



Public Law Project



Guide to Strategic Litigation

This guide was produced as part of the Public Law Strategic Support Project, funded by the Legal Services Commission (LSC), an organisation superseded by the Legal Aid Agency or LAA.

GUIDE TO STRATEGIC LITIGATION

1. Introduction

This guide has been produced to provide individuals and community groups with information to promote a better understanding of how to challenge decisions of public bodies. It is intended for non-lawyers, for community and voluntary sector groups and for individuals. It is not intended for litigants in person (ie those who go to court without a lawyer to assist them), and in no way replaces the need for expert legal advice. Instead, it is designed to help non-lawyers understand the judicial review process, to navigate their way through it, and to get the best out of the lawyers they will undoubtedly need.

There are a number of ways that individuals or groups can challenge the exercise of power by public bodies. These include complaints procedures and ombudsman schemes, appeals to tribunals, and judicial review litigation in the High Court. Of these, judicial review will, in many cases, be the most powerful tool for achieving effective change to public bodies' decision-making practices. This is due to certain features of the judicial review procedure, including its flexibility, its focus on preventing misuse of power by public bodies, and the court's tendency to do justice in each individual case with half an eye on the effect of its decision on good public administration (which may involve consideration of the impact of the judgment on those not involved in the litigation, including other individuals and public bodies). One judicial review case can make a difference to many other people and can give members of the community a focus for lobbying politicians and persuading public bodies to reconsider their policies. That is what makes judicial review such a powerful campaigning tool.

However, there are many hurdles to overcome before a judicial review case can be brought, and the costs and risks inherent in the process are high, including the potential for individuals bringing a case to incur huge debts, and the risk of making the law worse if a case is lost. So judicial review must be used wisely. As indicated above, this guide has been produced to assist individuals and community organisations to bring claims, where appropriate, on an informed basis, and to facilitate close effective working between individuals and the communities supporting them, and the lawyers bringing the claims.

The centrepiece of this guide is the step-by-step guide to judicial review at chapter 9, with the material in the chapters preceding it setting out relevant principles and background information. The guide can be used in at least two ways. It can be read from cover to cover (although the contents of chapters 1-8 may be too dry for some non-lawyers to take). Alternatively, readers can proceed straight to the step-by-step guide: where general principles are relevant, they are cross-referenced in the step-by-step guide, and can therefore be read as and when necessary.

The guide was produced with funding from the Legal Services Commission as part of the Public Law Strategic Support project (PLSS), by which the Public Law Project offered advice, training and litigation support to advisers and local NGOs who wished to challenge public bodies' practices and policies that affected their local community. The project ran for three years from 2008 to 2011 and challenged a range of public authority actions, including:

- Library closures
- The use of bankruptcy as a means of collecting arrears of Council Tax
- The response of local authorities to homelessness applications by children
- The conduct of bailiffs used by a local authority to collect Council Tax and other local authority debts

- A local authority's decision to cut funding for certain community-based mental health services by 43%
- HMRC's overly restrictive policies relating to: (1) taking notional entitlement into account in calculating the amount of any overpayment; and (2) failures to report changes in circumstances caused by relationship breakdowns or new relationships arising in the middle of the tax year; and (3) disputes about whether an annual return was returned by the recipient.

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1. An introduction to strategic litigation

1.1 What is strategic litigation?

1. Strategic litigation has been defined in different ways, for example:

“Litigation means taking cases to court. Strategic litigation is a method that can bring about significant changes in the law, practice or public awareness via taking carefully-selected cases to court. The clients involved in strategic litigation have been victims of [wrongs] that are suffered by many other people. In this way, strategic litigation focuses on an individual case in order to bring about social change”.

(Mental Disability Advocacy Centre: http://mdac.info/en/what-we-do/strategic_litigation)

2. A typical feature of strategic litigation is that cases are brought by individuals to test a legal point that also applies to cases other than just their own. Hence, strategic litigation is sometimes referred to as “impact” or “test case” litigation.
3. The aims of strategic litigation involve more than simply winning legal arguments in court: test case strategies might seek to create awareness and publicise the cause for which the strategy is mobilised, encourage public debate, set important precedents, achieve change for people in similar situations, and spark policy changes.
4. Individuals and groups might consider using strategic litigation where they want to:
 - Enforce the law
 - Clarify the meaning of the law
 - Challenge the law
 - Create new law

1.2 Overlap with Public Interest Litigation

5. Strategic litigation by pressure groups has also become synonymous with the public interest law movement which originated in the United States in the years of the Kennedy presidency. The movement sought to use the law to achieve social reform and benefit disadvantaged social groups through access to justice. Another of its aims was the achievement of social justice of a redistributive variety. The movement crossed the Atlantic in the 1970s and sparked renewed vigour in organisations such as the Child Poverty Action Group in the UK. The public interest law movement has become a worldwide phenomenon, with the higher judiciary in countries such as India taking a lead role in developing what has been referred to as a ‘poverty-oriented’ jurisprudence.

1.3 A short history of strategic litigation¹

(a) *Brown v. Board of Education of Topeka*

6. It is widely believed that the origins of strategic litigation in Britain stem from the experience of the American civil rights movement, and specifically *Brown v. Board of Education of Topeka* (1954). However, Carol Harlow and Richard Rawlings, in their seminal work ‘Pressure through Law’ have shown through a plethora of examples, some dating back to the eighteenth century, that strategic litigation has had a long, and

¹ This section draws heavily on “Pressure Through Law” by Caro Harlow and Richard Rawlings

at times fruitful history in the UK. A few such examples of what is now referred to as strategic litigation, and the outcomes achieved, are set out below:

(b) *Abolitionists*

7. One of the most celebrated cases fought in an English court, *Somerset v. Stewart* (1772) was in fact a test case, providing Granville Sharp, a dedicated abolitionist, the opportunity to test conflicting views of the common law on slavery. The case elicited a famous opinion by Lord Mansfield who seemed to reject slavery on overriding moral grounds. Though the decision may not have ended slavery in Britain as is commonly believed, it had the effect of rallying American abolitionists and judges who would play a central role in the American anti-slavery movement.
8. Sharp was then instrumental in setting up a pressure group to further the cause, when in 1787 he became the founder member and Chairman of the Committee for the Abolition of the Slave Trade. Sharp (and the abolitionists) later gained a similar ruling from the Scottish courts (*Knight v. Wedderburn* (1778)). Having become a well-organised lobby, they pushed for legislative change and governmental initiative. They used techniques such as organised mass meetings, regular briefing of MPs and peers, and even a boycott of goods produced by slaves. Slow and piecemeal legislative successes culminated in an Act abolishing slavery throughout the British Colonies in 1833.

(c) *The 'General Warrant' cases*

9. Another series of landmark English cases are those which include *Entick v. Carrington* (1765), in which the courts were asked to pronounce on the extent of the Crown's powers of arrest, search and seizure. They are considered crucially important for civil liberties and at the time were viewed as great moral and political victories over the government of the day. Behind these cases stood the radical politician, John Wilkes. The searches, arrests and seizures challenged in the litigation all involved attempts by the government to close down his newspaper, *The North Briton*, the plaintiffs being his publishers and printers. They had in fact been encouraged by Wilkes to litigate following his successful claim for damages against the then Home Secretary. Eventually the litigation strategy resulted in awards of damages for fourteen printers in one year. Wilkes was the leader of a political faction which would go on to form the 'Society for Supporting the Bill of Rights' in 1769, and the 'Constitutional Society' in 1771. These organisations, through their considerable legal expertise, strove to uphold the independence of the courts and the rule of law, and monitor judicial conduct.
10. The Wilkites have been described as a radical, anti-establishment pressure group, aware of the political effectiveness of successful litigation, and the publicity value of legal proceedings. They are just one example of many such organisations which were operating at the time, to good effect.

(d) *Prosecution Societies*

11. Before the advent of a centralised police force and public prosecution, the responsibility to apprehend and prosecute offenders rested with individuals. In this context, prosecution societies were set up to help victims of crime prosecute felonies. Financial constraints made such enforcement very difficult, especially in offences such as environmental pollution which might involve tracing emissions and showing them to be noxious.

12. Similar problems existed in the enforcement of industrial legislation with the magistracy itself sometimes involved in manufacturing, and hence opponents of the provisions which they were meant to enforce. In the case of chimney sweeps, despite effective legislation having been secured in 1840, providing a fine for any person employing a person under 21 to go up a flue, there was no official enforcement machinery. While people such as Lord Shaftesbury did undertake individual actions at times, the prosecution for the manslaughter of a 7-year-old Manchester apprentice led to the formation of the Climbing Boys' Society, which Lord Shaftesbury chaired. It acted as a prosecution society, taking over law enforcement by collecting information and conducting prosecutions where possible. The magistracy, however, could and did hamper the aim of the legislation by setting low fines, leading Shaftesbury to push a new Act through Parliament which substituted imprisonment for fines in suitable cases. Eventually, following a wave of emotion after a sweep had been sentenced to six months' imprisonment for the suffocation of his boy in a flue, an Act of 1875 strengthened the law by supplementing private enforcement with police involvement.

(e) *The Vice Societies*

13. The fact that strategic litigation is not, and has not been, the sole preserve of liberal activists is evidenced by the rise of vice societies in the mid-eighteenth century. Notable amongst these was 'The Society for the Suppression of Vice' (the Vice Society), formed in 1802, with membership drawn from the urban middle classes. In 1803, the Vice Society had secured 678 convictions in London alone, of which 623 were for Sabbath-breaking.
14. The Vice Society's strategy was to first publish an abstract of laws against vice, which included drunkenness, prostitution, profanity, fortune-telling, criminal libel and obscene books, and then to inspect areas for breaches of law, warning potential violators of its intentions to prosecute, and advertising its successful record in doing so. As a last resort it would prosecute, mostly with devastating effect, as the penalties imposed would be severe. Keepers of private theatres and houses where dances were arranged lost their livelihood, and arrangers of lotteries and publishers of obscene materials could find themselves in prison.
15. The prosecution of writers and publishers of rationalist and radical literature (Tom Paine was prosecuted for criminal libel for *Rights of Man*, and a radical publisher named Richard Carlile was imprisoned for two years for its subsequent publication) as opposed to pornographic material, inspired the first organised Freethought movement in Britain, with local groups that had formed to support victims of the Vice Society's nationwide prosecution campaign, transforming themselves into permanent rationalist societies.

(f) *The American experience - the NAACP*

16. The National Association for the Advancement of Coloured Peoples (NAACP), though not the first black organisation to consider a litigation strategy, has emerged alongside the American Civil Liberties Union (ACLU) as central to pressure-group litigation in the United States. No other organisation has made such a consistent use of the technique over so long a period.
17. Set up in 1909 by wealthy, white liberals prominent in social work and the anti-slavery movement, the NAACP was to be a pressure group designed as a 'watchdog of Negro liberties'. The need for a strong centralised legal bureau was felt early on and in 1916 the NAACP transferred responsibility for litigation to its central, in-house legal department. By 1915 the NAACP had moved into a proactive role in civil courts, with

this experience feeding into political campaigns. The NAACP also began using formal investigation techniques to draw attention to lynchings in 1913 and 1916.

