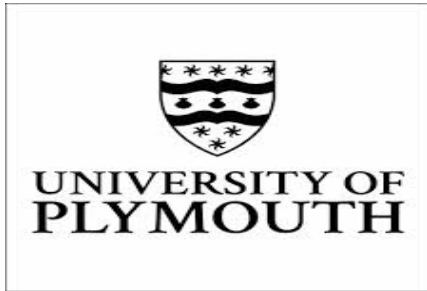




Public Law Project



UNIVERSITY OF EXETER | LAW SCHOOL



Community Law Clinic

# Access to justice in the South West 2021



26, 27 and 28 January 2021



# Access to justice in the South West 2021

26, 27 and 28 January 2021

## Delegate Pack

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## **Agenda and speakers**

### **Tuesday 26 January**

#### **Introduction**

Jo Hickman, Public Law Project

#### **09:30-11:00 How to use public law to help your clients**

Matt Ahluwalia, Garden Court Chambers

Carla Clarke, Child Poverty Action Group

Hannah Moxsom, Public Law Project (Chair)

Daniel Rourke, Public Law Project

#### **14:00- 15:00: Funding and referring cases**

Rosie Brennan, Plymouth University

Emily Gent, Access Social Care

Emma Marshall, Exeter University and Public Law Project (Chair)

Kate Pasfield, Legal Aid Practitioner Group

### **Wednesday 26 January**

#### **9:30-11:00: Online courts and remote advice**

Eddie Coppinger, University House

Kari Gerstheimer, Access Social Care

Jo Hynes, Public Law Project (Chair)

David Tulley, Plymouth Citizen's Advice

**14:00-15:30: European Union Settled Status (EUSS)**

Christine Brienne, Dorset Race Equality Council

Christian Davies, Public Law Project (Chair)

Carla Mirallas Martinez, Bindmans LLP and Here for Good

Nisa Tanin, Coram Children's Legal Centre

**Thursday 27 January**

**9:30-11:00: Discrimination challenges**

Sara Lomri, Public Law Project (Chair)

Audrey Ludwig, Suffolk Law Centre

Gus Silverman, Irwin Mitchell

Robyn Taylor, Deighton Pierce Glynn

**11:45-12:45: Unconscious bias training**

Sarah Burton, Public Law Project (Chair)

Nathalie Sherring, Dorset Race Equalities Council

**14:00-15:30 Access to justice- solutions**

Tia Matt, Director of Clinical Legal Education, University of Exeter

Chris Minnoch, Legal Aid Practitioners Group

Jacob Pritchard, Teignbridge CA

Laura Redman, Justice Together

Daniel Rourke, Public Law Project (Chair)

## Speaker Biographies

### **Matthew Ahluwalia, Garden Court Chambers**

Matthew is a social welfare and public law barrister. He has a particular interest in housing, homelessness, public law, welfare benefits, and migrants' rights. Prior to joining Garden Court, Matthew was an employed barrister at the Public Law Project.

### **Rosie Brennan, Associate Professor of Law, Plymouth University**

Rosie Brennan is an Associate Professor and Law Clinic Director at the University of Plymouth. Rosie is a solicitor and having qualified in 1993, practised in criminal defence work and immigration and refugee law. In 1993 she set up an Immigration department in the South London legal aid firm in which she was working and has continued to work on immigration and refugee law issues throughout her career combining practise with teaching. Rosie is one of the strategic leads of the Law Clinic at Plymouth and runs the Refugee Family Reunion clinic in partnership with the British Red Cross and a small Immigration project. She is the chair of the legal advice sub-committee of the Refugee and Asylum Seeker network in the city and has been campaigning with others on the legal aid capacity gap in immigration law.

### **Christine Brienne, Dorset Race Equality Council**

Christine joined Dorset Race Equality Council (DREC) as an Engagement Officer for the EU Settlement Scheme project 18 months ago. She is motivated in helping her fellow EU citizens in their application to the scheme and signposting the more vulnerable ones to the right advice. She is also a caseworker and community development officer for DREC, supporting groups and individuals from an ethnic background who face discrimination issues. Christine is French and has lived and worked in the UK for over 25 years. She has a Master of Arts in European Business, has worked in the field of innovation and socio-economic development and has enjoyed being a social enterprise and charity adviser for several years. She is passionate about empowering people, particularly in times of change.

### **Sarah Burton, Public Law Project**

Sarah worked for Greenpeace both in the UK and globally for over 20 years, and created their legal strategy, which led to a number of high level public law challenges in the UK and abroad. She was the International Campaign Director for Amnesty International, and served as a Board Member for English Nature and Natural England. Sarah works as a consultant to NGOs and as a coach and mentor to senior level campaign and management staff.

### **Christian Davies, EU Settlement Scheme Hub Coordinator, Public Law Project**

Christian coordinates PLP's EU Settlement Scheme support hub. His role includes providing second-tier advice to frontline organisations who assist vulnerable and disadvantaged applicants to the EUSS, and conducting related strategic casework. Before joining PLP, Christian trained and qualified as a solicitor at Slaughter and May. He has also provided pro bono advice on a wide range of legal issues as a volunteer at the Islington Law Centre and the Legal Advice Centre (University House).

### **Carla Clarke, Child Poverty Action Group (CPAG)**

Carla Clarke heads up the strategic litigation at Child Poverty Action Group and has led complex cases in the social welfare arena through all stages of the court system, from First tier Tribunal to the Supreme Court. Recent cases she was involved in include challenges to the benefit cap (*R (DA and DS) v SSWP* [2019] UKSC 21; the 2 child policy (*R (SC and others) v SSWP* [2019] EWCA Civ 615 and increasingly different aspects of the universal credit system eg *R (TD, AD and Reynolds) v SSWP* [2020] EWCA Civ 618. Prior to joining CPAG, she worked at the Government Legal Department in various litigation and advisory capacities and also at Minority Rights Group International where she engaged in litigation and advocacy work on the rights of indigenous peoples and ethnic minorities, particularly in Africa.

### **Eddie Coppinger, University House**

Eddie Coppinger is the CEO at University House. Eddie studied law at Guildhall and social policy at Goldsmiths. Eddie has been at University House since 2007. Before that Eddie was employed at two trade unions and two community law centres. University House is a specialist advice body which operates out of two offices in Bethnal Green. University House undertakes a number of A2J projects and has a reputation for innovation.

### **Emily Gent, Access Social Care**

After her first degree Emily worked in various organisations to assist people with support needs living in the community including a charity, local authority and NHS body. These experiences motivated her to become a lawyer and she completed legal academics at Exeter University before a training contract at Irwin Mitchell. Upon qualification as a solicitor Emily specialised in public law and moved to Simpson Millar (previously Maxwell Gillott) where she developed expertise in education and community care law and in court of protection health and welfare / deprivation of liberty work. Emily has been instructed by individuals and has acted on their behalf through their families, professional advocates and the Official Solicitor. Emily joined Access in August 2020 as Senior Legal Manager of the casework team also supporting strategy and project work.

### **Kari Gerstheimer, CEO and Founder, Access Social Care**

Kari qualified as a solicitor in 2003, and has an LLM in Human Rights Law. Kari advised refugees and asylum seekers in Canada before returning to the UK. She has worked in the social care sector since 2006 and set up a beneficiary facing legal department at Sense, the national deafblind charity, before moving the team to Mencap in 2017. As Director of Information and Advice at Mencap, Kari founded a



cross sector legal network to enforce the right to social care for people with a learning disability. In April 2020, the Legal Network span off to become an independent charity, Access Social Care.

#### **Jo Hickman, Director, Public Law Project**

Jo Hickman was appointed PLP's Director in 2015. She is a public law specialist with a background in both the private and voluntary sectors. Immediately prior to her appointment Jo was Head of PLP's Casework team where she developed and led the pioneering legal aid project, and acted in a number of seminal cases. She is widely recognised for her strategic expertise, having been historically named Legal Aid Lawyer of the Year and Times Lawyer of the Week. Most recently she was shortlisted as 2017 Lawyer of the Year at both the Legal Business and Solicitor Journal awards. She is a member of the Law Society Access to Justice Committee, a Board member of the Legal Aid Practitioners Group, and sits on the Civil Justice Council.

#### **Jo Hynes, Public Law Project**

Jo is a Research Fellow in Online Courts at Public Law Project (PLP) and a PhD candidate at the University of Exeter. Her work at PLP focusses on online courts and tribunals and related access to justice issues. Jo's ongoing doctoral research explores the legal geographies of immigration bail hearings and video links. She is particularly interested in courtwatching methodologies and procedural fairness in remote hearings. Jo has a BA in Geography (University of Oxford, 2015) and an MSc in Global Migration (University College London, 2017).

#### **Sara Lomri, Deputy Legal Director, Public Law Project**

Sara is a solicitor and Deputy Legal Director. Sara has a broad public law and human rights practice with a particular focus on disability and gender discrimination, and assisting those facing multiple disadvantages. In addition to her casework, Sara is currently leading a significant project at PLP focusing on improving and providing access to justice for frontline organisations and charities and their stakeholders or service users. Before Sara came to PLP she worked for ten years in private practice at Bindmans LLP, where she specialised in private and public law challenges against detaining authorities and was recommended in Chambers and Legal 500 in Civil Liberties and Healthcare categories.

#### **Audrey Ludwig, Head of Legal Services and Senior Solicitor Suffolk Law Centre**

Audrey is an experienced discrimination solicitor. She is also Director of Legal Services at Suffolk Law Centre, part of the Ipswich and Suffolk Council for Racial Equality family of charities. She headed the project to campaign for Suffolk Law Centre which launched in 2018 and now provides free legal services to a rural county that was previously a legal aid desert. Prior to that she worked in private practice, local government and disability charities as a solicitor or legal advisor.

#### **Emma Marshall, Research Fellow, Public Law Project**

Emma Marshall is a Research Fellow at PLP and joined the team in 2017. Emma also works part-time as a Postdoctoral Policy Consultant for the Community Justice and Policy Hub at the University of Exeter. Emma's research focuses on the British legal aid system, including the Exceptional Case Funding scheme, as well as other aspects of immigration law and policy. She is also involved in developing social research

to inform PLP's policy work and capacity building in the advice sector. Emma assisted the University of Exeter to set up an Exceptional Case Funding clinic as part of her doctoral research, and her doctoral thesis examines experiences of advice-seeking for asylum seekers and people with other categories of human rights applications in the South West of England.

### **Tia Matt, University of Exeter Community Law Clinic**

Tia Matt is a Senior Lecturer and the Director of Clinical Legal Education in the Law School, University of Exeter. She supervises students participating in the Community Law Clinic (CLC) and the Exeter Law Projects pro bono programmes. Tia attended the University of Washington School of Law in the United States, where she received a Doctorate of Jurisprudence, (J.D.) in 1999. She is a qualified solicitor of England and Wales. She is also licensed to practice law in the States of Arizona and Washington and admitted to practice before the United States 9th District Court and the United States Tax Court. In the US, Tia managed her own private practice focusing on asset protection while committing pro bono time to assisting charities. After arriving at Exeter in 2014, Tia revamped the clinical programme at Exeter and started the Community Law Clinic with her colleague, Luke Price.

### **Chris Minnoch, CEO, Legal Aid Practitioners Group (LAPG)**

Chris is CEO of Legal Aid Practitioners Group (LAPG), a membership body representing the interests of all those delivering legal aid services in England & Wales – solicitors, barristers, legal executives, caseworkers, costs lawyers and support staff. LAPG is a statutory consultee body with the Ministry of Justice and the Legal Aid Agency on all matters relating to legal aid policy and operational aspects of the legal aid scheme. LAPG advocates on behalf of practitioners and campaigns for improvements to the legal aid scheme, working collaboratively with other representative, membership and policy groups. LAPG also provides a range of service tailored to the needs of legal aid practitioners. Chris has been CEO of LAPG since 2018, having joined the organisation as Operations Director in 2016. Prior to that Chris worked in the third sector for 15 years, delivering legal advice services, providing training and running a specialist legal advice charity in London. Chris is an independent member of the MOJ's Legal Support Advisory Group and sits on the Advice Sector sub-group of the Administrative Justice Council. He is a regular public speaker on issues of legal aid policy and access to justice.

### **Carla Mirallas, Bindmans LLP**

Carla is Here for Good's Volunteer Coordinator and Registered European Lawyer based at Bindmans LLP since May 2019. In this role, Carla provides advice to EEA nationals and their families on the impact of Brexit and is also co-ordinating a team of volunteer lawyers who are working on specific applications. Prior to joining Here for Good and Bindmans LLP, she worked in a boutique private client law firm based in central London, specialised in providing immigration advice to individuals particularly on EU free movement law. Prior to that, she worked for Lupins solicitors where she advised vulnerable clients in many aspects of immigration, asylum and nationality law. Carla is also a qualified Spanish solicitor and before moving to the UK she worked for three years as a Spanish lawyer and barrister in the litigation department of a commercial law firm based in Barcelona.

**Hannah Moxsom, JFF Trainee**

Hannah joined PLP in August 2018 after completing her LPC & LLM at the University of Law. Hannah directly supports PLP's Deputy Legal Director, Sara Lomri, and provides casework support to all other members of the casework team. Hannah is also the first point of contact for new enquiries, helping the team to manage and provide signposting advice to enquirers.

Hannah has previously worked in housing and as a legal billing assistant. Hannah is committed to pursuing a legal career that challenges injustice and protects individual's rights, and during her studies also volunteered with Amnesty International.

**Kate Pasfield, Director of Legal Aid Policy & Member Services at Legal Aid Practitioners Group**

Kate is a lawyer who joined LAPG at the start of 2019. Before moving to LAPG, Kate worked for many years as a legal aid solicitor specialising in housing law. She qualified into the housing department at South West London Law Centres in 2007, became the Senior Solicitor at the Tooting branch in 2010, and then the Head of Legal Practice in 2012. She then moved to head up the housing and community care departments at Swain & Co Solicitors in 2014. She is a passionate advocate for access to justice, having spent many years acting for vulnerable tenants faced with possession proceedings, homelessness and poor living conditions. She is also a trustee at the London Legal Support Trust and sits on the grants committee distributing much needed funds to legal advice agencies in London and the Home Counties.

**Jacob Pritchard**

Jacob is an associate member of CILEX, and Legal Services Manager for the Citizens Advice Devon and Citizens Advice Cornwall Access to Justice Project. The project offers a legal consultancy and casework service for litigants in person in the family court, in addition to offering specialist training to Citizens Advice advisers. Jacob has been with Citizens Advice for over 6 years as a specialist caseworker and supervisor, as well working in private family law practice.

**Laura Redman, Justice Together Initiative**

Laura is the Acting Head of the Justice Together Initiative, which was formally launched in in the Summer 2019. She is US-qualified lawyer with twenty years of experience advocating for equality and human rights in the US and UK. Most recently, she was the Director of the Health Justice Program at the New York Lawyers for the Public Interest, where, through a community and movement lawyering model, she brought an immigrant and racial justice focus to health justice advocacy campaigns. Before joining NYLPI, Laura worked at the National Center for Law and Economic Justice as a Senior Attorney litigating strategic federal and state class action cases seeking systemic reform in the public benefits system. Prior to NCLEJ, Laura was a Senior Legal Officer at the Commission for Racial Equality in the United Kingdom and a judicial law clerk for the U.S. Court of Appeals for the Second Circuit, Staff Attorneys' Office. Laura has a Juris Doctor from Northeastern University School of Law in Boston, MA and an M.Sc. in Gender Studies from Birkbeck College.

### **Daniel Rourke, Public Law Project**

Daniel is a solicitor and leads on PLP's legal aid focus work. His recent work has focused on eligibility for legal aid, acting for two victims of domestic violence who successfully challenged refusals of legal aid based on their interests in the family home. These cases established a discretion to ignore inaccessible 'trapped' capital and secured a rule change which brought an end to 'imaginary' capital created by outdated rules which ignored the full extent of the mortgage secured on the home.

He joined PLP from the Migrants' Law Project at Islington Law Centre, where he worked on judicial review claims brought by NGOs concerning the rates of asylum support, the 'Detained Fast Track' asylum process and the Immigration Rules for adult dependent relatives. He also focused on family reunion for asylum seekers in the context of the European Refugee Crisis. This began with representing unaccompanied children in the Calais 'Jungle' camp and developed into a multi-year project involving collaboration with various partners to assist scores of vulnerable individuals across Europe and beyond.

Daniel has pursued his interest in asylum issues at PLP, acting for asylum seekers challenging the adequacy of asylum support accommodation.

### **Nathalie Sherring, Dorset Race and Equalities Council**

Nathalie Sherring, Chief Officer of Dorset Race Equality Council. Nathalie joined Dorset Race Equality Council in April 2015 as a Community Developer Officer/Caseworker but stepped up into the role of Chief Officer in Nov 2016 and has been an advocate for people from different ethnic backgrounds since then. Dorset Race Equality Council is a small charity that covers the whole of Dorset. Its remit is to:

- Support individuals from different ethnic backgrounds who feel they have been discriminated against because of their race or their religion and challenge discrimination in general.
- Support and empower individuals and ethnic minority community groups to promote their culture, to bring people together and to facilitate access to services.
- Support statutory, voluntary organisations and local businesses to embed the Equality, Diversity & Inclusion agenda in their organisation.

Prior to joining Dorset Race Equality Council, Nathalie led and developed extended services within the most vulnerable schools and developed and managed 6 children's centres in Dorset.

### **Gus Silverman, Irwin Mitchell**

is a Bristol-based associate solicitor in Irwin Mitchell's Public Law and Human Rights department. He represents clients across the country who have been harmed by the unlawful actions of the police and other state agencies, including the Ministry of Justice and the Crown Prosecution Service. He also represents clients bringing legal actions against private companies delivering services within the criminal justice system. Many of Gus' cases concern complaints and civil actions against the police. These include seeking accountability for clients who have been unlawfully arrested, assaulted and maliciously prosecuted, as well as clients who have been discriminated against by police officers. Gus also acts for the families of loved ones who die in police, prison and mental health detention, as well as in contentious non-detention deaths resulting from the acts or omissions of state agencies or private bodies. In 2019, he was named the Bristol Law Society's Lawyer of the Year. He is a Recommended Lawyer in the Legal 500 directory and a Star Associate in the Chambers & Partners directory. He regularly delivers training on actions against the police and inquest law.

**Nisa Tanin, Coram Children's Legal Centre**

Nisa is an immigration solicitor, who joined Coram Children's Legal Centre in 2019. She trained at Bhatt Murphy Solicitors in immigration detention, police law and inquests. Nisa has acted for children, young people and families at various stages of the immigration and asylum process, including applications and appeal under the EU Settlement Scheme.

**Robyn Taylor, Deighton Pierce Glynn**

Robyn Taylor is a lawyer and recently appointed head of discrimination and equality at Deighton Pierce Glynn. Robyn acts for a wide range of clients in both public and private law discrimination challenges against public bodies and services providers. She is particularly focused on strategic litigation involving disability discrimination. Prior to qualifying as a solicitor, Robyn worked for a charitable foundation tackling climate change and global health inequality."

**David Tully, Plymouth Citizen's Advice**

David is a trainee solicitor who has just started his new role in Citizens Advice as part of the Justice First Fellowship. Before that he was the manager for the Legal Advice Centre within Citizens Advice Plymouth which was tasked with trying to resource gaps in the legal provision for the people of Plymouth. This was done through developing remote consultations and services with external agencies that could provide advice remotely through clients.

