Access to justice for children and young people in Aotearoa New Zealand

Working paper No.11 – Strategic litigation

1 June 2023

Author: Jennifer Braithwaite LLM (Hons), MSCL (Hons)

This research study was made possible thanks to a Justice Fellowship from the Michael and Suzanne Borrin Foundation.

Context

This working paper considers the potential for strategic litigation to be part of closing the justice gap for children and young people in Aotearoa New Zealand. It forms part of an overall research project exploring the extent to which children and young people are able to access to justice in Aotearoa New Zealand. The findings of the research study are presented in three parts:

Part One contains my analysis of data from key informant interviews with adults with expertise in the justice system and/or working with particular groups of children and young people, as well as from a survey of children and young people aged 14 to 24.

Part Two discusses the meaning of access to justice and other related concepts such as legal empowerment as well as the specific meaning of access to justice for children and child-friendly justice. It then discusses the justice problems experienced by children and young people generally, as well as common barriers to accessing justice. The analysis in this report is based on my review of the research and literature in New Zealand and overseas as well as analysis of information obtained from the government and Crown entities.

This report is supported by a series of ten working papers discussing the justice problems and barriers to accessing justice experienced by particular groups of children and young people and is broken up into a series of reports relating to groups identified as likely to experience differing justice problems or barriers to access. These working papers are:

1. Children and young people in care or with care experience;
2. Disabled and neurodiverse children and young people;
3. Tamariki and rangatahi Māori;
4. Pacific children and young people;
5. Rainbow and takatāpui children and young people;
6. Girls and young women;
7. Boys and young men;
8. Poverty and socio-economic disadvantage;
9. Trauma; and
10. Intersectionality.

Part Three explores possible solutions or ways to close the justice gap for children and young people in Aotearoa New Zealand. This part of the study is also supported by a series of working papers in relation to possible solutions. At the time of writing these working papers consider the following topics with additional working papers likely to follow:

11. Strategic litigation;
12. Legal service delivery, non-lawyer services, and integrated services;
13. Data, evidence and measuring change;
14. Technology;
15. Training for professionals;
16. Legal education and continuing professional development for lawyers and judges; and
17. Law-related education for children and young people.

The reports and working papers are available at: https://www.cypaccesstojusticenz.com/

Introduction

A range of different terms are used to describe using the law to bring about positive change including strategic litigation, impact litigation, cause lawyering, public interest litigation, public policy litigation, and human rights litigation.[1] I have chosen to use the term strategic litigation as it is the most commonly used term in the context of litigation that advances children's rights. Child rights strategic litigation can be defined as "litigation that seeks to bring about positive legal and/or social change in terms of children's enjoyment of their rights".[2] Nolan and Skelton identify two key criteria to determine whether a case is child rights strategic litigation:[3]

1. The litigants must be a child or children or those acting on behalf of a child or children; and
2. The litigation must seek to advance the rights of more than one child and/or to bring about social change that will benefit all children or a category of children.

Schokman et al.'s guide to strategic litigation explains:[4]

> *Strategic litigation involves an organization or individual taking a legal case as a part of strategy to achieve broader systemic change. The case may create change either through the success of the action and its impact on law policy or practice or by publicly exposing injustice raising awareness and generating broader change. It is important that strategic litigation is used as one part of a wider campaign rather than being conceived of as an end in itself.*

The Australian Productivity Commission makes the case for strategic advocacy, law reform activities and public interest litigation in their review of access to justice arrangements on the basis of its wider benefits to the community, for example: "addressing an underlying problem that has led to many disputes can free up the resources of affected parties, legal assistance providers, private lawyers, courts and governments".[5] As Jen Puah, then the senior solicitor at YouthLaw Aotearoa, explained in an article about one of YouthLaw's strategic litigation cases: "[i]ncidental effects of such litigation include publicity, media coverage, and highlighting issues in the public arena even if the case is not successful".[6] The Sheila McKechnie Foundation's guide to using the law for campaigning and social change gives the example of Dignity in Dying:[7]

> *Dignity in Dying supports cases about assisted dying. Whilst no single case has changed the current law that makes assisted suicide a crime, they have led to changes in policy and guidance and raised the issue in the public arena. Co-ordinating legal action with effective communications and campaigns to create a swell of support is central to their approach.*

Another example of success without 'winning' in court is the Flemington & Kensington Community Legal Centre's discrimination test case against Victoria Police in the Australia Federal Court on behalf of 17 African and Afghan Australians who alleged they were victims of

---

[1] Nolan, A. & Skelton, A. (2022). 'Turning the Rights Lens Inwards': The Case for Child Rights-Consistent Strategic Litigation Practice. *Human Rights Law Review*, 22(4), 1-20 at 3.
[2] Ibid at 4.
[3] Ibid at 5.
[4] Schokman, B., Creasey, D. & Mohen, P. (2012). *Short Guide – Strategic Litigation and its role in Promoting and protecting human rights*. Advocates for International Development at 3.
[5] Productivity Commission. (2014). *Access to Justice Arrangements: Inquiry Report* at 708.
[6] Puah, J. (2015). Barriers to inclusive education in New Zealand: Enforcing a right to special education. *International Journal of Law and Education*, 20(1), 53-74 at 66.
[7] Sheila McKechnie Foundation. (2020). *Using the law for campaigning and social change* at 13.

