

**Advocacy and Campaigning**

# 14 Advancing change for children through law reform

Keywords: UN Convention on the Rights of the Child, laws, regulations, constitution, strategic litigation

**Duration: 2 hours**



## Introduction

Laws and legal reform can be powerful tools to realise children's rights, promoting social change, embedding policies and holding governments accountable. This session highlights the importance of laws in realising children's rights and how Save the Children and its partners can engage in child-related law reform and advocacy.

## Learning Outcomes for this session

### Knowledge and understanding

When you have studied this session, you should be able to:

1. Understand the key steps in law reform processes and opportunities for engagement
2. Describe how strategic litigation could be used to advance law reform.

### Practical and professional skills

When you have studied this session, you should be able to:

3. Articulate the importance of laws to achieve change for children.
4. Identify strategic opportunities for child-related law reform and engage effectively in reform projects.

**Duration 2 hours**

# 1 Why does law matter for children?

Legislation is important for children because it provides a clear message that children have the right to the same legal protection as adults. Laws do not automatically change behaviour, but they are often a prerequisite for successful awareness raising. It is, for example, difficult to tell adults to stop practising female genital mutilation if the law still permits such practices. Laws are also important as a basis for budget allocation and spending to deliver services to children. A law ensuring access to free health care provides an obligation by the state to allocate human and financial resources to provide these services to children.

The UN Convention on the Rights of the Child (UNCRC), which has been ratified by 193 states since it was adopted in 1989, creates the international legal framework for the protection of the rights of all persons under the age of 18. It lays down the legal obligation of governments in relation to a wide range of rights. It also establishes four general principles that need to be reflected in national laws:

- the best interest of the child
- non-discrimination
- the right to life, survival and development
- respect for the views of children.

Africa is the only region that has developed a specific human rights treaty on children – the African Charter on the Rights and Welfare of the Child (ACRWC), which provides complementary legal obligations in relation to children’s rights.

When ratifying the UNCRC, governments need to review and reform domestic legislation to ensure that it is compatible with the UNCRC. To begin with, it is important that the national constitution contains provisions to protect children’s rights. The rights articulated in the constitution will be enforced through child-related legislation, which can be found in different ‘sectoral laws’ related to health, education, juvenile justice, etc. Many countries also enact a comprehensive Children’s Act, which includes provisions that might not be covered in sectoral laws. Customary law must also be brought in line with the UNCRC. In some countries, the UNCRC forms part of national law as soon as a state has ratified it. This is called incorporation and means that it can be directly invoked before the courts and applied by national authorities.

### Case study: Banning of corporal punishment helped change behaviour

In 1979 Sweden became the first country to prohibit by law the use of parental corporal punishment. This legal ban was followed by an awareness-raising campaign. Research on behaviour change concluded that most preschool children in the 1960s had been smacked by their parents. Figures from the 1970s indicate that less than 50% of children experienced smacking during this era. During the 1980s this figure fell further, to around one-third. After 2000, data provided by parents suggests it is now down to just a few per cent (Modig, 2009).

### Activity 1

Why would it be better to include the right to free primary education in an Education Act rather than a national education policy?

### *Comment*

Both laws and policies are essential to translate children's rights into practice. However, laws set out standards that must be followed, while policies outline a government's goals, strategies and methods intended to achieve them. Laws are adopted by legislatures and can only be changed by legislatures. Legislatures can hold governments accountable for the implementation of laws that they have adopted. Laws can be enforced through courts. Policies, on the other hand, are developed by governments and their existence depends to a larger extent on political will of those in power. In most instances, a provision in an Education Act, therefore, provides a stronger foundation to ensure the right to free primary education than a national education policy.

## 2 Key steps in law reform

### Introduction to law reform

Law reform is the process of examining existing laws and changing them for the better so that they effectively contribute to the realisation of child rights. The aim of reform is to ensure laws better reflect social values and enhance justice or efficiency. To Save the Children, law reform will aim to align national laws with the standards set in the UNCRC.

Law reforms involve either one or a combination of the following:

- pass new law
- amend law
- revoke (i.e. repeal) law
- strategic litigation (see Section 3 below).

