Bates Wells

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Using the law to create change

A guide for charities and campaign groups

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Contents

Introduction

Legal action is rarely enough to drive systemic change on its own, but the law can be a powerful tool for purpose-driven organisations, especially when combined with other tactics within a broader campaign strategy.

This guide considers some of the ways you can engage strategically with the law (and the people who make it) to create change:

- **Investigating** a problem and obtaining evidence from public authorities
- Building an argument and **influencing** decision-makers
- Where necessary, **challenging** a flawed decision or seeking to enforce legislation

Please note that this guidance is general in nature and does not constitute legal advice. It relates to England and Wales only.

Bates Wells is a leading law firm for charities and not-for-profits, and our team works with a wide range of campaigners. Throughout this guide you'll find examples of our recent work. Please contact us to discuss any of the issues it covers:

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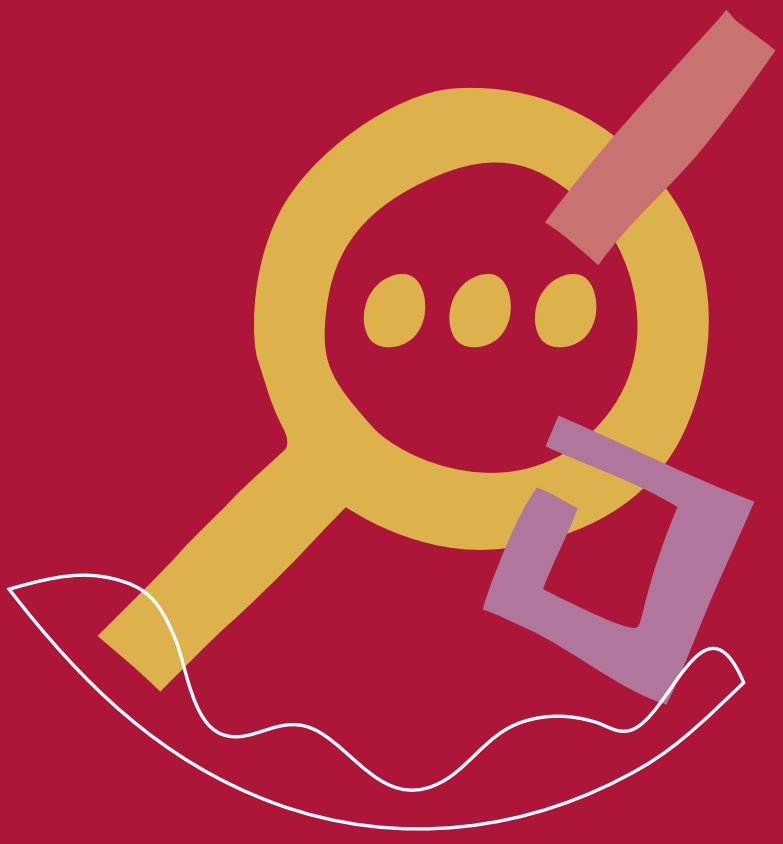
Investigating

Knowledge is power. Collecting evidence about a particular issue can be the first step in building an evidence-based case for change and developing a campaign strategy.

Organisations often gain valuable knowledge from their day-to-day work – insights that may not be obvious to those outside their field. For example, they might identify that a new policy is having unintended consequences for certain groups, or recognise patterns of non-compliance across multiple local councils. Capturing those observations in a structured paper or report – perhaps having strengthened them through targeted surveys or investigations, or working with external experts to sift the data – can allow you to transform first-hand experience into a persuasive resource.

In some cases, working with undercover investigators or whistleblowers can help to bolster your research, though it comes with a degree of legal risk that requires careful thought.



Information requests

Where you can't access all of the information you need to demonstrate a suspected problem, information requests are another valuable tool.

The Freedom of Information (FOI) *Act 2000* gives you the right to request information from public authorities, including government departments, local councils, regulators, schools, NHS bodies and police forces. *The Environmental Information Regulations 2004* establish similar rights to information about the environment.

The website **WhatDoTheyKnow.com** allows you to make bulk requests to multiple institutions, and creates a useful public archive of past requests and responses.

Requests can be refused on various grounds – for example, that the request is too broad and would take too long to respond to, that the material is confidential, or that disclosure would damage someone's commercial interests. Framing the requests carefully makes them harder to reject.