racial discrimination by police.[8] The case was settled out of court including an agreement by Victoria Police to commission an independent review of its training and practices which ultimately led to the Victoria Police's three-year action plan to address community concerns about discriminatory policing. The plan introduced requirements for police to provide receipts to individuals who are stopped; introduced new training for all members regarding dealing with vulnerable groups; and established both a broad community reference group network and a Chief Commissioner Human Rights Advisory Committee.[9]

'Winning' in court also isn't necessarily enough. For example, where the judgment is open to interpretation meaning further clarity, policy and guidance is required.[10] How decisions are implemented can also be important meaning that further work is required to communicate the outcome, training for professionals to do things differently, and education to help people understand their rights.[11]

Strategic litigation can involve a number of risks and challenges including the costly, uncertain, time consuming nature of the litigation process as well as risks around publicity and negative media coverage.[12] Where the case is controversial there could be opposition to the change sought and the proceedings could possibly even strengthen that opposition.[13] The litigation could have an impact on relationships with stakeholders, including government and those affected by the problem.[14] This can be a particular concern for those organisations who receive government funding. An additional challenge is that although the primary purpose of strategic litigation may not be to resolve an issue for an individual claimant, lawyers must still act in accordance with their professional obligations including to protect and promote the interests of their client at all times.[15]

Issues around potentially competing obligations to an individual client and the wider collective group that the litigation is intended to benefit can potentially be avoided by having an institutional or ideological plaintiff as Nolan et al. explain:[16]

> *[A]dding institutional clients in litigation, where this is permitted by the legal system, can be protective of individual children's rights by ensuring that children are not put at the forefront of litigation which might expose them to infringements of their right to privacy,[134] or could expose them to risks of violence or even threats to life, survival and development.[135] …Another aim may be to bring an action in such a way as to ensure that if the children decide to leave the litigation at some point, they are able to do so with minimal negative effects for the case.*

[8] Law Council of Australia. (2018). *The Justice Project: Final Report Part 2 Broader Justice System Players* at 57.
[9] Ibid.
[10] Sheila McKechnie Foundation, *Using the law for campaigning and social change* at 13.
[11] Ibid.
[12] Puah, Barriers to inclusive education in New Zealand: Enforcing a right to special education at 66.
[13] Equinet. (2018). *Strategic Litigation*. European Network of Equality Bodies at 31.
[14] Sheila McKechnie Foundation, *Using the law for campaigning and social change* at 13.
[15] Puah, Barriers to inclusive education in New Zealand: Enforcing a right to special education at 66. Rule 6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides: "[i]n acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties."
[16] Nolan, A. Skelton, A., & Ozah, K. (2022). *Advancing Child Rights-Consistent Strategic Litigation Practice*. Advancing Child Rights Strategic Litigation (ACRiSL) project at 55.

Unfortunately, this ability is limited in Aotearoa New Zealand and the New Zealand Law Commission has also recommended that any class actions regime in New Zealand should require representative plaintiffs to be class members except in the case of state entities.[17]

How to undertake strategic litigation

Although I am not aware of any New Zealand based guides or toolkits in relation to strategic litigation there is a vast array of overseas resources providing a useful pool to draw on for those considering strategic litigation in Aotearoa New Zealand. For example, Advancing Child Rights Strategic Litigation (ACRiSL) is a three-year global research collaboration involving partners from advocacy and academia which explores the ways that strategic litigation has been used to advance children's rights.[18] One of its key outputs is a report aiming to support practitioners to improve their strategic litigation work by putting children's rights at the heart of their practice.[19] The report gives guidance in relation to the range of issues to be considered in strategic litigation generally and in particular, strategic litigation involving children and their rights including:

- Scoping, planning and design including identifying key aims of litigation, clients selection, choice of action (individual children, collective or institutional) and participation and communication with children;[20]
- Operationalisation including agenda setting, design of remedies, providing support to children throughout the process, the risk of harm or (re)trauma, management of expectations, agreeing to a settlement, the participation of children throughout the litigation process, and working with partners;[21]
- Follow up to litigation including explaining the litigation outcomes to children involved in the litigation, ongoing support for children where litigation is only partly successful, strategies for implementation of the judgment;[22] and
- Advocacy, media and communications including the connection between litigation and wider advocacy, media-related advocacy including related children's rights issues, protection from harm, and decision-making and support around child engagement with the media, and communication about child litigants and their cases for external audiences.[23]

Additional resources including a caselaw database, webinar recordings, information about current children's rights litigation, and other guidance documents are also available on the ACRiSL website.[24]

The Children and Young People's Commissioner Scotland have also developed a Children's Rights Strategic litigation toolkit that includes a range of resources including a decision making tool to help choose cases to get involved in,[25] as well as a series of other tools to assist at each stage of the process including a Resource Planning Tool, a Timeline Planning Tool, a Strategic

---

[17] Te Aka Matua o te Ture – New Zealand Law Commission. (2022). *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa Class Actions and Litigation Funding* at 112.
[18] Advancing Child Rights Strategic Litigation. (n.d.). *Home.* https://www.acrisl.org/acrisl. Information about the project partners is available here: Advancing Child Rights Strategic Litigation. (n.d.). *Who We Are.* https://www.acrisl.org/who-we-are#projectpartners
[19] Nolan et al, *Advancing Child Rights-Consistent Strategic Litigation Practice*.
[20] Ibid at 42-60.
[21] Ibid at 61-82.
[22] Ibid at 83-90.
[23] Ibid at 91-106.
[24] See the navigation tabs at Advancing Child Rights Strategic Litigation. (n.d.). *Home.* https://www.acrisl.org/acrisl.
[25] Children and Young People's Commissioner Scotland. (2022). *Children's Rights Strategic Litigation Toolkit* at 6.