### Issuing administrative regulations to guide implementation

The steps or process for law reform vary from country to country. They often depend on the legal system and the governance processes of the particular country you work in. Figure 1 sets out the typical law reform process. (Overleaf)

### Case study: Process of enacting the Nigerian Health Bill

Nigeria is a federal republic with three tiers of government – federal, state and local. The process for law making at the federal level involves obtaining the approval of the National Assembly, which is made up of the Senate and House of Representatives. Proposals for new laws, amendments and repealing of laws can come from either the National Assembly or the administration. If a bill successfully passes the National Assembly, it will then only become law if it is assented to by the President.

The bill setting out a national framework for health services for Nigeria (Health Bill) was first introduced in 2004 by the then Minister for Health under the Obasanjo government. In the following 10 years, there have been six different versions of the Bill, each time being submitted to the Nigerian National Assembly and redrafted to take into consideration comments from legislators and to reflect the changing policy priorities of the government of the day. In 2011, the Health Bill finally passed the National Assembly. However, President Goodluck Jonathan failed to sign the bill into law. Although no reason was given by His Excellency, the Health Sector Reform Coalition (a coalition of local and international CSOs and NGOs including Save the Children) identified failure to engage the President's Office in advance and sufficiently as one of the lessons learnt.

The latest draft Health Bill is now (early 2014) awaiting passage through the Senate as a private members' bill. The campaign continues to work to maintain political and public pressure. This includes working with the government stakeholders to ensure the bill is supported by the government of Goodluck Jonathan, particularly the Federal Executive Council (or Cabinet), which is made up of senior ministers in the administration.

Legal reform projects will always be country, context, and issue specific. An in-country assessment at the start of any law reform project (see Figure 2 for details) will help determine the right approach and strategy.

It is also important to understand the legal system of the country in which the reform is to take place. Figure 3 sets out the key features of the three main legal systems in the world today – civil law, common law, sharia law. In some countries, there may be a blend of different legal systems (e.g. certain Northern Nigerian states have formally adopted sharia law as part of their legal system and Egypt recognises sharia as part of its legal system but does not enforce certain penalties as part of state law).

### Case study: State and sharia law existing side by side, and the problems of inconsistent definition of a 'child' in Nigeria

Although Nigeria passed the National Child Rights Act in 2003 and raised the minimum age of marriage to 18, a high number of the country's 36 states have not yet passed law implementing this provision. Twelve Nigerian states currently recognise sharia law in part or in whole. There continues to be substantial debate around whether the setting of 18 years as the minimum age for marriage is consistent with Islamic values, traditions and culture. This is situated in the context of there being different definitions of a 'child' throughout the country. For example, in the Child and Young Persons Act enacted in the Eastern, Western and Northern Regions of Nigeria, a child is someone under the age of 14 years. The Child Rights Act as passed into law in the Federal Capital Territory, on the other hand, defines a child as someone under the age of 18 years.

Source: Akinwumi (2009)

## Opportunities for legal reform

Opportunities for law reform can arise in a number of ways, from either:

- formal sources, for example a change in government policy or recommendations by a governmental body such as a law reform commission
- informal sources, for example pressure from the public, the media, and advocacy activities of interest groups such as Save the Children.

Table 1 highlights some key *national* law reform opportunities. In all instances, the UNCRC will be our benchmark to assess whether a law protects and advances the rights of children.

**Table 1 National law reform opportunities**

<b>Type of law</b>	<b>Context of reform</b>	<b>Examples of possible opportunities</b>
Constitution	<p>Constitutions are the cornerstone of a national governance system. They are the highest legal norm within the hierarchy of laws, set the benchmark for the legality of all other laws and form the basis for reviewing executive and legislative action.</p> <p>Constitutions also typically include rights of an aspirational/moral character that are not always supported by well-defined, enforceable legal obligations.</p> <p>Constitutions are difficult to amend and opportunities for reform can be infrequent.</p>	<p>When a government initiates a review of its country's constitution, seek to ensure issues critical for children (e.g. a right to enjoy access to child and maternal health services) are included as a fundamental right of citizens.</p> <p>Define how rights are applied and enforced through legislation.</p>
Domestic law (e.g. Children's Act 2005 – South Africa)	<p>Main way to reform law as the state is bound by the law it passes.</p> <p>Some countries may have a federal system of government where power is divided e.g. between the national and state governments. Therefore, reform may need to happen at one, or at multiple, levels of government.</p>	<p>Implement government policy (e.g. free health care for pregnant women and children) through legislation.</p>
Regulations/Executive instruments (e.g. Food and Drugs (Marketing of Breast Milk Substitutes) Regulations, 2006 – Statutory Instrument No. 48 of 2006 – Zambia)	<p>Regulations and executive instruments are made by officials who have been delegated powers by legislation.</p> <p>Regulations are needed to fill in the details and the procedure for implementing the law.</p>	<p>Propose regulations that set out in detail how the law should be applied and interpreted, including penalties for breach of law (e.g. restriction on distribution of baby formula to new mothers at hospitals).</p> <p>Establish or empower a body to monitor implementation of a law.</p>