Requests could help you to find out:

- the activities an authority is undertaking, and how it's spending public money.
- how a particular decision was made, and what factors were taken into account.
- whether a particular commitment or legal requirement is being breached (by a single authority, or on a larger scale).
- how strictly a regulator is monitoring and enforcing legal breaches.

"Where you can't access all of the information you need to demonstrate a suspected problem, information requests are another valuable tool."

The information obtained could help you to formulate a campaign strategy, target a specific intervention, pressure a decision-maker, or shape a legal challenge.

To give a few examples:

- Friends of the Earth used FOI requests to establish that £16bn of the Local Government Pension Scheme is invested in the fossil fuel industry – information that they used to launch a divestment campaign.
- Good Law Project used FOI requests (and, after the requests were rejected, an appeal to the Information Commissioner) to force the Department of Health and Social Care to reveal the names of 47 companies it put in the "VIP Lane" for PPE procurement contracts during the Covid-19 pandemic. That information informed strategic legal challenges, with the VIP Lane ultimately found to have been unlawful.
- The Independent Workers Union of Great Britain used FOI requests to reveal the significant sums local authorities were paying to private foster care agencies, as part of their campaign for better support for directly employed foster carers. The campaign resulted in key wins, including a significant fee increase for foster carers.
- Through FOI requests to the Ministry of Justice, the Howard League revealed that children in English prisons are typically kept in their cells for 20 hours a day, and receive less than the 15 hours of required education per week – statistics that have supported an ongoing campaign for reform.
- Through requests to environmental regulators, River Action has demonstrated that most UK dairy farms are likely to be non-compliant with river pollution regulations – evidence that has supported its calls for stronger regulatory action.

Influencing

Once you have a strong body of evidence about a particular issue or problem, there are many ways to use it.

Raising public awareness

If you have identified a particular breach, moving straight to a legal challenge (see below) might be the best option. But seeking to raise public awareness about a problem, and suggesting ways policy-makers could address it, is often a better first step. This could include campaigning through both the traditional media and social media.

For some issues, a formal mechanism for capturing the level of public engagement or outrage – such as a petition – can be valuable.

NEON has extensive resources to help progressive organisations craft a public message.

For example:

- Its **Press Officer Handbook** is full of tools and tips to help you get media coverage for the issue you care about, including how to write a brilliant press release and pitch to journalists.
- **The Spokesperson Handbook** is a comprehensive guide to help you choose and support the right messenger/s for your campaign, with a focus on boosting diverse voices in the media. This is a particularly important consideration when your goal is protecting the rights of a group that's been marginalised or shut out of the legal system; a campaign that's being undertaken by or with people from that group, rather than for or to them, will always have more legitimacy and impact.

To find out more about NEON's communications trainings, email: **hello@neweconomyorganisers.org**

Getting it right

Campaigning considerations for charities

Charities have to be careful when mounting a public campaign for change – they can undertake campaigning and political activity, but only to support the delivery of their core charitable objects. This is an issue that needs to be navigated carefully. While charities do, in fact, have considerable flexibility to engage in good faith campaigning and political activity to further their purposes, the Charity Commission is keen that they carefully scrutinise the benefits and risks of doing so (including in relation to their reputation).

Trustees should be bold enough to take the decision which they think most appropriately furthers their charity's objects. They should make the decision on this basis, not on the basis of their own views about whether or not it is a "good cause" – but by the same token should not be held back by a general reluctance to engage in controversial issues, or because of a particular narrow conception of charity.

Election law

There are a lot of myths around election law, rules you may have heard described as the 'Lobbying Act'. The key thing to remember is that election law does not stop UK charities or other UK organisations from campaigning. There are rules around campaigning before a general election – applicable in the year before the vote – which require you to register if you plan to spend a certain amount on regulated activity. As the next election is not due to be held for a few years, we don't focus on those rules here - but see our separate guide on election rules for charities here)

At all times, UK electoral law also requires that some types of content must contain what is known as an "imprint" – this is essentially a transparency statement about who is responsible for, and who has funded, content that might influence various electoral events. Generally, imprints will be required when engaging in regulated activity, although the regime applies regardless of whether or not the content is published during a regulated period ahead of an election.

Critical campaigning

Critical campaigns can be very effective at mobilising public opinion. When implementing a critical campaign, it is important to consider intellectual property law – for example, do you have the right to use brand names and logos in your campaign? – and the risk of defamation.