Litigation Mapping Tool, an Implementation Planning Tool, and a Dissemination Planning Tool.[26] Other guidance documents have also been developed by the Child Rights International Network[27] and the African Child Policy Forum[28] (although the latter is specific to the individual complaints mechanisms available in Africa). Clan ChildLaw in Scotland have also compiled resources about strategic litigation including articles, conference papers, and other resources.[29] Various other guides to strategic litigation and/or toolkits to assist those seeking to undertake strategic litigation have been developed including by the Public Law Project in the United Kingdom[30] and others.[31]

Class Actions

Class actions have the potential to benefit all parties interested in a dispute's outcome equally, including those that are traditionally excluded economically and socially, and to discourage unfair access to scare resources through using litigation as form of "queue jumping".[32] Another advantage of class actions is that representative plaintiffs may collectively or due to the nature of the representative have more resources and knowledge than individual plaintiffs which enables them to craft a more sophisticated, convincing and winning argument.[33] This advantage is also of benefit to society as a whole because it creates the opportunity to level the playing field between individual plaintiffs and institutional or large corporate defendants with significantly greater resources. Class actions can also bring attention to injustices in a way that individual litigation does not by demonstrating the number of people affected by the issue in dispute and potentially starting conversations at both community and political levels even if the litigation is not itself "successful".

As noted above, the New Zealand Law Commission has recommended that any class actions regime in New Zealand should require representative plaintiffs to be class members except in the case of state entities[34] which means that children and young people must themselves be plaintiffs in any class actions to address their rights and interests. This is a significant barrier to their access to justice because acting as a representative plaintiff, particularly in a high profile case in a small jurisdiction like New Zealand, can result in a high degree of media attention and discussion both online and in the plaintiff's community. This commentary can become quite nasty and cause significant harm even if their identity was kept confidential as all those in their local community will likely be aware, or become aware, of their identity fairly quickly and even if

---

[26] Ibid at 20.
[27] Children's Rights International Network. (2017). *Using the law for children's rights: An introductory guide*.
[28] African Child Policy Forum. (2020). *Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa*.
[29] Clan Childlaw. (n.d.). *Strategic litigation resources*. https://www.clanchildlaw.org/strategic-litigation-resources.
[30] Public Law Project. (2016). *Guide to Strategic Litigation*.
[31] ALT Advisory. (2022). *Strategic Litigation Toolkit*. Digital Freedom Fund; Equinet, *Strategic Litigation*; Sheila McKechnie Foundation, *Using the law for campaigning and social change*; TAP Network. (2021). *Using strategic litigation to advance SDG16+ implementation*; Saez, M. (2016). *Impact Litigation: An Introductory Guide*. Center for Human Rights & Humanitarian Law at American University College of Law.
[32] For a discussion of these issues in another jurisdiction see Refosco, H. (2020). Law, Development and Access to Education: A Brazilian Case Study of Class Actions. *HRLR Online* at 23-24. Refosco explains that rather than increasing citywide access to early-childhood education, individual litigation just enables some parents to dodge waiting lists for overburdened schools with the poorest families being the least likely to know that that litigation is possible.
[33] See Refosco, Law, Development and Access to Education: A Brazilian Case Study of Class Actions for a comparison of the outcomes achieved by plaintiffs in individual actions and in class actions relating to placements in early childhood education in Sao Paulo, Brazil.
[34] Te Aka Matua o te Ture – New Zealand Law Commission, *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa Class Actions and Litigation Funding* at 112.

they are not, the plaintiff will still be aware the commentary is about them. Acting as a representative plaintiff is also a heavy personal burden to bear particularly if the result of the litigation takes a number of years to achieve.

Another potential barrier is the cost of class action litigation. In Australia, the class action in *Konneh v State of New South Wales* discussed below was brought by the Public Interest Advocacy Centre, a community law centre whose work includes "legal advice and representation, specialising in test cases and strategic casework".[35] Unfortunately, there is not a similar law centre in New Zealand and the community law centre movement in this country would require additional funding for it, or specific law centres such as YouthLaw Aotearoa for children and young people, to take on this role. The Law Commission has recommended that the Government consider creating a public class action fund "that can indemnify the representative plaintiff in a class action for adverse costs and provide funding towards legal fees, disbursements and security for costs" with its main objective being to improve access to justice.[36]

Examples of strategic litigation

Make it 16 v Attorney-General

In New Zealand, litigation by Make it 16 Incorporated sought a declaration that the provisions of the Electoral Act 1993 and of the Local Electoral Act 2001 which provide for a minimum voting age of 18 years are inconsistent with the right in s 19 of the New Zealand Bill of Rights Act 1990 to be free from discrimination on the basis of age and that these inconsistencies have not been justified in terms of s 5 of the New Zealand Bill of Rights Act.[37] While the declaration was made by the Supreme Court of New Zealand,[38] this did not change the voting age. The same day the decision was released, then Prime Minister Jacinda Ardern announced that legislation would be drafted providing for the voting age at general elections to be lowered to sixteen.[39] However, as the Electoral Act required a 75% majority to pass legislation amending the voting age it was acknowledged that it was unlikely the legislation would be passed given that both the National party and ACT had announced that they did not support the lowering of the age. In March 2023 new Prime Minister Chris Hipkins announced that he had shelved plans for the legislation to lower the voting age at general elections but that legislation would be drafted to lower the age for local government elections which only required the standard majority.[40]

