The UNCRC is an example of an international Convention.

Intervene/Intervener/Intervention

To intervene means to be added into a case that someone else is bringing or defending.

The Commissioner's office can ask the judge on a children's rights case if they can intervene. When they intervene, the Commissioner's office does not represent or support one of the parties. Instead, the office will identify and highlight the broader human rights issues or problems. This helps the judges to make a better decision.

Judicial Review

If there is concern that a public body or public authority have not followed the law, a legal challenge can take place. That legal challenge is called 'judicial review'.

In a judicial review the judges hear arguments from both sides to decide whether a public body has followed the law or not. If the judges find that the public body did not follow the law, they can make that public body change their decision or policy.

Legislation

A law that is made official by parliament.

Policy

A plan of what to do that has been agreed officially by a public authority or a public body.

Public authority / Public body

An organisation that delivers a public service on behalf of the government. For example, local authorities, Police Scotland and NHS Boards are all public bodies.

Reserved matters

Reserved matters are areas in which the UK Government and Parliament keeps decision-making power.

Scottish Government

The Scottish Government runs the country. It must make all its decisions in line with human rights law. It is made up of members of the political party or parties that are in power.

Scottish Parliament

The Scottish Parliament passes laws on reserved matters. It must ensure those laws comply with human rights. It is made up of all democratically elected members of the Scottish political parties.

Sheriff court

A Sheriff is a judge. The Sheriff court is the first level of courts in Scotland. Most children and young persons' cases are heard in a Sheriff court.

Statement

A statement is a written document that is given to one of the parties in a case and can be used as evidence in the case.

Strategic litigation

Litigation means 'taking cases to court'.

Strategic litigation is a legal case that aims to change the law or bring about social change for more than one person. It is done by taking carefully selected cases to court to highlight a problem for one person as an example of what might be happening to many others.

Supreme Court

The UK Supreme Court (in London) deals with the most serious and important cases. Cases that have been heard at the Court of Session in Scotland can be appealed to the Supreme Court.

United Nations Convention on the Rights of the Child (UNCRC)





The UN Convention on the Rights of the Child is an international agreement that sets out what rights children have. Nearly all governments in the world have signed up to this agreement that states children are human beings with a distinct set of rights.

PART TWO – PRINCIPLES AND APPROACH

How does the UNCRC underpin our approach to strategic litigation?

Children's rights require governments and public authorities to act (or stop acting) in a particular way. The Commissioner's office is also expected to act in line with children's rights principles. That means the UNCRC should shape the Commissioner's work and decisions on strategic litigation. Drawing on the work of the [Advancing Child Rights Strategic Litigation Project](#), the Commissioner's office has thought carefully about how to make sure that we use children's rights to inform our work on strategic litigation.

There are different stages of Strategic litigation decision-making and the UNCRC applies to all of these stages. These stages are:

-  The scoping, planning and design of strategic litigation
-  Strategic litigation in action
-  Follow-up to strategic litigation, including implementation and sharing of information about the case (dissemination)
-  Campaigning, communications and media work



Relevant UNCRC Articles

(See Appendix 2 for more detailed information)

These are the Articles of the UNCRC that are most relevant to how we conduct Strategic Litigation.

Article 2 – all children have rights under the UNCRC. No child should be treated unfairly for any reason.

Article 3(1) – adults in power must do what's best for children

Article 4 – the Scottish Government and UK Government must do everything they can to make sure the UNCRC is upheld.

Article 5 – children have the right to be guided by their families and communities so that, as they grow up, they can use their rights in the best way. The more children grow, the less guidance they will need.

Article 6 – the rights of children to survive and to develop.

Article 12 – the right of children to be listened to and have their views taken seriously.

Article 13 – the right of children to find out and share information.

Article 16 – the right of the child to keep some things private.

Article 17 – the right of children to get information in lots of ways, so long as it's safe.

Article 19 – the right of children to be protected from being hurt or badly treated.

Article 36 – the right of children to be kept safe from things that could harm their development.

Article 39 – the right of children to get help if they have been hurt, neglected or badly treated.



Key principles

These principles will apply in different ways depending on how the Commissioner's office is involved in the litigation in question.