A defamatory statement is one published to a third party or parties, which is likely to reduce the claimant in the estimation of "right-minded members of society", and which causes or is likely to cause serious harm to their reputation (for a body that trades for profit, that means serious financial loss).

Governments cannot sue for defamation. You will have a defence to a defamation claim if you can prove (for example) that the statement was substantially true; that it was "honest opinion" (based on facts that were set out so that the reader could see the basis for the opinion); that you reasonably believed publication was in the public interest; or that the statement was privileged (for example, because it was made in the context of court proceedings).

These are complex questions and should be considered carefully before launching a critical campaign.

Consultant lobbying

Certain insider lobbying – lobbying ministers and senior civil servants for payment as part of a business – must be registered with the Registrar of Consultant Lobbyists.

Protest

Public protest can also play a vital part in a campaign, allowing campaigners to coalescence around a particular moment and set of demands – for example, River Action's March for Clean Water in November 2024 channelled growing public outcry about sewage discharges, and provided a tangible focus for the charity's policy asks.

Protecting the right to protest from infringement by the government and private companies can accordingly be a key strategic objective for campaign groups. For example:

- Liberty recently established that the Home Secretary had overstepped her powers when she used statutory instruments to prohibit protests that caused "more than minor" disruption.
- In 2021, campaigners at Camp Beagle – who protest the breeding of dogs for use in medical research at MBR Acres – successfully defended the company's applications for injunctions to severely limit protests outside the site (though the Court did impose an exclusion zone). The company had sought sweeping injunctions to (for example) limit the number of permitted protesters, prohibit intimidating placards, and ban loudspeakers.

Pressuring local authorities

Some issues can be addressed at a local level rather than requiring national change, and a targeted local campaign can be a powerful way of generating community engagement and empowering your supporters to take action. For example:

- Plant-Based Councils trains teams of volunteers to pressure their local authorities to switch to 100% plant-based catering; they currently have 40 active campaign teams, and have persuaded 13 councils to introduce plant-based motions or policies.
- Acorn has campaigned to introduce landlord licensing rules to protect tenants in various cities; in Newcastle, for example, they represented tenant voices at council consultations and lobbied individual councillors, resulting in licensing being introduced in various areas of the city with a high density of renters.
- Climate Emergency UK asks local councils (through FOI requests) about the actions they've taken towards net zero each year; the responses inform detailed Council Climate Action Scorecards, which they use to identify the worst performing authorities and the areas where they could make improvements.

A win against one local authority can create a precedent that others feel bound to comply with, and demonstrate that a particular change is possible on a local scale could also have a "trickle up" effect into national policies.

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Engaging with Parliament

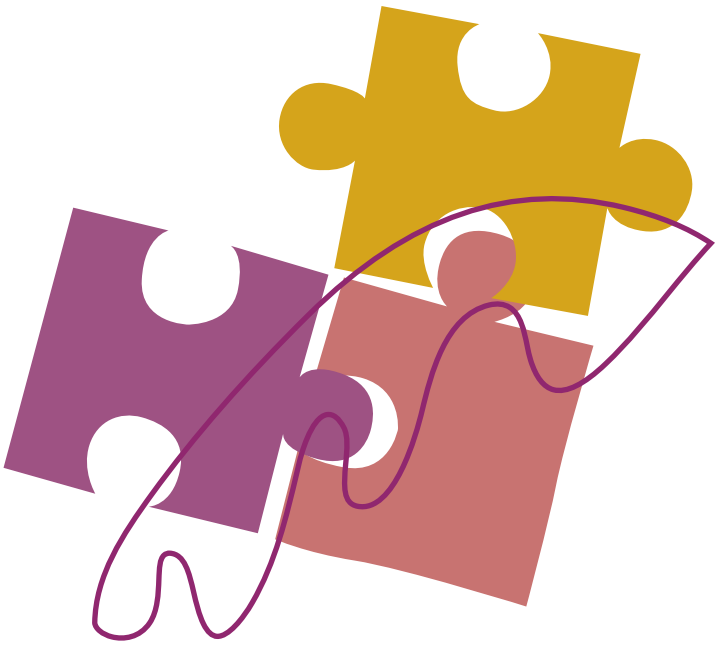
The government passes new laws – or amends old ones – to address gaps in the existing legal framework. Often, those gaps are identified by expert groups and campaigners, and highlighted through public campaigns.

You might be able to prompt the government to engage with a particular issue by responding to a consultation, or provide evidence to a Select Committee (a cross-party group of MPs or Lords focusing on a particular issue).