It was clear throughout this litigation that success in Court would not deliver the actual outcome sought i.e. a reduction in the voting age. Rather the litigation was part of an overall advocacy strategy to bring attention to the voting age and seek community support for it to be lowered to 16. Other factors that may have affected the support the Government has given to lowering the age for Local Government elections is that the Review into the Future for Local Government had also recommended that central government review the legislation relating to local

---

[35] See Public Interest Advocacy Centre. (n.d.). *PIAC at a glance.* https://piac.asn.au/about-us/piac-at-a-glance/. See Public Interest Advocacy Centre. (2016). *False imprisonment of young people class action.* https://piac.asn.au/project-highlight/false-imprisonment-of-young-people-class-action/

[36] Te Aka Matua o te Ture – New Zealand Law Commission, *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa Class Actions and Litigation Funding* at 459.

[37] *Make it 16 v Attorney-General* [2022] NZSC 134.

[38] Ibid at [72].

[39] (2022, November 21) Voting age 16 law to be drafted requiring three quarters of MPs to pass – Ardern. *Radio New Zealand.* https://www.rnz.co.nz/news/political/479195/voting-age-16-law-to-be-drafted-requiring-three-quarters-of-mps-to-pass-ardern

[40] Ensor, J. (2023, March 13). Prime Minister Chris Hipkins abandons plan for legislation to lower voting age for general elections. *Newshub*. https://www.newshub.co.nz/home/politics/2023/03/prime-minister-chris-hipkins-abandons-plan-for-legislation-to-lower-voting-age-for-general-elections.html

government elections including to lower the eligible voting age in local body elections to the age of 16.[41] The Independent Electoral Review Panel commissioned by the Minister of Justice also sought submissions on the voting age in its first consultation document.[42] The summary of submissions received reported mixed views on this issue[43] with the Independent Electoral Review Panel's recommendations due to be received by the Government in November 2023.[44]

A v Hutchinson and the Board of Trustees of Green Bay High School[45]

Student A was a student with dyslexia and Asperger's syndrome who did not qualify for high needs funding attending a mainstream high school. A had been quite well supported through his intermediate school's Special Education Grant (SEG) fund but when A transitioned to high school, wrap around services were not activated and the Resource Teachers: Learning and Behaviour (RTLB) service was reduced due to fiscal constraints. As support was reduced, A found it difficult to cope with the new high school environment and his behaviour escalated. This ultimately led to an incident with a teacher after which the school undertook a formal disciplinary process and excluded A citing difficulties with managing A's behaviour associated with his special needs and lack of funding to provide the support he needed to cope in the mainstream.[46]

When A's mother called YouthLaw for advice the senior solicitor advising on the legal advice line concluded that the school's disciplinary process did not meet the requirements set out in the Education Act and accompanying guidelines and as a result, it was highly likely the student would be successful in challenging the removal on procedural grounds through judicial review.[47] Youthlaw filed judicial review proceedings in the Auckland High Court on behalf of A seeking review of the Board's decision hoping to highlight the additional wider human rights issues although these were not central to the pleadings due to the limited purpose and scope of judicial review.[48] Puah summarised the High Court findings as follows:[49]

- *Under the Education Act, there was no time limit on the principal to investigate the incident and the individual circumstances of the student. It was held that the principal should have taken more time to establish the full facts of student A in light of his disability. It was evident from the evidence placed before the court that the teacher had not followed the guidance provided for in A's IEP. Further investigation would have revealed that A's support had been significantly reduced and there may have been ways to increase support - such as taking up the offer of A's educational psychologist for further input. As a*

[41] Review into the Future for Local Government. (2022). *He mata whāriki, he matawhānui: Draft report* at 21.
[42] Independent Electoral Review Panel. (2022). *Consultation document: An invitation to tell us what you think about our electoral system*. Independent Electoral Review at 18-20.
[43] Independent Electoral Review Panel. (2023). *Summary of submissions: Stage 1 engagement*. Independent Electoral Review at 14-15.
[44] Independent Electoral Review. (n.d.) *Home.* https://electoralreview.govt.nz/
[45] *A v Hutchinson and the Board of Trustees of Green Bay High School* [2014] NZHC 253. The summary of the case below draws heavily from both the High Court judgment and Puah, Barriers to inclusive education in New Zealand: Enforcing a right to special education.
[46] Puah, Barriers to inclusive education in New Zealand: Enforcing a right to special education at 69.
[47] Ibid at 67.
[48] Ibid at 69. Specifically, in a judicial review the judge will look at whether the way the decision was made was in accordance with the law rather than it was the 'right' decision. See: Ministry of Justice. (n.d.). *Judicial Review*. https://www.courtsofnz.govt.nz/assets/6-Going-to-Court/media/rules-and-resources/Judicial-reviews.pdf
[49] Puah, Barriers to inclusive education in New Zealand: Enforcing a right to special education at at 69-70.

consequence of these findings, the court quashed the principal's decision to suspend.

