The Change Toolkit

Chapter 8. Strategic litigation

While most litigation seeks to reach an outcome for a particular individual, strategic litigation uses an individual case to create broader change. It uses litigation and the courts to change the law, challenge the way a law is interpreted or applied and clarify or test its scope. In this sense, it is designed to have an impact far beyond an immediate case or individual client. In some instances, CLCs are able to support and initiate significant public interest test cases that would not otherwise proceed.

An integrated approach to casework and strategic advocacy

Strategic litigation is a practical way for CLCs to promote access to justice on a broad scale. It not only seeks redress for the client, but aims to prevent similar injustices from occurring to others in like circumstances in the future.

Strategic litigation can address the systemic problems that underlie a particular case and prompt ***change*** to unfair and ineffective laws. In this respect, it is able to address the adverse impact of some laws on vulnerable members of the community. Alternatively, strategic litigation can also be a way to ensure that certain groups obtain fair and equal ***access*** to the law as it currently is.

A strategic approach that ***integrates*** casework and systemic work helps to ensure that CLCs realise the full potential of individual cases to make a real difference.[1] Such an approach requires internal processes to support it. For example, Consumer Action Law Centre holds regular case intake and 'strategy' meetings, where legal and policy staff assess current cases, identify any recurrent and systemic issues at play and consider how they can act to have a positive impact on clients' lives.

Why bring strategic litigation?

Effective strategic litigation is a creative and powerful way to push for change, and can have a dramatic impact. Strategic litigation enables CLCs to speak out about unfair laws and expose inequalities in the system. It is an opportunity to participate in the development of positive new precedent, spark policy revision, and raise awareness and prompt public debate that may inspire pressure for change. It can also empower the client and advance the rights of marginalised groups in the community. Yet it also carries some considerable risks: it may be very time and resource intensive, place a heavy burden on the client, trigger community backlash, and lead to unwanted legal outcomes.

When would you use strategic litigation?

There are a number of important factual, legal and tactical questions to consider before you litigate. It is particularly crucial to assess the nature of the legal issues and the

[1] For some practical tips on how CLCs can promote a strategic approach and improve casework and policy integration, see Liz Curran, 'Solving Problems – A Strategic Approach: Examples, Processes and Strategies' (Australian National University, 2013) <http://law.anu.edu.au/sites/all/files/legalworkshop/final_report_solving_legal_problems_curran_calc_13_march_2013.pdf>.

circumstances and characteristics of the client and decide whether they are well suited to participating in strategic litigation.[2]

Selecting the right legal issues

- Will a judicial remedy be able to address the problem?
- What is the likelihood of the legal case succeeding?
- How costly will the litigation be to pursue, and what are the financial risks if the case is not successful?
- Is there media interest in the issue?
- Is it easy for the public to understand?
- What political or public backlash may follow?

Choosing a plaintiff

- What is the client's goal? Will strategic litigation help them to reach it? Are there alternative ways to accomplish the client's goal/s?
- How strong is the case on the merits, under the law and according to public opinion?
- Is the client suitable and willing to be the public face of a potentially controversial or high profile matter?
- Do they have realistic expectations about the likelihood of success?
- Do they have a commitment to the wider cause beyond their own personal outcome?
- Are they aware of and do they accept the risk of possible backlash?
- Does their lifestyle and schedule permit them to actively participate for the duration of the court case?
- Are they prepared to speak honestly about their own personal experience in open court and to the media?
- Are they credible and able to communicate in a clear and effective way?

You and your client will need to make a decision about whether, on balance, strategic litigation is the appropriate way to proceed in relation to the particular issue, for the individual client and at the present time.

Other key questions relate to standing[3] and choosing defendants (often, but not always, government).[4] There are also important ethical considerations to discuss with the client. These centre on issues of whether there are reasons to pursue litigation even if it is likely to fail, and the possibility of harm to the client as well as to the cause.[5] At all times, it is essential to remain conscious of the possible tension between the needs and expectations of the client and the broader goal and to have regard to your professional obligations towards your client.

Strategic litigation works best as one technique among many as part of an innovative campaign and an underlying theory of change. A win or loss does not dictate the success of the campaign as a whole. In fact, a positive outcome may ultimately be ineffective if it is not combined with other advocacy efforts to further the cause. Enforcement of and monitoring compliance with a favourable court decision may also present an ongoing challenge. Likewise, even 'failed' litigation can draw attention to injustices and build a foundation for future action and long-term change.

[2] The following questions were selected from Richard J Wilson and Jennifer Rasmusen, 'Promoting Justice: A Practical Guide to Strategic Human Rights Lawyering' (International Human Rights Law Group, 2001) 61-2 and Patrick Geary, 'Children's Rights: A Guide to Strategic Litigation' (Child Rights Information Network, 2009) 8-9, 18.

[3] For more information on standing, see Graeme McEwen 'Three Key Challenges in Strategic Public Interest Litigation' (Paper presented at the Victorian Bar Law Conference, Torquay, 2011) <http://www.vicbar.com.au/GetFile.ashx?file=pdf/Graeme%20McEwen%20Three%20Key%20Challenges%20%20in%20Strategic%20Public%20Interest%20Litigation.pdf>.

[4] See Patrick Geary, 'Children's Rights: A Guide to Strategic Litigation' (Child Rights Information Network, 2009) 8-9, 18.

[5] See Wilson and Rasmusen, above n 2, 63 and also Geary, above n 2, 18-19 on client safety and confidentiality.