18. The NAACP's first coordinated litigation strategy began once it had secured \$100,000 from the American Fund for Public Services. This was conducted by Charles Houston, the first full-time black lawyer, and Thurgood Marshall, the NAACP's most famous counsel and later the first black Supreme Court judge. Together they were responsible over thirty-odd years for the success of the anti-discrimination battle in American courts.
19. They targeted segregation in education, seeing it as a key to general desegregation in the sense that a literate population would be more alive to political rights. One after the other, at the legal level, law schools, universities, and state secondary schools were forced to open their doors to black students. The most celebrated case in this campaign, and possibly the most celebrated lawsuit of the century was *Brown v. Board of Education of Topeka* (1954), referred to as a 'revolution in constitutional law', establishing the Supreme Court at the centre of the American political process.
20. Enforcing the decision was a whole different matter however and NAACP officials actively sought compliance with *Brown* through desegregation suits until the late 1950s, after which disillusionment set in. The decision also faced a fierce backlash in the form of the so-called 'Southern Manifesto' backed by conservative interest groups, which proposed limitations to the Supreme Court's jurisdiction, prompting a retreat from the Court in terms of rejection of 'civil liberties cases'.
21. The desegregation campaign is the most extensive and best-documented litigation strategy in history. Overall, it is now seen as having been successful, despite the limitations of the direct effects it may have had, desegregation in the deep South coming only after Congress enacted the Civil Rights Act in 1964.

1.4 Litigation as a complement to social activism

22. As highlighted in the cases above, even organisations which have used proactive test-case strategies to push for reform have appreciated, or ended up appreciating, the need for a broader programme when it comes to social activism. Many have only come to the law on account of failures in the legislative sphere, or defensively in order to defend cases which have been brought against them during the course of their activism. However, several landmark victories which have been achieved in the courts, from equal rights actions to the protection and enforcement of civil liberties. At times the courts have been the stage of public spectacles and forums in which to raise political defences. These in turn have created public awareness, sympathy, and at times popular support to push through reforms which until that point had not been forthcoming.
23. It is important to remember that strategic casework feeds into lobbying in the same way as a single issue group may form a coalition with, or be absorbed into, a broader lobby. Individuals or organisations striving to bring about social change should certainly consider whether litigation should form part of their strategy.

1.5 Strategic litigation and public law

24. The examples of strategic litigation outlined above include many cases that would fall within the category of "private law", where the main remedy is a claim for financial compensation (damages). This guide only deals with public law challenges to the exercise of power by public bodies, which although they can include damages claims,

typically have as their objective the quashing of a decision, practice or policy. There are three main reasons why this guide focuses on public law remedies:

- (1) PLP's expertise is in public law.
- (2) Many challenges to public bodies' decisions, policies and practices will best be brought as claims for judicial review.
- (3) The time limits for bringing judicial review cases are very short (see below), and the potential consequences of getting it wrong mean that claims should not be brought without expert legal advice. It follows that legal advice must be sought at a very early stage, always as a matter of urgency. Whatever legal strategy emerges (whether it involves judicial review, another public law remedy or another remedy altogether), it can only be a good thing to clarify the strategy and focus efforts on implementing it as soon as possible after grounds for complaint arise. Furthermore, routinely considering potential judicial review claims within their very tight timescales should mean that other legal remedies with more generous limitation periods are not missed.

2. General principles of public law

2.1 Introduction

25. General principles of public law are set out below, and referred to as appropriate in the step-by-step guide that follows. They are not intended to replace the need for detailed legal advice before any claim for judicial review is considered.

2.2 What is public law?

26. Public law governs how public bodies exercise power. It is relevant to people's dealings with the State and its agents. Public law is not concerned with how private individuals treat each other: relations between private individuals are regulated by other types of law including the criminal law, the law of tort and the law of contract.
27. Mr Justice Sedley put it like this in a case called *R v Somerset CC ex parte Dixon* (1997):

Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power

28. Public law applies (1) to public bodies (2) when they exercise their public functions. It governs the official functions of central and local government (including housing law, planning law, criminal law, environmental law, social security law, education law, prison law, regulation law, immigration law, mental health law, and community care law). This means that the following are public bodies for the purposes of public law (this is not an exhaustive list):

- The police
- Government ministers and government departments
- Prisons
- Local authorities
- Local NHS trusts
- Maintained schools and school governing bodies

- Supervisory and regulatory authorities, for example the Care Quality Commission, the Information Commissioner's Office or the Office of Fair Trading.
29. Public law can also govern the acts and omissions of individuals such as private companies where the law holds those acts and omissions to be undertaken in the exercise of a public function. For example, a private company that runs a prison is deemed to be exercising a public function and so its actions in the running of the prison will be governed by public law.
30. Public law also regulates the conduct of courts inferior to the High Court, such as:
- County courts
 - Coroners' courts
 - Magistrates' courts
- as well as the conduct of administrative tribunals.

2.3 Some basic public law concepts

(a) The need for authority

31. Entrenched in our unwritten constitution is the idea that, while individuals are free to do that which is not prohibited by law, the actions of public bodies must - in general - be empowered or authorised by Parliament. The authority is usually found in: (1) primary legislation (an Act of Parliament); and (2) secondary legislation (for example, regulations made by a Minister under powers contained in primary legislation). Some EU legislation is also binding on public bodies.
32. So one of the first questions that public lawyers tend to ask themselves is:
- “Under what authority is the public body acting (or purporting to act)?”
33. If there is no valid authority, then the public body is acting unlawfully and must stop.

(b) Duties and powers

34. The authority of a public body to act will be expressed in one of two ways, either as: (1) a power (something that may be done in certain circumstances); or as (2) a duty (something that must or must not be done in certain circumstances).
35. So after checking under what authority a public body is acting, public lawyers will ask themselves:
- “Is the public body under a duty to do or refrain from doing something?”
36. If it is in breach of a duty, then the public body is acting unlawfully, and must stop. If the public body has a power to perform an act, public lawyers tend to ask themselves under what conditions that power can be exercised. This is because no power is absolute. The relevant legislation will often state the conditions underpinning the exercise of the power, and if it doesn't, the law implies them.
37. An example of an implied condition is that public bodies will behave fairly and reasonably taking all relevant and no irrelevant factors into account (see below): there

is no need to write this into the legislation explicitly because it is taken as read that public bodies have to act in this way.

38. So if the public body is using a power, public lawyers will ask themselves:

“What are the limits imposed on the exercise of the power, and has the public body exercised the power fairly and reasonably?”

(c) *Policies and guidance*

39. Also relevant to the exercise of power are policies and guidance. Guidance and policies are not the same as legislation. The difference between guidance and legislation has been described as follows: guidance *indicates* a particular outcome whereas legislation *dictates* a particular outcome. This means that guidance and policies are not legally binding on public bodies. However, a public body can only depart from guidance if it has a good reason for doing so.

(1) “Policies” are guidelines published by the public body itself. They should generally be followed unless there is a good reason not to.

(2) “Guidance” is similar to a policy, but published by someone other than the public body exercising the power.

40. So in order to check that a power has been exercised reasonably, taking into account all relevant factors and no irrelevant factors, public lawyers will ask themselves:

“What are the applicable policies and guidance? Have they been departed from in this case, and if so, has the public body justified its act or omission that is contrary to policy or guidance?”

2.4 Categories of public law mistake

41. Traditionally, judges divided public law mistakes by public bodies into three categories: illegality, irrationality and procedural impropriety. In plain English:

(1) “illegality” means “acting beyond the authority that a public body is given”;

(2) “irrationality” means “acting unreasonably”; and

(3) “procedural impropriety” means “acting unfairly”.

These terms are explained below.

(a) *A public body cannot act beyond the authority conferred on it by the law*

42. This means:

(1) A public body must have the legal power to do what it purports to do.

(2) For each decision a public body takes in the exercise of its public functions, it must take into account all relevant information (and must ignore irrelevant information).

(3) When taking such a decision, a public body should consider each case fairly on its own merits – this means that public body decision makers must not adopt

rigid blanket policies which might stop them from exercising their powers fairly having regard to the facts of each particular case before them.

- (4) A public body must properly understand the law, and must base its decisions on the correct legal test.
43. Certain laws restrict public bodies' powers to act, for example:
- (1) the European Communities Act 1972 restricts public bodies' power to do anything that contravenes the law of the European Union.
 - (2) the Human Rights Act 1998 restricts public bodies' power to do anything that would violate a person's rights under the European Convention on Human Rights.
 - (3) the Equality Act 2010 restricts public bodies' power to discriminate against people on grounds of gender, pregnancy and maternity, race, disability, sexuality, gender reassignment, religion or belief, or age.
- (b) *A public body must act reasonably*
44. Public bodies must not make unreasonable decisions. "Unreasonable" in this context means perverse or irrational. Although this rule is simply stated, decisions tend to have to be very unreasonable indeed before the courts will intervene. In the case of *Wednesbury*² Lord Green stated that for a decision to be irrational it must be, "so unreasonable that no reasonable authority could ever have come [to] it." Only then could "the Courts interfere... but to prove a case of that kind would require something overwhelming." The test of unreasonableness has been described as the "that is outrageous" test.
45. Linked with the concept of reasonableness, but separate from it, is the concept of proportionality. An act or omission is disproportionate if it is excessive in the circumstances of the case. This is sometimes likened to "cracking a sledgehammer with a nut". In general, a public body should not act in a way that is disproportionate, and should only interfere with the rights of others in the exercise of its public functions to the extent necessary to achieve its legitimate aims (and no further).
- (c) *A public body must act fairly*
46. This means:
- (1) Those affected by a public body's decision must be given a "fair hearing". This means (among other things), that relevant documents should be disclosed and those affected should be allowed to have their say before a decision is taken.
 - (2) Where a duty to consult arises or a public body chooses to consult (see further below) it must consult properly: for example, consultation should be when proposals are at a formative stage, with sufficient information and time for the consultees to respond in a meaningful way; and the results of any consultation should be taken into account when the public body makes its decision.
 - (3) Public bodies must keep their promises unless there is a good reason not to: if a public body has made a promise to an individual or a group of people, a

² Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948)

“legitimate expectation” may be created that the promise will be kept, so that if the promise is broken, legal sanctions can be imposed by the court. Individuals and organisations may also have a legitimate expectation that they will be consulted over a particular decision.

(d) *Maladministration*

47. Separate from the three traditional categories of public law mistake (illegality, irrationality and procedural impropriety), the concept of maladministration can form the basis of a challenge. Maladministration is associated with ombudsman schemes. It includes the three traditional public law grounds, and others as well. Examples of maladministration include bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, and arbitrariness. Ombudsmen have statutory powers to investigate complaints of maladministration. If an ombudsman (for example, the Local Government Ombudsman or the Parliamentary and Health Services Ombudsman) considers that a public body is guilty of maladministration, the ombudsman can recommend that the maladministration must cease (if it is ongoing) and that compensation be paid.