- *The court also held that the Green Bay Board had not considered all possible options, nor was the Board able to demonstrate adequate documentation that evidenced that a fair process in accordance with the principles of natural justice had occurred. It seemed that the ancillary issue of funding had dominated the Board's reasoning process. It was held that this was an improper process in light the obligations under the Education Act and MOE guidelines. As a result of those findings, the court determined it was not necessary to consider whether A's behavior had amounted to gross misconduct nor whether any discrimination issues had arisen.*[87]

The case achieved its objective of highlighting the plight of children and young people with special educational needs as it led to intense media interest,[50] commentary from the legal fraternity,[51] and greater public awareness. The decision also implicitly affirmed the right to special education and set out the school's duties in relation to inclusive education in a disciplinary context.[52] An inquiry was also launched by the government to investigate the provision of services for special needs children given the intense public interest,[53] followed by a review and 'update' to services to students with special educational needs.[54]

However, as Puah noted in her article the case was "only part of a wider struggle for change at a policy level and there is still significant progress to be made before it can be said that the right to a special education is justiciable, accessible, adaptable, available and acceptable."[55] This is demonstrated by IHC's education complaint to the Human Rights Commission which is currently awaiting hearing in the Human Rights Review Tribunal.[56]

Perhaps more importantly, although the Green Bay case was a success in terms of achieving the strategic objectives of the case, it was not a success for A as Puah explains:[57]

---

[50] For example see: Judge quashes school's decision to exclude student. *New Zealand Herald*. https://www.nzherald.co.nz/nz/judge-quashes-schools-decision-to-exclude-student/M6FF7MN6RHBHBHRUHGQTI473BE/; Green Bay High School fights to ban boy with Asperger's. *Stuff*. https://www.stuff.co.nz/auckland/68995539/green-bay-high-school-fights-to-ban-boy-with-aspergers; Judge quashes boy's exclusion. *Radio New Zealand*. https://amp.rnz.co.nz/article/b2dac2bc-7b82-493e-ac75-420214107781; School seeks to overturn High Court ruling. *Radio New Zealand*. https://amp.rnz.co.nz/article/726fbcb3-f62c-49c1-b3bc-a3ff5646b90c; Editorial: Special-needs children need more funding. *New Zealand Herald*. https://www.nzherald.co.nz/nz/education/editorial-special-needs-children-need-more-funding/FPKJAYYVRDFIBQJ36VAJDSNB6Y/

[51] Fortune Manning Lawyers. (n.d.). *Points of Note for Board of Trustees after Green Bay Judicial Review.* https://fortunemanning.co.nz/points-of-note-for-board-of-trustees-after-green-bay-judicial-review/

[52] Puah, Barriers to inclusive education in New Zealand: Enforcing a right to special education at 70.

[53] New Zealand Parliament. (2015). *Inquiry into the identification and support for students with the significant challenges of dyslexia, dyspraxia, and autism spectrum disorders in primary and secondary schools*. https://selectcommittees.parliament.nz/v/2/1c18522d-18be-4316-8b7d-e02f016f2331

[54] Johnson, K. (2015, July 9) Documents reveal focus of special education update. *New Zealand Herald.* https://www.nzherald.co.nz/nz/documents-reveal-focus-of-special-education-update/FECCZ3NWCYPNNTERX5O573IA3U/

[55] Puah, Barriers to inclusive education in New Zealand: Enforcing a right to special education at 70-71.

[56] See *Working paper no. 2 Disabled and neurodiverse children and young people* at 10 and "Case Study: IHC complaint to Human Rights Commission and Human Rights Review Tribunal" in *Access to justice for children and young people in Aotearoa New Zealand: Part 2: Justice problems and barriers for all children and young people.*

[57] Puah, Barriers to inclusive education in New Zealand: Enforcing a right to special education at 70.

> *[T]he aftermath of the judgment for A was not at all a success. Green bay school sought to appeal and did not engage and support A's return to school.[88] Following an attempt to return A to an unwelcome environment, A was severely traumatized and left mainstream education.[89] The immense personal cost to A was simply tragic although on a strategic litigation level, the case was a success.*

This outcome highlights the potentially competing interests of the individual young person who is the subject of this type of litigation and the interests of children and young people more generally who may be impacted by the decision. This tension is why many working on children's rights litigation favour representative actions led by an organisation, such as that by the IHC, than cases involving named children and young people (either individually or collectively).

Konneh v State of New South Wales[58]

Mr Konneh came to Australia from Sierra Leone aged 15. When he was 18 he was arrested by NSW Police based on an erroneous belief he was in breach of bail. In fact, he was not on bail at all and his charges had previously been dismissed under the Young Offenders Act 1997. He was held overnight before being released and alleged that during his detention he was handcuffed and strip searched. A year later Mr Konneh commenced a class action against the State of NSW on his own behalf and on behalf of other young people who had been arrested by NSW Police in similar circumstances and sought damages for false imprisonment, assault and battery, and aggravated and exemplary damages.

The case turned on interpretation of a provision in the Bail Act which allowed police officers to arrest based on a belief held "on reasonable grounds". The High Court found that the relevant provision did not provide a defence where the person was not on bail at all, with the question of whether it covered circumstances where the Police had an erroneous belief about the bail conditions (as opposed to where the belief related to the alleged breach). An article by two of the lawyers involved in the class action explains the significance of the case to those outside the class of plaintiffs in the case:[59]

> *Significantly, for legal practitioners in the field of intentional torts, the decision in Konneh is of wide import and may be relied on by others not included as class members. The judgment is authority for the general proposition that a pre-condition to the exercise of the statutory power to arrest found in s.50(1)(a) of the Bail Act is that the individual to be arrested must be on bail.7 The construction of the section by Garling J does not depend on any other personal characteristic of a potential plaintiff; it is a decision that can clearly be applied beyond the particular circumstances of the class members, to adults and others arrested purportedly under s.50(1)(a) when not on bail.*

As such, this case is an example of a case which has a wider impact on the community than just those immediately affected by the decision.

