

## **1. Introduction**

With limited resources and defined aims and objectives it is important for the Project to identify as closely as possible the criteria by which cases are taken on. Strategically and in each case we need to be clear as possible about what we wish to achieve through litigation.

The cases that the Project will take on fall within two broad categories – test cases and training/development cases.

### **Test cases**

The Project's definition of a test case includes cases which either establish a new point of law, (by changing or by clarifying the law), or cases which involve the application in a particular locality for the first time of a point of law developed elsewhere. The reasons behind this broader definition of a test case follow.

Whereas the 'test case' has always been seen as being concerned with the identification of new points, the Project also runs cases which are designed to apply points of law that appear new or underused in a particular context or locality. Examples include the work in Leicester on the public law dimensions of the allocation of National Insurance numbers to persons newly arrived in the UK, (eg refugees), and the work on behalf of the service users of small voluntary organisations threatened with funding cuts.

The Project has found (as have previous test case litigators) that a successful test case strategy is not just about winning legal arguments in court. There have been too many examples of the government changing the law to reverse court victories to make this a sufficient basis on which to build a strategy. Publicity, education, the focus of a campaign and keeping public bodies aware of their powers and duties can be as important reasons for bringing a case as a victory on a legal point.

In addition, while it is preferable for PLP to take a proactive role in identifying and bringing test cases in a planned and strategic way, we must be flexible enough to spot important public law cases referred to us that we might not always have prioritised. One member of our management committee who ran a test case strategy himself commented that it is probably impossible to plan for more than about one-third of cases.

It should also be remembered that predicting the outcome of cases is notoriously difficult and that we can never guarantee that a particular case will lead to the outcome we aim for or intend. The leading study on public interest cases by Harlow

and Rawlings rather pessimistically states that the outcome of court cases are often so inconsistent as to deserve the term "lottery"<sup>1</sup>.

### **Training/Development cases.**

The Project also runs cases which are not considered to fall within the above definition. Although our resources are primarily targeted on test cases, the Project also has a training and development role, leading advisers from other agencies through the initial assessment of a case, through to trial or other conclusion. This shows advisers the way in which public law can be used by involving them in the process, sharing the documents and correspondence generated and allowing them to observe the proceedings.

This also keeps Project solicitors in touch with day to day matters of practice and procedure, as well as bringing in much needed income.

## **2. The aims of PLP**

The starting point for a casework strategy must be PLP's main aim - increasing access to public law remedies for disadvantaged groups in society. Within this general aim we have identified three main strands which are:

- access to justice
- improving the quality of decision making
- accountability of decision makers

## **3. Prioritising casework areas**

We prioritise social welfare casework areas where lawyers are not firmly established, and have therefore traditionally excluded immigration and housing. It should also be noted here, however, that our expertise of working closely with groups and acting for organisations has often led us away from any priority casework area list. For example, we have become involved in immigration law on behalf of RLC and mental health/community care law on behalf of VIA. We should recognise that we are in demand for our skills as public lawyers on behalf of organisations who represent disadvantaged groups.

It is also important to take on cases which would increase access to public law remedies, for example:

- who is reviewable,
- standing,
- who can intervene,

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<sup>1</sup>Pressure through law (1992) p301.

- maximising the availability of legal aid in judicial review cases, minimising the costs risk where it was not.

We have found it useful to narrow the focus even more and to concentrate resources on just one area at a time for a fixed period. This was done with community care and we are now attempting to do it with voluntary sector funding decision making.

This is when the Project can be at its most effective - identifying an area where public law has a great potential but is underused, drawing together the main players involved in the area (especially organisations and charities) and with them identifying the main public law points that need resolving. Helping these organisations provide information and education to their local branches and users provides us with the feedback which then provides us with our cases, and often important test cases where abuse of power and/or unlawfulness is widespread. This strategy is currently underway with NACVS.

It would also be possible to concentrate a casework strategy around a public law issue (like, for example, the duty to give reasons) and to seek out cases which test the issue. The identified problem with this approach is the difficulty of finding groups and organizations to work with to identify cases: there are plenty of groups campaigning for increased health care rights, very few (if any) who campaign for a general duty to give reasons!

It was suggested at an awayday sometime ago that as a key to 'spotting' cases we should adopt a matrix whose axes are the casework areas which we wish to target and the 'public law' ends (accountability, quality of decision making, clarifying the law, duty to give reasons) we wish to achieve. Always bearing in mind our client group, our best cases will be where casework area and public law aims intersect.

#### **4. Some factors in deciding whether to take on a case**

From the above, some of the factors which may enable us to identify whether a particular case is one which we should take on are listed below. This is not a blueprint but an attempt to be a little more scientific about the exercise than having a 'sixth sense' for a good PLP case.

First of all in any case we take on, it must be one which has real potential to be of benefit to disadvantaged groups (or, at the very least, a disadvantaged individual) in society.

Next there are two factors which are highly desirable in any case:

- a) it is supported (or hopefully brought) by an organisation on behalf of disadvantaged sector in society
- b) it has a wider public interest and applicability than the facts of the individual case

There are then a number of factors the presence of all or some of which, although not essential, will support a decision to take on a case

- a) it is within our "target" casework areas;
- h) it has the potential to establish an important point of substantive law;
- c) it cannot be litigated as effectively by other lawyers;
- d) it will enhance the standing of the Project;
- e) it will be complementary to the 'client organisation's' campaign or strategy for legislative or other change on behalf of disadvantaged groups;
- f) it will show the ways in which public law can provide a remedy .

We should have the following aims in mind when conducting a case:

- a) to increase access to public law (e.g. on standing or reviewability);
- b) to improve the quality of decision making by a public body;
- c) to make the decision maker more accountable;
- d) to achieve funding for the case through legal aid or other funding.

### **5. Proactive and planned.....**

Once we have the criteria we have to get the cases. The most effective way is through proactive projects initiated by us with other organisations which have as an aim the identification and litigation of test cases.

### **6.....but flexible**

We have to be flexible, though. Other important cases will be referred to us not as major test cases but as individual complaints, (such as the RLC case). There was no way that we could have planned the case but we had to be prepared to apply our principles and criteria to the particular facts of the case when it arose. Our particular skills can raise the potentially ordinary case into one of some importance.

It is not possible to plan a casework strategy in the same way as it is possible to plan a piece of research or policy work. An irresistible case may be referred to us to which we may decide to devote major resources for the rest of the year. Potentially important and carefully planned test cases may never get off the ground or may collapse.

There is a balance to be reached between turning away half-decent cases because we are waiting for - or looking for - "the big one", and taking on too many "run of the mill" cases so that when the major test case comes along we do not have the resources to deal with it properly. We have moved away from taking on cases which are based entirely on individual facts where it is the client him or herself who has contacted us with no supporting group or organisation interested in the outcome for more general reasons.