3. Public law challenges (other than judicial review)

48. The following types of public law challenge are considered below:

- (1) Complaints procedures
- (2) Ombudsman schemes
- (3) Appeals
- (4) Review procedures
- (5) Alternative Dispute Resolution

49. Judicial review is then considered under a separate heading.

3.1 Complaints procedures

50. Most public bodies have complaints procedures, and even where these do not exist or are not publicised, there is nothing to prevent people from making a written complaint. Community-based letter writing campaigns can be a cheap and simple way of galvanising communities. In terms of accessibility and effectiveness, complaining is often therefore the most important public law remedy, and should be considered in every case.

3.2 Ombudsman schemes

51. Once a complaints procedure has been exhausted, there may be an onward right of complaint to an ombudsman. In some cases, particularly where what is being challenged is a public body’s policy or practice, an ombudsman can recommend (and in effect require) that it be changed.
52. The legal basis for a complaint to an ombudsman is different from the classic public law wrongs of illegality, unreasonableness or unfairness (see paragraphs 41-46 above). By contrast, ombudsmen have statutory powers to investigate maladministration (see paragraph 47 above) which causes the complainant injustice.

The broader purpose of ombudsmen's investigations is to achieve a rise in standards of public administration as well as settling individual grievances. To form the basis of an ombudsman complaint it is also necessary to identify an injustice which the complainant suffered as a result of the alleged maladministration.

53. There are a number of different ombudsman schemes, including the Parliamentary and Health Service Ombudsman (which deals with complaints against Government departments) and the Local Government Ombudsman (which deals with complaints against local authorities). Ombudsmen have powers to investigate allegations of maladministration, and publish reports of their findings. Their recommendations can include the ending of a policy or practice, and the payment of compensation to the complainant. Complaints should generally be made within 12 months of the act or omission complained of (though ombudsmen generally have discretion to investigate late complaints).
55. Ombudsman schemes can be effective. For example, in 2008, the Public Law Project received reports of local authorities recovering Council Tax arrears by using bankruptcy proceedings against debtors who owned their own home instead of the less draconian remedies available to them. Often these proceedings were brought against people with mental health problems who could not cope with paying their Council Tax bills or with claiming benefits. But the consequences of bankruptcy proceedings were often severe – as well as losing their homes, debtors could find that Council Tax arrears of as little as £750 could mushroom into a bill of tens of thousands of pounds once the costs of bankruptcy proceedings were factored in.
56. PLP considered that local authorities were under a duty to act proportionately (this means adopting measures that are appropriate to the scale of the problem they are intended to solve; in other words, not using a sledgehammer to crack a nut), and only to use bankruptcy proceedings as a last resort. We planned to bring a claim for judicial review in a suitable case to ask a court to give guidance on the issue. However each time we tried to bring a case to court, the local authority backed down, and discontinued the bankruptcy proceedings, to avoid the issue being scrutinised by the court. In the event, before a claim could be commenced, the Local Government Ombudsman published a report into a complaint against the use of bankruptcy by Wolverhampton City Council.³ The ombudsman held that it was maladministration for bankruptcy to be used by local authorities to recover Council Tax except as a last resort. Subsequent decisions of the Local Government Ombudsman held it to be maladministration for bankruptcy proceedings to be commenced by local authorities without checks first being made to see whether the local authority was aware of any mental health issues on the part of debtor.⁴
57. So on this issue, the Local Government Ombudsman effectively achieved all that we wanted and there was no need to bring expensive and complicated judicial review proceedings.
58. The main benefit of ombudsman schemes is that they are simple and cheap. They are good for systemic problems like delays where litigation in individual cases does not cure a systemic problem, and the Ombudsman's investigative powers can be helpful in finding out what is going on inside public authorities. Ombudsman schemes are also free and do not require advice from a lawyer. However they are slow to produce an

³ <http://www.lgo.org.uk/complaint-outcomes/local-taxation/local-taxation-archive-2005-to-date/wolverhampton-city-council-06b16600/>

⁴ <http://www.lgo.org.uk/complaint-outcomes/local-taxation/local-taxation-archive-2005-to-date/london-borough-camden-07-12661/>

outcome, and although ombudsmen can sometimes intervene quickly, they tend to become involved after the event, rather than to prevent problems arising in the first place. Further, ombudsmen have a discretion whether or not to investigate a complaint, and sometimes decide not to investigate, particularly where complaints are complex and an investigation would be resource-intensive and time-consuming. Ombudsmen are public bodies for the purposes of public law and so a decision not to investigate a complaint, or a decision to terminate an investigation, could itself (in principle) be challenged by judicial review.

3.3 Appeal procedures

59. Where public bodies make decisions that affect individuals (for example, a decision by the DWP not to award a benefit), it is important to establish whether there are any rights to review or appeal the decision. Where there is a right of appeal, typically to an administrative tribunal called the First-tier Tribunal, consideration should be given to pursuing it. Decisions on appeals can lead to changes in the law and practice of public bodies, but the timescales are lengthy, as the appeal generally has to proceed through the appeal system and into the higher courts, which can take years.
60. One of the fundamental principles of judicial review is that it is a remedy of last resort, to be embarked upon – in general – only after a claimant has exhausted all applicable appeal rights (see further paragraphs 87 below)
61. Legal aid for representation before tribunals is generally not available except in exceptional circumstances.

3.4 Reviews

62. Where public bodies take decisions that affect whole communities (for example, a decision by a local authority to cut services), there are unlikely to be any appeal rights, at least none that can be exercised by members of the community. However, there may be review procedures that can be triggered through community pressure.
63. For example, local authorities have a statutory duty to hold to account the authority's executive (eg, a Cabinet) by scrutinising its decisions. This function is carried out by a committee (sometimes more than one committee) known as an "overview and scrutiny committee", and the process by which a decision is scrutinised is known as a "call-in procedure". While a decision of the local authority's executive is being considered by an overview and scrutiny committee, it cannot be implemented, and if the committee is persuaded that the decision is wrong, it can require the authority to reconsider it.
65. A person or group that wishes to challenge a decision by a local authority's executive can therefore seek to prevent the implementation of the decision by triggering the call-in procedure, i.e. by persuading an overview and scrutiny committee to consider the decision. The call-in procedure varies from local authority to local authority. It is important to be aware of the time limit for a decision to be called in and how many councillors on which committee(s) are required to request that a decision be called in. This information is likely to appear in the authority's procedure rules, which should be available on its website or on request. Alternatively, you can ask your councillor.
66. Once an overview and scrutiny committee has been persuaded to call a decision in, it can hold a hearing at which it can require officers and members to attend to give evidence. The procedure rules will often specify the time within which a hearing must take place following a call-in. After the hearing, the committee can require the decision-maker to reconsider the decision. A majority of an overview and scrutiny

committee will usually belong to the governing party, which means that where there is a consensus among the governing party that a contentious decision should be made, the call-in procedure may not succeed in getting it changed. But where a decision is unpopular locally, and the ruling party is split, then if councillors can be persuaded to invoke the call-in procedure, it might provide members of the community with an opportunity to put pressure on decision-makers to think again.

3.5 Alternative dispute resolution

67. “Alternative Dispute Resolution” (or ADR) is the name given to a number of different schemes aimed at resolving disputes without the need for expensive litigation. There are several types of ADR including mediation, arbitration and conciliation schemes. Some schemes are legally binding, which means they preclude subsequent recourse to the courts, except to enforce an award. A general principle of ADR is that to be effective, both parties must commit to it. ADR is still more common in private law than public law disputes. The imbalance of power between the individual and the State does not lend itself to ADR in many circumstances. But if both parties agree, it can be cheaper, quicker and less damaging to relationships than litigation, and is particularly important where there is a relationship of dependency between the individual and the State which cannot be allowed to break down. As with outstanding appeal rights, ADR always needs to be considered before a judicial review claim is brought (see paragraphs 87 below).

4. An introduction to judicial review

68. Judicial review is a special type of court procedure where the judge looks at the public body’s decision, policy, practice, act or omission, and decides if it is lawful or not. If it isn’t, the court may quash the decision or action, and require the public body to reconsider it, lawfully.
69. Claims for judicial review are usually commenced in the Administrative Court (a branch of the High Court). However in certain circumstances, judicial review claims can now also be heard by the Upper Tribunal.
70. Judicial review claims are expensive to bring. They are heard by specialist judges, and claimants are well advised if possible to engage a solicitor and a barrister to represent them.⁵ Cases can take many months or years to be heard. In this regard it should also be born in mind that if a case is successful at first instance, it may well be appealed to the Court of Appeal, and from that court to the Supreme Court, by the public body defendant (which may be able to bear the cost of continuing the litigation more easily than an individual or a campaigning organisation or community group).
71. It is sometimes said that there is no such a thing as “a certain case”, but judicial review cases are more uncertain than most types of litigation because of the discretionary nature of the available remedies (see paragraph 83 below), the different approaches of individual judges to intervening in politically sensitive cases,⁶ and the ability of

⁵ It is possible for a judicial review claim to be brought by an individual without a lawyer to support them, but success rates in claims brought by unrepresented individuals (known as “litigants in person”) are very low, and this course of action is strongly discouraged, even where potential claimants consider themselves to be skilled lawyers. The courts are required to be accessible to litigants in person, and generally treat them with courtesy. But however well they consider themselves to understand the process, most litigants in person end up losing, incurring thousands of pounds worth of debt in the process and creating bad law.

⁶ Some judges tend to be more deferential to public bodies, and some tend to be more interventionist. It is not generally possible to know which judge will hear a claim until the day before the hearing.

defendant public bodies in some cases to re-take decisions and amend their policies in response to a claim, while proceedings are ongoing.

72. It is therefore crucial that expert legal advice is sought at the outset before a judicial review claim is pursued. What follows is designed to make such advice easier to understand, not to replace the need to take it.

4.1 What can be challenged by judicial review?

73. Judicial review can be used to challenge the lawfulness of decisions, acts, omissions, policies and practices (referred to below as “decisions”) that affect individuals. Only decisions by public bodies (see paragraphs 28-29 above for the definition of a public body) can be challenged by way of judicial review. The question whether a decision is amenable to judicial review is not always straightforward, and will often require legal advice.