*Red flags, unfair systems and the 'smell test':  
How to spot public law issues.*

Daniel Rourke



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# OVERVIEW: HOW TO SPOT A POTENTIAL JUDICIAL REVIEW

- Key principles
- Red flags
- Unfair systems
- Examples from the immigration sphere



# KEY PRINCIPLES: WHO CAN BE CHALLENGED?

- Public bodies e.g.
  - The Home Office (Secretary of State for the Home Department).
  - DWP (Secretary of State for Work and Pensions).
  - Local authorities (e.g housing or planning decisions).
- Private companies exercising public functions.
  - SERCO (e.g. in the context of running a private prison).





# KEY PRINCIPLES: WHAT CAN BE CHALLENGED?

- Decisions.
  - Policies.
- Acts.
  - E.g. Adopting a procedure or exercising a power.
  - NB. Remedies can prevent specified future acts.
- Omissions (failures to act).
  - Delay.



# KEY PRINCIPLES: WHY MIGHT A DECISION BE FLAWED?

- There are a number of different grounds for judicial review.
- Broadly categorised into three grounds:
  - ILLEGALITY
  - PROCEDURAL UNFAIRNESS
  - IRRATIONALITY
- In certain circumstances (i.e. breach of convention rights):
  - PROPORTIONALITY



# KEY PRINCIPLES: WHEN CAN A CHALLENGE BE STARTED?

Remedy of last resort...

But beware of the ticking clock!

Time limit

‘Promptly and in any event within 3 months’

- Don’t assume all hope is lost
- Keep evidence of attempts to refer



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# RED FLAGS: GROUNDS FOR JUDICIAL REVIEW

*They might say...*

*'They can't do that!'*

*'They had already made up their mind.'*

*'They didn't follow their own policy!'*

*'They didn't look at my documents.'*

*'It makes no sense.'*

*'If they'd asked, I would have said.'*

*'This will ruin my children's lives.'*

*You might say...*

*'This absolutely  
stinks!'*



# EXAMPLES: FROM THE IMMIGRATION SPHERE

## Features of the Immigration System

- Limited appeal rights
- Problems with accessibility and quality of representation
- Excessive complexity
- Harsh policies
- The ever-present threat of removal



# EXAMPLES: FROM THE IMMIGRATION SPHERE

## The underlying immigration matter

- Removal decisions
- Fresh claims
- Certification
- Refusals that do not carry an in-country right of appeal
- ‘Computer says no’



# EXAMPLES: FROM THE IMMIGRATION SPHERE

## Challenging Home Office failings

- Asylum support issues
- Trafficking decisions
- Delay
- ‘No recourse to public funds’



# **JUDICIAL REVIEW**

## **in welfare benefits cases**

**Carla Clarke**

**Jan 2021**



# What is Judicial Review?

Judicial review is about holding public bodies, including the Government, to account.

*“Judicial review is a critical check on the power of the State, providing an effective mechanism for challenging the decisions of public bodies to ensure that they are lawful.”*

Ministry of Justice Consultation on proposals for reforms in obtaining permission to appeal from Upper Tribunal to Court of Appeal, November 2020.

# 26 Decisions

***'Decisions' of a public nature***, broadly defined include:

- failure to make a decision
- failure to do something in time / delay
- failure to exercise discretion when making a decision
- issuing guidance (or other document) which gets the law wrong
- a refusal to do something (e.g. provide an urgent medical assessment)
- procedural maladministration / practice
- decisions made according to unlawful regulations
- discrimination in decision making



# JUDICIAL REVIEW PROCEDURE

## Civil Procedure Rules

Pre-Action Protocol for Judicial Review: pre-claim

[https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_jrv](https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv)

Part 54: judicial review claims

<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54>

# Overview of procedure

1. Pre-action letter (usually 14 days for response)
2. No or unsatisfactory response
3. Issue proceedings High Court (promptly / 3 months from date of decision being challenged) N461
4. Acknowledgement of Service (21 days)
5. Permission (on papers or on renewal hearing)
6. Detailed grounds of defence
7. Reply and further evidence
8. Final Hearing (no cross examining of witnesses)
9. Appeals:
  - a) Court of Appeal;
  - b) Supreme Court;
  - c) European Court of Human Rights.

Not at all like this procedure

# Time limit

- Strict time limit to issue proceedings
- *Promptly and in any event within 3 months* of the decision under challenge
- 3 months includes the pre-action stage.
- **ACT QUICKLY**



# Costs

- There are no costs implications in sending a pre-action letter (except your time).
- If the matter is resolved in the pre-action stage, however many letters you send, there are no costs implications.
- Legal Help is however available for the pre-action stage where a public law contract is held.
- Significant costs arise when judicial review proceedings are issued and failure to follow the pre-action protocol may be penalised. Refer to a solicitor, legal aid is available (under public law contracts).

# “Remedy of last resort”

- If there is an alternative remedy a claimant should usually use it.
- Is there a right of appeal?
- Is there a right of review/complaint?
- **The alternative remedies rule: A claimant should usually exhaust all other available remedies before bringing a judicial review claim**



# Dis-applying the alternative remedies rule

- Is the alternative remedy capable of resolving the client's problem? The "effective remedy rule".
- When might it not be?



# Dis-applying the alternative remedies rule: The need for speed

- Is your client destitute?
- Is your client homeless?



Standard response time to a pre action protocol letter is **14 days** under the pre-action protocol, but this can be shortened where need requires.

Compare mandatory reconsideration and appeal time scales.

# Dis-applying the alternative remedies rule: The public importance of the issue

Does the question have wider implications than your individual client?

**IMPORTANT**

E.g. recurring misinterpretation of guidance

E.g. misleading or incomplete guidance

# Dis-applying the alternative remedies rule: Remedy sought is not otherwise available

- Change to guidance
- Request for (improved) training of decision makers
- Human Rights Act damages
- Declaration

# Tactics

- Right of appeal? Use it.
- Consider a pre-pre-action letter. Send a MR request and ask for a response within a fixed time, explain why this is a 'reasonable time' in all the circumstances. 7, 14, 28 days? Explain will send a pre-action letter if no response is received.
- If no response is received, send a JR pre-action letter challenging both the delay and the substantive issue.
- A pre action letter will often prompt a MR decision.

# Using the Pre-action Protocol



Adding another string to your bow

# <sup>38</sup> Why use the pre-action protocol?

- Quick win (14 days)
- No cost risk
- [Easy using templates](#)
- Chance to change DWP policy / practice / guidance to improve things for others
- Support from CPAG

[cpag.org.uk/welfare-rights/judicial-review/judicial-review-pre-action-letters](http://cpag.org.uk/welfare-rights/judicial-review/judicial-review-pre-action-letters)

# Why are pre-action letters effective?

- Decided by DWP legal department
- Potential cost of litigation
- Potential to set precedent

# Common DWP response

## Response to proposed claim

*Judicial review is a remedy of last resort. The Claimant must exhaust all other remedies available to her before issuing judicial review proceedings. **In this case, the appropriate means of challenging the Secretary of State's decision is to pursue the statutory appeal route.** The Claimant has begun this process by requesting a mandatory reconsideration. **The mandatory reconsideration has now been carried out and we accept that the Claimant has a right to reside and is eligible to receive benefits.** A decision will be sent to the Claimant to that effect in due course. **We hope this is a satisfactory result for your Claimant and no further proceedings will ensue.***



# What if they say no?

[cpag.org.uk/welfare-rights/judicial-review/map-solicitors](https://cpag.org.uk/welfare-rights/judicial-review/map-solicitors)

HOME / WELFARE RIGHTS / JUDICIAL REVIEW PROJECT

## Judicial Review project

Our Judicial Review project has been set up to help welfare rights advisers with the Judicial Review process. In this section you will find information and tools about the following:

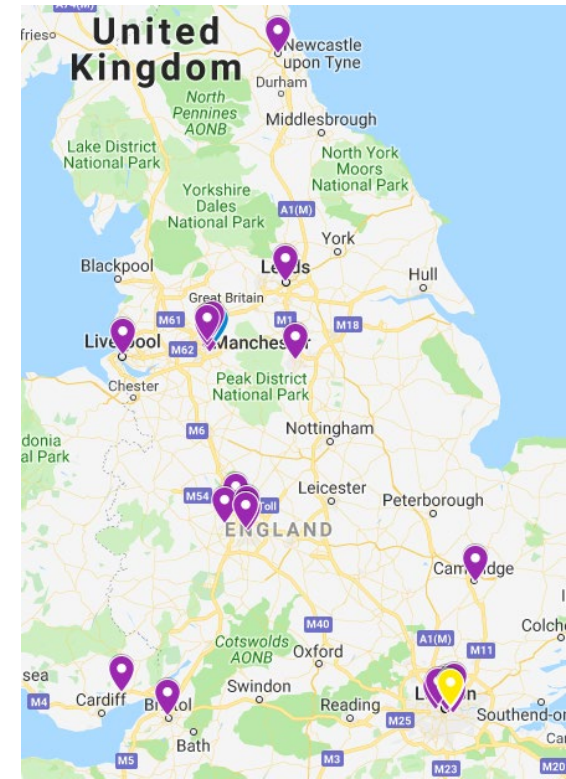
- [Network of solicitors you can make referrals to](#) (external link)

Currently 37 firms

Purple: Legal Aid

Yellow: Pro Bono

Blue: Pre-Action Stage support



# Common challengeable welfare benefit decisions

- No right of appeal inc. discretionary decisions
- Unlawful policy, practice or procedure
- Failure to make a decision or delay
- Failure to provide a decision notice
- Failure to exercise discretion / operation of blanket policy

# Examples

- Inappropriate Universal Credit conditionality
- Refusal of a Discretionary Housing Payment
- Failure to offer or refusal of a Universal Credit Advance
- Delays in providing Mandatory Reconsideration decisions
- Delays in making Right to Reside decisions
- Refusal to extend the time limit for making a MR request
- The decision to recover an overpayment of benefit
- Refusal to pay UC without a National Insurance Number
- Claim closure
- Failure to record or respond to a mandatory reconsideration request
- Failure to award the carer element in line with a run on of carers allowance following a bereavement
- Failure to treat as liable for housing costs
- Failure to send an ESA50/UC50 or refer for a WCA
- Failure to pay cbESA pending an appeal
- Refusal to change which parent/carer Child Benefit is paid to
- Failure to make enquiries to establish HRT

# Grounds for judicial review

- There is a **public law duty** for public authorities to behave in a certain way:
  - To follow the law, including:
    - Primary and secondary legislation including Human Rights Act and Equality Act
    - Caselaw
  - Not to do things they do not have the legal power to do
  - To follow fair procedures
  - Not to act irrationally
- Not to do so renders decisions **unlawful** and forms the basis of all judicial review claims.

# 10 common grounds for judicial review

- (1) failure to follow the law
- (2) fettering discretion / operation of a blanket policy
- (3) taking irrelevant matters into account
- (4) failure to have regard to relevant factors
- (5) failure to make a decision / delay
- (6) breach of ECHR / Human Rights Act 1998
- (7) breach of the Equality Act 2010
- (8) *ultra vires* (beyond powers)
- (9) irrationality / Wednesbury unreasonableness
- (10) procedural irregularity / unfairness

***Inevitable overlap***

# Selection of examples using some of the specific grounds

# 1) Failure to follow the law

The public body got the law



- Failed to apply the correct primary or secondary legislation
- Failed to follow relevant case-law
- Misinterpreted primary or secondary legislation or case-law

## Example: Refugee subjected to habitual residence test

- C made a claim for UC and was told he must meet the HRT before his claim could be determined. C has leave to remain as a refugee as shown on his Biometric Residence Card. As a refugee C is exempt from the HRT under Reg. 9(4) of the Universal Credit Regulations 2013:

*“For the purposes of determining whether a person meets the basic condition to be in Great Britain, except where a person falls within paragraph (4), a person is to be treated as not being in Great Britain if the person is not habitually resident in the United Kingdom...*

*(4) A person falls within this paragraph if the person is—...*

*(d) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees ...*

- SSWP is therefore acting unlawfully in delaying the determination of C’s claim for UC until habitual residence has been established.
- JR is appropriate as there is no decision to be appealed rather a failure/delay in making a decision and because C has no income as asylum support has ended.



## 2)<sup>49</sup> Failure to exercise discretion/operation of a blanket policy

Whenever you see the word '*may*' do something the decision maker must consider whether or not to do it. ie. exercise their discretion and not operate a blanket policy.

Eg. Whether to recover all or part of an overpayment

Eg. Whether to award a discretionary housing payment

## Example: HB 4 weekly

Under Reg 92 HB Regs, LA has the discretion to make rent allowance payments at intervals of one month where the claimant's rent liability is incurred monthly and where payment of the rent allowance is made directly to the landlord. LA refuses to pay HB monthly due to council policy.

It is unlawful to operate a 'blanket policy' when a discretion is available. In *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546 the Court of Appeal summarised this principle when it stated:

*"[a] public authority may not adopt a policy which precludes it from considering individual cases on their merits".*

In stating that "HB can only be paid 2 weekly or 4 weekly" it would appear that LA operates a blanket policy not to pay HB monthly despite the discretion available to it and, in so doing, has refused to consider the claimant's individual circumstances in deciding the frequency of her/his HB payments. As such the LA has unlawfully fettered the discretion available to it under s. 92(4) HB Regs.

### 3) <sup>51</sup> Failure to take relevant matters into account and/or taking irrelevant matter into account

- Often overlap with exercise of discretion/operation of blanket policy
- Includes failure to take into account decision maker's own guidance
- Eg failure to take account of financial hardship in refusing to reduce rate of deductions below the prescribed maximum
- Eg failure to have regard to completed DS1500 and own guidance in closing claim of terminally ill person because of failure to sign claimant commitment

## Example: DHP shared accommodation rate

- C is under 35 has severe mental health problems and PIP appeal is imminent. 1 bed flat but LHA shared rate is applied.
- DWP and the local authority's DHP guidance include *"All claims will be assessed on their individual merits, including, where relevant, considerations of equality"*.
- LA's own policy refers to the objectives of DHP scheme as including supporting vulnerable people and those with physical and mental disabilities
- DHP is refused because *"The property is unaffordable"*
- Failure to take into account relevant facts (mental health, medical evidence and likely imminent change of circs) or follow relevant guidance

## (4) Failure to make a decision / delay

- There is no statutory time limit for deciding claims.
- However, the Defendant is under a duty to consider all claims for benefit within a “reasonable time” – *R(C and W) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin). What counts as a reasonable time depends on the circumstances, including the impact on the claimant (consider UC claims).
- In most cases, a letter before action will prompt DWP to make a decision, removing the need to bring proceedings.

“Thank you for your template regarding delays processing UC MR decisions, which had the desired result of providing us with a written MR outcome which we can now appeal, after nearly 6 months waiting and a conciliatory payment of £50 to the client for avoidable delays.” Citizens Advice Bureau

## (5) Breach of the Equality Act 2010

### Discrimination under s.29

- Direct: always unlawful.
- Indirect discrimination: lawful where it can be justified as a proportionate means of achieving a legitimate aim.
- Protected characteristics under s.4

# Example: claimant commitment

- The default requirement under reg. 88(1) UC Regs is that all claimants are required to undertake 35 hours of work search each week and be available to take up work for the same. Applying this blanket provision to those caring for young children (the majority of whom are women) would be indirectly discriminatory, contrary to the Equality Act 2010, as such people (people with young children, lone parents and women) would be more likely not to be able to comply with the requirements and so be subject to UC sanctions, consequent financial loss and emotional distress. The law recognises this and avoids such indirect discrimination by virtue of the limitations in regs. 88(2) and 97 UC Regs and associated guidance.
- By failing to apply the limitations, D's action is necessarily discriminatory, it cannot be shown to be a proportionate means of achieving a legitimate aim, and there can be no justification for the same.

## (6) Failure to make reasonable adjustments

Under s.20 of the Equality Act 2010 authorities have a duty to make “reasonable adjustments” to avoid substantial disadvantage in comparison with persons who are not disabled, and under s.21 failure to do so constitutes discrimination on the grounds of disability.



# 57 Example: Failure to make reasonable adjustments

- The Defendant is aware of the Claimant's mental health condition and has been specifically advised of his needs.
- In failing to take account of the Claimant's mental health problems and needs, and disregarding his request for contact to be made in writing to avoid significant and undue mental health distress and for a paper-based assessment, the Defendant has failed to make reasonable adjustments and is in breach of its own guidance which makes clear that the "*claimant knows best what their needs are*".

# CPAG Judicial Review Project

Judicial Review email advice for advisers:



[jrproject@cpag.org.uk](mailto:jrproject@cpag.org.uk)

Judicial Review template letters:

[www.cpag.org.uk/content/judicial-review-pre-action-letters](http://www.cpag.org.uk/content/judicial-review-pre-action-letters)

Pre-action protocol case studies

[www.cpag.org.uk/content/cpag-judicial-review-project---  
early-successes](http://www.cpag.org.uk/content/cpag-judicial-review-project---early-successes)



# Judicial review in homelessness cases

Matthew Ahluwalia, Garden Court Chambers

26<sup>th</sup> January 2021



GARDEN COURT CHAMBERS



@gardencourtlaw

# <sup>61</sup>This presentation will cover:

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- Why using public law in homelessness cases matters
- Common scenarios
- Some recent examples



# Why might using public law matter in this context?

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- Public law remedies can be empowering for your clients and achieve important outcomes
- Impact of coronavirus highly likely to have an effect on decision-making
- Judicial review is in scope for legal aid
- Not just used for strategic casework or test cases

However - general principal is that judicial review is meant to be a remedy of last resort – e.g. *R (Glencore Energy UK Ltd.) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716, paras. 53 to 56.