You can also engage with Parliament proactively. Politicians and civil servants work across a huge range of issues, and often welcome targeted engagements or well-drafted briefings from expert organisations. Many groups successfully combine public campaigns with direct political engagement, increasing pressure on politicians to act while equipping them with the knowledge they need to do so effectively. Backbench members of Parliament often align themselves with particular causes, in relation to which they might be prepared to propose a Private Members' Bill, which can be a valuable way of drawing attention to an issue and influencing government thinking.

For example:

- Cruelty Free International regularly provides politicians with expert briefings on new research about animal testing and cruelty-free alternatives, which in turn often inform Parliamentary Questions asked by supportive MPs; it has also hosted Parliamentary receptions, allowing politicians and their staff to discuss the issue directly with campaigners and experts.
- The Runnymede Trust acts as secretariat for the All-Party Parliamentary Group on Race and Community, a role which allows it to engage politicians across all parties in evidence-based discussions on race and equality.
- As well as making regular expert submissions to Select Committees and Public Bill Committees, Shelter encourages its supporters to engage directly with their MPs – for example by signing petitions or sending template emails – in order to mobilise public pressure on core issues.



"You might be able to prompt the government to engage with a particular issue by responding to a consultation, or provide evidence to a Select Committee."

Proposing or engaging with legislation

You could consider drafting your own legislation or White Paper (a policy document setting out proposals for future legislation), allowing you to focus a campaign around detailed "asks" and demonstrate how your idea would work.

Case Study: working with B Lab UK and the Better Business Act campaign, we prepared draft legislation demonstrating how company law could be amended to replace the doctrine of "shareholder primacy" with an approach more focused on sustainability. Over 2,500 businesses joined the Better Business Act coalition supporting the change, and a Private Members' Bill based on the draft was subsequently introduced to Parliament by a Liberal Democrat MP (see more here and here).

Case Study: we collaborated with Fashion Declares to produce a Sustainable Fashion White Paper on the future of fashion regulation in the UK. The White Paper sets out policy recommendations, which aim to foster a collaborative approach to these issues across the industry and inform the decision-making of the Circular Economy Taskforce, recently set up by the UK government (see more here).

Once the government has decided to progress a bill through Parliament, there will usually be further opportunities to engage directly with the drafting process as it works its way into law (for example, by submitting evidence to a Public Bill Committee set up to scrutinise the text).

You could also send briefing papers to the MPs and Lords who'll be voting on the bill, summarising its potential impacts and suggesting the changes you think are necessary. Sympathetic MPs might rely on your evidence in debates, and propose amendments based on your suggestions.

Case study: we worked with Fair Game CIC, which campaigns to improve financial sustainability and fairness in football, to improve the Football Governance Bill. Fair Game proposed targeted amendments to the bill in key areas, which it combined with a public campaign alongside other organisations in the sector. A number of its proposals made it into the revised legislation (see more here).

Participating in a public inquiry

Public inquiries are used to investigate a serious incident, crisis, or institutional failure. They can be a crucial means of amplifying the voices of the people who were affected, securing accountability, and making recommendations for change.

Charities and other organisations are often called to participate in public inquiries, as witnesses or as "core participants" (who have a greater degree of involvement). By participating, they can provide expert evidence on a particular area of the inquiry's focus, highlight structural issues and specific impacts, and advocate for particular outcomes in the inquiry report. Thoughtful participation in a high-profile inquiry can provide a valuable platform for drawing attention to an issue and shaping the public conversation.

In recent years, the Covid-19 Inquiry, the Independent Inquiry into Child Sexual Abuse, and the Grenfell Tower Inquiry (amongst many others) have benefited from the participation of campaigners, charities and other expert groups.

Case study: Business Disability Forum (BDF) is a not-for-profit membership organisation working to transform the lives of disabled people by supporting and encouraging businesses to become more disability inclusive. BDF was called to give evidence to Module 9 of the UK Covid-19 Inquiry, which examined economic interventions taken by the government in response to the pandemic. BDF's evidence addressed the unequal impact of the pandemic on people with protected characteristics.

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Inquests

Inquests are the forum for investigating unexpected deaths, and charities and other organisations who were directly involved might be called on to participate, as witnesses or as "interested persons". In some inquests (those given "Article 2" status) their role might involve highlighting the broader issues that may have contributed to the individual's death, to inform recommendations in the Coroner's Prevention of Future Deaths Report.