4.2 Who can bring a claim for judicial review?

74. An applicant in judicial review must have sufficient interest in the claim (known in legal language as “standing”) to be permitted by the court to bring judicial review proceedings. What this means in practice is that the claimant must have sufficient connection to the subject matter of the claim. If the judicial review remedies potentially available from the court might make a practical difference to the individual claimant, then the test is likely to be met. The purpose of the sufficient interest test is to deter busybodies, but generally the courts take a liberal approach to this issue. However, where a claimant’s connection to the case (in terms of its practical effect on him or her) is more tenuous, it should not be assumed that the court will allow the claim to proceed, however strong and genuine the individual claimant’s political views about the dispute.
75. Where a decision or policy adversely affects a number of individuals in different ways, it may help to persuade a judge to allow the claim to proceed if separate claimants bring the claim jointly, each one showing a different aspect of the prejudice caused by the decision, policy or practice under challenge. For example, if a public body decided to cut funding to a local mental health service provider, a claim could be brought by a service user with chronic needs, a service user with moderate needs and a carer, all of whom would be able to demonstrate different adverse effects of the funding cut.
76. Claims for judicial review can sometimes be brought by non-governmental organisations (NGOs), whom the courts sometimes accept are bringing a case in the public interest (rather than for their own financial interests). For example, the environmental charity Friends of the Earth was permitted to bring a judicial review claim to challenge the government’s setting of the tariff for purchasing electricity produced by solar panels.
77. There is a tension between the court’s role of holding public bodies to account (which is particular to judicial review), and the court’s traditional role adjudicating over the rights of the individual. Ultimately the choice of claimant in a test case is partly strategic (who would make the “best” claimant(s)?) and partly inflexible (who has actually been affected by the decision, policy or practice in question, and who can fund a case, either by qualifying for legal aid, or otherwise?). These are questions on which advice must always be sought wherever judicial review is a possibility.
78. In human rights cases (where the claimants argues that the public body is acting incompatibly with the European Convention on Human Rights), a person has sufficient

interest only if he or she is a “victim”. In general this means that a claimant must be directly and adversely affected by the act or omission.

4.3 What is the time limit for bringing a claim for judicial review?

79. There is no fixed time limit for bringing a claim for judicial review (except where the claim concerns a challenge to a planning or procurement decision in which case fixed time limits apply – see below). Instead in all non-planning and non-procurement cases, a claimant is under a duty to bring a claim “promptly”. What “promptly” means depends on the facts of each case - in some cases it can be very short (a matter of days), but in every case a claim must be started within 3 months of the decision, act or omission complained of. “Promptly and in any event within 3 months” is a very short period of time indeed given all the different things that have to happen before a viable claim for judicial review can be launched responsibly (including in some cases, the need to prepare additional evidence). That means that every claim for judicial review is urgent, and in every case legal advice should be taken at the outset, preferably before the decision under challenge is even made. The Civil Procedure Rules (which govern court procedure) have recently been amended to require judicial review claims in (a) planning and (b) procurement cases to be brought, respectively, (a) within 6 weeks after the grounds to make the claim first arose, or (b) within 30 days of the date the claimant first knew or ought to have known that grounds for starting the proceedings had arisen⁷.

5. Judicial review remedies

5.1 Judicial review remedies explained

80. Six remedies (types of order) are available in judicial review cases:
- (1) A quashing order: this is an order that quashes a decision, setting it aside so that it has no legal effect. The court can make a quashing order in relation to an invalid decision that has already been made, for example, an unfairly reached decision that someone is does not qualify for community care services. The authority is then obliged to take the decision again applying the proper legal test or by a fair procedure.
 - (2) A prohibiting order: this is similar to a quashing order but acts at an earlier stage prohibiting a public body from acting unlawfully.
 - (3) A mandatory order: this order enforces the performance of a public duty for example, to make a water authority carry out tests on polluted water where it is under a duty to do so or to oblige a local authority to carry out a community care assessment. This includes enforcing the duty to reach a discretionary decision, for instance by making a public body consider an application for a facility or benefit (though it cannot be used to determine the outcome of the exercise of the discretion).
 - (4) An injunction: this is an interim order compelling the public body defendant to perform, or not to perform, a specified act while the judicial review proceedings are ongoing.
 - (5) A declaration: this is an authoritative ruling on the rights of the parties, or the state of the law. It is a non-coercive form of relief: in other words, by a

⁷ See CPR Part 54.5(4)-(6) at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54#54.5>

declaration, the court can declare the law or the respective rights of the parties without making any order against the public body defendant to do a particular thing. A declaration might be made, for instance, concerning the proper way to interpret a piece of legislation in future.

- (6) Damages: the failure of a public authority to act in accordance with public law principles does not in itself give rise to a right to financial compensation. Traditionally, damages were rarely awarded in applications for judicial review and they were not available to compensate people who merely have had unlawful decisions made against them. There had to be a separate and recognised legal claim, for example, in negligence or breach of statutory duty, which was proven (although damages may be available for a breach of section 6 of the Human Rights Act 1998).

81. In addition, under the Human Rights Act 1998, higher courts and tribunals may in certain cases grant declarations (called “declarations of incompatibility”) where a piece of legislation cannot be read compatibly with the European Convention on Human Rights. The consequences of granting such a declaration will not, of itself, provide the client with a practical remedy. In the legal system of England and Wales, Parliament is supreme, and a declaration of incompatibility is, so far as Parliament is concerned, merely a legal opinion. Parliament can take heed of it, but is under no obligation to take action to amend the legislation. However, a declaration of incompatibility creates political pressure to amend the law, and can provide focus to lobbying efforts.

5.2 The limits of judicial review remedies

82. It is important to understand the limits on the remedies available in judicial review cases.
83. Firstly, unlike in other types of litigation, there is no absolute right to a remedy, even if a claimant establishes that a public body acted unlawfully. Remedies in judicial review cases are always discretionary and can be withheld by the courts. The court may take account of a range of factors in deciding whether or not to intervene. Indeed it is not uncommon for the judicial review courts to rule that a decision was unlawful but to decline to make an order in favour of the claimant, for example because the judge concludes that the claim was brought too late, or because the decision would be bound to be the same even if it was retaken properly, or because the requirements of good administration mitigate against the making of an order.
84. Secondly, the judicial review courts are generally more comfortable looking at the process by which a decision, policy or practice was formulated (including what legal and evidential factors were taken into account), as opposed to directly assessing the efficacy of the decision, policy or practice under challenge⁸. The reason for this is that judges are aware of the limitations both of their expertise and of their constitutional role: judges are (or should be) experts at weighing evidence, and interpreting and applying the law. They are not necessarily experts at anything else, and will generally be very reluctant to reach conclusions that go beyond the evidence before them.
85. As well as lacking expertise in formulating policy, judges are often sensitive to the risk that their decisions could be said to lack democratic credibility because they are not elected. This means that they will be reluctant to put themselves in a position where

⁸ The classic exception to this rule is where the decision, policy or practice is so unreasonable, that it “defies logic”, but the courts regard this as a high threshold for a claimant to meet, and challenges on this ground are only very rarely successful.

they could be criticised for making policy. For example, in considering a challenge by way of judicial review to a decision by a local authority to cut funding for local services, a judge will be keenly aware that it is for the local authority, and the electoral process, to determine priorities for how public money is spent, not for the (unelected) court. So while the court will look at the procedure by which the decision to cut services was taken, and may intervene if the procedure was unlawful, the court will generally not require money to be spent on funding the service in question, on the basis that (if a lawful procedure has been followed) how a local authority spends its money should be subject to electoral rather than legal sanction.

86. This means that in general, judges regard themselves as unable to substitute their own decision for that of the defendant. So when a public body's decision, policy or practice is quashed, the court is likely to focus on ensuring that the defendant public body re-takes the decision properly rather than mandating a particular outcome. There may well be a risk that, where an order of this sort is made, the public body will re-take the decision by going through a lawful procedure, and will then arrive at the same decision, this time in a way that cannot be challenged by judicial review. It is therefore essential that expectations of what can be achieved through judicial review (including the risk of such an outcome) are clarified by taking expert legal advice at the outset, and certainly before a case is commenced.

5.3 Alternatives to judicial review

87. The range of potential public law remedies are considered above (at paragraphs 80-81). In any potential case, it is crucial to be aware of what other remedies there may be beside judicial review. This is because:
- (1) Judicial review is not always a practical option, for example if a complainant is not eligible for legal aid and cannot afford to fund a case privately, or if a claim for judicial review is out of time. In those circumstances, a strategy may have to be constructed around a cheaper and less urgent remedy (such as a complaints procedure – see paragraphs 50 above).
 - (2) The court will generally refuse permission for judicial review cases to proceed, if there is an alternative, equally effective, remedy open to the person bringing the case, and the alternative remedy has not been used or exhausted.
 - (3) Where a claimant applies for legal aid to enable a claim for judicial review to be funded (see paragraph 91 below), it will be a pre-condition to a grant of public funding that there is no suitable alternative remedy.
88. The existence of an alternative remedy (and if one exists, the extent to which it is an effective remedy which would prevent a claim for judicial review), should be considered whenever legal advice on a potential claim for judicial review is sought. When considering whether an alternative remedy would be effective, a number of factors are relevant including:
- (1) The length of time it would take for the alternative remedy to review the act or omission under challenge; and
 - (2) Whether the alternative remedy can make a decision on the issue that binds the local authority.
89. The question of whether an effective alternative remedy exists is a complex one and it is important to get legal advice on this issue as soon as possible.

6. Funding a claim for judicial review

90. Potential judicial review claimants will seek advice initially from a solicitor. The solicitor may instruct a barrister to give preliminary advice on certain aspects of the case, or to draft the formal legal documents and represent the claimant if a claim goes ahead. The solicitor is responsible for instructing the barrister who is either paid by the solicitor (with money obtained from the client, or from the other side if the case is won and the other side is ordered to pay the costs of the case), or by the State, if legal aid is granted.
91. Solicitors and barristers are expensive, and so bringing a judicial review is expensive. If a case proceeds to a full hearing and the claimant loses the costs can be upwards of £30,000. However, there are a number of ways that judicial review claims can be funded:
- (1) Privately: a claimant(s) can fund a judicial review from private means. This could mean an individual funding a claim or a community group raising a collective fund to enable an individual claimant to bring a claim that affects the wider community.
 - (2) Legal aid: legal aid may be available to fund - or partially fund - a judicial review claim, although with some important riders. The legal aid scheme in England and Wales is administered by a part of the Ministry of Justice called the Legal Aid Agency, in accordance with the Legal Aid and Sentencing of Offenders Act 2012 (LASPO), and regulations made under that Act. Legal aid warrants a guide of its own, and is beyond the scope of this document, but in brief, eligibility for legal aid depends on whether the type of work for which legal aid is sought is listed in Part 1 of Schedule 1 to LASPO, and if it is, whether the Legal Aid Agency makes a determination that an individual should receive funding for their case. In deciding whether to make such a determination, the Legal Aid Agency will take into account the individual's means (there are separate income and capital tests), and the strength of the individual's case (legal aid is in general granted only in those cases with sufficient prospects of success). A grant of legal aid serves two main purposes: (i) it means that the legally aided individual's lawyers can get paid; and (ii) it means that the legally aided person will not in practice have to pay the other side's legal costs if the claim is unsuccessful (unless their financial position improves and the other side obtain a further order from the court permitting the recovery of costs). In practice costs are not recovered from legally aided litigants who lose. Depending on the claimant's means, and whether other people stand to benefit from the case (if it is successful) beyond the individual concerned, the Legal Aid Agency may refuse legal aid because there is alternative sources of funding, or else require a contribution towards the cost of the case from members of the community who might benefit from the claim (see sections 7.14-7.15 of the Lord Chancellor's Guidance on Civil Legal Aid and Regulation 44 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013). A fighting fund may need to be raised in a very short period of time, for example in order to comply with the duty to act promptly in judicial review cases.