### Case study: Opportunity to enshrine free health care for children in the constitution

In Nigeria, a Constitutional Review Committee which was established by the National Assembly in 2011 recommended that certain social rights be recognised as fundamental rights. As a result of its review, the Committee recommended the introduction of an explicit provision that every Nigerian citizen has the right to ‘free primary and maternal health care services’. Save the Children has taken this opportunity and is campaigning for the provision to be expanded so that free health care services for children is explicitly included as a fundamental right in the amended Constitution

## Stakeholders

Law reform is often a medium- to long-term process. Most reform projects depend on political will as well as the cooperation and collaboration of stakeholders, and will involve understanding and working with the governmental institutions responsible for making, funding, interpreting and implementing the law. The make-up of these institutions will vary from country to country; however, they will normally include:

- The Legislature – passes bills into law and approves the budgets proposed by the government. Members of the legislature also propose and debate bills and it often has a mandate to monitor implementation of adopted laws.
- The Executive – proposes bills, implements law, manages the budgetary process, coordinates external funding, and makes administrative regulations and guidelines. Members of the executive have responsibilities for overseeing the implementation of laws.
- The Judiciary – adjudicates whether functions of government are being performed fairly and interprets the meaning of laws.

The extent to which these institutions overlap, or are distinct from one another, will depend on the legal framework of the country.

During the assessment stage, it will be very important to begin the process of identifying governmental and non-governmental stakeholders and building coalitions. These people and groups will be an important source of information as they have considerable knowledge, understanding and expertise they can bring to the law reform process. They will also have a key role in legitimising and propelling the reform process forward. In addition to government institutions cited above, below are examples of other parties that may need to be engaged throughout the law reform process – from the initial design through to the enactment and implementation stage:

- Children – objects of change and their direct input into the process will ensure legitimacy and that laws are designed to take the situation of children into account.
- Academics – may come from a variety of fields including social and natural sciences. They can provide a historic context and information on any given issue that will assist a reform project to avoid unintended consequences when enacted.
- Lawyers – some countries will have a body that represents lawyers who can inform on how the law might operate in practice, by way of objective legal reporting.
- Key public institutions – such as schools, hospitals, courts, which may actually be implementing the new law and have very practical considerations to input.
- Law Commissions – some states have experts who work on the standard of laws and are able to offer valuable critique on the precise wording of provisions.
- Civil society – can provide a crucial perspective on law reform as well as information on potential impacts on children.
- Private sector organisations – may have a key role in implementation and will present relevant commercial arguments depending on their interests.
- Intergovernmental organisations such as UN – can complement national advocacy efforts by offering a supra-national perspective on the subject and maintaining pressure on governments.
- Traditional leadership – community/tribal leaders will often be the focal point of social and cultural practices and can be persuasive advocates of reform.
- Religious institutions – will offer a guide on the social, cultural, and moral values of a state and its people, and will often be extremely influential.
- Human Rights Commissions and/or Children’s Ombudspersons – national independent institutions that promote and monitor human/child rights.

Consultations should be undertaken to gain as many perspectives as possible on the suggested law reform. The process will be context specific, but it will generally involve clarification of the issue needing reform and requests for feedback on the text of any draft laws.

In some cases, it might be useful for selected stakeholders to enter into a coalition where an alliance adds value and demonstrate breadth of support.

There are many ways to engage with stakeholders, such as public hearings or community meetings, consultation forums, consultation through the media, surveys and public opinion polls. It is important to identify the key contributors to the area of reform being undertaken as it can be damaging to the process if key stakeholders are not consulted.