# Alternative remedies – section 202 reviews and section 204 appeals

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- Public law principles already used in challenging homelessness decision-making:
  - Failing to take into account relevant factors
  - Applying wrong legal test
  - Misinterpreting statute
  - Breaching statutory duties
  - Irrationality or unreasonableness
- Most of the significant homelessness case law comes from, or starts as, s.204 appeals in the County Court
- See also Chapter 19 of the Homelessness Code of Guidance



## Common judicial review scenarios

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The following are examples of decisions that are not appealable under section 204 HA 1996 (and may therefore be amenable to judicial review):

- Failure to accept a homelessness application (i.e. gatekeeping)
- Failure to provide interim accommodation pending a decision on a homelessness application
- Refusing to provide accommodation pending review
- Failure to protect belongings
- Failure to agree or assess a PHP, or to take reasonable steps
- Failure to reach a decision on a homelessness application
- Failure to provide suitable interim accommodation
- Refusing to accept an out of time review
- Eviction from temporary accommodation (without sufficient or reasonable notice)





# *Bankole-Jones v Watford Borough Council* [2020] EWHC 3100 (Admin)

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- Section 204 appeal that was transferred, on application by C, to the Admin Court – section 42 of the County Court Act 1984
- Applicant applied as homeless; suffered from mental health problems include PTSD
- Provided with s.188 accommodation but asked to leave because of complaints about his behaviour; LA later decided A was not in priority need
- Ground 1 was whether the coronavirus pandemic amounted to an ‘emergency’ within meaning of s.189(1)(d)
- Ground 1 was rejected because it had not been raised with LA prior to s.202 review, and because there was insufficient detail to say that A was homeless ‘as a result of’ an emergency
- Grounds 2, 3 and 4 were also dismissed



# *Tiemo, R (on the application of) v Lambeth London Borough Council* [2020] EWHC 1193 (Admin)

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- Issue was suitability of s.188 accommodation
- Claimant made application to enforce interim relief order to provide suitable accommodation
- Issue was affordability. There was said to be a shortfall of £281.44 per week between claimant's income and living expenses, of which rent was a significant proportion
- LA said that they would not enforce rent collection while claim for housing benefit was pending
- By the time of the hearing the Claimant had not made a claim for housing benefit
- High Court held that in the circumstances the application was premature



# *Escott, R (On the application of) v Chichester District Council* [2020] EWHC 1687 (Admin)

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- Claimant was placed in interim accommodation with a shared bathroom and kitchen
- Later found not to have priority need
- Pre-action letter challenged the suitability of the accommodation due to covid-risks in shared facilities, as well as challenging refusal to accept late review request
- Interim relief sought to place claimant in self-contained accommodation due to vulnerability to risk of covid, due to past medical history
- Claimant placed in a self-contained but unfurnished flat
- High Court held in application for interim relief that LAs are not obliged to provide furnished accommodation
- Coronavirus cut both ways; can be argued to enhance requirement for suitable accommodation but also provides LAs with some leeway as to how to meet demand with scarce resources



# *Mitchell, R (On the Application Of) v London Borough of Islington* [2020] EWHC 1478 (Admin)

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- Applicant was of no fixed abode and accepted by LA as being owed relief duty, as well as owed offer of s.188 accommodation
- LA later decided A did not have priority need and withdraw accommodation, however they did not properly notify A of end of relief duty
- This was because the notice from the LA did not comply with the notification requirement set out in section 188(1ZA)(b) by failing to inform the applicant of a decision that when the authority's section 189B(2) duty comes to end, the local authority would not owe him a duty to provide him with accommodation under section 190 or section 193 of the 1996 Act (para. 61)
- High Court granted declaratory relief



# *M<sub>99</sub> R (On the Application Of) v London Borough of Newham* [2020] EWHC 327 (Admin)

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- Main housing duty must be discharged immediately upon acceptance
- LA accepted that TA was unsuitable but left family there for two years
- Admin Court held that once it had been accepted that the applicant's current accommodation is not suitable, the authority are in breach of the s. 193 duty
- Even if that was wrong and the LA had a reasonable time to provide alternative accommodation, on the evidence in this case LA had also breached that duty
- Mandatory order granted the LA provide suitable accommodation within 12 weeks



# *Bykartyk, R (on the application of) v Welwyn Hatfield Borough Council* [2019] EWHC 3480 (Admin)

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- Local authority refused to take second homelessness application
- Applicant had been placed in s188 accommodation but later found not to be in priority need, given notice to leave and became homeless – upheld on s202 review
- A made second homeless application, this time including medical evidence about her mental health
- LA refused to entertain second application
- High Court said this was irrational as clearly the medical evidence disclosed new facts
- Also helpful on alternative remedy – had A appealed to County Court, it would have been limited to review of evidence at the time of the review decision so would not have provided effective remedy



# *SH, R (on the application of) v The London Borough of Waltham Forest* [2019] EWHC 2618 (Admin)

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- Victim of trafficking and refugee applied as homeless and LA accepted duty to house under s.193
- Offered a property in Ilford but no offer letter ever supplied by LA; claimant had to move after seeing served with a no-fault eviction notice
- Then moved to a PRS property in Tottenham that was eminently unsuitable
- Claimant approached LA again as homeless; LA treated this application as a fresh homeless app; LA offered a third property in Kettering which was refused by claimant
- Held that s.193 duty had never been discharged



# Thank you

020 7993 7600

info@gclaw.co.uk

@gardencourtlaw







## The Means Test Review

Kate Pasfield

Director of Legal Aid Policy &  
Members Services

Legal Aid Practitioners Group

# LAPG'S ROLE IN POLICY WORK

- We work to improve the delivery and administration of the legal aid scheme by engaging with the LAA on operational issues and the MoJ on the development and implementation of legal aid policy
- We are a statutory consultee body for the LAA
- We participate in the Civil and Crime Contract Consultative Groups, the Process Efficiency Team, the Quarterly Digital & Technology Meetings and numerous other informal and ad-hoc meetings and processes.
- We seek to work constructively with the LAA and the MoJ as we have found that this is the most effective way of achieving meaningful change on behalf of legal aid providers.

# Legal Aid Means Test Review

“We will conduct a review into the thresholds for legal aid entitlement, and their interaction with the wider criteria. This review will assess the effectiveness with which the means-testing arrangements appropriately protect access to justice, particularly with respect to those who are vulnerable. The review will include looking at the capital thresholds for victims of domestic violence and evidence gathered during the review of legal aid for inquests.” (**Legal Support Action Plan, February 2019**)

**Government action: We will complete a comprehensive review of the legal aid eligibility regime by Summer 2020.**

(Planned publication date due to Covid-19 delay, with accompanying consultation: Spring 2021 and likely to come into force in **early 2022**)

## Eligibility for legal aid

Financial thresholds for entitlement to legal aid have not been updated for inflation for many years.

Originally, when legal aid was first introduced in 1949, 80% of the population qualified for legal aid.

That proportion declined as means testing became progressively tougher. Data suggests that now, as few as 20% of people would be entitled to legal aid based on the current means test.

## Legal Aid Means Test Review – Scope

In Scope	Out of Scope
All criminal and civil legal aid schemes and Exceptional Case Funding (ECF)	Which issues should be in scope of LASPO
The income and capital thresholds including disregards	The merits tests governing civil (including ECF) legal aid
The calculation of Civil and Criminal Legal Aid contributions including exemptions	The interests of justice (merits) tests governing criminal legal aid
Evidential requirements	Operational implementation (this will be delivered by LAA, HMPPS and any other operational bodies*)
Passporting arrangements, including in relation to Universal Credit (UC) recipients	
Discretionary powers of the Director of Legal Aid Casework (DLAC) at the Legal Aid Agency	
The rationale for determining why certain areas of legal aid provision should be means tested or non-means tested	

## MTR Work Streams

Civil legal aid	income thresholds capital thresholds
Criminal legal aid	income thresholds at the Crown Court and Magistrates Court
Contributions	income and capital contributions for both criminal and civil legal aid
Passporting	which means-tested benefits recipients should be “passporting” through the income test; whether to reinstate capital passporting
Non-means tested	some areas of legal aid are non-means tested due to potential seriousness; look at rationale and potential changes
Disregards	some types of income and capital are disregarded for legal aid purposes; re updating and refining the list

**Summary Table – Main eligibility limits from 6 April 2020:**

Forms of Civil Legal Services	Income limits	Capital limits	Passporting Benefits
<p><b>Legal Help;</b>  <b>Help at Court;</b>  <b>Family Help (lower);</b>  <b>Help with Family Mediation;</b>  <b>Family Mediation;</b>  <b>Legal Representation for proceedings in:</b>  the immigration and asylum tribunal of the First-tier tribunal; or transitional cases (see guidance).</p>	<p>Gross income not to exceed: <b>£2,657</b> per month*</p> <p>Disposable income not to exceed: <b>£733</b> per month</p>	<p>Disposable capital not to exceed:</p> <p><b>£3,000</b> [Legal Representation in respect of an immigration matter set out in Regulation 8(3)]</p> <p><b>£ 8,000</b> [All other forms of civil legal services]</p>	<p>Clients properly in receipt, directly or indirectly, of:</p> <ul style="list-style-type: none"> <li>• <b>Income Support,</b></li> <li>• <b>Income-Based Job Seeker's Allowance,</b></li> <li>• <b>Income-Related Employment and Support Allowance,</b></li> <li>• <b>Guarantee Credit or</b></li> <li>• <b>Universal Credit</b></li> </ul> <p>are passported through the gross income and disposable income test <u>but capital must be assessed in all cases.</u></p> <p><b>For controlled work asylum and immigration matters only described in regulation 6(1) of the Financial Regulations:</b> clients properly in receipt, directly or indirectly, of NASS support are passported through both the income and capital tests.</p>
<p><b>*Note:</b> A higher gross income cap applies to families with more than 4 child dependants. Add £222 to the base gross income cap shown above for the 5th and each subsequent child dependant.</p>			

[R \(oao GR\) v Director Of Legal Aid Casework \[2020\] EWHC 3140 \(Admin\).](#)

The Director of Legal Aid Casework has a discretion to value capital *other than money* on an equitable basis. Although GR concerned a domestic abuse survivor, the discretion applies in *all civil areas of law*.

This means that it is possible for ‘trapped’ capital to be excluded by affording it a ‘nil’ value and this should be considered in all cases where the client would pass the means assessment but for the existence of the ‘trapped’ capital.



## Mortgage cap removal

The LAA has legislated to remove the existing cap on the amount of mortgage debt that can be deducted from a property's value, so that all mortgage debt will be deducted. The current limit is £100,000.

This means that more individuals will pass the financial eligibility criteria for civil legal aid.

This change will come into effect from 28 January 2021.

## LAA stats on provider numbers

### Number of Providers :

Category of Law	Dec-10	Apr-11	Apr-12	Apr-13	Apr-14	Apr-15	Apr-16	Apr-17	Apr-18	Start of current contract, 01/09/2018	% change Dec 2010 to Sep 2018	Apr-19	Apr-20	Sep-20	Oct-20	Nov-20	Dec-20	Jan-21*	% change Sep 2018 to Jan 2021
Claims against Public Authorities	66	65	63	58	54	53	65	65	64	82	24%	80	74	74	72	72	72	72	-12%
Community care	88	87	85	83	71	91	87	81	76	92	5%	94	88	86	86	84	84	84	-9%
Discrimination	0	0	0	0	0	0	0	0	0	0		0	17	17	16	16	16	16	
Education	25	25	24	0	0	0	0	0	0	0		0	8	8	8	8	8	8	
Housing & Debt	368	367	346	368	345	323	305	286	254	286	-22%	295	265	260	254	252	252	252	-12%
Immigration & Asylum	194	199	197	239	226	199	182	166	141	198	2%	203	189	186	184	183	182	182	-8%
Family	1781	1721	1557	1352	1269	1211	1160	1090	1003	1017	-43%	1029	992	986	977	974	972	971	-5%
Clinical Negligence	175	172	169	166	156	142	107	106	100	99	-43%	100	99	99	97	97	96	96	-3%
Mental Health	188	184	172	168	160	176	169	158	147	156	-17%	156	148	148	144	141	140	139	-11%
Public Law	90	90	87	83	79	74	92	89	84	111	23%	110	100	100	99	99	99	99	-11%
Welfare Benefits	288	288	286	0	14	15	15	16	14	51	-82%	52	41	41	41	41	40	40	-22%

\* figures to 13 January

# How to feed into the means test review?

Contact:

Phoebe Clapham Head of Legal Aid Means Test Review – MoJ

[Phoebe.Clapham@justice.gov.uk](mailto:Phoebe.Clapham@justice.gov.uk)

kate.pasfield@lapg.co.uk

# Access Social Care



March 2020

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Social care can change lives



**There has been a  
staggering 92% drop in the  
number of legal aid cases  
taken on since 2010**

**Without access to justice,  
the right to social care  
might as well not exist**



## Our Legal Aid Research

Written a hypothesis – why legal aid lawyers are not taking on cases

Research to test hypothesis

Look for solutions to maximise the use of legal help



## How we work – connecting our expertise to other organisations



Subscriptions based model



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## Our legal network has 3 workstreams:

### Empower

Providing legal education so people know when to use the law

- Training videos
- Case studies and bite sized updates
- Ongoing training through the advice line
- Resources – info packs, precedent letters

### Enforce

Providing early legal help to hold public bodies to account

- Caseworker advice and casework
- Pro-bono clinics
- Pro-bono Barristers' panel
- **Chatbot**

### Challenge

Using data and strategic approaches to drive system level change

- Monthly reports to spot trends
- Collaborating with others to influence change locally and nationally
- Strategic casework

<sup>90</sup>  
**We have a 98% full or partial success rate with our cases**

**So we need to make sure that we can help more people**

## Growth in the South West – partnering with Barnwood



- Local organisations apply to Barnwood to fund their membership fee
- Co-produced service model
- Local advice co-ordinator works with our cloud based legal team
- Technology will help us

# Knowing when to refer to a legal aid firm

- (a) Asylum and immigration
- (b) Community care
- (c) Criminal cases
- (d) Debt - partial
- (e) Discrimination
- (f) Education - partial
- (g) Family - partial
- (h) Housing - partial
- (i ) Mental health and mental capacity
- (j) Welfare benefits appeals beyond first tier tribunal
- (k) Other cases / exceptional case funding

[Choose the area you most need help with - Check if you can get legal aid - GOV.UK \(checklegalaid.service.gov.uk\)](https://www.gov.uk/checklegalaid.service.gov.uk)



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## Knowing when to refer 2

Availability of legal aid will depend on:

- the type of case
- the person's **means**

## Knowing when to refer 3

Two levels (as apply to community care):

(a) early legal help – pre-action and some tribunal work

(b) full legal representation – legal proceedings requiring application to Legal Aid Agency

## Knowing when to refer 4

- **Are there any urgent issues?**
- **Do you need to gather more information, factual or financial?**
- **Think about possible legal deadlines: e.g. maximum 3 months from date of decision if looking at potential judicial review**

## Who makes the referral

- No rules on who can refer
- Individual affected,
- family member,
- deputy or power of attorney if this is relevant,
- or advice sector organisation (with consent) amongst others
- The most important thing is that the referral contains the relevant information needed to proceed to next steps



# Information needed to refer - 1

## Set out information to assist on **legal aid eligibility**.

- Means of live-in partner are aggregated
- Is the person on means tested benefits?
- Savings under £3,000 (not taken into account for the purposes of legal aid)
- Savings between £3,001 and £8,000 (they will qualify for legal help but may be asked to contribute to full legal representation)
- Savings over £8,000 (this would mean the person is unlikely to qualify for legal aid at all unless pensioner disregards apply)
- How old are they?

## Information needed to refer - 2

### Give effective background information

- Does the decision relate to a public body? If so, which one?
- Does the decision relate to a care provider specifically? Or in housing, for example, who is the housing provider?
- If you are challenging a specific **decision**, what was the date of that decision?
- What steps have already been taken?
- What is the ongoing impact on the individual / group of individuals if the situation remains unresolved?
- Why is it urgent and / or what is the point of law in issue?

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## Our referral process:



At each stage we record reasons for referrals not being successful. Many cases skip 1 and 2 due to urgency or strategic issues arising.

100  
**Thank  
you**



## Contact details

[enquiries@accesscharity.org.uk](mailto:enquiries@accesscharity.org.uk)

[www.accesscharity.org.uk](http://www.accesscharity.org.uk)



# Access to justice challenges in the South-West - experience of Plymouth Law Clinic



Rosie Brennan, University of Plymouth Law Clinic

# Legal Aid summary

- ▶ Work that is in scope of legal aid (Legal Aid Sentencing and Punishment of Offenders Act 2012 – schedule 1) – difficulties in establishing who remains automatically in scope – link referred to earlier <https://www.gov.uk/check-legal-aid>
- ▶ Exceptional Case Funding LASPO 2012, s10 – breach of individual's Convention rights (within the meaning of the Human Rights Act 1998), or any rights of the individual to the provision of legal services that are enforceable EU rights
- ▶ In scope automatically or ECF – merits plus means
- ▶ <https://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>

# Challenges in referring cases

- ▶ Even where a case is identified as in scope or ECF obtained, difficulties in referral due to capacity gap
  - ▶ Reduction in legal aid practitioners and contracts due to LASPO
  - ▶ Legal aid fees
  - ▶ Difficulties in recruitment in some areas of law
  - ▶ Covid-19 impacts
- ▶ South West suffers from all of this, in addition to geographical isolation, infrastructure issues, length of time advice deserts have persisted, significant pressure on the voluntary sector



# Example of a capacity gap

- Immigration Law – out of scope (LAPSPO), asylum remains in scope
- But impact on immigration legal aid providers – see earlier
- Plymouth case study
  - One caseworker providing legal aid coverage for city
  - Dispersal area for asylum seekers
  - Knock-on impact on cases in scope and other types of immigration cases
  - ECF referrals
  - Pressure on voluntary sector
  - Work undertaken pro bono

# Example of a capacity gap

- Attempts to address - agency co-operation
- Collaborative work with PLP, ILPA, Plymouth agencies – see session on Thursday 28<sup>th</sup> January
- <https://righttoremain.org.uk/legal-aid-droughts-and-deserts-new-report-by-dr-jo-wilding/>
- Other gaps

# Looking for solutions

- Building more effective referral pathways
- Making referrals more attractive – work that can be done pre-referral – as discussed earlier
- Specific work on Exceptional Case Funding
- Training and upskilling
- Growing own talent
- The role of law clinics
- Networks – links with organisations with specialist knowledge
- Continuing to document the gaps and engage with key organisations who are working on issue and lobbying MOJ
- Funding?

# A word on Law Clinics

- University Law Clinics – Devon and Cornwall: Plymouth and Exeter Universities
- Primarily educational projects, cannot fill gaps, but can contribute
  - Work under supervision in specific areas
  - Work co-operatively with partners
  - Next generation of advisors
  - Help build pathways
  - Networks
  - Evidence base
- <https://www.plymouth.ac.uk/courses/undergraduate/lb-law/plymouth-law-clinic>
- <https://socialsciences.exeter.ac.uk/law/communitylawclinic/>

# Some resources

<https://www.lawworks.org.uk/legal-advice-individuals>

<https://www.lawworks.org.uk/sites/default/files/files/lw-cr-legal-aid-scope.pdf>

<https://publiclawproject.org.uk/exceptional-case-funding/>

Spending of the Ministry of Justice on legal aid:

<file:///C:/Users/rbrennan1/Downloads/CDP-2020-0115.pdf>

Future of Legal Aid inquiry

<https://committees.parliament.uk/work/531/the-future-of-legal-aid/>

# Access Social Care

## *Developing a legal chatbot*

March 2020



# THE<sup>11</sup> LEGAL CHATBOT



**Local authority funding  
has been cut by  
nearly 60%.**

**96% of local authorities  
unlikely to meet legal  
duties**





**There has been a staggering 92% drop in the number of legal aid cases taken on since 2010**

**Without access to justice, the right to social care might as well not exist**



# THE<sup>14</sup> LEGAL CHATBOT

- 
- **Mencap receive over 15,000 calls**
  - **But only answer 59%**



# Funding cuts impact the lives of the people we support

Covid-19 has made things  
worse



**98% success rate with our cases**



## How we work – connecting our expertise to other organisations



In 2018 we set up a legal network which was incubated by the national charity, Mencap

Social care organisations pay a subscription so that their staff and beneficiaries can benefit from our service

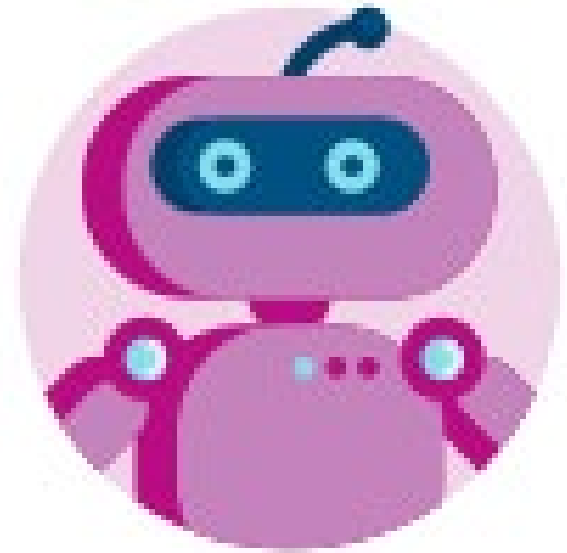
In 2019 the Legal Network became an independent charity.