When the Commissioner's office is carrying out work around the scoping, planning and design of strategic litigation, children's rights mean that:

- ▶ children should be involved in identifying the rights issue(s) to be litigated in cases, the goals to be pursued by litigation, and in the whole strategic planning of litigation
- ▶ strategic litigation involving the Commissioner's office will not exploit children
- ▶ children must have the information necessary to understand and weigh up the opportunities/risks involved in litigation
- ▶ the Commissioner's office's strategic litigation work must always be in children's best interests
- ▶ the Commissioner's office's strategic litigation work will be attentive to how that work might impact on children's policy/advocacy agendas
- ▶ the Commissioner's office must think about whether the litigation offers a chance to challenge and/or develop parts of the legal system that make it hard for children to claim their rights

When the Commissioner's office is putting strategic litigation into action, children's rights mean that:

- ▶ the Commissioner's office, lawyers and others working with children on strategic litigation must engage with and effectively communicate with those children
- ▶ the Commissioner's office, lawyers and others working with children on litigation must make sure that the children feel comfortable and secure, and that they feel they can speak freely without being judged
- ▶ children's views must shape the agenda as the case progresses to ensure their participation is meaningful and not tokenistic
- ▶ children's ability to understand issues and make decisions must be kept under constant review in order to ensure that their views are given appropriate weight in decision-making about the litigation
- ▶ remedies should be in line with the views and interests of the children affected
- ▶ the Commissioner's office will consider the risk of any potential harm or (re)trauma that children might be exposed to as a result of the litigation process
- ▶ the Commissioner's office must ensure that children are aware of possible outcomes and what those outcomes might mean in advance of judicial decisions to manage their expectations
- ▶ children must be supported and feel comfortable to express their views to lawyers or other professionals, either directly or via another trusted person

When the Commissioner's office is working on the follow-up to strategic litigation, including implementation and sharing of information about the case (dissemination), children's rights mean that:

- ▶ the Commissioner's office, lawyers and others working with children on strategic litigation involving the Commissioner's office must make sure that the children fully understand what the court has decided
- ▶ children must be informed by the Commissioner's office of subsequent developments related to, or arising from, the court's decision
- ▶ the Commissioner's office shall be alert to any ongoing support needs the child might have, and will take all reasonable steps to signpost them to support following the conclusion of the strategic litigation
- ▶ children, who want to be, should be able to be involved in any follow-up activities related to the litigation
- ▶ the Commissioner's office should ensure dissemination of information on the outcomes of the litigation in child-friendly language so that it is available/accessible to all children to whom it might be of interest

When the Commissioner's office is working on campaigning, communications and media work, children's rights mean that:

- ▶ children's right to privacy, which means no reporting of the child's name or image or identity, must be respected at all times and the representations of the Commissioner's office to the court must take account of the child's right to privacy unless the child specifically wants to be identified
- ▶ the Commissioner's office's will be attentive to the risks of harmful media attention and will mitigate these where possible
- ▶ where media forms part of the the Commissioner's office's litigation strategy, children must be provided with the support needed to engage with the media effectively (should they choose to do so)
- ▶ children's views about how they/their cases should be presented by the office to external audiences (including in publicity materials) must be given effect to by the Commissioner's office

PART THREE – DECISION-MAKING TOOLS

Criteria Tool

Is this legal issue within the mandate of the Commissioner?

Yes No

Is this legal issue linked to the priorities set out in the current Strategic Plan of the Commissioner's office?

Yes No

Has this issue been identified by the Commissioner's Young Advisers as one of the urgent areas that the office should be working on?

Yes No

Is this issue among the priorities set out in the current Delivery Plan of the Commissioner's office?

Yes No

Are the children and young people impacted from an identified group whose rights are most at risk?

Yes No

Is this a systemic issue?

Yes No

Is litigation the best way to address this issue?

Yes No

Is there a reputational risk for the children and young people whose rights are involved and/or the Commissioner's office?

Yes No

Does the proposed litigation create a risk of trauma or re-traumatisation for a child or young person?

Yes No

Number of children and young people likely to be impacted by the litigation

- 1-100
- 100- 1000
- 1000-10,000
- 10,000 – 100,000
- 100,000- 1,000,000
- Over 1 million

Scale the benefits to children and young people from the litigation (choose one)

- Moderate consequences
- Long term life-changing consequences
- Lives are at risk

Is the proposed litigation likely to protect the existing rights of children and young people or increase their rights (ie is it reactive or proactive)

Yes No

Does the proposed litigation have a realistic prospect of success?

Yes No

Consider the timing – is this is the right time for this challenge giving consideration to current politics, resourcing of the Commissioner's office and public opinion?

Yes No

Is the Commissioner's office the best organisation to be involved this litigation?

Yes No

If the Commissioner's office does not do this work – will others take it on?
If so, who?