Although beyond the scope of this document, we should refer readers to a telephone advice line operated by PLP which deals with queries about legal aid. The advice line can be reached between 10am and 11am on Mondays to Wednesdays and Fridays on 020 7843 1268 or for members of the public on a Freephone number: 0808 165 0170.

- (3) Conditional Fee Agreement (CFA): a CFA is an agreement reached between a claimant and their lawyer. The basic principle is that if the claimant loses the case they will not be liable for their own legal costs, and if they win, the defendant public body will be ordered to pay the claimant's costs. The problem is that a CFA does not cover the defendant's costs if the claimant loses the case (see below). It may be possible to obtain after the event insurance to cover the defendant's costs (see above).
- (4) Pro bono: It may be possible for a claimant's lawyers to agree to act for free (pro bono) to bring a judicial review claim. However, it must be remembered that there will still be some fees (see below) that need to be paid to the court in order to bring the claim. Furthermore, whilst having lawyers who will work for free will reduce the claimant's costs, it will not address the risk that the claimant will be liable for the defendant's costs if the claim is lost.
- (5) Protective costs orders (PCOs): A protective costs order protects a claimant from having to pay the entirety of the defendant's costs in the event that the claimant loses the case. PCOs are available in cases involving environmental issues and cases where the claim is in the public interest or of significant public importance. A claimant's application for a PCO will usually be considered by the court at the same time as it decides whether to grant permission for the judicial review to proceed (see below). If a PCO is granted by the court it will either order that the claimant will not have to pay any of the defendant's costs or that the amount that they will have to pay will be capped to an amount that the claimant can afford. The level of the cap will be decided by the court. If a claimant successfully obtains a PCO they can proceed with the judicial review safe in the knowledge that they are protected from the full financial risks of losing their claim. The courts have been reluctant to grant PCOs where claimants have a private interest in the proceedings (ie where they stand to gain in a practical sense if the proceedings are successful). For this reason, PCOs are typically sought by NGOs and are generally of less relevance to private individuals.

7. Costs in judicial review cases

- 92. The general rule in judicial review cases is that the losing party will be ordered to pay the winning party's costs (although this rule does not apply in practice in legal aid cases). A party's "costs" include court fees and lawyers' fees and they can be very high, particularly in lengthy or complex cases.
- 93. It is possible for claimants to get after the event insurance to cover a defendant's costs in the event that the claimant loses the case. Some home contents insurance policies include this type of insurance. However, because of the unpredictability of judicial review proceedings most policies exclude judicial review proceedings and so this is unlikely to be a valid option for judicial review claimants. This means that judicial review proceedings should not be commenced unless the claimant has been advised about whether there is a risk that s/he will be ordered to pay the defendant's costs if the claim fails, and in that event, how that can be managed.

8. Judicial review procedure

- 94. The process of bringing a judicial review claim has three main stages:
 - (1) the pre-action stage

- (2) the permission stage
- (3) the full hearing

8.1 The pre-action stage

95. The pre-action stage is the first step in bringing judicial review proceedings. It involves the claimant sending what is called a “pre-action letter” to the defendant. This letter outlines details of the decision, practice or policy that is under challenge and sets out the reasons why the claimant thinks that that it is unlawful. The letter should also state what the claimant wants the defendant to do (for example, change the policy or re-make the decision) and in what time scale. The letter should then ask the defendant to respond within a specific time period, usually 14 days (this can be shortened in urgent cases). Finally, the letter should state that if a satisfactory response is not received within that time period, judicial review proceedings will be issued. Information about the pre-action protocol including the suggested format of a pre-action letter is published by the Ministry of Justice here: http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv#IDAGJKCC.
96. The purpose of the pre-action letter is twofold. First, it puts the defendant on notice that the claimant is contemplating bringing proceedings against it and gives it an opportunity to look into the alleged unlawfulness and respond to the allegations. Second, it gives the defendant a chance to remedy the problem or suggest a solution before court proceedings are commenced.
97. The defendant’s response must set out either the basis on which it thinks that the decision, practice or policy is lawful and why the claimant’s position is wrong, or whether it agrees that its own position is wrong. If the defendant agrees that it has acted unlawfully it should set out how it proposes to remedy the situation and/or enter into negotiations with the claimant to agree the terms of a settlement. If the situation is remedied by the defendant or an agreeable settlement is reached the judicial review claim will go no further.

8.2 The permission stage

98. If there is no response to the pre-action letter or if the response is not satisfactory, the next step is to make an application to the Administrative Court for permission to bring a judicial review claim against the public body. There is a £60 fee for making the application. A copy of this application must be served on the defendant.
99. At the permission stage the claimant should consider:
 - (1) applying for a protective costs order (see paragraph 91(5) above).
 - (2) whether an interim remedy (see paragraph 80(4) above) is needed to prevent the public body from enforcing its decision, practice or policy before the court has decided whether it is lawful. If an interim remedy is needed it should be requested in the application form and the claimant should ask a judge to make an urgent decision on the papers about whether the interim remedy should be granted.
 - (3) whether there are any other individuals or organisations who should be told about the judicial review so that they can get involved or assist the claimant (see further below).

100. Once the claimant has filed the application for permission the defendant will normally file and serve an acknowledgement that it has received a copy of the application (an “acknowledgement of service” in legal language) and a document setting out the basis on which it intends to defend the claim (known as “summary grounds of resistance”).
101. The claimant’s application and the defendant’s summary grounds of resistance will then be put before a judge, who will decide whether to grant permission for the judicial review to proceed to a full hearing (see below). This decision will be made on the papers, which means that there are no oral arguments and no one needs to attend court. The test for granting permission to bring a judicial review is whether the claim is “arguable”.
102. If the judge considers that the claim is arguable he or she will grant permission it to proceed to a full hearing. If the judge refuses permission then the claimant has seven days in which to request that the decision be reconsidered at an oral hearing. The seven day time limit starts to run on the day that the claimant is notified of the judge’s decision. An oral permission hearing will be before a judge in the Administrative Court. Both parties can attend the oral hearing and put forward their arguments as to why the claim should or should not be granted permission.
103. If the judge at the oral hearing refuses permission then the claimant can appeal the refusal to the Court of Appeal. In order to do this the claimant must first ask the Administrative Court judge to grant permission to appeal to the Court of Appeal and, if permission is refused, can make a written application for permission to appeal to the Court of Appeal itself. This must be done within seven days of the refusal of permission by the Administrative Court. At the time of writing, the Government is consulting on a proposal to restrict claimants’ right to renew permission applications to an oral hearing in certain circumstances.

8.3 The full hearing

104. If permission to bring a judicial review claim is granted it will proceed to the final stage: the full hearing. In order to have the full hearing the claimant must pay the court a further fee of £215 within seven days of the decision to grant permission.
105. Within 35 days of the decision to grant permission the defendant must file and serve its detailed grounds of resistance setting out in greater detail the basis upon which it intends to resist the claim. This must include any written evidence it wishes to rely on.
106. The full hearing will then take place before a judge in the Administrative Court. This may be many months after the permission decision, although this will depend on the urgency of the case. The full hearing will involve lawyers from both sides making arguments about the lawfulness of the decision, policy or practice in question. It is very unlikely that the claimant will need to give evidence or be questioned – the lawyers and the judge will do the talking!
107. At the end of the full hearing the judge will usually say that he or she will “reserve judgment”. This means that a written judgment will be given at a later date. Sometimes the judge will give judgment on the day (known as an “ex tempore judgment”), but this is unusual. Once the judgment has been given the parties will then have an opportunity to make representations to the judge about costs. As stated above, the standard position is that the losing party pays the winning party’s costs.
108. The losing party may want to appeal the judgment. Seeking permission to appeal at this stage follows the same process as that outlined above. The losing party must first

ask for permission to appeal to the Court of Appeal from the Administrative Court. If permission is refused they can renew their application for permission to the Court of Appeal directly. This must be done within seven days of the judgment being given.

9. A step-by-step guide to judicial review

109. The following step-by-step guide for potential judicial review claimants will make reference where appropriate to the general principles set out above. The 7 steps are:

- (1) Identify the problem
- (2) Seek legal advice
- (3) Gather evidence
- (4) Decide how a case is going to be funded
- (5) Look for support
- (6) Develop a press strategy
- (7) Win the litigation

These are considered in turn.

Step 1: Identify the problem

110. In order to develop a strategy you must first try to identify exactly what the problem is, when it arose, who is responsible for it, and what authority they were acting under.

111. To work out **what the problem is** you will need to establish the following:

- (1) Is the problem a positive decision that a public body has made (for example, a decision to close a hospital or a library)?
- (2) Alternatively is the problem a failure by a public body to do something (for example, a failure to carry out a community care assessment on a disabled person in need of such services)?
- (3) Is the root of the problem a public body's policy or practice (for example, a policy of refusing to provide community care services to people unless they have critical needs will always be a problem for those with only moderate needs). It is important to identify any such policy or practice even though in general, the object of a judicial review challenge will usually be a decision or a failure to make a decision.

112. Then you will need to think about **when the problem arose**. This is a very important question in the context of judicial review proceedings because of the strict time limits that apply. As stated above (at [paragraph 79](#)), judicial review proceedings must be brought "promptly", and in any event within 3 months⁹. What this means will differ from

⁹ At the time of writing, the Government has received consultation responses on proposals to reduce this long-stop period in certain types of judicial review case – see PLP's consultation response at: <http://www.publiclawproject.org.uk/documents/Public%20Law%20Project%20response%20to%20JR%20consultation.pdf>)

case to case but in order to fulfil the requirement you need to act as quickly as possible at every stage. Whatever the facts of your case, a judicial review claim must be brought within three months of the decision, act or omission complained of. The question of timing is a complex one and so it is important to get legal advice as soon as possible after you become aware of the problem or of the risk that the problem might arise.

113. If the problem is a specific decision that a public body has made, then it will have arisen on the date that the decision was made (although where there was a delay between the date a decision was made, and the date it was communicated to a claimant, the court is likely to take that into account in considering whether the claimant acted promptly).
114. Where the problem is a failure by a public body to make a decision, it may be possible to argue that the failure is ongoing so that it should not be time-barred. However, strict time limits may still apply and so as soon as you are aware of the policy or practice you need to act quickly and should seek legal advice as soon as possible.
115. Finally you will need to think about **who is responsible** for the decision, policy or practice, or omission. This involves finding out who made the decision and under what powers. For example, if the problem arises from the decision to close a hospital, you need to work out whether the decision was taken by the NHS Trust, the local authority or the Department of Health.
116. Once you have identified who is responsible for the decision you need to think about **what authority they were acting under** when they made the decision. This means identifying the legislation (primary, secondary or, in some circumstances, European) that gave the public body the authority to act. Then you need to identify the nature of that authority. This means working out whether the public body had a power to act as it did. If it did have a power to take action, you need to work out the extent of that power and think about whether the public body went beyond it: remember that no power is absolute. You also need to think about whether the public body had any duties to comply with when it exercised its power. Ask yourself whether the public body fully complied with its duties. At this stage it is also important to think about whether the problem touches on any human rights or Equality Act 2010 issues.
117. Finally, you should consider whether there are any relevant policies or guidance that the public body ought to have followed. If there are, you should think about whether the public body has complied with them and, if not, whether it has given a good reason for not doing so.