---

[58] *Konneh v State of New South Wales (No. 3)* [2013] NSWSC 1424. The summary of this case largely draws from an article by two of the lawyers acting for Mr Konneh: Nagy, M., & Tuckey, M. (2014). Davids and Goliath: Konneh v State of New South Wales. *Law Society Journal*, 52(1), 53-56.

[59] Nagy & Tuckey, Davids and Goliath: Konneh v State of New South Wales at 54.

Binsaris v Northern Territory of Australia[60]

The case of *Binsaris v Northern Territory of Australia* related to an incident at the Don Dale Youth Detention Centre in August 2014 during which four young Aboriginal boys aged between 15 and 17 were intentionally tear gassed by a prison officer while the prison officer was trying to incapacitate a fifth young person. Each of the four young people were exposed to the tear gas and affected by it.

The four young people instituted proceedings in the Supreme Court of the Northern Territory for batteries, including the unlawful use of a CS fogger, which is a dispersal device for a form of tear gas (CS gas) and a prohibited weapon under the Northern Territory Weapons Control Act. The case followed the 2016 release of footage of the four boys being exposed to tear gas at the Detention Centre and the 2017 Royal Commission into the Protection and Detention of Children.

At trial and on appeal, the Northern Territory Government argued that the use of the tear gas was lawful on either or both of two bases including an argument that the Youth Justice Act permitted the use of tear gas by prison officers when called to assist in a detention centre and a second argument that "the powers and privileges of police officers, granted to prison officers by s 9 of the Prisons (Correctional Services) Act, permitted the use of force".[61] The earlier judgments of the Supreme Court and the Court of Appeal in the Northern Territory had found that the use of the tear gas was lawful however, the majority of the High Court allowed the appeal and found that the use of the tear gas was unlawful and each of the four young people were entitled to damages. This decision effectively set aside the previous findings of the Supreme Court and the Court of Appeal in the Northern Territory on the lawfulness of the tear gassing. In particular, the majority made clear statements that a detainee in a youth detention centre, under the *Youth Justice Act*, is not a prisoner and a youth detention centre is not a prison. Again, while this litigation related to a fairly specific situation, it has the potential for wider application given the court's findings in relation to the proper interpretation of the Youth Justice Act and other relevant litigation.

Child welfare reform in the United States

In the United States class action lawsuits and public interest litigation have become an increasingly common way to facilitate institutional reform.[62] A well-known example is *Brown v Board of Education*,[63] which consolidated several individual lawsuits brought by black students who shared a similar claim of being denied entry into white schools and led to the dismantling of legalised segregation in the United States South.[64]

American Civil Liberties Union (ACLU) have brought a series of class action lawsuits including a class action against Kansas City's foster care system for mistreating and neglecting children in care which resulted in a consent decree mandating reforms to be implemented by Kansas

---

[60] *Binsaris v Northern Territory of Australia* [2020] HCA 22. The summary of this case below draws from Human Rights Law Centre (n.d.) *High Court judgment finds young people were unlawfully tear gassed in Don Dale and that they are entitled to damages*. https://www.hrlc.org.au/human-rights-case-summaries/2020/7/29/high-court-judgment-finds-young-people-were-unlawfully-tear-gassed-in-don-dale-and-that-they-are-entitled-to-damages

[61] *Binsaris v Northern Territory of Australia* [2020] HCA 22 at para 93.

[62] McMullen, E. (2017). For the good of the group: Using class actions and impact litigation to turn child welfare policy into practice in Illinois. *Children's Legal Rights Journal,* 37(2), 236-252 at 236; Lee, J.Y., Gilbert, T., Lee, S.J., & Staller, K.M. (2019). Reforming a System That Cannot Reform Itself: Child Welfare Reform by Class Action Lawsuits. *Social Work (New York)*, 64(4), 283-291 at 283.

[63] *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954) (USSC+).

[64] Lee et al., Reforming a System That Cannot Reform Itself: Child Welfare Reform by Class Action Lawsuits at 283.

City in its service delivery to children and families in the foster care system.[65] The ACLU have also brought similar cases against child welfare systems on behalf of children indefinitely left in child welfare institutions due to bureaucracy, lack of funding, and neglect.[66] One example is *B.H. v. Smith*, a class action suit brought by the ACLU originally brought against DCFS in Illinois in 1988.[67] The complaint alleged that DCFS routinely subjected the children to serious damage to their mental health, development, and physical well-being, including by failing to provide children and families with appropriate services to prevent their initial removal from their home or to reunify them with their families and failing to provide safe and stable placements when in care.[68] The lawsuit was settled by consent decree.[69] McMullen identified four positive impacts on children from the lawsuit and resulting consent decree:[70]