Yes No

Does the proposed litigation raise any conflicts of issue for the Commissioner's office or any individual staff?

Yes No

Other relevant factors

The Commissioner's office needs to consider a number of factors when deciding to get involved in strategic litigation. Some are external (political landscape, public opinion) while others are internal (resourcing). The **Resource Planning Tool** sets out the factors we will take into account when we are considering our internal resourcing.

Strategic litigation can take years to bring about change, depending on the hearings and the number of appeals that are taken. We need to factor the potential time a challenge might take and how much of our resources are allocated to that issue. The **Timeline Planning Tool** sets out the factors we will take into account when collating a potential timeline of a case so we can see what resources are needed and when.

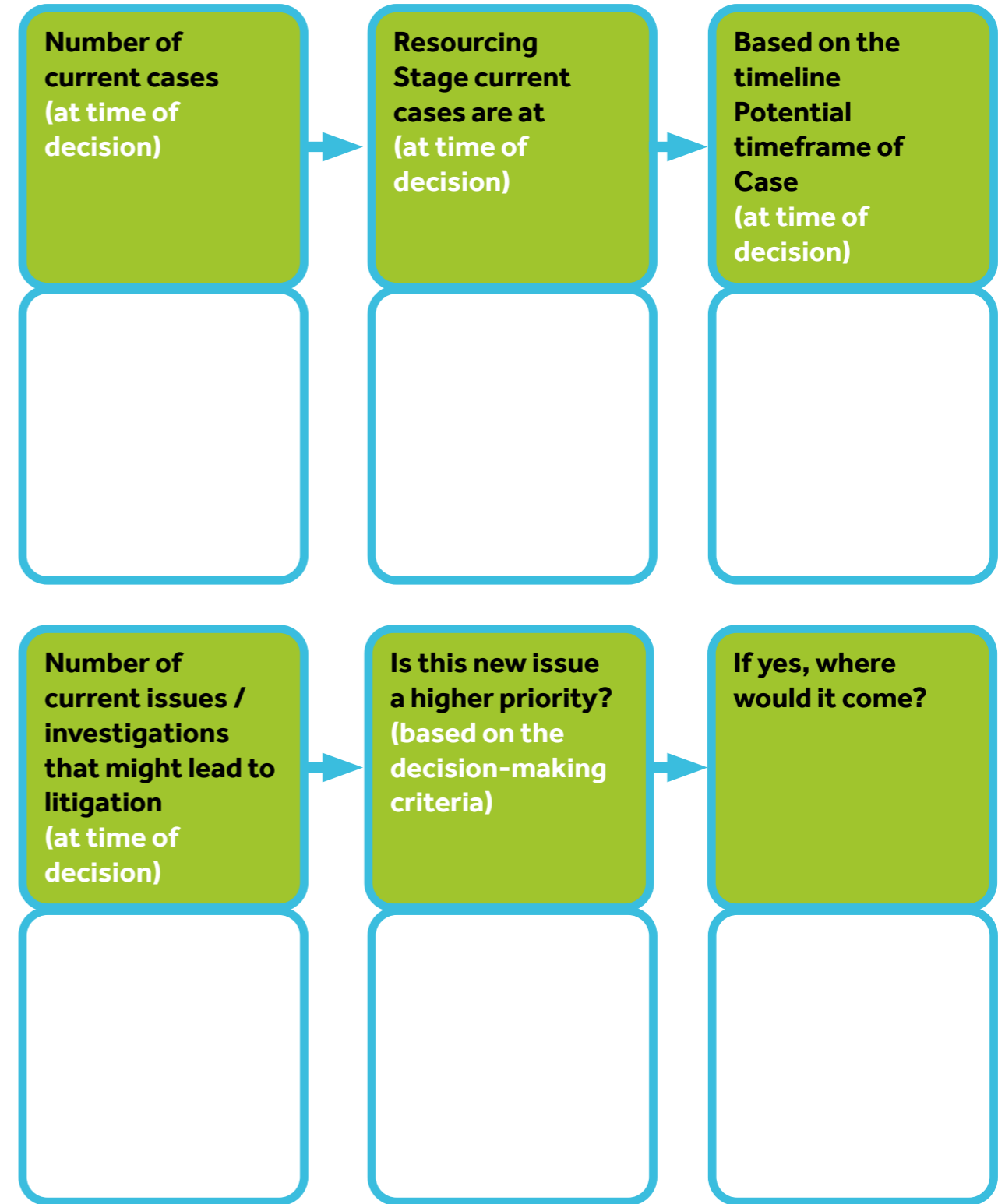
Often, we are not the only organisation working on a particular issue. It is important for us to know who else is working on this issue and what their position is. This is so we can hopefully work collaboratively with them, so that we don't duplicate work that is already taking place, and so that we are all asking for the change we want to see in similar ways to make the change easier to understand for the politicians and the voters. To help us work out who else is involved in a particular issue and what change we are seeking we have a **Strategic Litigation Mapping Tool** that we complete for each issue.