Step 2: Seek legal advice

118. As soon as you have identified the problem, and think that there is a chance that judicial review might be appropriate, you should seek legal advice to establish whether judicial review is feasible, and if it is, the costs and risks of bringing a claim, and what you might gain if it is successful. This should be done at the earliest opportunity so as not to fall foul of the time limit by when any claim must be issued. Every public lawyer is familiar with a client who has sought advice in order to bring a claim which was strong but which could not be brought because the client sought advice too late. Where judicial review is a possibility, you must act with urgency. Every day counts.

Finding a solicitor

119. Legal advice can be provided by a solicitor who specialises in public law (the area of law which concerns challenges to the decisions made by public authorities). You can search for a suitable solicitor through the Civil Legal Aid service's Legal Adviser Finder (<http://find-legal-advice.justice.gov.uk/>). Using this search engine you can locate solicitors in your area who have expertise in public law. The Law Society, the body that represents solicitors in England and Wales, also provides a similar search engine: <http://www.lawsociety.org.uk/find-a-solicitor/> (see further paragraphs 165-172 below).
120. A solicitor must consider whether they have competence in the area of law with which your case is concerned before agreeing to give legal advice. The level of knowledge and experience a solicitor has in the *specific* law and practice relating to the decision or policy you are seeking to challenge may be key to how they advise you. As such, before making a decision on which solicitor to seek legal advice from, you should research their areas of specialism. This can be done by checking a solicitor's firm's website, or by contacting a solicitor's firm and asking for details of their expertise in relation to the type of decision or policy which you wish to challenge.

Advice to seek from a solicitor

121. Once you have secured an appointment with a solicitor, you will need to ensure that he or she provides you with the advice that you need, to enable you to decide how to proceed, and in particular whether to bring a judicial review claim. To ensure you have all the advice you need, you may wish to ask your solicitor the following questions (each of which is considered in more detail below):
- (1) Can the problem be challenged by way of judicial review?
 - (2) Is there an alternative remedy that should be pursued instead of judicial review?
 - (3) Is it too late to bring a judicial review?
 - (4) Do I have sufficient interest to bring a judicial review (or would someone else be better suited to bringing a claim)?
 - (5) Are there grounds for bringing a judicial review?
 - (6) Which judicial review remedies is the court likely to order, and would this solve the problem?
 - (7) How can a judicial review claim be funded?
 - (8) What evidence is needed to bring the case?
 - (9) What are the chances that the case will succeed?
 - (10) Which barrister does the solicitor propose to instruct to work on the case?

Can the problem be challenged by judicial review?

122. Your solicitor will be able to advise you on whether your problem is one that can be challenged by way of judicial review. This means that the solicitor will work out whether a public body is responsible for the decision, omission, practice or procedure complained and whether judicial review is available to challenge that decision, omission, practice or procedure.

Is there a suitable alternative remedy that should be pursued?

123. One of the key things to think about with your legal adviser is whether there are other suitable ways of solving the problem, without resorting to judicial review. There are three main reasons for this: firstly, judicial review is a remedy of last resort and the courts may refuse to hear a judicial review claim if the problem could have been solved another way. Secondly, judicial review is expensive and there may be cheaper ways of solving the problem. Finally, judicial review remedies are discretionary (see paragraphs 83 and 81 above). This means that even if someone wins their judicial review they may not get the remedy they have asked for. If there is a way of bringing about change without relying on discretionary remedies, this may be preferable.
124. This means that you and your legal advisor must consider whether the problem could be solved effectively by an alternative to judicial review, including whether there is a complaints procedure, ombudsman scheme, statutory appeal or review that may be sufficient (see paragraphs 48-67 above).

Is it too late to bring a judicial review?

125. Judicial review claims must be brought “promptly”. What this means depends on the facts of each case. Whatever happens, judicial review claims must be brought within three months of the decision, omission, policy or practice complained of. A solicitor will be able to advise you about whether you are too late to bring a judicial review or whether there are exceptional circumstances that could mean that the time limit can be extended (see paragraph 79 above).

Do you have sufficient interest to bring a judicial review?

126. Your solicitor will be able to advise you about whether you have sufficient interest to bring a judicial review claim. To do this your solicitor will consider the impact of the public body’s decision, omission, practice or policy on you. It might be that your solicitor thinks that another person is more appropriate to act as the claimant in the judicial review or that there should be multiple claimants (see paragraphs 74-78 above).

Are there grounds for bringing a judicial review?

127. Your solicitor will consider whether the problem can be challenged using the grounds of judicial review:
- (1) Has the public body acted unlawfully? This includes considering whether the public body has breached its human rights, equality or European law duties.
 - (2) Has the public body acted unreasonably?
 - (3) Has the public body acted unfairly?

See paragraphs 41-46 above.

Which judicial review remedies might solve the problem?

128. If you and your legal adviser consider that judicial review is the only effective way to try and solve the problem, think about which of the judicial review remedies you want to ask the court to grant, i.e.:

- (1) Quashing order
- (2) Mandatory order
- (3) Prohibiting order
- (4) Declaration
- (5) Damages.

129. Also remember to think about whether you need to ask the court for an injunction to stop the public body enforcing a decision or applying a policy while you are bringing your claim. See further paragraphs 80(4) and 99(2) above.

How can a judicial review claim be funded?

130. If you and your legal adviser decide that judicial review is the only effective way to try to solve the problem then you must go on to consider how the claim will be funded. This means that you need funding for your own lawyers and you need to manage to the risk that you will be liable for the defendant's costs if you lose the case. When thinking about funding you need to consider the following options:

- (1) Legal aid
- (2) Private funding (either by an individual or by a group)
- (3) Conditional Fee Agreements
- (4) Pro bono
- (5) Insurance
- (6) Protective costs orders

See paragraph 91 above for an explanation of how these options work in practice.

131. Funding is a vital consideration that needs to be considered at the outset. A claim should not be issued before funding arrangements have been carefully considered and agreed. Given its important, this is identified as a separate step, below.

132. The question of funding may inform the decision about who is going to be the claimant in the case. It may be more sensible for the claimant to be someone who is eligible for legal aid (see paragraph 91(2) above) or for a group of people who are all affected by the public body's decision, policy or practice, to join together and share the financial burden of litigation. Where the decision, policy or practice affects a wider community, a fund could be put together to cover the costs risks of bringing a claim (see paragraphs 154-155 below).

What evidence is needed to bring the case?

133. Your solicitor should advise you on the kind of evidence that will be required to strengthen the judicial review and maximise the chances that it will succeed. This will involve thinking about the different types of evidence that are available and whether or not you or your solicitor will be able to obtain them.

What is the chance of winning the case?

134. Once he or she has had time to look closely at the potential claim, a solicitor should be able to give you some advice about the strength of the claim. Sometimes a solicitor will give the claim a percentage chance of success, or ask a barrister to consider how likely it is that the claim will succeed. The solicitor should also advise you on the chances of getting the remedy that you want. This information will help you decide whether you want to pursue the claim.
135. Even if there is a potential case, you must never lose sight of the fact that there is no such thing as a certain case. Litigation can backfire in a number of ways – every case can be lost, often at ruinous expense to those bringing it, and sometimes even if a case is won, the result may not be as rewarding as was hoped. So litigation should never be commenced lightly, or without expert advice.

Which barrister does the solicitor propose to instruct to work on the case?

136. If you decide to take the case forward your solicitor will instruct a barrister to assist with the case. The barrister will do research on the legal points, draft documents for the court and, if the case goes to a hearing, make oral arguments before the judge. Although it is a solicitor's job to instruct a barrister, this is a key decision in any case (as, like all professionals, barristers vary greatly in their skill levels and areas of expertise), and you should have input into the choice of barrister. Solicitors often build close working relationships with individual barristers. While this can aid effective collaboration, and so is not necessarily a bad thing, it is important to select the best barrister for the particular case, and that choice should be enhanced rather than clouded by the solicitor's working relationships. A reputable solicitor will not be offended if you ask for his or her suggested choice of counsel to be discussed with you, and subjected to your scrutiny and potential veto.

Step 3: Gather evidence

137. In order to help you and your legal adviser work out whether a decision or policy could be judicially reviewed and how strong the claim might be, it is necessary to find evidence which shows that there is a problem, and that the problem is caused by the decision or policy. There are lots of different types of evidence and it is important for you and your solicitor to think carefully about what types of evidence might be available, how and when the evidence can be obtained and how strong the evidence is.

Evidence from the individual claimant(s)

138. Evidence from you as the claimant(s) is vital to showing how the decision, omission, policy or practice adversely affects you. The nature of this evidence will depend on the type of case but it might include a statement explaining your situation, evidence of your financial position, medical evidence, evidence of your attempts to resolve the problem with the public body before turning to judicial review or evidence of your engagement with the public body on the issues (for example, consultation responses or attendance at public meetings).

Evidence from the public body

139. Information about the decision, policy or practice may be available from the public body itself. Public bodies publish general information on their website, including minutes of meetings, reports, guidance, policies and procedures. These documents

might be useful in demonstrating that a decision has been reached unfairly or unreasonably or in showing that a public body has not adhered to its guidance.

140. For information that is not in the public domain, you can consider asking the public authority who made the decision or policy for information, by using your 'right to know' as set out in the Freedom of Information Act 2000 (FOIA 2000). The purpose of using the FOIA 2000 in judicial review proceedings is to get information about the decisions, policies and practices of a public body that might be useful in showing that they are unlawful, unreasonable or unfair. The Information Commissioner's Office provides a description of the types of information that can be asked for under the FOIA 2000, exemptions from and restrictions on the 'right to know', and explains the procedure which you need to follow to make a request: www.ico.gov.uk/for_the_public.aspx. A more detailed guide on how to use the FOIA 2000 can be found here: www.cfoi.org.uk/pdf/foi_guide.pdf.
141. You should be mindful of the time limit by which a claim for judicial review must be issued before making a FOIA request. A public authority normally has 20 days from the date of receiving your request in which to respond, and you may have to make a further request to the public authority or request a review if their initial response is unsatisfactory. Because of the delays that can arise when using the FOIA request procedure, it may be necessary to take legal advice before making a request for information, in order to ensure that a claim can be issued within the time limit.
142. Before making a request for information under the FOIA 2000, you should bear in mind that the information might already be publicly available. The website www.whatdotheyknow.com provides a database of previous FOIA requests made to public authorities, which you can search by subject or by public authority. Checking these sources first may save you from having to make an unnecessary FOIA request.