Challenging

In some cases, the right legislation is already in place – but it is meaningless if not enforced. Campaigners are increasingly turning to strategic litigation to ensure that both public and private bodies comply with hard-won laws – including environmental and animal welfare standards, equality protections, and human rights.

Judicial review

Judicial review allows you to challenge the decisions, acts, or omissions of central or local government, another public body, or a private organisation performing a "public function" (for example, a private company running a prison) ("the defendant" to the claim).

Bringing a claim is a significant undertaking, in terms of time and costs, but a successful challenge – or even an unsuccessful one – can raise the profile of an issue, force a change of course by the defendant, and/or set a legal precedent with implications beyond the case itself.

The recent case of *R (Finch) v Surrey County Council* is a striking example. The key finding in that case – that the Council, before granting permission for an onshore oil well site to be built, should have considered the indirect "downstream" emissions that would ultimately be created by the scheme – has since led to an "indirect emissions" approach being followed in a range of other contexts, including an offshore oil and gas project, a coal mine, and a proposed airport expansion.

Finch took over three years to work its way up to the Supreme Court, but some claimants manage to secure key concessions without ever getting as far as a hearing – and, in some cases, without even filing a claim. The aim of a pre-action letter (see below) is to avoid the need for proceedings; a well-formulated letter can prompt an authority to revisit its original decision with a more critical eye, and potentially accept that it got something wrong.

It is important to weigh up at the outset whether the costs and potential risks of being involved in a challenge are justified. For a charity, this will mean careful consideration by the trustees of whether the proposed involvement furthers the charity's purposes and serves its best interests. The Charity Commission has produced guidance on the relevant factors (here), and separate guidance on ensuring that your decision-making is robust (here). A charity would need to carefully consider the terms of this guidance – take proper advice, discount irrelevant factors, and consider alternatives – before progressing.

A key part of any successful challenge is the comms strategy underpinning it. NEON's Press Officer Handbook provides a foundation for thinking about how to get your message across as part of a progressive campaign. Particular complexities arise when you are publicising a legal challenge – for example, making sure the public messaging is aligned with the framing of the legal case, and making sure you don't refer to any confidential documents – so it's essential that your legal and comms teams are able to work together effectively, recognising their equally crucial roles.

Grounds for judicial review

A judicial review can be brought on various grounds (or combinations of them). You can argue that a public body has:

- broken the law by failing to comply with a statutory obligation (for example, an environmental target, a provision about animal welfare, or a duty under equality or human rights law).
- tried to do something it doesn't have the power to do (acted "ultra vires").
- acted irrationally – that is, made a decision outside the range of reasonable decisions available to it.
- failed to take into account all of the matters it should have done, or ignored matters it should have considered.
- failed to carry out a consultation when it was required to (either by statute, or based on its past practice).
- displayed bias in its decision-making.
- breached a "legitimate expectation" requiring it to act in a certain way (for example, because of promises it's made in the past).

What orders can the Court make?

The usual remedy sought in judicial review is a "quashing order", in which the Court invalidates the decision being challenged and requires the public body to retake it. Sometimes the Court will delay the quashing order coming into effect, to give the defendant time to make any necessary alternative arrangements.

The Court can also impose a "mandatory order" requiring the public body to take steps to comply with its legal duties, or a "prohibiting order" preventing it from doing something.

You can also seek a declaration from the Court to clarify the legal position.