Getting the judgment is not the final step in strategic litigation: work has to be done to make sure the decision that has been made has meaningful impact, for example through changes to legislation or guidance. Someone has to take on the work of making sure a decision is implemented. Sometimes that will be the Commissioner's office, sometimes it is better if that work is taken on by others. Sometimes it is better if a number of different people work on the implementation. This is decided on a case-by-case basis. To make sure we are doing our best to ensure implementation is worked on efficiently, we use an **Implementation Planning Tool**.

Once there has been a change in law, policy or practice, we need to make sure that people who are affected and people who work in the relevant area know about the changes and what they mean. To do that we need to produce and share (disseminate) information about the changes. To make sure we have disseminated the change as widely as possible we have a **Dissemination Planning Tool**, which we work through.



Resource Planning Tool



Timeline Planning Tool

Timeline of case

Date started

Date completed

1 Case planning

2 Instructed solicitor & advocate

Name

3 Hearing scheduled

Date

4 Potential stages of litigation

5 Appeal taken

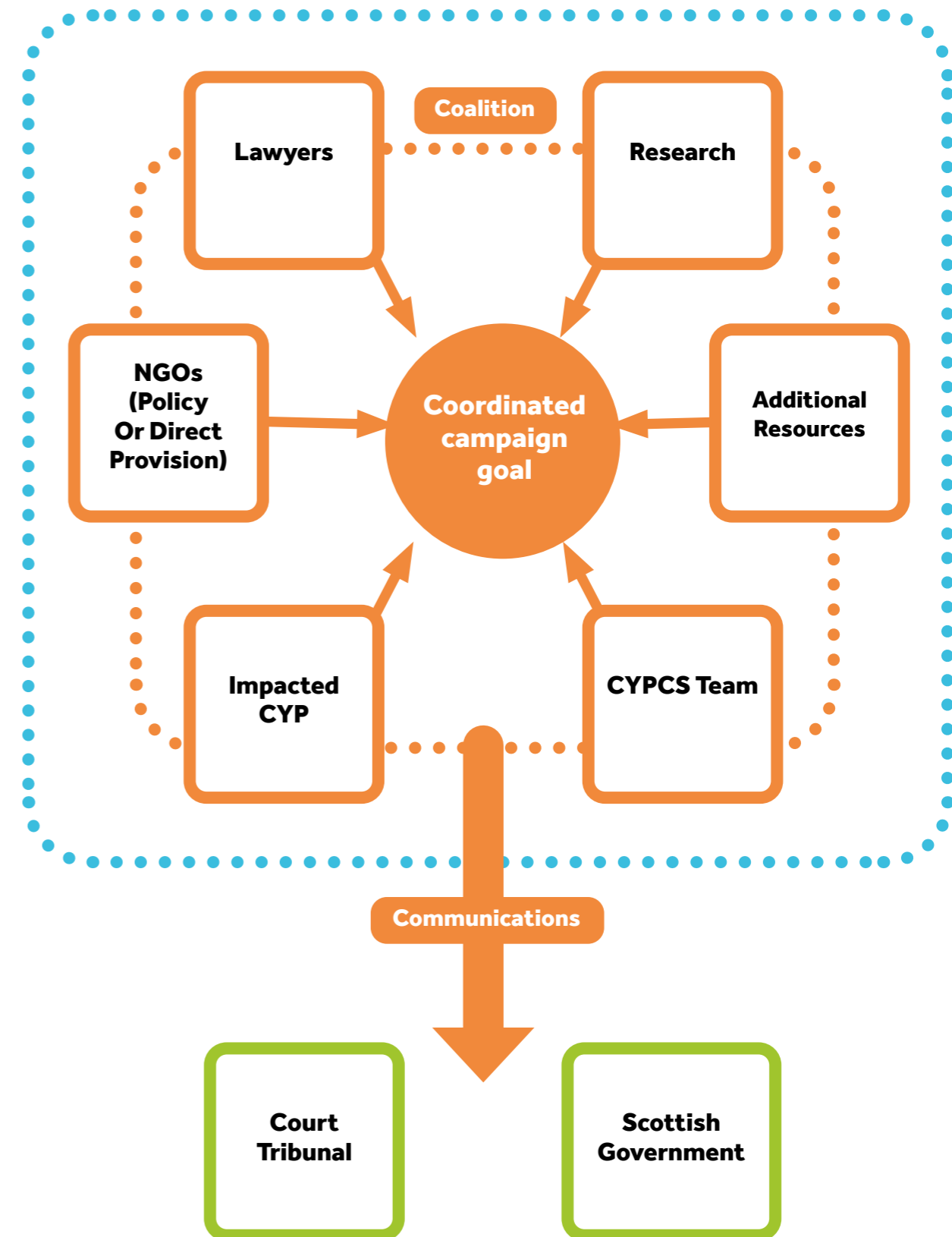
By whom

6 Implementing decision (policy / lobbying)

7 Disseminating changes to sector

Strategic Litigation Mapping Tool

Wider Network



Dissemination Planning Tool

(By dissemination we mean how a decision is messaged to the relevant bodies)

Dissemination Steps

Brief overview of the issue	[Give a brief description of what the decision/update/outcome you are seeking to disseminate]
Create a child-friendly version of the overview	[Check language and understanding with Young Advisers Group (YAG) or ask YAG to write this version]
How and when the information was disseminated	[List of actions taken to disseminate so far and when you took them, for example, an article in x newsletter, date]
What we hope to achieve by disseminating	[Why we are looking to circulate more widely?]

Short review of dissemination steps so far

Media	[Summary of where it appeared, for example, which newspaper or broadcast outlet and when]
Social media	[Summary of where it was shared, when and any data gathered, for example, engagement]
Newsletters	[Summary of where it appeared, when and any data gathered, for example, open rate]
Briefings	[Summary of where it was shared, when and any engagement as a result]
Other coverage	[For example, any debates or discussions in the Parliament, or coverage in journals/ law reviews/ academic research/textbooks/training materials]

Dissemination Outcomes

Organisation and key contact	Date info was sent	Response	Any resulting exposure ie links to 3rd party blogs

Individuals	Date sent	Response	Any resulting exposure ie links to 3rd party blogs

Publication and author (digital or print? include links)	Date published	Detail of information given in publication

Implementation Planning Tool

Implementation Plan

Goal of implementation	Resourcing (organisations working on issue)	Date work begins	Steps taken	Date change is made

Parliamentarians / public body	Date briefed	Response	Follow up