Now we are expanding.

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## Our Requirements

- Accessible online portal
- Triage
- Help users navigate resources
- Free at point of use
- Available 24/7
- Used by other organisations



# THE<sup>119</sup> LEGAL CHATBOT

**A collaborative  
project:**



**ALLEN & OVERY**



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**Designing a chatbot :**





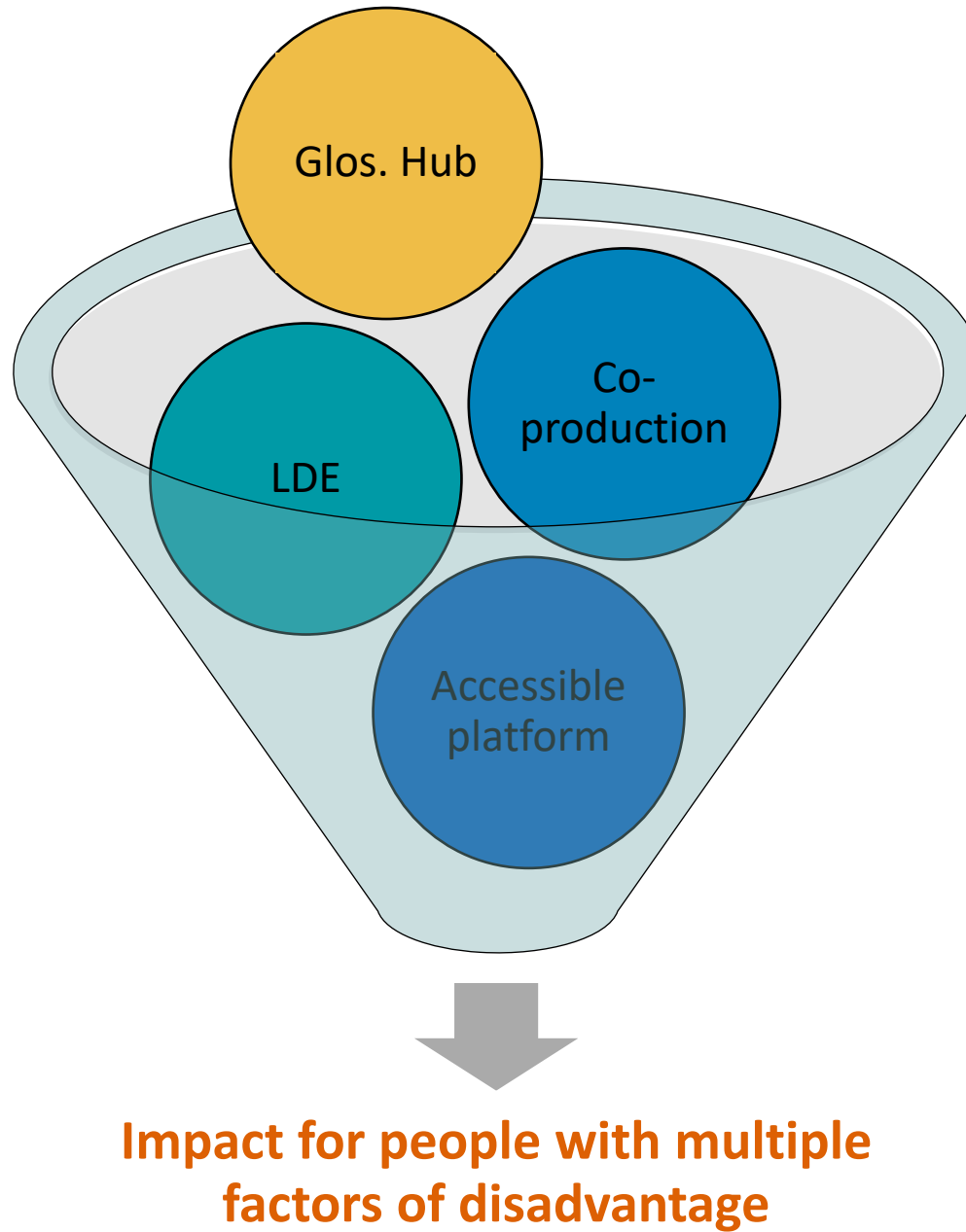
# Design Thinking Workshop



# THE<sup>122</sup> LEGAL CHATBOT

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## Accessibility:



# LEGAL CHATBOT<sup>123</sup>

## What is the impact so far?



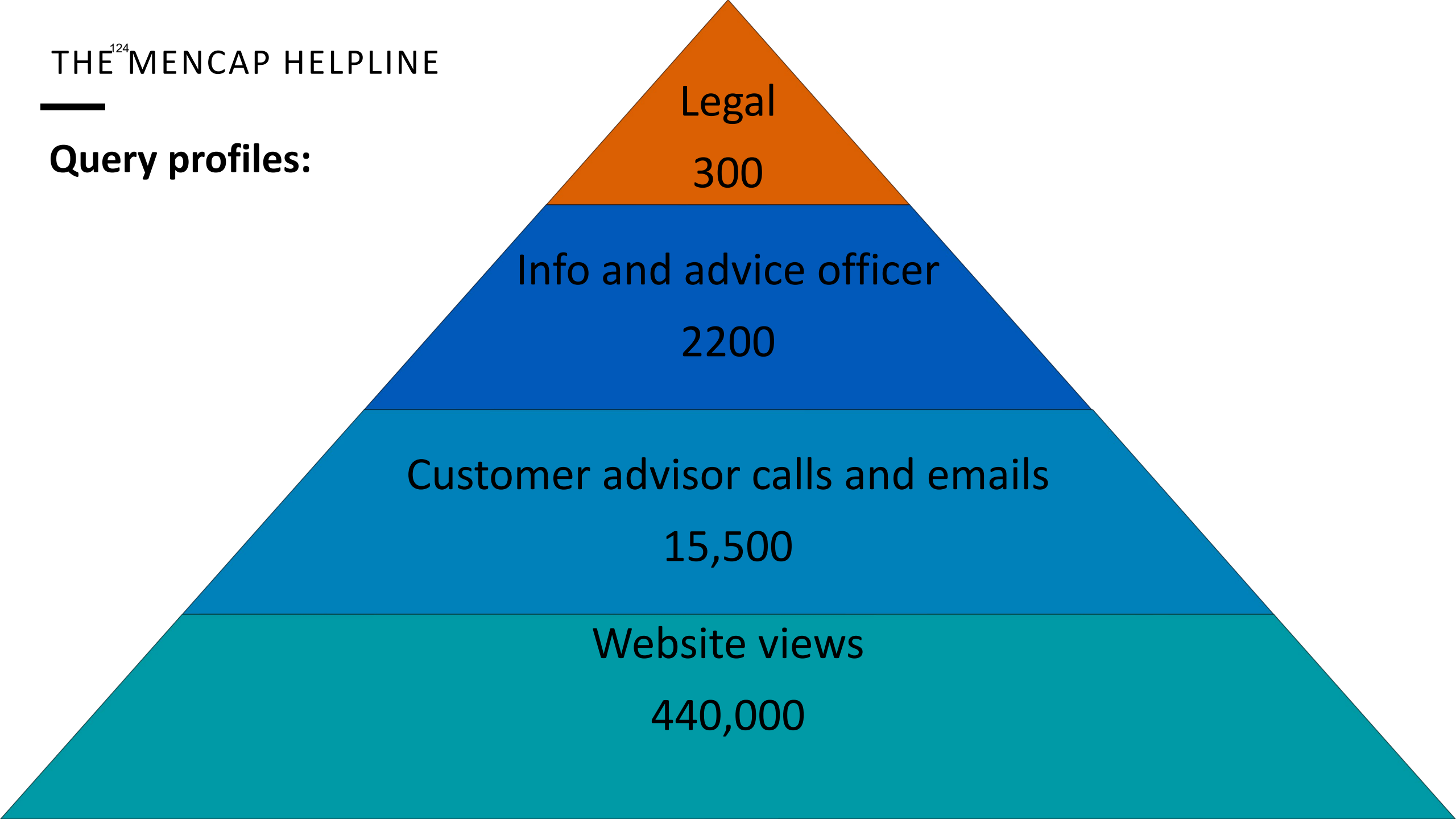
Customer advisors able to answer more complex queries

Easier to find the right template letter

Information more accessible



**Query profiles:**



---

**Equivalent value of answering queries:**



**1,700,000 queries**

**=**



**Helpline  
£2 million**

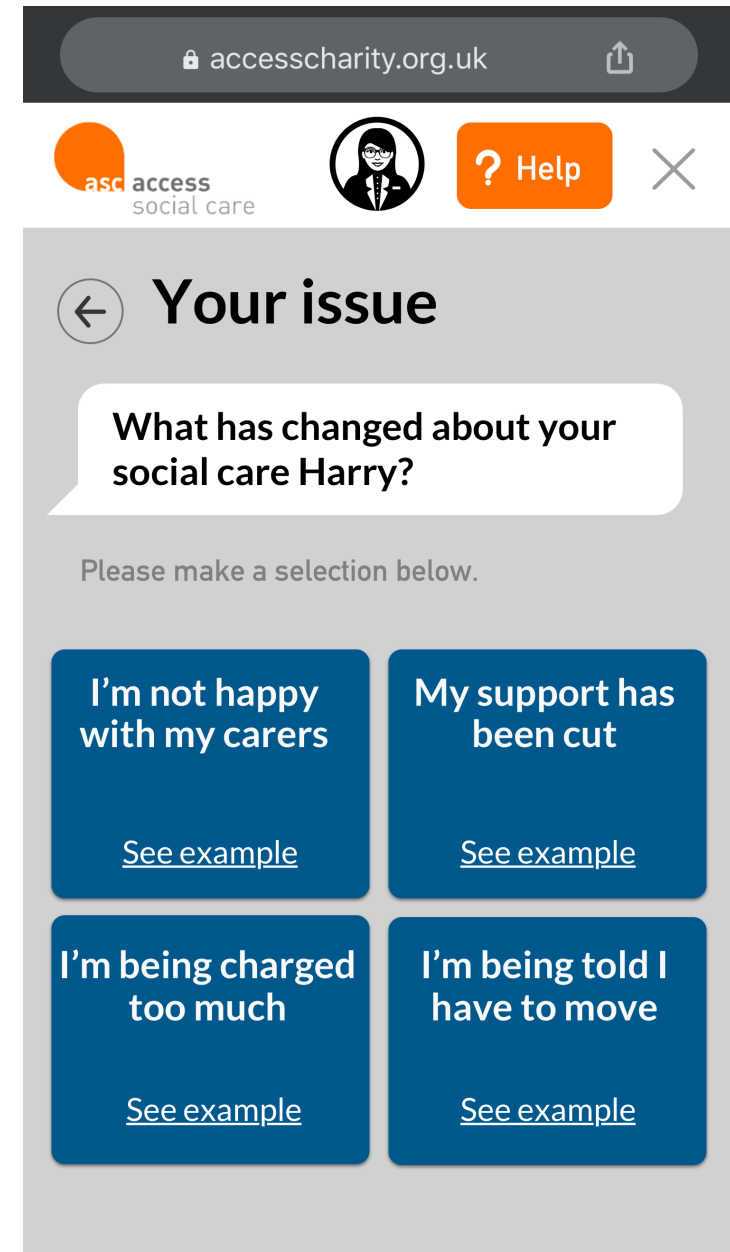
**OR**



**Chatbot  
£10,000**

# THE<sup>126</sup> LEGAL CHATBOT

Ready to launch in March 2021:



# Challenges

Pro-bono and finding the right Ai development partner

Content curation and accessibility

Determining readiness for launch

Seed funding v continuation funding for tech projects







# 129 Citizens Advice Plymouth

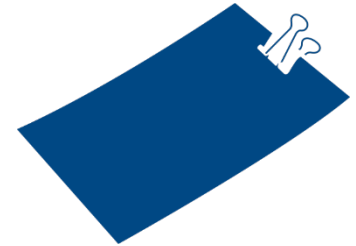
Legal Advice Centre



January 2021

# Talking Points

1. Introduction: Project Goals and Barriers
2. Remote Legal consultations. Volunteer solicitors.
3. Remote supervision to enhance current offering
4. Volunteer policy. Working with barristers to provide advice pro bono
5. Partnership work with local agencies
6. Justice First Fellowship. Organising without in house capacity



# Engaging Services

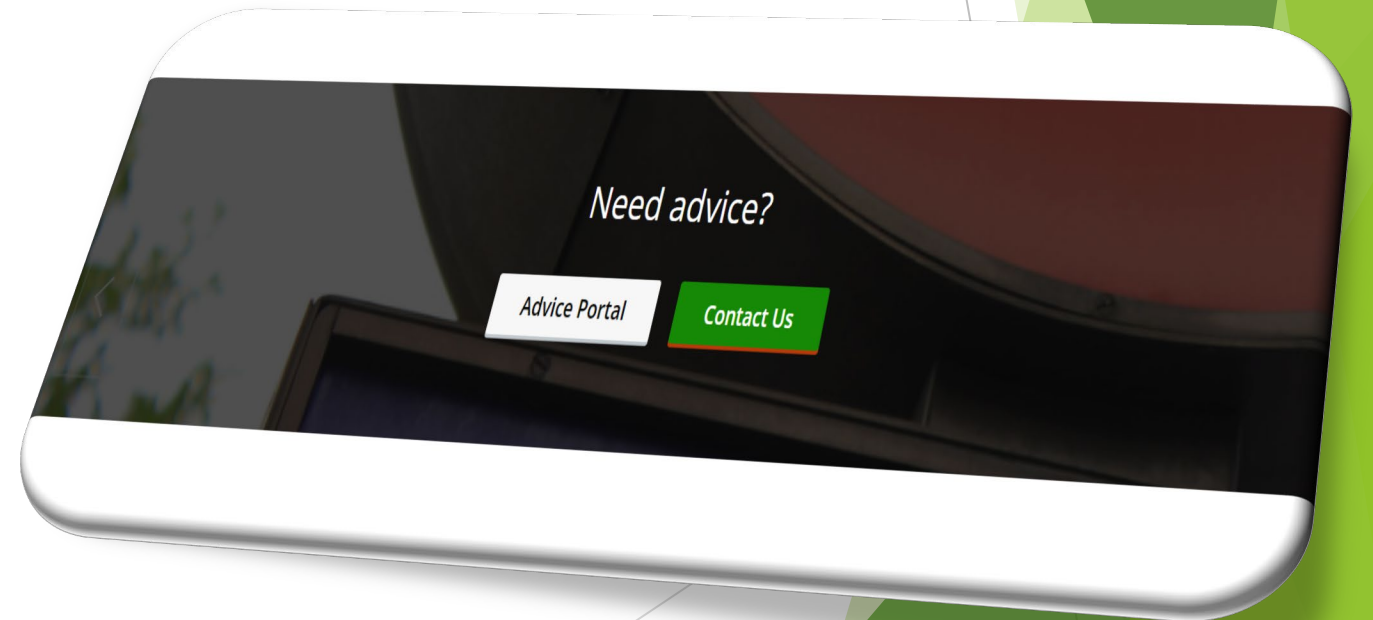
Telephone: 01752 982899

<https://citizensadviceplymouth.org.uk/legal-advice-centre/>

LACAdmin@CitizensAdvicePlymouth.org.uk

# Legal Advice Centre (University House) Advice Portal

Eddie Coppinger  
Director



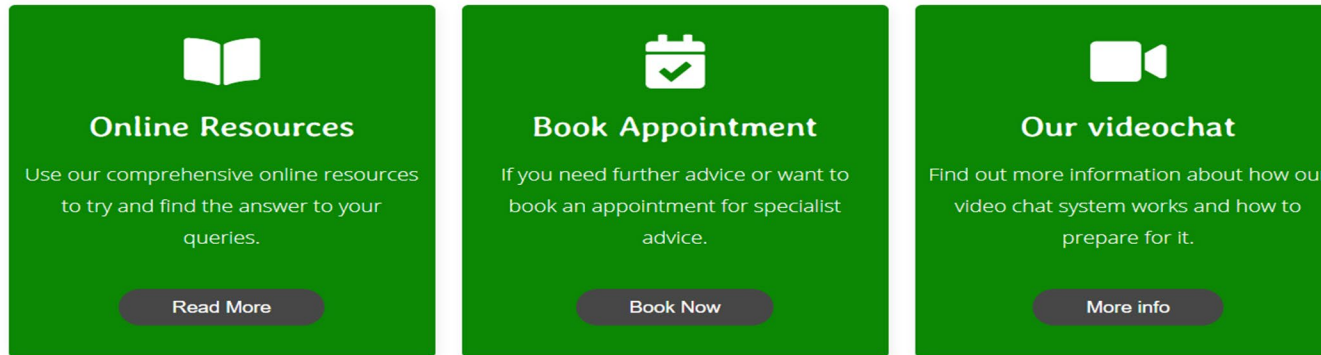
## What is the purpose of the Advice Portal?

The portal allows you to find up to date and specialist information on welfare benefits, housing, employment, family matters and domestic abuse. You can also book an appointment in order to receive support via webcam or telephone, or you can use the same system to book appointments for clients to receive legal support directly.

## Who can register?

We are currently allowing advice agencies or similar organisation in Tower Hamlets, Hackney, Newham, Devon, and Cornwall to join. Registration is free, and there are no limits on the number of accounts per organisation.

You can either have one central account or each staff member can create an account for themselves.



- ❑ Promoting a new way to get legal advice, the University House Advice Portal is a hub for organisations to receive support remotely from the Legal Advice Centre (University House).
- ❑ The service is for advisers/support workers to receive help on existing cases, or to make full referral of appropriate cases to University House.
- ❑ The portal allows you to book an appointment/slot in order to receive support via webcam, or you can use the same system to book appointments/slots for clients to receive legal support directly.
- ❑ Registered users can also receive professional development support, with up to date information and training on many areas of social welfare law and practice.

- ▶ You may be able to help your service user with the useful information available on the portal. Split into difference categories, it is easy to find what you are looking for.
- ▶ If you cannot find what you need, [book an appointment](#) and we can give advice to the service user.



Welfare Benefits



Employment



Housing



Domestic Abuse



# Booking appointments

1. The calendar will have pre arranged slots for different areas of advice. Find a free one for the area of advice you need and choose it.

The number in brackets on the calendar below is how many free appointment slots there are at that time.

Adviser

< January 2021 >

Mo	Tu	We	Th	Fr	Sa	Su
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

2. You then need to fill in the required information that is sent to us. We will then arrange the appointment with yourself or service user.