> *First, the required reforms have improved the safety of the children by ensuring DCFS provide at least minimally adequate care, meaning the children in DCFS care are free of physical harm and receive adequate food, clothing, shelter, and mental and medical care.42 Second, it holds DCFS accountable to these promises by creating a system that improved caseworkers' ability to provide appropriate and necessary services, enforce reasonable efforts standards, and make timely decisions about children's placements. 43 Third, it led to a shift in the supervision system that provides for more thorough investigations and has helped ensure accountability within DCFS and its employees. Fourth, the B.H. Consent Decree created regulations for case plans to ensure they are developed promptly and thoroughly and are ultimately effective.*

The ACLU also continued to both hold the DCFS accountable in relation to the changes it agreed to make in the original consent decree, and to use the consent decree as a "jumping off point" to seek further changes to the child welfare system including in relation to a shortage of mental health services for young people in residential care.[71] However, McMullen notes that while this consent decree has been a cornerstone for DCFS reform in Illinois, "it is not a solution in and of itself because the enforcement process is neither simple nor automatic".[72]

Another example discussed by Lee et al. is *Dwayne v. Granholm,* a class action lawsuit filed by Children's Rights against the Governor of Michigan and the Directors of Department of Human Services (DHS) Children's Services Administration alleging that the DHS was violating the rights of the children in foster care through significant system deficiencies and thus, failing to provide for the children's safety, permanency, and well-being.[73] The lawsuit was settled in 2008 by consent decree which:[74]

> *[M]andated approximately 240 substantive changes, with the required reforms falling into 12 categories covering actions that would improve children's safety (for example, create a centralized child protection hotline to receive and assign*

---

[65] Ibid at 284. A consent decree is an agreed settlement that resolves a legal conflict without admission of guilt or liability that is approved by the Court and can then be enforced by the Court.
[66] Ibid at 285-286.
[67] ACLU. (n.d.). *B.H. v Smith*. https://www.aclu-il.org/en/cases/bh-v-sheldon. The case name has changed over time as the DCFS Director has changed.
[68] See the Second Amended Complaint.
[69] See Restated Consent Decree.
[70] McMullen, For the good of the group: Using class actions and impact litigation to turn child welfare policy into practice in Illinois at 241.
[71] Ibid.
[72] Ibid.
[73] Lee et al., Reforming a System That Cannot Reform Itself: Child Welfare Reform by Class Action Lawsuits at 286.
[74] Ibid.

complaints), permanency (for example, develop a program to serve youths who are aging out of foster care by providing additional supports and extending care until age 21), and well-being (for example, monitoring the prescription of psychotropic medications to children in the foster care system)

The original consent decree was then followed by the first modified settlement agreement in 2011 and a second modified agreement in 2016 which was known as the Implementation, Sustainability, and Exit Plan.[75] Overall, the requirements of the original and modified consent decrees are not vastly different from each other and DHS continues to be monitored pursuant to the consent decree many years after it had originally been agreed.[76]

Alvarez used multiple case study and document analysis to explore extended litigation-based reform of thirteen state child welfare agencies in the United States to identify key factors that contributed to substantive improvements in the state foster care system. They identified nine dominant factors:[77]

- consent decrees and settlement agreements were well-defined with a realistic scope and timeframes for implementation;
- monitors appointed by the court to oversee implementation were seen as collaborators rather than outsiders;
- the ability to move from an adversarial to collaborative working relationship;
- basing the reform plan on a case practice model involving engaging with children and families in case management, service provision, and decision-making;
- reform is facilitated by leadership which understands agency operation and deficits and provides continuity and consistency;
- governmental and legislative support for CWA institutional reform gives attention, focus, and legitimacy to agency deficiencies, need for reform, and the reform process;
- inadequate institutional capacity to incorporate change processes can inhibit change;
- where CWA are structured as an independent agency leaders had greater control over the reform process and more direct accountability; and
- the change process took a step by step approach including sequencing policy and procedural implementation with the initial focus on the most critical agency deficiencies.

Other learnings to take from class actions to reform the child welfare system in the United States, one lesson raised by Lee et al. is that social work education should involve learning about class action lawsuits including "their history in transforming social services institutions, their benefits as well as costs and critiques, outcomes of class action lawsuits (that is, consent degrees), and the role and functioning of consent decrees in facilitating systemic change".[78] Lee et al. also argue that social workers should be trained to collaborate with lawyers, legal experts, and other related professionals.[79] Another lesson from Oppenheim et al.'s review of selected child welfare lawsuits involving mental health services for foster care children[80] is to include all

[75] Ibid at 286-287. See Dwayne v. Snyder. (2011). Modified settlement agreement and consent order and Dwayne v. Snyder. (2016). Implementation, Sustainability, and Exit Plan.
[76] Ibid at 287.
[77] Alvarez, A. (2020). Nine Key Factors in Extended Litigation-Based Reform of State Child Welfare Agencies. *Children and Youth Services Review*, 116, 105115 at 2-8. Each of these factors is discussed in some detail.
[78] Lee et al., Reforming a System That Cannot Reform Itself: Child Welfare Reform by Class Action Lawsuits at 289.
[79] Ibid.
[80] Oppenheim, E., Lee, R., Lichtenstein, C., Bledsoe, K.L., & Fisher, S.K. (2012). Reforming Mental Health Services for Children in Foster Care: The Role of Child Welfare Class Action Lawsuits and Systems of Care. *Families in Society*, 93(4), 287-294.

those who should be held accountable in the litigation. In particular, they argue that if class action litigation is a reform strategy for mental health services for children in foster care, then "the mental health agency must be held equally accountable for the outcomes of children and families served by child welfare".[81]

Further reading:

Advancing Child Rights Strategic Litigation. (n.d.). *Home.* https://www.acrisl.org/acrisl. See also the case law database, recordings of previous events, and resources.