PART FOUR – APPENDICES

Appendix 1: Legislation

Commissioner for Children and Young People (Scotland) Act 2003

Section 4 'Promoting and Safeguarding rights'

(1) The general function of the Commissioner is to promote and safeguard the rights of children and young people.

(2) In exercising that general function the Commissioner is ...to:

- a. Promote awareness and understanding of the rights of children and young people.
- b. Keep under review the law, policy and practice relating to the rights of children and young people with a view to assessing the adequacy and effectiveness of such law, policy and practice.
- c. Promote best practice by service providers, and
- d. Promote, commission, undertake and publish research on matters relation to the rights of children and young people.

Section 5 'United Nations Convention and equal opportunities'

(2) The Commissioner must have regard to any relevant provisions of the United Nations Convention on the Rights of the Child.

(4) The Commissioner must act in a manner which encourages equal opportunities and, in particular, the observance of equal opportunity requirements.

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

Section 10 Power for Commissioner to bring or intervene in proceedings

- (1) The Commissioner for Children and Young People (Scotland) Act 2003 is amended as follows.
- (2) `In Section 4 (promoting and safeguarding rights), after subsection 2 insert – '(2A) In exercising that general function, the Commissioner may – a) bring proceedings under section 7(1)(a) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2021. B) intervene in proceedings in which a person claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) of that Act.

Appendix 2: Relevant articles of the UN Convention on the Rights of the Child

Article 2 Para 1 States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without 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.

Para 2 States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions.

Article 3(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 4 States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5 States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6 Para 2 States parties shall ensure to the maximum extent possible the survival and development of the child.

Article 12 Para 1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

The General Comment on Article 12 says that all processes in which children are heard should be:

- Transparent and informative
- Voluntary
- Respectful
- Relevant to children's lives
- In child-friendly environments
- Inclusive and non-discriminatory
- Supported by training
- Safe and sensitive to risk
- Accountable

Article 13 Para 1 The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

Article 16 Para 1 No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

Article 17 States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

Article 19 Para 1 States Parties shall 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, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 36 States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 39 States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.



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