Stages of a judicial review – summary

- A judicial review has to be brought promptly, and in any event within three months of the decision being challenged. It is crucial to move fast.
- The first stage is to send a "pre-action" letter to the defendant, setting out the proposed grounds of challenge and asking for information and concessions. This is an attempt to avoid proceedings, and doesn't commit you to bringing a claim.
- If the pre-action process doesn't resolve the dispute, you can formally commence proceedings by "filing" a claim in the Administrative Court, a division of the High Court (in London, Manchester, Leeds, Birmingham or Cardiff) and serving the papers on the defendant and any interested parties. (Claims relating to immigration and asylum decisions follow a slightly different process, and are usually filed in the Upper Tribunal.)
- When filing a claim, as well as setting out your legal argument in a claim form and "statement of facts and grounds", you have to provide the Court with the evidence you wish to rely on. You should also set out any other applications you need to make – for example, for a "costs capping order" (see below), or an interim order preventing the defendant from taking certain steps until the claim is resolved. All of these documents are usually prepared by your legal team with your input, and there is often a lot of work involved.
- The defendant then has 21 days to file a summary response, explaining briefly whether it intends to oppose the claim (and if so why).
- If necessary, you then have seven days to file a reply.
- After that, the Court will decide whether to grant permission for the claim to proceed. It will usually make a decision based on the documents, without a hearing. The Court will grant permission if it thinks the claim has a real prospect of success, i.e. raises an arguable case that merits full investigation. Permission could be refused because the Court does not think that the claimant's case has sufficient merit, because the challenge has not been brought promptly enough, because the issue is purely academic, or because there is an alternative remedy available to the claimant.
- If permission is refused, in relation to the whole claim or certain grounds, you can usually ask for a "renewal hearing" at which the decision will be reconsidered.
- If permission is granted, the defendant will be ordered to provide a detailed response to the claim, along with evidence, within a fixed period (usually 35 days). The "duty of candour" requires the defendant (and the claimant) to provide all relevant information and documents, whether they help their case of hinder it.
- The claim then proceeds to a final hearing. For a simple claim, hearings often last one day, and involve no witness evidence – just legal argument. Complex claims may need longer final hearings (and may involve interim hearings along the way).
- The judgment might be issued straight after the hearing, or (more often) after some delay. Either party can appeal the decision if they are unhappy with it.
- You can (and should) seek to reach a negotiated settlement with the defendant wherever possible during the proceedings.

Bringing a judicial review as claimant

On core issues, a charity or other purpose-driven organisation might choose to bring a challenge itself, as a claimant (whether alone, or jointly with other organisations / individuals).

To bring a claim you must have legal "standing", which means that you have a "sufficient interest" in the issue to which the claim relates. You are likely to have standing if you are directly affected by the decision, but you could also have:

- "associational" standing, where you bring the claim on behalf of your members.
- "surrogate" standing, where you represent the interests of persons who might not be well-placed to bring a challenge themselves (for example, children).
- "public interest" standing, where you bring the claim on behalf of the wider public interest. This kind of standing is particularly important when the impact of a decision is not limited to particular individuals or groups – for example, environmental claims – but an organisation relying on it has to demonstrate that it has particular expertise and experience in the relevant area.

A claim arguing that human rights have been breached must be brought by someone who is directly affected. If you are working with individual claimants, it will be vital to consider at the outset the ways in which the legal system can feel hostile or disempowering, and how you will try to minimise those risks (for example, by ensuring full participation in strategic decision making and comms).

Case study: after the government announced that it was cutting spending on overseas aid to 0.3% – in what appeared to be an indefinite departure from the statutory target of 0.7% – The ONE Campaign sent a pre-action protocol letter challenging the lawfulness of the cut. As an expert in overseas aid spending and global poverty reduction, ONE sought to bring the challenge in the public interest (see more here).

Interested parties in judicial review

If anyone other than the claimant or defendant is directly affected by the claim, they can be granted "interested party" status, which allows them to participate fully in proceedings. For example, if a claimant challenges a decision by a local authority to grant planning permission to a particular scheme, the developer behind the scheme will usually be an interested party.

However, this will rarely apply to organisations with a broader public interest perspective on the proceedings, who are more likely to seek intervenor status.

Intervening in a judicial review

If you have particular expertise that might benefit the Court – for example, an understanding of the broader context that the parties themselves might not be well-placed to explain, or insights into how the Court's decision is likely to affect a particular marginalised group – you can apply to intervene in the proceedings. A strategic intervention by a charity or campaign group is usually (but not always) made in support of the claimant's case. Intervenors can seek to present witness evidence and to make written and oral submissions on points of law. They have significantly less power than the parties in terms of framing the case, but a carefully targeted intervention can impact the Court's approach.

For example:

- Friends of the Earth intervened in Finch v Surrey County Council (the case about "downstream emissions" referred to above), providing evidence that a failure to take such emissions into account breached obligations under climate legislation.
- Liberty intervened in a successful challenge brought by UNISON against the decision to increase employment tribunal fees, providing evidence of the impact the fee increases would have on vulnerable groups.
- The mental health charity Mind intervened in a successful challenge to the Home Secretary's policy towards detainees with mental illness, submitting evidence which was referred to multiple times in the judgment.

You might be approached directly by the claimant asking you to intervene, or you might decide to apply after hearing about the claim though your network or the media.