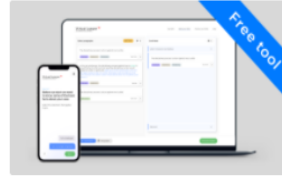
## Personal information

Fields with \* are required

I have read the User FAQ *	-
Referred by *	Advice Portal Admin
Your Organisation *	
Location *	-
Appointment is for *	-
E-Mail Address for appointment	
Contact name for appointment *	
Contact Phone for appointment *	
Enquiry Description *	Please briefly explain the issue, including any important deadlines.

## Booking overview

# Free Legal Writing Tool



## Free Legal Writing Tool

Badly treated at work? Use Virtual Lawyer to write to your employer. Virtual Lawyer is a free to use tool that helps you write a letter to you

[Read More](#)

Virtual Lawyer is a **free** to use tool that helps you write a letter to your employer. It is an award-winning tool developed by the team at Monaco Solicitors who are experts in employment law and legal technology.

The tool is designed to be easy to use by everyone, not just lawyers. It helps you draft a letter quickly using paragraphs relevant to your employment issues. All paragraphs in the tool have been written and reviewed by specialist employment lawyers.



# The EU Settlement Scheme

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Christian Davies, Solicitor and EUSS Hub Coordinator

Public Law Project

# The EU Settlement Scheme

- Implementation of UK's obligations under Part 2 (Citizen's Rights) of the [Withdrawal Agreement](#)
- [Appendix EU](#) of the Immigration Rules
- Open to:
  - EEA and Swiss citizens resident in the UK before 31 December 2020
  - Family members
  - People with EU derivative rights to reside (e.g. Zambranos)

# Settled status (SS)

- Indefinite leave to remain
- Available to those who have completed a 5 year continuous qualifying period in the UK
- Similar rights to live, work, rent, access NHS and benefits as British citizens

# Pre-settled status (PSS)

- 5 years' limited leave to remain
- Available to those who have less than 5 year continuous qualifying period in the UK
- Right to live, work, rent and use the NHS
- Position in relation to welfare benefits is currently unclear. See [\*Fratila and Tanase v SSWP\* \[2020\] EWCA Civ 174](#)

# EUSS status is “digital only”

- The majority of EUSS applications must be done online
- EEA nationals only receive a digital form of proof of status; no physical document
- Complex and unprecedented system - see [PLP report](#)
- Strong appearance of discrimination against people who are digitally excluded e.g. disabled people, the elderly and Roma communities



# Deadlines

- Deadline for applications to the EUSS is 30 June 2021
- Late applications will be allowed where there are “reasonable grounds” - guidance apparently forthcoming
- Individuals with PSS can upgrade to SS once they have completed a 5 year continuous qualifying period - must do so before PSS expires

# Grace period

- EU free movement ended on 31 December 2020
- The [Application Deadline and Temporary Protection Regulations](#) effectively preserve the rights of those lawfully resident before 31 December 2020 until the later of:
  - 30 June 2021 (the application deadline); or
  - the date on which an application submitted before the application deadline is determined
- EEA citizens *should* be able to continue to rely on their passport to prove status until the application deadline
- No protection for individuals with “reasonable grounds” for making a late application

# PLP's EUSS Hub

- The EUSS Hub provides second-tier advice to frontline organisations on complex EUSS applications.
- We also take referrals for EUSS-related systemic public law challenges.
- Please email [c.davies@publiclawproject.org.uk](mailto:c.davies@publiclawproject.org.uk) for more information.

# Derivative Rights

Nisa Tanin  
Coram Children's Legal Centre  
27 January 2021

Nisa.Tanin@coramclc.org.uk  
@MigrantChildren

## EU11 / EU14

- Person with (i) derivative right to reside, or (ii) Zambrano right to reside, or (iii) had a derivative or Zambrano right to reside
- At the date of application ***and in an application made by the required date***
- Completed a continuous qualifying period of 5 years / less than 5 years
- No supervening event
- EU4 – where granted LTR(E), must continue to meet the eligibility requirements for that leave which they met at the date of application (except for any which related to their dependency as a child, dependent parent or dependent relative) or meet other eligibility requirements for LTR(E) under EU14/EU14A

## Annex 1 – “required date”

- Depends on the categories – see Annex 1 for details
- No ILR(E) or LTR(E) under Appendix EU:
  - Before 1 July 2021; or
  - **Before the end of such further period of time for the person to make an application under this Appendix**, as SSHD considers reasonable and notifies to the person in writing, where SSHD is satisfied that there are reasonable grounds for the person’s failure to meet the deadline [before 1 July 2021]
- LTR(E) under another part / outside IRs **or** LTR(E) under Appendix EU, which has not lapsed / cancelled / curtailed / invalidated, and which expires on/after 1 July 2021:
  - Before the date of expiry of that leave; or
  - Before the end of such further period of time for the person to make an application under this Appendix, as SSHD considers reasonable and notifies to the person in writing, where SSHD is satisfied that there are reasonable grounds for the person’s failure to meet the deadline [before 1 July 2021]

## ***Annex 1 - "Person with a derivative right to reside"***

- EEA national under the age of 18
- By the specified date, A is (and for the relevant period has been/was):
  - resident for a continuous qualifying period in the UK with a derivative right to reside by virtue of Regulation 16(1) of the EEA Regulations
  - No requirement for comprehensive sickness insurance

<i>Chen – Reg 16(2)</i>	<i>Ibrahim – Reg 16(30)</i>	<i>Teixeira – Reg 16(4)</i>
<ul style="list-style-type: none"> <li>• Must not be exempt person: right to reside under another EEA Regulation, right of abode or ILR(E) unless under App EU</li> <li>• Excludes person with a Zambrano right to reside</li> </ul>		
Primary carer of an EEA citizen child under 18	Child of former EEA citizen worker	Primary carer of child of former EEA citizen worker
Resident in UK	Child lived in UK, while EEA parent worked in UK	Child lived in UK, while EEA parent worked in UK
Self-sufficiency	Child in education in UK	Child in education in UK
EEA child unable to remain in UK, if primary carer left UK for indefinite period		Child unable to continue education in UK, if primary carer left UK for indefinite period
	Adult child (over 18) in education, dependent on primary carer due to severe physical / mental impairment	Primary carer of adult child (over 18) in education, due to child's severe physical / mental impairment
No access to public funds	Access to public funds	Access to public funds



## ***Alternative care arrangements***

- Is it appropriate for another person to care for child, considering child's best interests?
- Whereabouts and immigration status of other parent
- Accept there is no alternative care arrangement by other parent if:
  - Not British citizen and does/did not have another right to reside in UK (unless under App EU 'person with derivative right'); or
  - Is (was) residing outside the UK
- Unless another direct relative or legal guardian in UK caring for child
- Unsuitable care arrangement – child protection issues
- Mere assertion, lack of financial resources / care provision not sufficient in themselves

## ***Annex 1 - "Person with a Zambrano right to reside"***

By the specified date, they are (and for the relevant period have been):

- (a) resident for a continuous qualifying period in the UK with a derivative right to reside by virtue of Regulation 16(1) of the EEA Regulations, by satisfying the criteria in:
  - (aa) paragraph (5) of regulation 16; or
  - (bb) Paragraph (6) of that regulation ...
  
- (b) without leave to enter / remain in UK, unless granted under App EU

# Without leave to enter / remain

EUSS Zambrano Guidance - “alternative means”

- A would not be required to leave UK as BC able to reside in the UK, if A:
  - Has (or for relevant period had) LTR(E) in UK (unless under Appendix EU); or
  - Realistic prospect of success of an application under Appendix FM / Article 8
  - Zambrano principle cannot be regarded as “*a back-door route to residence by such non-EU citizen parents*” (SSHD v Patel [2017] EWCA Civ 2028 at §76)

## Patel v SSHD [2017] EWCA Civ 2028

- (i) Recognised that a reference to fundamental rights (under Arts 7 and 24 of the Charter and Art 8 of ECHR) was relevant to the question of whether a *Zambrano* right is established (§78); but
  
- (ii) The fact that Article 8 ECHR is *engaged* (i.e. that there would be an interference in a protected family life) is not determinative of whether a *Zambrano* right is established (§42)

## **EUSS Guidance, p.36**

- If pending application under EUSS, and then applies under another part of IRs, both applications must be considered
- Where both applications fall to be granted, must consult the European Migration & Citizens' Rights Unit before either application is decided

## **EUSS Guidance, p.36**

- If pending application under another part of IRs, and then applies under the EUSS, original application will be varied and must no longer be considered
- Unless the application under another part of IRs is a claim for asylum or humanitarian protection or ***otherwise based on human rights***, in which case both applications must be considered, and where both fall to be granted must consult the European Migration and Citizens' Rights Unit before either is decided

## **EUSS Zambrano Guidance, p.30**

- If already has (or, as the case may be, for the relevant period had) LTR(E), unless granted under Appendix EU, must consider for leave under the other eligibility requirements in rule EU11 (and, where relevant, EU12) and EU14 of Appendix EU
- If the applicant does not meet any of these other requirements, and the applicant's extant leave has 28 days or more until expiry, must refuse the application under EU6
- If, at the point of decision, that leave to enter or remain has less than 28 days until its expiration date, must go on to consider the other requirements



# Challenging delays in the EU Settlement Scheme

27 January 2021

Carla Mirallas

Lawyer, Bindmans LLP

Volunteer Coordinator, Here for Good



## Delays under the EUSS - Introduction

- Delays are currently common and widespread amongst many applicants. These delays are causing a great deal of anxiety and stress to many applicants.
- The impact of these delays on individuals and their families varies from case to case and depends on their individual circumstances.
- Many applicants may face serious restrictions in terms of working, renting, accessing medical treatment and find themselves abroad and separated from family members whilst waiting for a decision.

# Different types of delays within the EUSS

From 3 months up to 13/14 months delay...!

## 01

### Paper applications - Derivative rights

Those with derivative rights of residence; Zambrano, Chen and Ibrahim and Teixeira' carers

## 03

### Non-EEA family members

Family members are also experiencing delays, particularly if they applied without a BRP issued under EU law

## 05

### Criminal convictions

Delays are caused also by referrals to immigration enforcement (no information provided to applicants/legal representatives)

## 02

### Paper applications - No ID

Those without valid ID/Passport are also experiencing lengthy delays

## 04

### EUSS Family Permits

In addition to the normal delays, the situation of those who are abroad is worsened by many visa centre closures (re- Covid-19)

## 06

### Pending investigations

Applications get automatically paused for 6 months. Not reasonable to pause in all cases.



# Different types of delays within the EUSS

## 07

### Administrative reviews

Some administrative reviews have also been delayed. The Home Office guidance states that usually applicants get a decision within 28 days. However, we have seen delays of over 3-4 months.

## Pending prosecution/police investigation

- In practice we have seen that many applications are paused until the outcome of the prosecution is known. If paused, UKVI will only review the application 6 months after it has been paused. If the outcome of the pending prosecution is known, the application will then be considered under the EUSS.
- The EUSS suitability guidance states that where the applicant has a pending prosecution which does not meet the criteria for referral to IE, the Home Office must consider whether it is **reasonable** and **proportionate** for the application to be paused until the outcome of the prosecution is known.
- It is therefore not appropriate to pause in all cases!

## Home Office's response regarding delays

- Standardised reply by email & phone. Examples:
  - *“We are continuing to work on your application and aim to make a decision as soon as possible”*
  - *“Your case is still currently under consideration with the senior case working team”*
  - *“Each application is considered on a case-by-case basis. Therefore, we are unable to give a timescale for completion. All cases are decided on their individual merits and complex background checks have to be completed before a decision is to made”.*
- No timescale provided
- Possibility to escalate cases in certain situations (i.e. homeless individuals, victims of trafficking, children's best interests etc...)

## EU Settlement Scheme: current estimated processing times for applications

(updated 22 May 2020)

- The guidance does not help to provide reassurance to applicants as the times stated very often fail to mirror the processing times that we encounter in real life: *“It usually takes around 5 working days for straightforward applications to be processed if no further information is required, but it can take up to 1 month”*.
- We have come across many applicants with straightforward applications who have been waiting much longer without any obvious reasons that could possibly justify the delay.
- The guidance fails to specify what processing time applicants can expect when they fall outside the 1 month processing times.

## EU Settlement Scheme: current estimated processing times for applications

(updated 22 May 2020)

- The first step in understanding the length of any delay is to calculate when the Home Office considers the application processing time to have started:
  - If applicants applied using the [EU Exit: ID Document Check app](#), the processing time starts when the online application form was submitted;
  - For those who posted their ID to the Home Office, it will be when the Home Office received the document;
  - In addition, if the applicant is a non-EEA family member and needed to provide their biometrics as part of their application, the processing times start once the Home Office receive their biometrics.

## Impact of Covid-19 outbreak on the EUSS

- The EUSS online guidance stated: *“It is taking longer than usual to process applications because of coronavirus (COVID-19)”*.
- Suspension of some services:
  - From 30 March 2020 until 28 May 2020:
    - The EUSS Resolution Centre was closed so applicants were unable to request paper application forms and make enquiries;
    - The postal route was closed
  - From 30 March 2020 until now:
    - Some centres where identity documents can be scanned remain closed.



## Challenging delays: Suggested initial steps

- Delays under the EUSS are affecting a large number of applicants and often the delay may be unreasonable and unjustified.
- The Home Office's customer service standard time for in-country settlement applications is 6 months. In most cases, it will be premature to consider initiating judicial review proceedings before this timeframe has passed.
- For a legal challenge to be successful, applicants will have to show that the delay is to the point that it is unlawful. Evidence as to the detriment caused to the applicant as a result of the delay can be helpful in demonstrating the unreasonableness.
- Before considering a challenge to the delay, it is good practice to document attempts made by the applicant in trying to secure an update or decision from the Home Office.

## Challenging delays: Suggested initial steps

### STEP 1: Contact the EU Settlement Resolution Centre (SRC)

- Contact the SRC to obtain updates on the progress of the application. The SRC can be contacted by phone/email (see website).
- Highlighting the length of time the applicant has been waiting for a decision and any difficulties he/she is facing as a result.
- Keep an accurate record of all phone calls, including the date, name and team number of the person you spoke to and the information provided regarding the status of the application. Keep a record of all phone calls/email correspondence with the SRC.

## Challenging delays: Suggested initial steps

### STEP 2: Make a complaint against the Home Office

- If the SRC is not providing a satisfactory answer or a reasonable timeframe, consider making a complaint against the Home Office's failure to make a decision:
  - By email: [public.enquiries@homeoffice.gov.uk](mailto:public.enquiries@homeoffice.gov.uk), or;
  - By post: Home Office, Direct communications unit, 2 Marsham Street, London SW1P 4DF.
- Provide contact details and include information about the department you felt provided you a dissatisfactory service (EUSS Case working team).
- The Home Office aims to respond within 20 working days. If you remain unsatisfied, you can also ask the applicants' MP to refer the case to the Parliamentary and Health Service Ombudsman.

## Challenging delays: Suggested initial steps

### STEP 3: Contact applicant's Member of Parliament (MP)

- Applicants who are resident in the UK can also contact their MP and ask them to contact the Home Office regarding the delay in processing their application.
- We would recommend writing to the MP, making sure applicants provide them with the EUSS application reference number so that they can follow this up with the Home Office.
- In our experience, MPs offer a great assistance to applicants by making enquiries on their behalf with the Home Office and sometimes their correspondence can help focus the Home Office's mind on their application, which can help to process the application quicker.

## Challenging delays: Suggested initial steps

### STEP 4: Consider initiating legal action (JR)

- If after trying all the above steps, the applicant's decision is still pending, no further information/documents are required from the applicant and he/she you has been waiting for an unreasonable amount of time to get a decision, you may wish to consider initiating judicial review proceedings.

## Challenging delays: Suggested initial steps

### STEP 4: Consider initiating legal action (JR)

- If after trying all the above steps, the applicant's decision is still pending, no further information/documents are required from the applicant and he/she you has been waiting for an unreasonable amount of time to get a decision, you may wish to consider initiating judicial review proceedings.

## Letter Before Claim (Pre-Action Protocol for Judicial Review)

- JR is a way of challenging the decisions, acts (and sometimes the failure to act) of a public body, because it has not acted lawfully. It is a court procedure.
- In JR proceedings, the judge will not be concerned with the conclusions of that process (whether you should be granted settled or pre-settled status), as long as the right procedures have been followed to reach that decision.
- It is important to be aware that this type of legal remedy is expensive, risky and complex.

## Letter Before Claim (Pre-Action Protocol for Judicial Review)

- Before commencing JR, certain steps must be taken. These steps include writing a letter to the public body (in this case, the Home Office) setting out why you think they have acted unlawfully and what you want them to do to rectify the situation (to reach a decision without further delays).
- You should state also your intention to apply for JR if they do not confirm they will take the action you have specified within a certain time, which is usually 14 calendar days. This is known as a “pre-action protocol” letter (or letter before claim).
- There is a specific format setting out all the issues the pre-action letter should address in a document known as the Pre-action Protocol for Judicial Review. In addition, the Home Office has also published a pre-action protocol template, which applicants can use.



## Letter Before Claim (Pre-Action Protocol for Judicial Review)

- This letter is an important document because many public body defendants will withdraw/reach a disputed decision in response to a well-drafted letter. The letter can therefore trigger the resolution of the dispute without the need for JR proceedings to be started. For this reason, a lawyer who specialises in these type of proceedings should usually draft the pre-action protocol, if possible.
- The fact that you may decide to submit a pre-action protocol letter does not mean that you are obliged to initiate JR proceedings. The letter is just an attempt to try to resolve matters amicably with the Home Office in order to avoid initiating court proceedings.
- If there is no satisfactory response to your letter, the next step would be to make an application for permission to apply for JR. At this stage, you should contact a solicitor who will properly assess the case, your available funding options and your chances of success.

## Suggested legal arguments to challenge a delay under the EUSS

- The delay is unreasonable and is in breach of the SSHD's common law duty to act in a reasonable time period;
- The delay is manifestly excessive and unreasonable;
- The delay is in breach of the Secretary of State's obligations under Section 6 of the Human Rights Act 1998 because it amounts to a breach of our client's and his family's rights to respect for private and family life as protected by Article 8 ECHR;
- The delay is in breach of SSHD's duty to safeguard and promote the best interest of the child under section 55 of the Borders, Citizenship and Immigration Act 2009.

## Common law duties

- There is a duty on public authorities, including the SSHD, to process applications in a ‘reasonable’ time. What constitutes reasonable will depend upon the circumstances.
- In *(R (S) v SSHD [2007] EWCA Civ 546; [2007] INLR 450 at §51)* which considered ‘reasonable’ time taken to process an asylum claim, the court held: *‘It is a flexible concept, allowing scope for variation depending not only on the volume of applications and available resources to deal with them, but also on differences in the circumstances and needs of different groups of asylum seekers. But [...] in resolving such competing demands, fairness and consistency are also vital considerations.*
- In the case of *R (FH) v SSHD [2007] EWHC 1571*, the court held that a delay of around 12 months in determining an asylum claim was not necessarily unlawful if an explanation for the delay was provided and the ‘approach of the respondent was based on a policy which was fair and applied consistently’ (§8). Further, the SSHD may not rely on having insufficient resources to explain an unreasonable delay if the system itself was not rational (§11).