Evidence from interested groups or organisations

143. In order to show that the public body's decision, omission, practice or procedure will affect the wider community, it is often helpful to contact organisations who work with or represent people who are likely to be adversely affected by it. Such organisations include NGOs, charities, support groups, pressure groups, service user groups and community groups. These organisations may be able to provide valuable evidence about people's situations and experiences, either demonstrating the effect that the public body's decision, omission, practice or procedure has had, or will have, on those people. The evidence might be in the form of case studies, answers to questionnaires, statistics, or statements from experts, caseworkers, campaigners or policy officers working in the field.

Step 4 – make a final decision about how a case is to be funded

144. See paragraphs 91-93, and 130-131 above.

Step 5 – look for support

145. It is important for a guide to strategic litigation to acknowledge that litigation is rarely a complete solution. A multipronged approach will maximise the prospects of a successful outcome. You are more likely to achieve change through strategic litigation if you have the support of as many other groups and individuals as possible. You should start developing your support base at the outset and continue to build your campaign throughout the litigation process. Support can be had from neighbours,

community groups, service user groups, trades unions, NGOs and charities, academics, relevant professionals or recognised experts, politicians and journalists.

146. Seeking support of this kind is important for a number of reasons, each of which will be considered in more detail below:

- (1) To lobby effectively
- (2) To publicise the issue
- (3) To obtain useful background information
- (4) To seek supportive evidence
- (5) To fundraise

To lobby effectively

147. Litigation will rarely provide a complete solution to a problem. One of the benefits of strategic litigation is that it can create the space for a political solution. The reason for this comes from the different roles performed by judges and politicians under our constitution, and the limitations of judicial review remedies (see paragraphs 82-86 above). Where a judicial review claim succeeds, it is common for the court to order the public body to re-take its earlier decision, in accordance with the law as set out in the court's judgment. There is therefore a risk that the public body will re-take a decision by going through a different (this time lawful) procedure but will arrive at the same outcome, this time in way that cannot be challenged by judicial review. This is where lobbying can be crucial.

148. Lobbying is a way of trying to persuade decision makers to bring about change. Successful lobbying may bring about more widespread and lasting change than an individual judicial review claim. You might decide to lobby for change after your legal challenge has been won or lost, or you might want to use lobbying as a complementary approach to litigation, running the two in parallel. The Tony Nicklinson 'right to die' case is an example of strategic litigation with a high profile press and lobbying strategy. In that case ensuring that the issues received public attention and support may have been an important objective in its own right.

149. The organisation United Against Racism has produced a useful step-by-step guide on how to lobby, which can be read here:

www.unitedagainstracism.org/pages/info21.htm#1. If you are thinking of lobbying for your cause, consider approaching the following people:

- (1) Your MP
- (2) Your local councillors
- (3) The government minister responsible for the issue
- (4) MPs of members of the House of Lords who have expressed support for the issue in the past
- (5) Members of relevant Select Committees or All Party Parliamentary Groups.

To publicise the issue

150. Contacting friendly journalists can be part of the lobbying process, although it has to be carefully managed. Community activists often get a bad press from certain sections of the media, and the wrong sort of publicity can raise the political temperature, and make it more difficult for judges to intervene in the way you want them to. Publicity may also make it more difficult for decision-makers to do the right thing for fear of being seen to back track or to avoid losing face. However, publicising the issues can be an important way of gaining public support and political attention (see further step 6 below).

To obtain useful background information

151. Decisions are rarely taken, and policies are rarely formulated in a vacuum. Learning about the history of a public body's policy, practice or decision will help you to challenge it. Legally relevant questions include what evidence was taken into account by which decision maker(s) and on what date(s). It will sometimes make sense to make contact with people who may know more about these matters than you, and who may be natural allies. For example, in a where the issue arises from a local government decision, you may want to contact a councillor, a local journalist, a local health or education professional, or a locally-based NGO.

To seek supportive evidence

152. Lawyers and judges are supposed to be expert in law. But it would be wrong to assume that they are experts in anything else. Where a complaint about a decision or a policy by a public body raises issues requiring specialised knowledge, it is usually worth considering whether professionals or specialist organisations in the field would support the complaint. For example, if a health authority cuts community mental health services, anyone wishing to challenge that decision should not assume that a judge will necessarily accept that that cuts to services will result in an adverse impact to the health of service users, particularly if this is disputed by the public body. All that a judge can do is assess the evidence before him or her - and if there is no direct evidence of adverse impact to health, or if the evidence is unclear, there is a risk that a judge will decline to conclude that an adverse impact exists. That makes expert evidence from professionals, academics, specialist organisations and experts in the field potentially very useful for campaigners. A court may view such evidence as more accurate, objective and impartial than the evidence of a lay person, particularly if that lay person is a known activist.
153. In addition to providing expert evidence in support of a claim, some specialist organisations might want to be involved in the case more formally. Organisations like NGOs can apply to the court to intervene in judicial reviews where they believe they can provide independent, expert evidence that will assist the court in making its decision. Where organisations are known to support the claimant's position it is worth contacting them to ask them to consider intervening. Judges may take the interventions seriously because they are objective contributions to the proceedings.

To fundraise

154. If litigation is to be a viable option, there are likely to be cost implications. These basically break down into two categories:
- (1) Paying for your lawyers;

- (2) Paying the legal costs of the public body against whom you wish to bring a case (if the case is lost), or raising money to insure against that eventuality.

These matters are considered in detail in section 4 above.

155. It may therefore be necessary for you to raise money to bring a case. Getting support from a range of individuals and organisations may help with this. For guidance on legal fundraising, best practice, support and ideas, see the Institute of Fundraising's website: www.institute-of-fundraising.org.uk/guidance/five-minute-fundraiser/

Step 6 – develop a press strategy

156. Having a carefully thought-out press strategy can be an effective way of supporting strategic litigation, lobbying for change and gaining popular support. You should plan your press strategy around the different stages of litigation. This means that you will need to think about publicity around the permission decision, the full hearing and the judgment. You may also want to continue to publicise the issue after the case has finished. For example, if you win the case you may want to use the media to draw attention to the poor practices of the public body in order to put pressure on them to make substantive changes to the way they make decisions and to demonstrate the power of judicial review to other public bodies. If you lose the case, you may want to use the media to lobby for political change and sway public opinion in your favour.
157. Here are some tips for developing an effective press strategy:
 - (1) Identify the key issues in your case and why they are important for the public. Try to encapsulate this in three or four short sentences. You can then use these sentences to describe the case in press releases, leaflets, on your website or social media pages and when speaking to journalists.
 - (2) Focus your press strategy around the different stages in the litigation and give regular updates about what stage the case is at and when the next stage will take place.
 - (3) Journalists will often be interested in a personal story so think about whether there is a back story that will make the case more human and accessible for the public. If there is, pitch the story as an exclusive to a journalist in the lead up to the litigation. This will lay the groundwork for press interest in the case when it goes to court.
 - (4) Research whether the issues in your case are being litigated or campaigned about elsewhere. If they are, incorporate this into your press materials to demonstrate the wider significance of your case.
 - (5) Draft a press release for journalists at each stage of the litigation. A press release should be short and informative. You should include a simple summary of the issues in the case, a narrative of what has happened so far and some powerful quotes that show why the case is important. You should also include the contact details of someone who could provide a journalist with more detailed information should they need it. If you are publishing the press release to announce the judgment in your case, consider attaching a copy.

Step 7 – win the litigation

158. The procedural steps that must be taken to bring a judicial review claim are set out at paragraphs 94-108 above. Your solicitor and barrister will be responsible for complying with the relevant time limits, drafting documents for the court, corresponding with the defendant public body and preparing the case for the hearing. This will include gathering and preparing the evidence (see above), which is something that you may be able to help with. You should be kept informed of the progress of the proceedings, you should be shown the documents in the case and invited to comment on them if you want to and you should be consulted on any decisions that need to be taken. However, it is unlikely that you will need to play a formal part in the proceedings, such as by giving evidence. You can of course attend the hearings with your legal representatives.
159. If you win your case then you will normally get your legal costs paid by the defendant public body. You should try and build on the success of your win by having an effective media strategy (see paragraphs 156-157 above) in place to apply pressure to the public body to learn from its mistakes and improve the quality of its decision- or policy-making in the future. Remember that there is a risk that the defendant public authority will try to appeal the decision to the Court of Appeal.
160. If you lose your case then you will normally have to pay the defendant's costs. Costs for judicial review proceedings can be very high and so it is extremely important to consider how to deal with this eventuality before you start litigation (see paragraphs 91 and 130-131 above). Having a press strategy in the event that you lose the case is as important as having one for when you win a case. Losing a judicial review is not necessarily the end of the road for the campaign and you should continue to lobby and raise awareness about the issues in order to bring about change through non-legal routes. You can also talk to your legal representatives about the possibility of appealing the decision to the Court of Appeal.

10. Examples of judicial review in action

161. What follows are some examples of where judicial review has been used successfully to bring about strategic change. It is hoped that they will give community groups and individuals a sense of the power of judicial review and inspire people to take action:
162. In 2007 the Public Law Project brought a judicial review on behalf of three local residents to challenge Harrow Council's policy of restricting adult community care services to people with critical needs only, therefore withdrawing services from people with substantial needs. The latter category includes those whose independence is at substantial risk if their needs are not addressed, including those who have only partial choice and control over their immediate environment, an inability to carry out the majority of personal care or domestic routines or an inability to maintain the majority of social support systems and relationships. The judicial review was supported by a number of local groups, including Mencap, Harrow Rethink Support, Mind, Harrow Association of Disabled People and Age Concern. All of the groups had serious concerns that Harrow Council's policy would leave hundreds of vulnerable people without essential care. Each organisation provided specific evidence about the effects of the policy on the people that they represented. For example, Age Concern anticipated an increasing number of older people being at risk and having a very poor quality of life if the policy was implemented and Mencap stated that the policy would have a devastating effect on individual service users and their carers. In addition, the three individual claimants submitted evidence to demonstrate the adverse effects that the policy would have on them. The judge found that the policy was unlawful because Harrow Council had failed to fulfil its duties under the Disability Discrimination Act 1995 (now replaced by the Equality Act 2010): it had not had regard to the need to eliminate

discrimination against disabled people or to promote equality of opportunity. As a result of the case Harrow Council had to re-consider their policy, ensuring that they fulfilled their equality duties. The judgment in the case can be read here:

[www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2007/3064.html&query=title+\(+chavda+\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2007/3064.html&query=title+(+chavda+)&method=boolean)

163. In 2008 the Public Law Project brought a judicial review claim on behalf of two service-users of Southall Black Sisters against Ealing Council. Southall Black Sisters is a not-for-profit organisation providing services for black women, particularly those who have been victims of domestic violence. The organisation was funded by Ealing Council until 2007, when the Council reviewed its funding arrangements. The Council proposed to stop funding Southall Black Sisters and instead fund a service for all women in the borough. However, when making its funding decision the Council failed to assess the adverse effect that the change would have on black and minority ethnic women. Southall Black Sisters threatened legal action and the Council agreed to undertake a race impact assessment exercise. However, the Council's assessment was seriously flawed: it failed to properly consider the inevitable adverse impact of using the same level of funding for a service for all women that was previously providing a specialist service for only a proportion of women in the area. As a result Southall Black Sisters brought judicial review proceedings. They argued that the Council had failed to discharge its duties under the Race Relations Act 1975 and had failed to follow its own guidance on conducting impact assessments. The Equality and Human Rights Commission intervened in the case to provide their expert view on the meaning of the race equality duties. Half way through the hearing Ealing Council withdrew its decision and agreed to continue to fund Southall Black Sisters. In spite of this, a detailed judgment was given by the court setting out several key principles about the race equality duty (now under the Equality Act 2010). The case is now relied on by many organisations seeking to challenge similar decisions by public bodies who have failed to properly assess the likely impact of the reduction or withdrawal of funding on black and minority ethnic communities, women and people with disabilities. The judgment can be read here: www.bailii.org/ew/cases/EWHC/Admin/2008/2062.html