An application to intervene can be filed at any stage in proceedings, but should be made as promptly as possible. It should summarise the evidence and submissions you want to provide, and explain what you can bring to proceedings that the parties can't. Before applying, you should notify the parties that you intend to do so and seek their consent (though you can still apply even if one or both parties object).

Intervening is less time-intensive than bringing a claim (though it can still involve a lot of work), and so generally involves lower legal costs – particularly if you coordinate a joint intervention with other organisations. Intervening can, though, still be expensive, and (unlike claimants) intervenors cannot generally recover their costs even if the claim goes their way.

Similarly, intervenors will not usually be ordered to pay another party's costs even if the claim goes against them – unless they ended up effectively taking over the claimant's or defendant's role, their submissions were unhelpful to the Court, and/or they acted unreasonably. This only happens rarely, but it is important to bear the risk in mind throughout proceedings – particularly since a finding that your intervention was unhelpful or unreasonable could also have a reputational impact.

Intervenors, like the parties, have a duty of candour to the Court, and have to be prepared to provide the Court with any relevant facts or documents they hold.

"...a carefully targeted intervention can impact the Court's approach."

It is important to weigh up at the outset whether the costs and potential risks of an intervention are justified, and how you plan to communicate about your involvement (which might require some coordination with the claimant).

Case Study: The RSPCA intervened in support of the Humane League UK's judicial review challenge to DEFRA over the use of fast-growing chicken breeds. A report produced by the RSPCA regarding the harms suffered by such breeds provided the scientific foundations for the claimant's case. The challenge was unsuccessful, but the Court made a crucial finding that – if the RSPCA's evidence about the harms suffered by fast-growing breeds is correct – keeping them is unlawful. Future litigation might seek to build on that finding (see more here).

Submitting witness evidence in a judicial review

Where you don't wish to make legal arguments, but have valuable factual evidence to offer the Court, you could seek to produce a witness statement in support of the claimant (or defendant). The statement could refer to (and exhibit) relevant evidence, such as survey data, case studies, or reports.

This can be a valuable way of getting your voice heard in Court. It is often a less time- and cost-intensive option than intervening, and does not carry any risk of having to pay adverse costs (see below).

The downside is that you have no real control over the legal arguments or how your evidence is used. This approach is accordingly most effective when you are aligned with the party who will be relying on your evidence and broadly agree with their legal analysis – in which case you might also be able to agree a joint comms approach.

Case Study: Doctors' Association UK prepared a witness statement in support of a judicial review challenge brought by Anaesthetists United, and Marion and Brendan Chesterton, against the GMC. The claim related to the inadequate regulation of associates in the NHS, and the blurring of their role boundaries. DAUK supported the claimants' framing of the legal arguments, but wanted to offer the Court its members' insights into the particular problems the regulator's approach had created on the ground for doctors. The Court agreed that the evidence was relevant to the claim and should be considered.

Comms after a claim ends

When proceedings conclude, it will often be important to publicise a claim's successes (whether achieved in Court or through a negotiated settlement) – both so that your supporters understand what's been achieved, and to make sure that anyone who might be able to benefit from the precedent or change in approach is aware of it. It might also be necessary to monitor whether the defendant does what it has been ordered, or has agreed, to do, and to highlight any failure to comply. This ongoing work is often a crucial part of a successful comms strategy in a strategic challenge.

Other types of challenge

Sometimes, bringing (or intervening in) types of litigation other than judicial review could also help to advance your goals, particularly if you want to challenge the conduct of a private company rather than a public body. For example:

- Climate charities have had some recent success in using company law to challenge actions by the Boards of oil and gas companies.
- Private claims in nuisance or trespass are increasingly being used to challenge pollution.
- Claims in the Employment Tribunal often raise key issues, for example about workers' rights or equality law.
- Tenants groups and the London Renters Union have successfully used the Property Tribunal to secure Rent Repayment Orders against landlords whose properties breach housing standards.

Case Study: in a claim that began in the Employment Tribunal and ended in the Supreme Court, two Uber drivers successfully challenged the company's classification of them as independent contractors, rather than "workers" entitled to protections under employment law. The decision had significant implications for all Uber drivers, and for the estimated 5.5 million individuals employed in the wider gig economy (see more **here**).

Again, organisations can seek to intervene in claims such as these on public interest grounds (or to submit evidence in support of one of the parties). Interventions can be particularly valuable when the claim is about private interests, meaning that the Court might not hear from the parties about the wider ramifications or public interest points.