## Common law duties

- Therefore, what constitutes a ‘reasonable’ time depends on the context. The unique context of the EUSS means that only short delays are reasonable:
  - 1) the EUSS is only open for a limited period of time and will close on 30 June 2021. As applicants only have a limited amount of time to secure status, applications should be determined promptly to allow for subsequent applications.
  - 2) the SSHD’s guidance states that for most applications there are expected processing times of between five days and a month. While the guidance states that paper applications will take longer, there is no indication of how much longer this will take. As such, the five days to a month processing timeframe should be used as a benchmark for assessing what is a reasonable length of time for determining paper applications.

# THANK YOU

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Carla Mirallas

[c.mirallas@Bindmans.com](mailto:c.mirallas@Bindmans.com)

020 7833 4433

@BindmansLLP

HOW CAN WE HELP?

+44 20 7833 4433 | [info@bindmans.com](mailto:info@bindmans.com) | [bindmans.com](http://bindmans.com)

236 Gray's Inn Road | King's Cross | London | WC1X 8HB



# Impact of EUSS on people at risk

**27 January 2021**

Christine Brienne

EUSS Engagement Officer

Dorset Race Equality Council





## Who we are



## Dorset Race Equality Council (DREC)

A local charity supporting individuals and groups in challenging racism and discrimination, and promoting the celebration of ethnic, cultural and religious diversity in Dorset.

Co-partners with Citizens Advice BCP for delivering the EU Settlement Scheme project in Dorset:

- DREC: offering the **engagement** side of the project
- Citizens Advice BCP: providing EUSS specialist **advice**
- COVID aware: helping EU / EEA citizens with their applications and post application queries by phone, email, video, and face to face on appointment only basis.

# The EU Settlement Scheme Project in Dorset

- **Funding** provided by the Home Office and delivered through local organisations DREC and Citizens Advice BCP
- 1<sup>st</sup> tranche of funding from Spring 2019 to March / June 2020
- 2<sup>nd</sup> tranche of funding from October 2020 to **31 March 2021**
- EUSS advice continued to be given to clients during the funding gap period within new parameters due to lockdown.
- **1<sup>st</sup> phase**: successful in engaging with a lot of individuals, organisations and large employers (i.e. hospitals) and helping EU citizens and their family with their application.
- It is estimated that more than 95% of EU nationals in the Bournemouth, Christchurch & Poole (BCP) area have applied and only 50 to 65% in the rest of Dorset
- **2<sup>nd</sup> phase** focuses on **complex cases**, and on reaching those in rural areas as well as the more **vulnerable** and those **at risk** of 'slipping through the net'.



## Who is 'at risk'

Travellers

Rough sleepers

Transient workers

People with disability

Low digital literacy

Mental health issues

Criminal conviction

Children in care

Children of EU / EEA parents born in the UK but not British

Older citizens who are long term residents and who believe they do not need to apply or are not aware of the scheme

## A few examples

### Low digital literacy

- **Client A** is 86. He has no IT skills and is unable to apply for himself, he does not use internet and does not use a mobile phone or email. He lives independently with no younger family members to support him. Even though an application was successfully completed via a face to face appointment, he will not be able to prove his status in the future as this requires IT skills to generate codes to present to DWP and other bodies, leaving him vulnerable.

### Thinking they do not need to apply

- **Client B** has been in the UK for 40 years and is with the incorrect assumption that he is a British national because he has been a resident for so long and is married to a British National. No proof of Indefinite Leave to Remain. Without our team encouraging him to apply, he would have been left without status.

### Language and mental health issues

- **Client C** is Spanish, has mental health issues and has difficulty understanding the application process. Without the help of our team during lockdown, he would effectively have slipped through the net and would never have been able to apply by himself and get a status.

# Barriers & Challenges (1)

## Not wanting to apply

- EU citizens with a criminal conviction are particularly reluctant to apply as they fear deportation.
- No clear guidance as to what exact criminal convictions are classed as serious enough to refuse status.
- **Client D** is Portuguese and has been homeless in the UK for 4 years. He has had several hospitalisations and arrests in connection with drug related issues. He did not want to apply to the EUSS because of criminality checks.

## COVID-19

- Has a negative impact on vulnerable clients who need to apply for status, especially where applications are complex and require face to face support. They have to weigh up the risk of COVID when applying now vs later with possible delays. This is an unfair situation for already vulnerable people.

## Barriers & Challenges (2)

### Digital Proof of Status

- Some agencies request digital proof of status, i.e. job centres or housing providers/councils, but have no idea how to assist clients in generating the code required to prove their status.
- This leaves vulnerable clients in very difficult position of dependency on institutions/ other people/ charities in the future.

### Delay

- Significant delay in getting application results, especially for third country nationals.

### Home Office

- On occasion, the HO resolution centre is refusing to issue paper applications to clients when needed, because they are not able to get the right documents from their consulate, a common issue during lockdown.

## Impact of Brexit on people at risk

- **Hate incidents** targeting eastern Europeans and increased tensions between communities
- **Employers not 'au fait'** and refusing to employ / dismissing staff who have not yet applied or received their status
- **Going from pre-settled to settled status** – no reminder of the date from HO, will need to access their status online and then reapply.
- If a passport has been renewed, risk of not having kept the original number for online access
- Language barrier – may not understand the risk of losing their status.
- The more **vulnerable** and those who are not digital friendly will need help to reapply and are at risk of becoming **illegal** once their 5 years run out.

## Actions and solutions

- **Strong Partnership work**
- Active **Networking** – grassroots and with agencies and organisations
- Direct access to the Home Office via the EUSS project
- **Access to Justice** project / caseworkers
- Signposting and referring complex cases to partner organisations and professionals
- Member of the Brexit Civil Society Alliance – **Lobbying** and sharing information
- Member of Prejudice Free Dorset (DREC is a 3<sup>rd</sup> party reporting centre for Dorset Police)
- Ongoing **interaction** with our multicultural communities

# Contact

Our local team offers **free help** with your application.

Contact: **07761 092704**  
[euss.advice@citizensadvicebcp.org.uk](mailto:euss.advice@citizensadvicebcp.org.uk)

For further engagement, please contact Christine  
**07743 370459**  
[christine.brienne@dorsetrec.org.uk](mailto:christine.brienne@dorsetrec.org.uk)



## THANK YOU

Christine Brienne, EUSS Engagement Officer

Dorset Race Equality Council

07743 370459 / [christine.brienne@dorsetrec.org.uk](mailto:christine.brienne@dorsetrec.org.uk)

[www.dorsetrec.org.uk](http://www.dorsetrec.org.uk)

Access to Justice South West:  
**Introduction to the Equality Act 2010**

Audrey Ludwig  
Solicitor





# A Whistlestop Tour of Equality Act

# Equality Act 2010

- Essentially it sets out **what is prohibited, required & allowed** in certain situations to avoid \*unlawful\* discrimination based on each of the protected characteristics.
- The first part of the Act has general principles and most of the latter contains exceptions to those general rules
- No hierarchy of rights. Conflict between protected classes is recognised and determined by courts.

# Protected Characteristic

The Equality Act protects the following characteristics (s4):

- Age (s5)
- Disability (s6)
- Gender reassignment (s7)
- Marriage and civil partnership (s8)
- Pregnancy and maternity (s4)
- Race (s9)
- Religion or belief (s10)
- Sex (s11)
- Sexual orientation (s12)

# Notes about protected characteristics

- Each one has to be considered **separately**. A policy or decision benefitting one protected class may amount to unlawful discrimination against another
- Where there is conflict between two competing rights (*Ladele v London Borough of Islington* [2009] EWCA Civ 1357 (15 December 2009) or *Lee v Ashers Bakery* 2018, then court will determine issue

# Context of discrimination is important

- Equality Act only applies in context of work, some housing, education, some transport, provision of services to the public, some clubs and associations, trade unions, public functions, occupational pensions and insurance.
- Doesn't apply in other contexts. Also many, many exceptions in Act to make it workable
- Primarily, breach dealt with by Civil Action taken in **County Court, Employment Tribunal** or **First Tier Tribunal** ( Special Educational Needs and Disability Tribunal) depending on issues (NB judicial review...see later)
- Don't confuse with hate crime

# Direct Discrimination

- **13. Direct discrimination**
- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B **less favourably than** A treats or would treat others.

# Indirect discrimination

- **19. Indirect discrimination**

- (1) A person (A) discriminates against another (B) if A applies to B **a provision, criterion or practice** which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
  - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a **particular disadvantage when compared with persons with whom B does not share it,**
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a **proportionate means of achieving a legitimate aim.**

# Harassment

- **26. Harassment**
- (1) A person (A) harasses another (B) if—
  - (a) A **engages in unwanted conduct related to a relevant protected characteristic**, and
  - (b) the conduct has the **purpose or effect** of—
    - (i) **violating B's dignity**, or
    - (ii) creating an **intimidating, hostile, degrading, humiliating or offensive environment for B**.
- (2) A also harasses B if—
  - (a) A engages in **unwanted conduct of a sexual nature**, and
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
  - (a) A or another person **engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex**,
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  - (c) because of B's rejection of or submission to the conduct, **A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct**.



# Victimisation (hint: like whistleblowing protection)

- 27. Victimisation
- (1) A person (A) victimises another person (B) **if A subjects B to a detriment** because—
  - (a) B **does a protected act**, or
  - (b) **A believes that B has done**, or may do, a protected act.
- (2) Each of the following is a protected act—
  - (a) **bringing proceedings** under this Act;
  - (b) **giving evidence or information** in connection with proceedings under this Act;
  - (c) doing any other thing for the purposes of or in connection with this Act;
  - (d) **making an allegation** (whether or not express) that A or another person has contravened this Act.
- (3) **Giving false evidence or information**, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

# Public Sector Equality Duty: breach is grounds for judicial review

- **149. Public sector equality duty**
- (1) A public authority **must**, in the exercise of its functions, have **due regard to** the need to—
- (a) **eliminate discrimination**, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) **advance equality of opportunity** between persons who share a relevant protected characteristic and persons who do not share it;
- (c) **foster good relations** between persons who share a relevant protected characteristic and persons who do not share it.

# A few examples of exceptions (100s of them)

- Sched 9 part 1 s1 Occupational requirements
- Schedule 9 part 1 s2 Religious requirements relating to sex, marriage etc., sexual orientation
- Sched 11 part 1 s1 admission to single sex schools
- Sched 3 part 27 single sex services (eg intimate waxing service)
- Schedule 16 (1) single characteristic associations like an African Caribbean club
- Sched 23 regarding acts authorised by statute or the executive

# Making Policies Equality Act Compliant (or How to Spot Non Compliant Ones)

# Making policy

- How do public bodies (eg DWP, schools) private bodies (eg Tesco, British Airways), charities (Oxfam, RSPCA) etc write policy whilst avoiding discriminating against someone?



# Equality Impact Assessment

- Remember s149 Public Sector Equality Duty? Only applies to public bodies or those “exercising public functions”
- To prevent breach of this and indirect discrimination, best to do one of these



# Indirect Discrimination

- s19 Equality Act defines indirect discrimination.
- Applies to all bodies, so in making any policy, risk of indirect discrimination should always be considered

## Indirect Discrimination

What it is...



“This happens when a requirement is applied equally to everyone but has the effect of excluding one group of people more than another”

# Indirect Discrimination cont

- 1. Essentially if there is a policy that applies/impacts in practice, generally or to more than one protected characteristic (p.c.), (even if only explicitly references one p.c. like a "disability policy" or a "trans policy")....
- 2. & it particularly disadvantages one p.c. (compared to people who don't share that p.c.) because of their p.c.
- [We know from the case of Ewida (British Airways cross necklace over uniform case) that it only needs to be some of that p.c. even just a few but just not one person... ] cont...



# Indirect Discrimination cont

- 3. And the policy maker cannot objectively justify it by showing it is a proportionate means to achieve a legitimate aim.
- 4. This looks at how widely drawn the policy is and why it has been made?

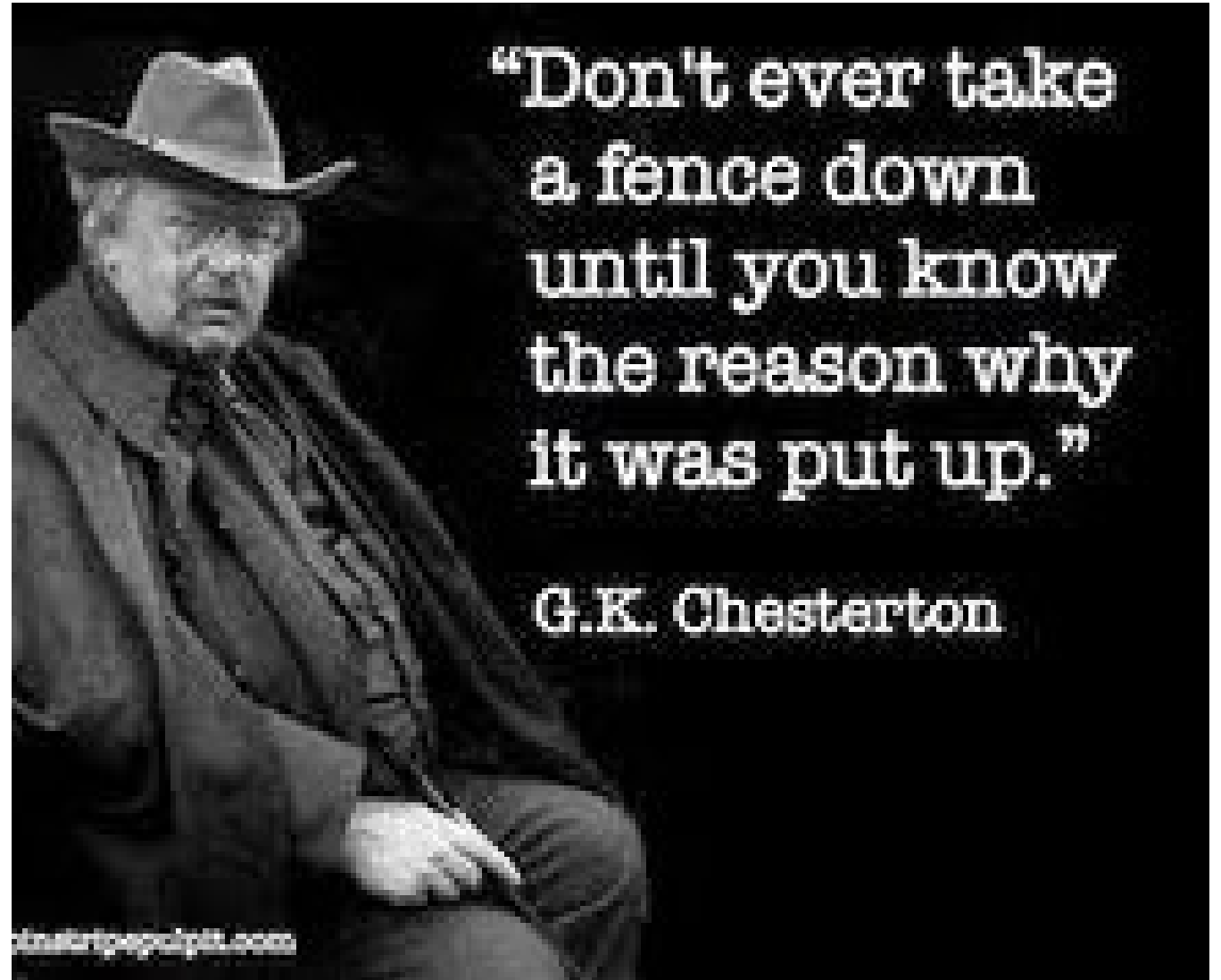


# Tips for Equality Act compliant policy making

- 1. Good **equality monitoring** of current service against each of the protected classes in the Equality Act (so note "sex" and "gender reassignment" not "gender" which isn't one)
- 2. Check for any group that are disproportionately **adversely affected** by policy (or likely to be) so low uptake of service, or pattern of usage suggest certain needs.

(slight detour)  
Chesterton's Fence

- If there is existing policy, why is as it is? What does current policy do and really get to grips with why?



“Don't ever take  
a fence down  
until you know  
the reason why  
it was put up.”

G.K. Chesterton

## Tips cont.

- 3. If you have the luxury do ask any specialist discrimination lawyer (not me!) to refer you to any law (both statutory and caselaw) that is relevant, guidance from Equality and Human Rights Commission etc. In their absence, google the issue to see if there are concerns expressed about the issue. Take care about written “guidance” as quality variable

## Tips cont.

- 4. Consult widely; not just the lobbyists or spokespeople but people in community and users/potential users of service of all protected classes
- 5. Make draft policy explaining on what evidence you have made it and why?
- 6. Consult on draft policy;

# Seeing through different lenses

- You need to see the issue as if through the lens of each of all of the P.Cs (list in s4 EA) and try to work out if and then how it will impact on them adversely or at all. Dont rush this or make assumptions



- Think of yourself as a discrimination solicitor with long line of clients, each of them representing several different people from each protected class concerned about the policy. Why are they concerned? How does it impact them? Could the policy be rewritten, reduced etc?



# Tips cont.

- 7. Questions to think about:
- Is the policy too widely drawn or could it be narrowed down?
- Does a policy favour one P.C. at the expense of another? (Even extends to does it impact different groups of disabled people differently)
- Can it be rewritten to balance it more?
- Has anyone suggested how it could be done another way?



8. Pay particular attention to any **statutory exceptions** to normal rules in the Equality Act. These are numerous in the Act including positive discrimination, religious exemptions in certain employment, occupational requirements to allow employment only of ... particular p.c. (or p.c.s like an "BAME man") or single sex exemptions for facilities.

9. Why are they important? Parliament recognised it was important that, where objectively appropriate, that these particular exceptions to general rules against discrimination, are available. Whether you make a policy to use or not to use them, you will need to explain, by reference to good evidence why that is? It is not sufficient to just say we don't have to; so need to consult & document evidence carefully why or why not used

## Tips cont.

- 10. Make policy. Think about the actual wording of all policies. Some findings of indirect discrimination don't relate to an intentional decision but really thoughtless drafting.
- 11. After implementing policy, get feed back and equality monitoring and review etc

**IT TAKES  
LESS TIME  
TO DO A THING RIGHT,  
THAN IT DOES  
TO EXPLAIN  
WHY YOU DID IT WRONG.**

*Henry Wadsworth Longfellow*

[INSPIRE.COM](http://INSPIRE.COM)

Litigation is  
Expensive

# Don't be Dogmatic!!

- 12. Be pragmatic & careful. Litigation about discrimination is expensive financially & reputationally. So be prepared to compromise, think outside the box & don't be dogmatic. **Train staff to make policies carefully** and in accordance with the law, not to appease lobbyists.
- 13. Above all document evidence to support why you made policy. You may need it

# Case Study 1 : Housing Gateway Policy Bidding for properties

Disabled Client with top priority unable to successfully bid for property for 5 years.  
Why?