Examples

HRLC voting rights cases

***Rowe v Electoral Commissioner* (2010) 243 CLR 1**

In August 2010, the High Court struck down legislation that resulted in the early close of the electoral rolls and denied over 100,000 Australians the right to vote (*Rowe v Electoral Commissioner* [2010] HCA 46).

The court was asked to decide the validity of changes to the *Commonwealth Electoral Act 1918* made by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*. The Amendment Act resulted in the electoral roll being closed on the day on which the electoral writ is issued for new or re-enrolling voters, and three days after the writ is issued for voters updating enrolment details. Previously, the electoral roll remained open for a period of seven days after the issue of the writ. The 7-day period enabled the AEC to advertise and promote enrolment and target particular groups with information campaigns, including Indigenous Australians and people experiencing homelessness. At the 2004 Federal Election, approximately 423,000 people had enrolled, re-enrolled or updated enrolment during the 7-day period.

The new legislation disproportionately disenfranchised Indigenous Australians, young people, people experiencing homelessness and people in remote communities.

The challenge to the early close of the rolls was jointly conceived and coordinated by the Human Rights Law Centre and GetUp! and built on the previous work of the HRLC in establishing constitutional protection of the right to vote in the landmark High Court case of *Roach v Electoral Commissioner* (2007) 233 CLR 162.

The court held that the changes were an unreasonable and disproportionate constraint on the constitutional mandate that government be chosen by the people. The changes were consequently held unconstitutional, with the result that countless vulnerable Australians into the future will avoid the arbitrary disenfranchisement that would have resulted from the new law.

Prisoners and the Right to Vote: *Roach v Electoral Commissioner* (2007) 233 CLR 162

In early 2007, the Human Rights Law Centre commenced legal action in the High Court to challenge the constitutionality of legislation which prevented sentenced prisoners from voting in federal elections.

The plaintiff in the matter was Vickie Roach, an Aboriginal prisoner at the Dame Phyllis Frost Centre in Deer Park, Victoria. The defendants were the Commonwealth of Australia and the Australian Electoral Commission.

The matter was heard by the High Court in June 2007.

The case raised major issues about prisoners' rights, the right to vote, representative democracy, responsible government and Indigenous rights.

In a landmark decision, the High Court upheld the fundamental human right to vote, finding that the Howard Government had acted unlawfully and unconstitutionally in imposing a blanket ban on prisoners voting. However the Court upheld the validity of the law providing that prisoners serving a sentence of three years or longer were not entitled to vote.

The case has had implications for all prisoners serving sentences in Australia. The decision of the High Court was a victory for representative democracy, accountable government, the rule of law and fundamental human rights.

Flemington-Kensington Community Legal Centre's police racial discrimination case

In late 2005, Tamar Hopkins, Principal Solicitor at Flemington-Kensington Community Legal Centre, started to encounter a number of young African-Australian men who complained of being stopped, harassed and abused by

Victoria Police officers. As the complaints continued to mount, Hopkins became aware that there was a serious problem in the community.

After a string of dead-end complaints to the OPI and Victoria Police, Hopkins met with Peter Seidel, Public Interest Law Partner at Arnold Bloch Leibler, who offered to work on the case pro bono. In December 2008, a complaint was lodged with the Australian Human Rights Commission. This lead to more delays and fruitless attempts at conciliation.

In November 2010, an unprecedented racial discrimination case was filed against the Commissioner of Police, the State of Victoria, and various individual police officers in the Federal Court. Flemington-Kensington CLC worked alongside a pro bono team of solicitors and counsel from Arnold, Bloch Leibler to pursue the case. Initially, there were 17 applicants who each made claims of repeated police racial harassment, taunts and abuse. This number dropped to six after 11 withdrew, frustrated and exhausted. Of those who remained, engineering student Daniel Haile-Michael talked to journalists, at forums and conferences about the case in an effort to publicise the issue and spark media attention.

Following expert examination of police statistics that indicated at least an unconscious police racial bias toward African men in the Flemington and North Melbourne area, the case was settled in February 2013 on the day the trial was due to start. As part of the settlement, Victoria Police agreed to conduct a public review of their training and field contact policies and practices. This encompassed a formal community consultation process, inviting all members of the public to make submissions. Additionally, the applicants were free to tell their stories publicly, using redacted versions of documents from the legal proceedings.

Victoria Police released its report on 30 December 2013 and launched a three-year plan to address the community concerns about discriminatory policing. This high-profile inquiry and official response represents a milestone in the history of Victoria Police and police racial profiling.[6]

Acknowledgments

This chapter has been downloaded from http://www.thechangetoolkit.org.au. We recommend checking back to see if the content has been updated.

The Change Toolkit was prepared by the Federation of Community Legal Centres. The Federation is the peak body for community legal centres across Victoria.

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[6] The information in these examples is drawn from the following sources: <http://www.thecitizen.org.au/features/police-ready-listen-african-australians-have-plenty-say>, <http://www.communitylaw.org.au/flemingtonkensington/cb_pages/files/Long%20Road%20to%20Change%20-%20Softcopy.pdf, http://www.theage.com.au/comment/no-one-should-be-stopped-by-police-just-because-theyre-black-20130218-2end5.html>, <http://www.hrlc.org.au/victoria-police-to-commence-public-review-following-racial-discrimination-court-settlement>, <http://youthlaw.asn.au/wp-content/uploads/2013/02/Media-Release.pdf>.