For example:

- Good Law Project, the Environmental Law Foundation and others jointly intervened in a private claim brought by the Manchester Ship Canal Company Ltd against United Utilities. The case concerned sewage discharges into the claimant's canal; the intervenors set out the scale of similar discharges in waterbodies across the country, and explained that the Court's findings about the legal remedies available would affect all of them.
- Shelter intervened in a case brought by an individual under the Housing Act 1996, concerning a local authority's approach to his homelessness appeal; they explained the detailed requirements imposed by the relevant statutory scheme, and the practical difficulties homeless people face in making such appeals.

Case study: Royal College of Nursing intervened in a challenge, heard by the Supreme Court, about the appropriateness of indefinite injunctions to protect the identities of clinical staff involved in end of life care for children. They supported the position of the NHS Trusts advocating for injunctions, and filed detailed evidence and submissions about the potential impact upon clinicians and clinical services if the injunctions were lifted.

It is also possible to make complaints to regulatory bodies (at a lower cost than litigation, and with no adverse costs risk). For example, you can complain to the Advertising Standards Authority or the Competition and Markets Authority about "greenwashing" (or "humane-washing") by private companies who present a misleading picture of their environmental or ethical credentials.

Funding your involvement

Funding your own costs

Strategic litigation can be expensive – particularly as a claimant, but also as an intervenor. There are various ways of seeking to limit, and raise funding for, your own legal costs. For example:

- Legal crowdfunding – collecting small donations from a broad group of supporters through an online platform – has proved a valuable tool for funding cases that could otherwise not have been brought.
- Litigation funders might agree to fund a strong claim in exchange for a percentage of any damages paid by the defendant if the claim succeeds. This model rarely works for judicial review, in which damages are not usually sought – but there are dedicated philanthropic litigation funders who will support strategic claims.
- Sometimes lawyers will be able to work on a "no win, no fee" basis (though, again, this is less common in judicial review), or undertake work at reduced rates or "pro bono" (for free).
- Some claimants will be eligible for legal aid, though this is increasingly rare.

The risk of having to pay the other side's costs

The usual rule in litigation is that you have to pay the other side's costs if you lose or withdraw the claim ("adverse costs") as well as your own. This is a risk that many claimants can't afford to take.

In judicial review claims, the Court can impose a "costs capping order" limiting the amount you could be liable to pay to the defendant if you lose, provided:

- you are bringing a claim in the public interest, i.e. one that raises an issue of general public importance, and
- you wouldn't be able to do so without some kind of protection from adverse costs. Demonstrating this will require producing evidence about the extent of funding available to you, though you are not expected to put all of your available resources on the line for the case. If your funding position is likely to fluctuate because you are crowdfunding, you can ask for the cap to be set as a percentage of whatever you raise.

For environmental claims, the Aarhus costs capping regime applies. The starting point under Aarhus is a maximum exposure of £5,000 for individual claimants and £10,000 for NGOs, with the defendant's exposure capped at £35,000.

Costs capping orders can also be made in types of claims other than judicial review, if the Court considers that it is in the interests of justice to do so.

If your organisation is a charity, the trustees will need to be satisfied that the legal proceedings are in the charity's best interests, and represent an appropriate use of its funds. A costs capping order can provide essential reassurance.

Bates Wells

Bates Wells is the country's leading charity law firm, and the first to certify as a B Corp. Our lawyers are experienced in using the law to drive change. We acted in all of the case studies highlighted above.

Bates Wells lawyers are experts in **freedom of information**, **judicial review**, and **public inquiries**, as well as other forms of **litigation**; our lawyers also specialise in **campaigning law**, **parliamentary procedures**, and **charity regulation**.

Please get in touch if you would like to discuss how your organisation might be able to use the law to drive change; we are always happy to have a preliminary chat about your options and scope out ideas.

Bates Wells

Making a profit is core to all businesses but our goal is to combine this with a real social purpose. Our values are pivotal to us, they shape our decisions and the way we live and work.

We focus on positive social impact as much as we focus on being a successful law firm. Our top tier legal advice is coupled with a real desire to drive change and we were the first UK law firm to achieve B Corp certification, awarded to businesses that balance purpose and profit.

Today, our clients are diverse – from corporate household names, to public bodies, to start-ups. We're also the firm of choice for thousands of charities and social enterprises. We continue to lead the market we helped to shape.

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