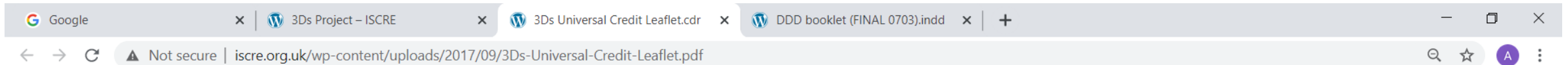
Rule allows local authority to disqualify bid if “property not adapted or unadaptable”. Individually could be good reason as prevent long voids whilst adaptation taking place, but means disabled people wait longer

When client came to us, unsuccessful in over 100 bids

Used FOIs to show his wait much longer than comparable non disabled person

Letter before Action resulted in an offer of a house. Now following R v Nuri and Abdullah ex parte Birmingham 2020 applying for legal aid to pursue substantive discrimination claim for failure to do reasonable adjustment to housing policy

# Case Study 2



## Guidance Notes for Claimants and Intermediaries:

### Protection under the Equality Act 2010

This law recognises that adjustments (changes) may need to be made in certain areas to help people with disabilities overcome barriers that are not faced by people who are not disabled. This is known as the duty to make 'reasonable adjustments'

### You don't have to qualify for a disability benefit to be 'disabled'

You are treated as disabled if you have a physical or mental Impairment that has a **substantial** and **long term** negative effect on your ability to do **normal daily activities** for example diabetes or dyslexia.

**Substantial** - more than minor or trivial. For example, it takes much longer than usual to complete a daily task like getting dressed.

**Long term** - the condition has lasted or will last 12 months or more. For example, a breathing condition that develops as a result of a lung infection.

**Normal daily activities** - things that people do regularly. For example, shopping, reading and writing, using the phone, watching television, washing and dressing, preparing and eating food, housework, walking and travelling or taking part in social activities.

There are special rules about recurring or fluctuating conditions, for example, arthritis. In addition, you automatically meet the disability definition under the Equality Act 2010 from the day you're diagnosed with HIV infection, cancer or multiple sclerosis.

### Contact :

Citizens Advice Ipswich: 01473 298 633  
ISCRE: 01473 408 111  
Ipswich Disabled Advice Bureau: 01473 217313  
Quoting '3Ds UC Project'

### Ipswich & Suffolk Council for Racial Equality

46a St Matthews Street  
Ipswich  
Suffolk  
IP1 3EP  
01473 408111  
Registered Charity Number: 1055386  
Company Registration Number: 4616709



### Citizens Advice Ipswich

19 Tower Street  
Ipswich  
Suffolk  
IP1 3BE  
01473 219777  
Registered Company No. 3428057



## 3Ds Project

Disability + Disadvantage = Duty

## Claiming Universal Credit?

Long term sick or disabled?

## What you need to know before signing your

Thanks for Listening!

@audreysuffolk

# PLP Access to Justice in the South West 2021

## Discrimination Challenges

Robyn Taylor, Solicitor  
[Rtaylor@dpglaw.co.uk](mailto:Rtaylor@dpglaw.co.uk)



# Elements of an Equality Act 2010 claim

- **Protected characteristic(s)** – (Part 2, Chapter 1)
- **Prohibited conduct** (Part 2, Chapter 2)
- **Relevant relationship** (Parts 3 – 7)
- **Detrimental treatment**
- **Exceptions / defences**
- **Remedies** (Part 9)

# Private law Equality Act 2010 claims

Examples of private law discrimination claims

- *FirstGroup Plc (Respondent) v Paulley (Appellant) [2017] UKSC 4*
- *Plummer v Royal Herbert Freehold Ltd*
- *No DSS cases*

# Public law Equality Act 2010 claims

## Examples of public law discrimination claims

- *R (Ward and others) v Hillingdon LBC and Equality and Human Rights Commission (intervener); R (Gullu) v Hillingdon LBC and Equality and Human Rights Commission (intervener) [2019] EWCA Civ 692*
- *R (On the Application Of) v The Office for Standards In Education, Children's Services And Skills [2020] EWHC 1679 (Admin)*

# Private or public law claim?

- The County Court has exclusive jurisdiction (s.113 and s.114) with certain exceptions
- The County Court has power to grant any remedy which could be granted by the High Court in proceedings in tort, or on a claim for judicial review (see s.119(2)). Further, an award of damages may include compensation for injury to feelings (s.119(4)).
- BUT, s.113(2) provides: “Subsection (1) does not prevent – (a) a claim for judicial review”
- The Administrative Court needs to be satisfied that a claim is a genuine judicial review claim, rather than a s.29 claim dressed up as a judicial review. See in particular *Hamnett v Essex County Council [2014] 1 WLR 2562*. It is helpful if there are other judicial review grounds...  

‘In general the Administrative Court is not well suited to hear factual disputes of the sort that may arise under section 29 and other similar provisions of the 2010 Act. In suitable cases this can be done and there can be live evidence and cross-examination but that is not normal, whereas the county court is used to conducting such trials on a daily basis.’
- You can include a claim for damages in JR
- Note early concession in JR claim may give rise to private law claim

# Elements of an Article 14 ECHR claim

- **The circumstances of the claim fall within the ambit of a substantive convention right**
  - Must be discrimination in the enjoyment of “the rights and freedoms set forth in this convention”.
  - Not necessary to show violation of substantive provision to fall within the scope of Article 14 just needs to be within the ambit (see Carson)
- **Difference in treatment between two persons who are in analogous situation or treated the same as others in a relevantly different situation**
- **Difference in treatment on the ground of one of the characteristics listed or “other status”**
  - Status includes sex, race and colour, language, religion etc. as well as “other status” (see R (Carson) v SSWP [2005] UKHL 37 and R (Stott) v Secretary of State for Justice [2018] UKSC 59)
  - ‘Other status’ has been widely drawn
- **Objective justification for that difference in treatment**
  - A difference of treatment between persons (or the failure to treat differently persons in relevantly different situations) violates Article 14 only if it “has no objective and reasonable justification.” That is, “if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.” (Molla Sali v Greece [GC], 2018 at [135]; Eweida & Others v United Kingdom at [88])
  - Conventional proportionality four stage test set out in Bank Mellat [2013] UKSC 39

# Additional points to note

- Margin of appreciation

As the Court's role is not to substitute the competent national authorities in assessing whether and to what extent differences in otherwise similar situations justified differential treatment, States enjoy a certain margin of appreciation. The scope of that margin will vary according to the circumstances, the subject-matter and the background of the case (see *Molla Sali v. Greece* [GC], 2018, § 136; *Stummer v. Austria* [GC], 2011, § 88; *Burden v. the United Kingdom* [GC], 2008, § 60; *Carson and Others v. the United Kingdom* [GC], 2010, § 61).

- Manifestly without reasonable foundation test

When should the MWRF test be applied?

How does it fit with the conventional proportionality test?

## Examples of Article 14 claims

- *Secretary of State for the Home Department and Others v R (Joint Council for the Welfare of Immigrants)* [2020] EWCA Civ 542
- *J.D. and A v the United Kingdom* (nos. 32949/17 and 34614/17)

# Benefits of relying on Article 14

- The protected characteristics in the Equality Act are limited and exhaustive. Status under Article 14 is much wider and may more readily tackle the issue of intersectionality which the Equality Act fails to address (for example *B.S. v. Spain*).
- Strasbourg case law is highly developed and may add to Equality Act arguments.
- Longer limitation period.

BUT

- Does not cover all 'relationships' or circumstances covered under the Equality Act 2010.



# PLP Access to Justice South West:

## Challenging race discrimination in policing

**Gus Silverman**

Associate Solicitor, Irwin Mitchell LLP

([gus.silverman@irwinmitchell.com](mailto:gus.silverman@irwinmitchell.com))

28.01.21

# The problem

- **Stop and search:**
  - Black people are nine times more likely to be stopped and searched by police than white people under 'reasonable suspicion' powers
  - 18 times more likely under section 60 Criminal Justice and Public Order Act 1994
- **Arrests:**
  - Black men are three times more likely to be arrested than white men
  - Mixed race men were more than two times more likely to be arrested than white men
  - Both black and mixed race women were more than two times more likely to be arrested than white women
- **Use of force:**
  - Black people experienced 12% of use-of-force incidents in 2017-18, despite accounting for 3.3% of the population, according to the 2011 census.
  - A higher proportion of incidents where police used firearms (26%) and those where officers used Tasers (20%).
- **Deaths in police custody:**
  - Black people are more than twice as likely as white people to die in police custody.

## Challenging discrimination

- Police complaints
- Private law actions
- Public law actions

## The police complaints system: Deadlines

No time limit on making a complaint

**BUT** *“If more than **12 months** have passed between the incident (or latest incident) and the date of your complaint, then the appropriate authority may not investigate it. If you are making a complaint more than 12 months after the incident you should explain the reason for the delay. However, explaining your reasons does not guarantee that the complaint will be investigated”*  
(<https://policeconduct.gov.uk/7-there-time-limit-making-complaint>)

# The police complaints system: The Standards of Professional Behaviour

## The Standards of Professional Behaviour (Schedule 2, Police (Conduct) Regulations 2020)

### 1. Honesty and Integrity

Police officers are honest, act with integrity and do not compromise **or abuse their position**.

### 2. Authority, Respect and Courtesy

Police officers act with self-control and **tolerance**, treating members of the public and colleagues **with respect and courtesy**.

Police officers do not abuse their powers or authority and respect **the rights of all individuals**.

### 3. Equality and Diversity

Police officers act with fairness and impartiality. They **do not discriminate unlawfully or unfairly**.

...

### 10. Challenging and Reporting Improper Conduct

Police officers **report, challenge or take action against the conduct of colleagues** which has fallen below the Standards of Professional Behaviour.

# The police complaints system: Categorising complaints

Complaints can be made to either the local force or the Independent Office for Police Conduct (IOPC)

Complaints vs recordable conduct matters:

- A recordable conduct matter is “*any matter which is not and **has not been the subject of a complaint**, where there is an indication (whether from the circumstances or otherwise) that a person serving with the police may have committed a **criminal offence** or **behaved in a manner which would justify disciplinary proceedings**” (Section 12, Police Reform Act 2002)*

Mandatory referrals to the IOPC:

Complaints alleging “*a criminal offence or behaviour which is liable to lead to disciplinary proceedings and which, in either case, was **aggravated by discriminatory behaviour on the grounds of a person's race...**” (Regulation 4, Police (Complaints and Misconduct) Regulations 2020)*

## The police complaints system: Categorising complaints (cont.)

*“... disciplinary proceedings are intended to deal with **serious breaches** of [the Standards of Professional Behaviour] that would damage public confidence in policing and have the potential to bring the reputation of the police force concerned or the service as a whole into disrepute such that a formal sanction would be appropriate if the allegation or matter were found proven.” (para 4.34 Home Office Statutory Guidance on Professional Standards, Performance and Integrity in Policing)*

Modes of investigation:

- Local investigation
- Directed investigation, or
- Independent investigation

# The police complaints system: What does the investigation decide?

Where 'special procedures' are engaged:

- Whether any person to whose conduct the investigation has related has **a case to answer** in respect of misconduct, gross misconduct or has no case to answer;
- Whether or not any such person's **performance** was unsatisfactory;
- Whether or not any matter which was the subject of the investigation should be referred to be dealt with under the **Reflective Practice Review Process**

(Regulation 27, Police (Complaints and Misconduct) Regulations 2020)

Special procedures must be engaged where there is an indication that the subject of the investigation may have committed a criminal offence or behaved in a manner that would justify the bringing of disciplinary proceedings

(Paragraph 19A, Schedule 3, Police Reform Act 2002)



## The police complaints system: How should complaints be investigated?

*“3.2 The **reasonable and proportionate handling** of complaints and other matters is necessary to ensure both public confidence in the complaints system, and the system’s efficient and effective operation.”*

*“3.5 This means doing **what is appropriate in the circumstances**, taking into account the facts of the matter and the context in which it has been raised, within the framework of legislation and guidance. It means weighing up **the matter’s seriousness and its potential for learning, against the efficient use of policing resources**, to determine the extent and nature of the matter’s handling and outcome. Considering the matter’s seriousness should involve due regard to the nature of the incident, any actual or potential impact on, or harm to, individual(s), communities or the wider public and the potential impact on confidence in the police and in the police complaints system. A reasonable and proportionate response includes providing **a clear and evidence-based rationale for any decisions taken.**” (IOPC Statutory Guidance, 2020)*

## The police complaints system: IPCC [sic] guidelines for handling allegations of discrimination (2015)

*“5.2 For discrimination complaints, the investigating officer should be able to show a **good understanding of equality and diversity issues** and have the knowledge, skills and experience to be able to effectively apply these guidelines.”*

*“5.7 It is common in discrimination cases for there to be little or no direct evidence available to support an allegation ...*

*5.8 In this case, the investigation **will need to consider whether there is other evidence** from which a case to answer for discrimination can be established ... including:*

- **complaint history** and patterns of behaviour [including regarding systemic discrimination]*
- **comparator evidence** – comparing how the complainant was treated against a person in the same or similar situation who does not have the same protected characteristic*
- an **assessment of language used**, including language used in any records relating to the incident in question or arising from the complaint investigation”*

## The police complaints system: IPCC guidelines for handling allegations of discrimination (2015) – cont

*“evidence that the discrimination was intentional and targeted would significantly increase the severity of the misconduct and could, depending on the circumstances, give grounds for criminal offences to be considered.” (page 59)*

*“6.20 Whether or not a case to answer has been found, **the question should still be asked about how the complainant came to the view that the police actions were discriminatory** and whether there is anything that the officer or staff member could have done that would have changed this. For example, could the officer or staff member have shown greater care, consideration or politeness or could they have provided a better explanation for their actions at the time?”*

# Making the most of a police complaint

Prepare properly:

- Gather evidence (CCTV, mobile phone footage, subject access requests to the police, medical records, witness statements and proof of evidence (depending on severity))
- List points of complaint and cross reference with relevant evidence
- Cite the IPCC *Guidelines for handling allegations of discrimination*

Make sure the complaint is being properly investigated:

- Is the Investigating Officer appropriate? (Reg 21 Police (Complaints and Misconduct) Regulations 2020)
- Has the complaint been recorded properly?
- Are the terms of reference and any action plans appropriate?
- Is the mode of investigation correct?
- Is a mandatory referral required?
- Are the correct officers being investigated?
- Should there be early liaison with the CPS?
- Chase meaningful 28 day updates

Apply to review poor investigation outcomes to the IOPC / Chief Officer within 28 days (consider requesting underlying evidence before submitting detailed grounds of appeal) and consider JR'ing unlawful review outcomes

## Private law claims

Common law torts (3 yr limitation if claiming PI; 6 limitation if no PI claim):

- Assault and battery
- False imprisonment
- Malicious prosecution
- Mifeseance in a public office
- Discrimination as a basis for aggravated and/or exemplary damages

Breach of statutory duty:

- Equality Act 2010 (within 6 months)
- Human Rights Act 1998 (Arts 2, 3, 8, 10, 11 + 14) (within 1 year)
- Data Protection Act 2018 torts (3 yr limitation if claiming PI; 6 limitation if no PI claim)

# Funding

## Legal Aid

- Disposable income of less than £733 pm or in receipt of means tested benefits (inc. Universal Credit, Income Based Jobseekers, Income Related Employment Support Allowance, Income Support)
- Capital of less than £8,000
- Contributions may be required from income and/or capital may be required

## Conditional Fee Agreements

## Before the Event Insurance

## Crowdfunding

## Resources

IOPC Statutory Guidance on the Police Complaints System

[https://www.policeconduct.gov.uk/sites/default/files/Documents/statutoryguidance/2020\\_statutory\\_guidance\\_english.pdf](https://www.policeconduct.gov.uk/sites/default/files/Documents/statutoryguidance/2020_statutory_guidance_english.pdf)

IPCC guidelines for handling allegations of discrimination

[https://www.policeconduct.gov.uk/sites/default/files/Documents/research-learning/guidelines\\_for\\_handling\\_allegations\\_of\\_discrimination.pdf](https://www.policeconduct.gov.uk/sites/default/files/Documents/research-learning/guidelines_for_handling_allegations_of_discrimination.pdf)

Home Office Police Misconduct Guidance

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895928/Home\\_Office\\_Guidance\\_on\\_Police\\_Misconduct.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895928/Home_Office_Guidance_on_Police_Misconduct.pdf)

Stand Against Racism & Inequality (Bristol based advice organisation) <https://www.sariweb.org.uk/>

INQUEST (advice and campaigning on state related deaths) <https://www.inquest.org.uk/>

StopWatch (research and action for fair and accountable policing) <https://www.stop-watch.org/>