African Child Policy Forum. (2020). *Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa.* ACPF.

ALT Advisory. (2022). *Strategic Litigation Toolkit*. Digital Freedom Fund.

Child Welfare Information Gateway. (n.d.). *Reform Based on Litigation.* https://www.childwelfare.gov/topics/management/reform/litigation/

Children and Young People's Commissioner Scotland. (2022). *Children's Rights Strategic Litigation Toolkit* Children and Young People's Commissioner Scotland.

Children's Rights International Network (CRIN). (2017). *Using the law for children's rights: An introductory guide*.

Equinet. (2018). *Strategic Litigation*. European Network of Equality Bodies.

Nolan, A. Skelton A., & Ozah, K. (2022). *Advancing Child Rights-Consistent Strategic Litigation Practice.* Advancing Child Rights Strategic Litigation (ACRiSL) project.

Schokman, B., Creasey, D. & Mohen, P. (2012). *Short Guide – Strategic Litigation and its role in Promoting and protecting human rights*. Advocates for International Development.

Sheila McKechnie Foundation. (2020). *Using the law for campaigning and social change*.

[81] Ibid at 293.

References

African Child Policy Forum. (2020). *Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa*.

ALT Advisory. (2022). *Strategic Litigation Toolkit*. Digital Freedom Fund.

Alvarez, A. (2020). Nine Key Factors in Extended Litigation-Based Reform of State Child Welfare Agencies. *Children and Youth Services Review*, 116, 105115.

Binsaris v Northern Territory of Australia [2020] HCA 22.

Children and Young People's Commissioner Scotland. (2022). *Children's Rights Strategic Litigation Toolkit*.

Children's Rights International Network (CRIN). (2017). *Using the law for children's rights: An introductory guide*.

Equinet. (2018). *Strategic Litigation*. European Network of Equality Bodies.

Independent Electoral Review Panel. (2022). *Consultation document: An invitation to tell us what you think about our electoral system*. Independent Electoral Review.

Independent Electoral Review Panel. (2023). *Summary of submissions: Stage 1 engagement*. Independent Electoral Review.

Law Council of Australia. (2018). *The Justice Project: Final Report Part 2 Broader Justice System Players*.

Lee, J. Y., Gilbert, T., Lee, S. J., & Staller, K. M. (2019). Reforming a System That Cannot Reform Itself: Child Welfare Reform by Class Action Lawsuits. *Social Work (New York)*, 64(4), 283-291.

McMullen, E. (2017). For the good of the group: Using class actions and impact litigation to turn child welfare policy into practice in Illinois. *Children's Legal Rights Journal,* 37(2), 236-252.

Nagy, M., & Tuckey, M. (2014). Davids and Goliath: Konneh v State of New South Wales. *Law Society Journal*, 52(1), 53-56.

Nolan, A. & Skelton, A. (2022). 'Turning the Rights Lens Inwards': The Case for Child Rights-Consistent Strategic Litigation Practice, *Human Rights Law Review*, 22(4), 1-20, https://doi.org/10.1093/hrlr/ngac026

Nolan, A., Skelton A., & Ozah, K. (2022). *Advancing Child Rights-Consistent Strategic Litigation Practice*. Advancing Child Rights Strategic Litigation (ACRiSL) project.

Oppenheim, E., Lee, R., Lichtenstein, C., Bledsoe, K. L., & Fisher, S.K. (2012). Reforming Mental Health Services for Children in Foster Care: The Role of Child Welfare Class Action Lawsuits and Systems of Care. *Families in Society*, 93(4), 287-294.

Productivity Commission. (2014). *Access to Justice Arrangements: Inquiry Report*.

Puah, J. (2015). Barriers to inclusive education in New Zealand: Enforcing a right to special education. *International Journal of Law and Education*, 20(1), 53-74.

Public Law Project. (2016). *Guide to Strategic Litigation*.

Refosco, H. (2020). Law, Development and Access to Education: A Brazilian Case Study of Class Actions. *HRLR Online.*

Review into the Future for Local Government. (2022). *He mata whāriki, he matawhānui: Draft report*.

Saez, M. (2016). *Impact Litigation: An Introductory Guide*. Center for Human Rights & Humanitarian Law, American University College of Law.

Schokman, B., Creasey, D., & Mohen, P. (2012). *Short Guide – Strategic Litigation and its role in Promoting and protecting human rights*. Advocates for International Development.

Sheila McKechnie Foundation. (2020). *Using the law for campaigning and social change*.

Snowden, M. (2018). *Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland*. Clan Childlaw.

TAP Network. (2021). *Using strategic litigation to advance SDG16+ implementation*. TAP Network.

Te Aka Matua o te Ture – New Zealand Law Commission. (2022). *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa Class Actions and Litigation Funding*.

Vanhala, L. & Kinghan, J. (2019). *Literature Review on the Use and Impact of Litigation*. Public Law Project.

Case Law

A v Hutchinson and the Board of Trustees of Green Bay High School [2014] NZHC 253.

Make it 16 v Attorney-General [2022] NZSC 134.

Konneh v State of New South Wales (No. 3) [2013] NSWSC 1424.

Binsaris v Northern Territory of Australia [2020] HCA 22.

Brown v. Board of Education of Topeka, Kansas 347 U.S. 483 (1954) (USSC+)