### **Case study: Building a coalition of stakeholders**

In 2011, Save the Children and the Health Reform Foundation of Nigeria conceived the Health Sector Reform Coalition, made up of local and international CSOs and NGOs, as a way of better coordinating campaigning activity on the Health Bill and of pooling resources and political weight. The coalition successfully campaigned for the passage of the Health Bill through the National Assembly in 2011, following sustained campaign activities involving children, religious leaders, media and important civil organisations such as the Market Women's Association of Nigeria.

For further details of the Coalition's work and lessons learnt please see *Voices for Change: Nigeria*, <http://bit.ly/1abKI0k> and the video <http://bit.ly/13QOWHK>

## Activity 2

You work in the Republic of Myr, which is a constitutional monarchy. King Drogo rules Myr as the traditional chief of the country and as head of the Executive. The country also has a National Assembly made up of elected representatives, and all laws must be passed by the legislature. The Queen Mother is a very influential figure, and she has been active in the areas of women's and children's rights. Research shows that the biggest cause of infant mortality is the inability of new mothers to register the birth of their child without their husband or father being present (for cultural reasons, men do not visit women who have just given birth). Registration must be done within one week of the birth, and although it is primarily for immigration/citizenship purposes, registration also ensures the newborn child is able to access free health care. Consider:

1. Where might you look for laws that might address the difficulty of new mothers in registering their children?
2. What laws would you need to change/like to introduce?
3. Who are the main key stakeholders that you would like to engage?

## Comment

1. Laws on immigration/citizenship and on access to health services will be relevant to question (1). You might also want to look at the Constitution to check what it says about citizenship and/or birth registration. In addition to looking at primary legislation, don't forget to examine the administrative regulations issued by officials that set out how the law should be implemented and enforced. For example, it might be that the administrative regulations do not require the husband or father to be present before the newborn child is registered, and that the practice of requiring their attendance has emerged as a custom. The regulations could be clarified accordingly. Think also beyond the obvious laws. For example, we can draw on the prohibitions on gender discrimination.
2. The necessity of change will depend on your assessment of where the issue lies. For example, you could achieve the reform objective by having the relevant regulations amended (e.g. extend the period of registration from one week to three months), or by running an awareness campaign among hospital staff that the law does not require men to attend registration of births. Or else it might be necessary to amend the underlying health legislation by removing the requirement that children under the age of five be registered before they can access free health services. Resources such as funding, expertise, timeframe, and whether there is enough political capital (e.g. do you have enough legislators who will approve the change to the Health Act?) will be key factors in the decision.

3. Will stakeholders be engaged throughout the legal reform process? You may need to manage conflicting interests carefully to avoid gridlock. Also consider building formal coalitions with like-minded organisations, which will usually enhance the profile of the reform being proposed. In this example, key people will include the King, legislators, relevant ministries (health, immigration and citizenship, gender and equality, and finance). You might also wish to engage those who do not have a formal law-making function, but have influence, such as the Queen Mother, women's groups, hospitals/doctors, other NGOs, children themselves, religious leaders, the Human Rights Commission, and so on.

### Activity 3

How do you think you could involve children in law reform processes in your country?

### *Comment*

There are many ways in which you could involve children in the different steps of the law reform process. Here are a few examples of how Save the Children has supported children to influence laws in their countries:

- In Kenya, children were supported to advocate for the inclusion of children's rights in the Constitution by developing a memorandum with their recommendations addressed to the Constitutional Review Committee and Parliament.
- In Zanzibar, Save the Children worked together with the Ministry of Labour, Youth, Women and Children Development to lead a national child consultation related to the development of the Children's Act of 2011. It included consultations with over 500 children providing them with opportunities to make suggestions on specific areas of the law as part of the national consultations.
- In Sudan, Save the Children is planning to develop a child-friendly version of the Child Act to make it easier for children to learn about and use the Act.

## 3 Strategic litigation as a tool for law reform

Strategic litigation, also called impact litigation, involves bringing a case to the court to create broader change in society. It is different from legal services to individual children since it is focused on strengthening the legal framework, benefiting many more children than the child involved in a specific case before the court. Strategic litigation can be used to address gaps in legislation, to change laws or to further interpret a legal provision.