11. Resources and further information

164. This guide attempts to help community groups and individuals identify and develop strategic litigation. It is not a substitute for legal advice and if you think that you have a problem that could be challenged by way of judicial review you should seek **legal advice** from a solicitor specialising in public law as quickly as possible. You can search for a suitable solicitor through the Civil Legal Aid service's Legal Adviser Finder (<http://legaladviserfinder.justice.gov.uk/AdviserSearch.do>). Using this search engine you can locate solicitors in your area who have expertise in public law. The Law Society, the body that represents solicitors in England and Wales, also provides a similar search engine: www.lawsociety.org.uk/find-a-solicitor/.
165. You may also be able to get legal advice from a local law centre (www.lawcentres.org.uk/) or Citizen's Advice Bureau (www.citizensadvice.org.uk/).
166. If you want to look at the piece of **legislation** that gives a public body the authority to act you will find it at www.legislation.gov.uk. Reported judgments in judicial review cases are available through the **case law** search function on the British and Irish Legal Information Institute website: www.bailii.org/.
167. For details about how to **request information** from public bodies under the Freedom of Information Act 2000, see the Information Commissioner's Office website:

www.ico.gov.uk/for_the_public.aspx, and the more detailed guidance: www.cfoi.org.uk/pdf/foi_guide.pdf. Details of previous FOIA 2000 requests can be found here: www.whatdotheyknow.com

168. If you want to make a complaint to the **ombudsman** you will need to identify which ombudsman is responsible for the subject matter of your complaint. The most commonly used ombudsmen are:
- The Parliamentary and Health Services Ombudsman: www.ombudsman.org.uk/
 - The Local Government Ombudsman: www.lgo.org.uk
 - The Financial Ombudsman: www.financial-ombudsman.org.uk/
169. If you want to **lobby** your local MP you can find out who they are, what their voting record is and which official posts they hold on <http://www.theyworkforyou.com/mps/>, which also enables you to contact the MP directly. It might also be helpful to look at the guide to lobbying produced by Unite Against Racism: www.unitedagainstracism.org/pages/info21.htm#1
170. For advice and information about **fundraising** for a strategic litigation campaign, see the Institute of Fundraising’s website: www.institute-of-fundraising.org.uk/guidance/five-minute-fundraiser/
171. For more details on the strategic litigation and research undertaken by the **Public Law Project**, have a look at our website: www.publiclawproject.org.uk.

Public Law Project
March 2013

A Glossary of legal terms

Administrative Court	The Administrative Court is a branch of the High Court in England and Wales. Judicial review cases are held in the Administrative Court and are heard by a High Court judge or a Deputy High Court judge.
Administrative tribunals	A tribunal is part of the justice system. Tribunals are like specialist courts that deal with specific areas of law such as immigration and asylum, benefits or employment law. Tribunals resolve disputes between parties in accordance with the rules that govern the tribunal system. Tribunals are split into a “first tier” and “upper” tribunal. Cases are heard first in the first tier tribunal and then they may be appealed to the upper tribunal.
Alternative dispute resolution	Alternative dispute resolution (ADR) is the name given to a number of different schemes aimed at resolving disputes without the need for expensive litigation. There are several types of ADR including mediation, arbitration and conciliation schemes
Appeal	An appeal is a review of a decision by a court. Appeals can usually only be brought where a court has made an error of law in making their decision.
Barrister	A barrister is a type of lawyer. Barristers are sometimes called ‘counsel’. A barrister acts as an advocate, making written and oral submissions to judges. Barristers can act as advocates in all courts.
Claimant	A claimant is someone applying for a legal remedy in court proceedings. A claimant might be an individual, a group or a

	company. Before the introduction of the Civil Procedure Rules in 1999, a claimant was called a plaintiff.
Condition fee agreement	A conditional fee agreement (CFA) is an agreement reached between a claimant and their lawyer. The basic principle is that if the claimant loses the case they will not be liable for their own legal costs, and if they win, the defendant will be ordered to pay the claimant's costs.
Costs	The word 'costs' refers to amount of legal fees and expenses incurred by a party to legal proceedings. These include the lawyers' fees, court fees and administrative expenditure like photocopying. When a party wins a case it is normal for the other party to pay their costs.
Damages	Damages are financial compensation that can be awarded by a court to a party that has suffered loss, injury or damage.
Declaration	A declaration is an authoritative statement from a court that demonstrates what the law is or what the parties' rights are. A declaration does not require a party to do anything specific.
Defendant	A defendant is a person against whom court proceedings are brought.
Discretion	In public law, a discretion is where a public body has a choice about how to act. This does not mean that the public body has an unlimited power to do as it pleases, but that it has some room for manoeuvre.
Duty	In public law, a duty is something that a public body must do or must refrain from doing.
Evidence	Evidence is the information used in legal proceedings to establish facts and support arguments. Evidence may be in various forms, including expert evidence, medical evidence or documentary evidence (for example, photographs).
Guidance	Guidance is material that is there to assist a public body in what it does. It is not legally binding. Guidance is published by someone other than the public body itself.
Human rights	Human rights are inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status may be. Everyone is entitled to human rights without discrimination. Human rights govern the way that the state treats individuals. The United Kingdom's human rights obligations to people in this country are set out in the European Convention on Human Rights, which became part of UK law when the Human Rights Act 1998 came into force in 2001. Human rights include the right to a fair trial, the right to a private and family life and the right to free expression.
Illegality	In public law, illegality refers to a situation where a public body has acted beyond its lawful authority.
Intervention	An intervention is a procedure used in litigation by which a court can allow a third party to join a legal case. This third party will usually be an expert in the area that the case is concerned with and will assist the court in reaching its decision by providing expert evidence and arguments.
Injunction	An injunction is an order from a court that compels a person or a public body to do a specified act or to refrain from doing a specified act.
Irrationality	In public law, irrationality means unreasonably.
Judge	A judge is a person appointed to decide cases in courts of law.

	Judges have different titles according to which court they work in and they are of different levels of seniority.
Judicial review	Judicial review is a way of challenging the acts, omissions, decisions or policies of a public body. Judicial review can be brought if a public body has acted unlawfully, unfairly or unreasonably and claims for judicial review must be brought promptly. If a public body has not acted lawfully, fairly or reasonably the court may quash the decision or action, and require the public body to reconsider it properly.
Legal aid	Legal aid is state funding for people to bring cases. Eligibility for legal aid is determined by a combination of assessing a litigant's financial means and assessing the strengths of their case. In April 2013 the legal aid system in England and Wales will undergo a fundamental shake up. Many areas of law will be taken out of scope of legal aid and many people will no longer be eligible for legal aid. Legal aid for judicial review will still be available where the eligibility criteria are met.
Legal Aid Agency	The body that has, since 1 April 2013, administered legal aid in England and Wales
Legal Services Commission	The Legal Services Commission is the body that was responsible for the operation of legal aid in England and Wales from 1999 to 2013. It was sponsored by the Ministry of Justice, and its work was overseen by an independent board of commissioners. In April 2013 the Legal Services Commission was replaced by the Legal Aid Agency, part of the Ministry of Justice.
Litigant	A litigant is someone who is part of a legal case. A litigant in person is someone who is part of a legal case and who is not represented by a lawyer.
Mandatory order	A mandatory order is an order from a court that requires a public body to act in a certain way.
Maladministration	Maladministration is where a public body fails to act properly. Neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, and arbitrariness are all examples of maladministration.
Non-governmental organisation (NGO)	A non-governmental organisation or NGO is a not-for-profit voluntary group. It may be local, national or international. NGOs are campaigning organisations that raise concerns with governments and advocate for policy change.
Omission	An omission is a failure to do something.
Policy	A policy is a set of guidelines published by a public body. Policies are like flexible rules which cannot be departed from without good reason.
Power	In public law, a power is something that a public body may do in certain circumstances. A power is different from a duty because a public body does not have to act in a particular way when it has a power, whereas it does have to act in a particular way when it is under a duty.
Primary legislation	Primary legislation is legislation made by the legislative branch of government. Primary legislation takes the form of Acts of Parliament.
Pro bono	Pro bono is a Latin phrase that means doing something for free.
Procedural unfairness	In public law procedural unfairness or impropriety is when a public body acts unfairly.
Prohibiting order	A prohibiting order is an order from a court that stops a public body from acting unlawfully.

Protective costs order	A protective costs order (PCO) is an order made by a court that protects a claimant from having to pay the entirety of the defendant's costs in the event that the claimant loses the case.
Public body	A public body is a body that is exercising public functions. This includes the police, the prison service, the NHS, government departments and some courts and tribunals.
Public law	Public law is the branch of law that governs the relationship between public bodies and individuals. It requires public bodies to act lawfully, fairly and reasonably when they are exercising public functions.
QUANGO	A QUANGO is an acronym that stands for 'quasi-autonomous non-governmental organisation'. A QUANGO is a body to which the government has granted power to act. A QUANGO is a public body for the purposes of public law.
Quashing order	A quashing order is an order from a court that sets aside a decision of a public body so that it has no legal effect.
Regulatory authorities	A regulatory authority is a public body or government agency tasked with supervising or regulating a particular area of activity. Regulatory authorities deal in the area of public law by enforcing rules and regulations and imposing supervision or oversight for the benefit of the public at large. Some regulatory authorities perform investigations or audits, and some are authorized to fine people and direct that certain action be taken.
Remedy	In legal terms a remedy is the order that a court makes in favour a party in order to give them redress for a wrong they have suffered. A remedy may be financial (damages) or an order requiring a body to act or stop acting in a particular way.
Royal Prerogative	The Royal Prerogatives are a series of historic powers formally exercised by the king or queen. In reality these powers are now exercised by government ministers. They enable the government to act in areas that are not covered by legislation.
Secondary legislation	Secondary legislation is legislation made by the executive. It enables the government to make changes to the law or provide more detail about how a piece of primary legislation will be enforced. Secondary legislation usually takes the form of a statutory instrument.
Solicitor	A solicitor is a lawyer who advises clients and instructs barristers to work on a case. Solicitors may appear as advocates in the lower courts.
Standing	In public law standing refers to the ability of a group or individual to challenge the decision, act or omission of a public body. A group or individual must have sufficient interest in an issue in order to be able to challenge it. This means that the judicial review remedies potentially available in the case must make a practical difference to the individual claimant.