Often strategic litigation is conducted by organisations specialising in litigation or by individual human rights lawyers. Save the Children can be involved in strategic litigation by:

- facilitating contact between local child rights organisations and strategic litigation organisations
- assisting in identifying cases or collecting data for the cases
- providing funding for litigation processes
- supporting local partners or, where deemed suitable, children, to become an applicant in cases before the courts
- training judges and other court officials on children's rights.

### Case study: Strategic litigation in South Africa

With support from Save the Children, the Centre for Child Law is conducting strategic litigation to advance children's rights in South Africa. For example, based on a constitutional challenge of the law that makes minimum sentences ranging from 5, 10, 15 years and life imprisonment for certain crimes apply to 16- and 17-year-olds, the Constitutional Court declared the relevant sections in the law unconstitutional and ordered that the relevant section in the law should not apply in respect of an accused person who was under 18 at the time of the offence.

Strategic litigation is more successful when embedded in broader advocacy strategies where civil society can disseminate and monitor implementation of the judgment.

Before engaging with strategic litigation, you need to consider how to mitigate risks, including what the implications of losing the case would have on the realisation of children's rights, costs, how long it would take to get a judgment, and how your government views strategic litigation brought against it by civil society.

If a case has gone through a country's court system without achieving the desired outcome, you can explore how to use international and regional communication procedures and courts to get a pronouncement in the case. The Committee overseeing implementation of the ACRWC has a communication procedure in place and when the Third Optional Protocol to the UNCRC on a Communications Procedure enters into force, it will also provide an opportunity for children or their representatives to bring violations of the rights in the UNCRC before the Committee on the Rights of the Child.

### **Case study: African Committee on the Rights and Welfare of the Child decides against the Government of Kenya**

Based on a communication brought by civil society organisations on behalf of Nubian children in Kenya, the Committee overseeing implementation of the African Charter on the Rights and Welfare of the Child decided that the Kenyan government had violated a number of rights in the Charter. It recommended, among other things, that the government ensure that these children can acquire Kenyan nationality and that they are registered immediately after birth. The government was also requested to report back to the Committee on the implementation of these recommendations.

### **Activity 4**

Discuss with colleagues in your office to what extent strategic litigation has been used to advance children's rights in your country, and whether there are opportunities for Save the Children to support work in this area.

### ***Discussion***

You might want to contact an organisation specialising in strategic litigation in your country to understand better to what extent strategic litigation has been undertaken in your country and what the opportunities and challenges are in relation to strategic litigation in your context. If there are no experts on strategic litigation in your country, you could try to identify an organisation in another country that you could talk to. For example, the Centre for Child Law in South Africa has provided support to an organisation in Zambia to explore opportunities for strategic litigation within a Zambian context. It might also be useful to discuss some of the following points with your colleagues and with organisations specialising in strategic litigation:

- Is the legal system in your country conducive to strategic litigation?
- How could Save the Children and its partners help to identify cases?
- Would Save the Children be in a position to provide funding for litigation processes?
- Could we train judges and other court officials on children's rights to prepare the ground for child rights litigation?
- What would be the potential risks of engaging in strategic litigation, and how could you mitigate those risks?

If you have identified strategic litigation as a useful tool to advance children's rights in your country, but there is no tradition or capacity to use this tool, Save the Children could organise a workshop with key child rights organisations and potential litigation organisations to develop a strategy for how to take this forward.

## Summary

This session has looked at laws and law reform in realising children's rights. By now you should have:

- a basic understanding of the linkages between the UNCRC and law reform
- knowledge of the key steps in child-related law reform processes, stakeholders involved in this process and how to use strategic litigation as a tool to advance children's rights
- an understanding of how Save the Children can engage strategically in law reform.

## References

Akinwumi, O. S. (2009) 'Legal impediments on the practical implementation of the Child Right Act 2003', *International Journal of Legal Information*, vol. 37, no. 3, Winter, Article 7

Modig, C. (2009) *Never Violence – Thirty Years on from Sweden's Abolition of Corporal Punishment*, Stockholm, Government Offices of Sweden and Save the Children Sweden.

## Further reading

Child Rights Information Network (2008) *Children's Rights: A Guide to Strategic Litigation*, London, CRIN.

# Acknowledgements

*This session was authored by Ulrika Sonesson Cilliers and Olivia Mak*