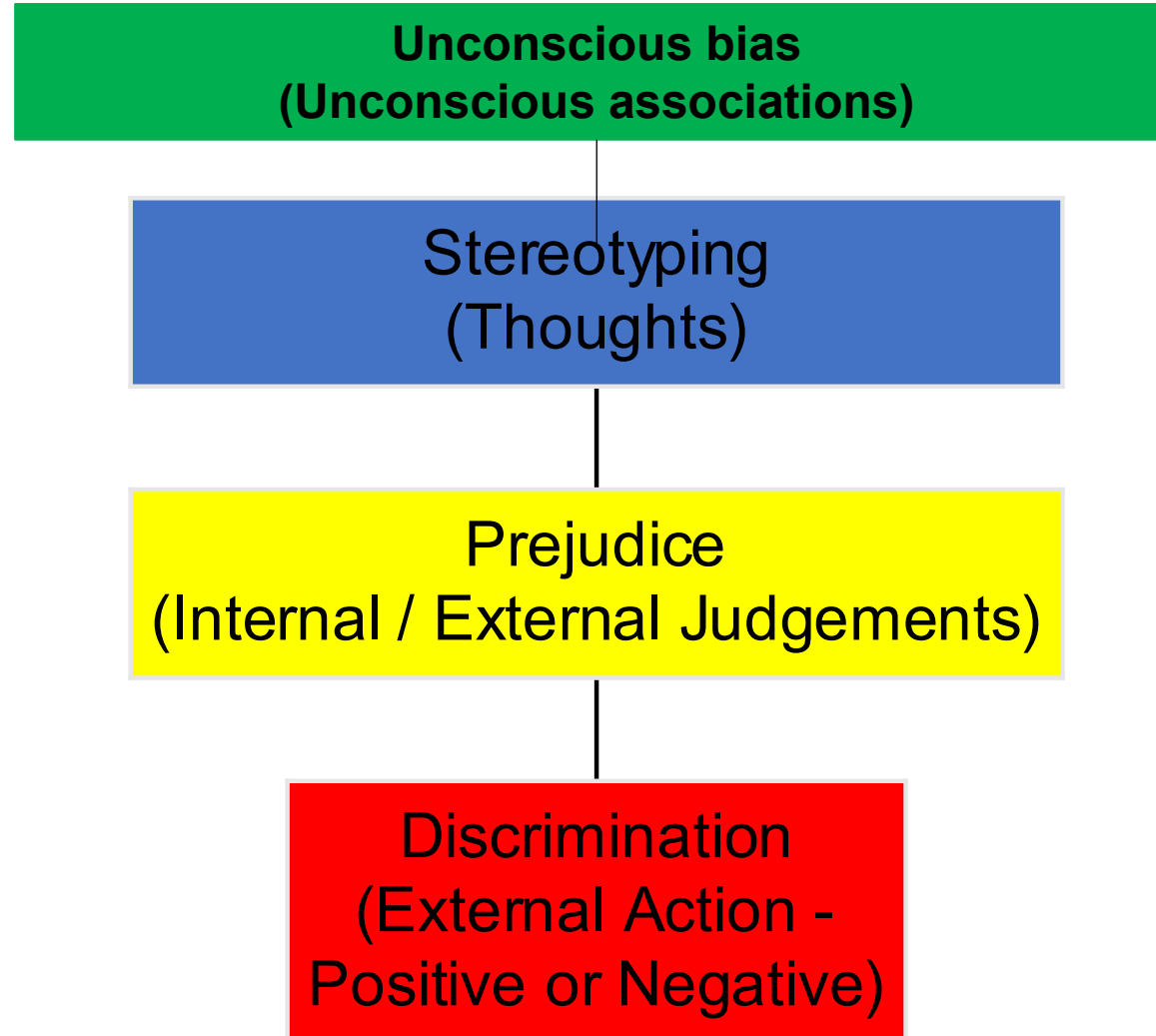


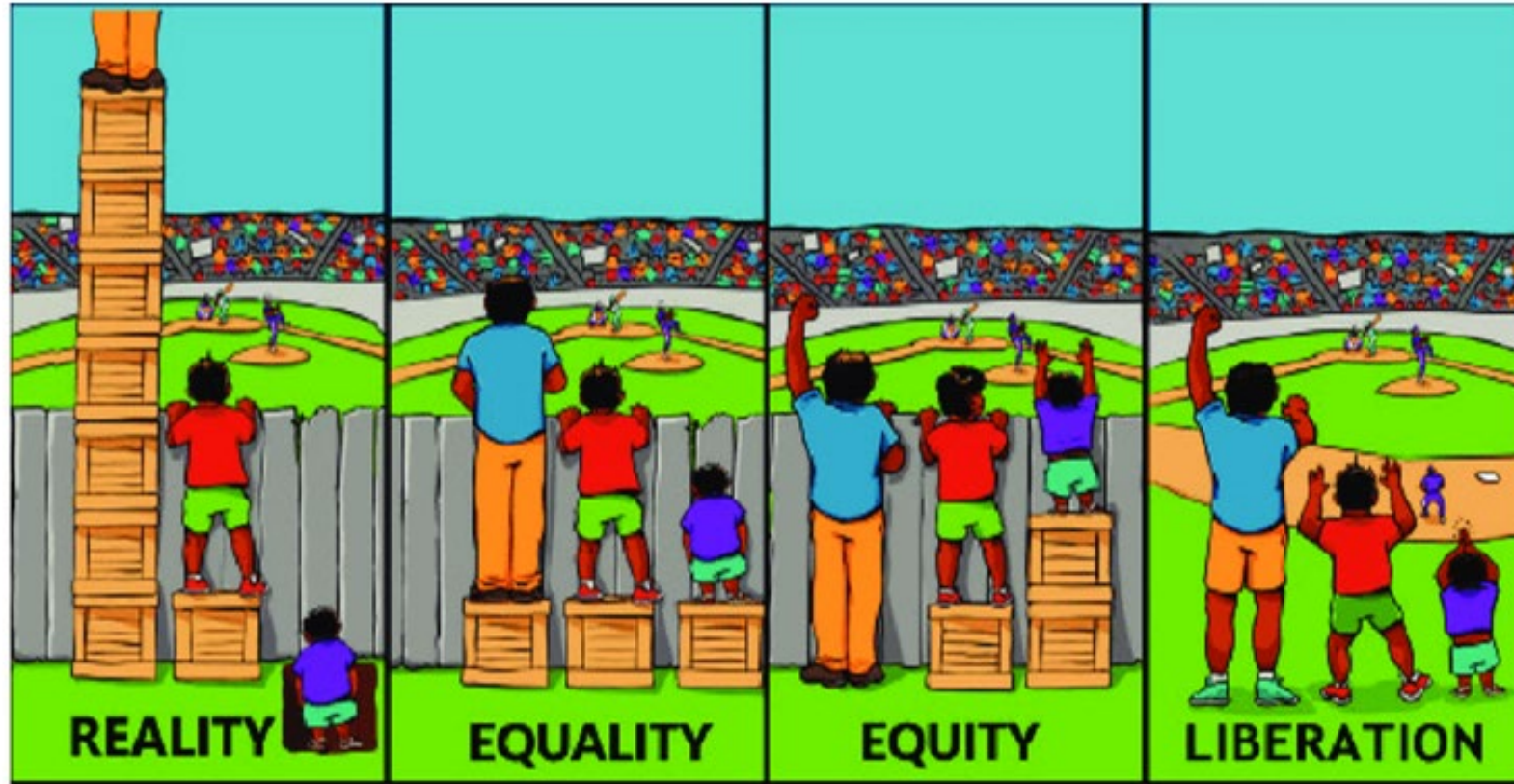
# Unconscious bias and Discrimination

Access to Justice in the South  
West 2021

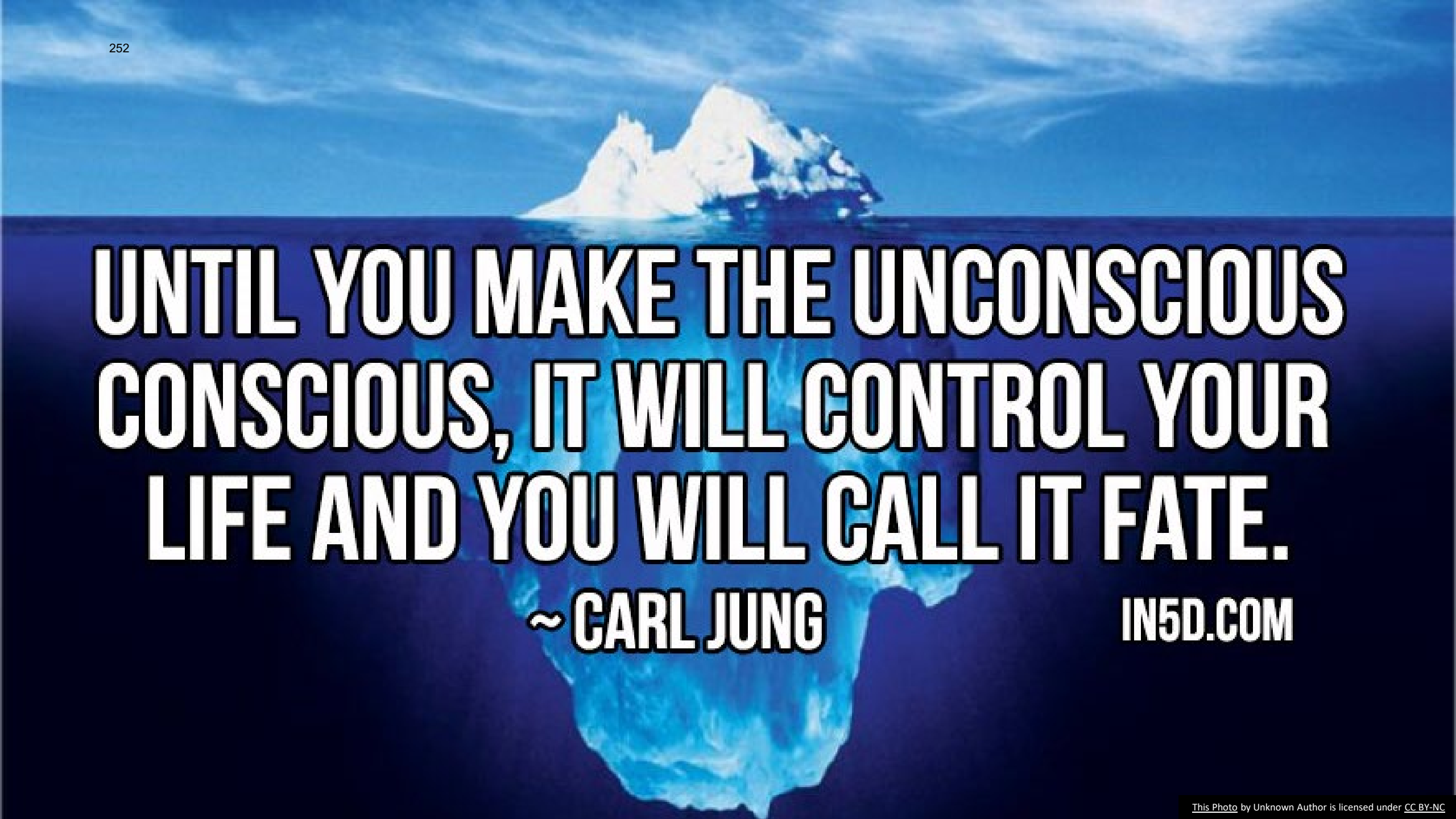


# The Process of Discrimination







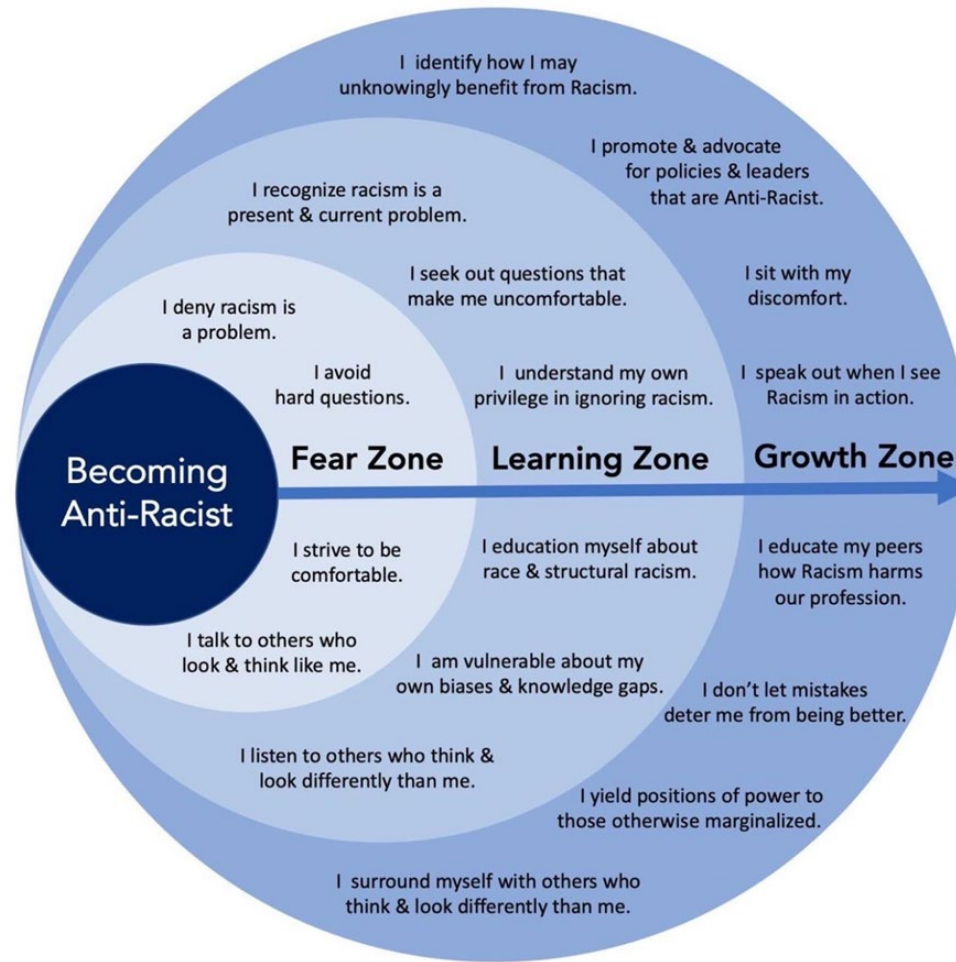
A photograph of an iceberg floating in the ocean. The tip of the iceberg is visible above the water line, while the much larger, jagged base is submerged below. The sky is a clear, bright blue, and the water is a deep, dark blue. The text is overlaid on the image, with the main quote in large white letters with black outlines, and the attribution and website in smaller white letters with black outlines.

**UNTIL YOU MAKE THE UNCONSCIOUS  
CONSCIOUS, IT WILL CONTROL YOUR  
LIFE AND YOU WILL CALL IT FATE.**

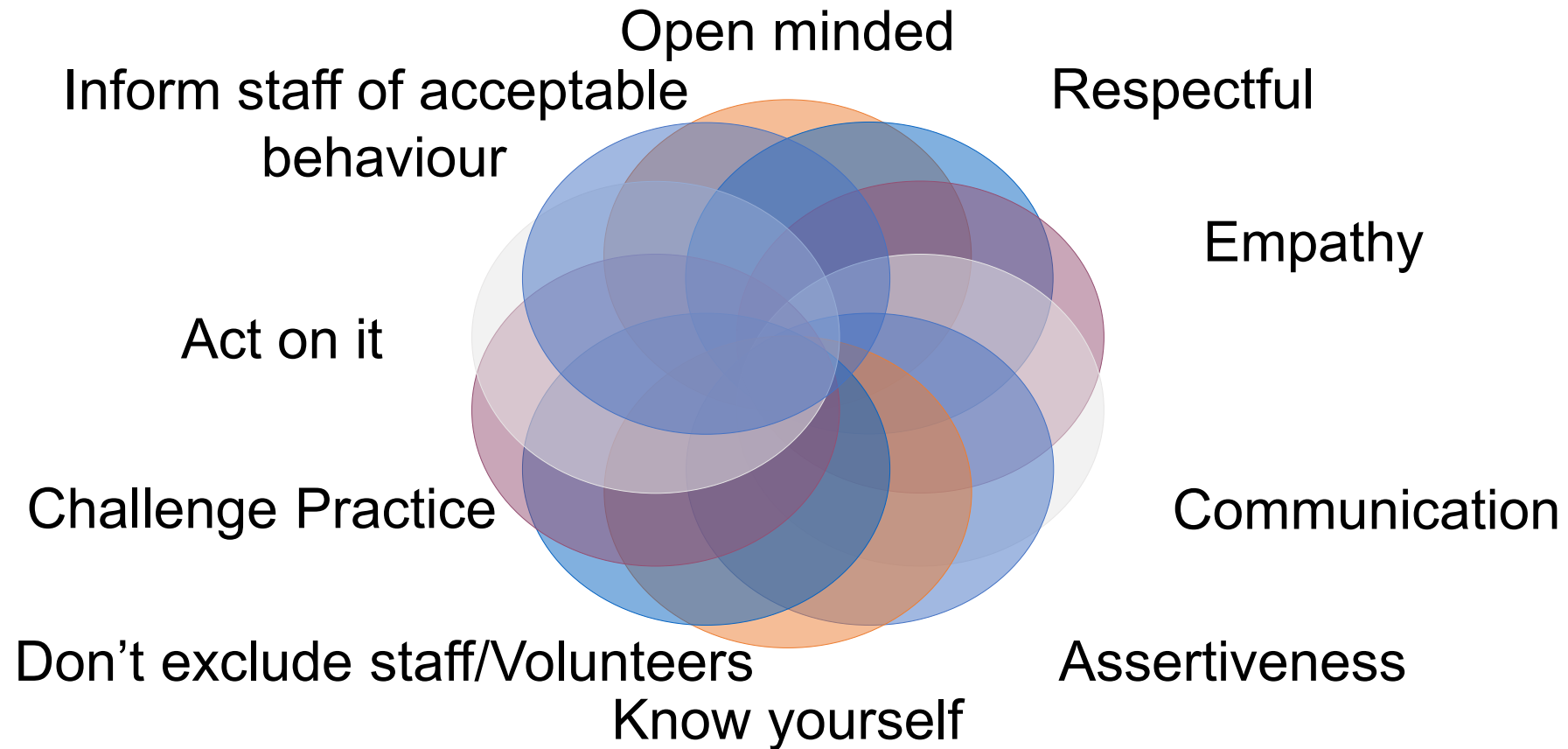
**~ CARL JUNG**

**IN5D.COM**





# Ten Principles of anti-discriminatory practice



What are White  
privileges?



## What can we do?

- Acknowledge the issues
- Be willing to change
- Understand our personal bias and how they affect our lives and other people's lives
- Have the courage to talk about racism
- Have the courage to stand up for any kind of discrimination
- Educate people and encourage people to educate themselves
- Lobby the government against the hostile environment policies
- Take those policies to judicial reviews
- Support people who are potential victims of the inequalities
- Be aware of the inequalities and be willing to challenge those inequalities
- Embrace and encourage diversity

**IF WE DO NOT WILLINGLY AND  
PRO-ACTIVELY INCLUDE  
WE AUTOMATICALLY EXCLUDE**

***Access to Justice  
Solutions:***  
**The Justice Together  
Initiative and creative  
models for influencing  
and strategic litigation**

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Laura F. Redman  
Acting Head  
Justice Together Initiative

28 January 2021



## **1. Justice Together Consultation Themes**

- Challenges
- Opportunities

## **2. Justice Together Initiative**

- Vision and Mission
- Strategy and Grant Partner Process

## **3. Creative Strategies for Influencing and Strategic Litigation**

- Community and Movement Lawyering
- Medical-Legal-Community Partnership
- Strategic Litigation and Influencing

# Challenges

- Deserts and droughts
- Capacity at specialist levels
- Retention and recruitment
- Poor quality advice
- Empathy
- Early intervention
- EU Settlement Scheme
- Capacity to engage with influencing, strategic litigation and campaigning

# Opportunities

- Collaboration and coordination
  - Within sector
  - Early intervention
  - Beyond immigration sector
  - Holistic approach
  - Create knowledge hubs or coalitions
  - Formal partnerships with universities, law firms, or other institutions
- Strengthen OISC LV 2 and 3 supervision/support
- Build leadership within community and people with lived experience
- Share learning and best practices amongst regions
- Feed into influencing and policy work

## *Our Vision*

Our vision is that people who use the immigration system can access justice fairly and equally, so that they can get on with their lives.

## *Our Mission*

Our mission is to build a community of people and organisations with diverse backgrounds, strengths, and experience to transform access to justice in the UK immigration system.

Through grant-making and collaboration, we will connect lived experience, front-line advice and influencing strategies to create lasting change.

# Justice Together Grant Partners



We are committed to using a different approach to making long-term impact through grant-making and collaboration. In line with our values, we will bring together organisations across the UK to use their collective power to leverage change in the immigration system, and to influence how the sector operates and how immigration advice is funded.

## **Advice and Representation Partners:**

We want to work with advice partners in every part of the UK to strengthen local capacity and co-ordination in delivering specialist immigration advice, as well to draw on case data to support regional and national influencing work.

## **Influencing Partners:**

By ‘influencing’ we mean work that is focused on changing systems or structures. We want to fund a range of approaches to transforming the immigration system, but with an emphasis on collaboration and centering people with lived experience leading the change.



## Community and Movement Lawyering

In movement lawyering, legal advocates support community groups and their members, those with direct lived experience of the issues, to build power, develop leadership, change or social and cultural environments.

In practice, at its heart is real collaboration with communities with lived experience of the systems that need to change; not just in sharing stories but to develop a true understanding of needs and priorities and determine the best tools to bring about impactful change.



# Build Power, Develop Leadership, Creative Tools



Case 2:20-cv-00777-CCC-MF Document 55 Filed 09/28/20 Page 1 of 9 PageID: 1534

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

GEURYS SOSA,  
  
Plaintiff,  
  
v.  
  
COUNTY OF HUDSON, NEW JERSEY;  
HUDSON COUNTY CORRECTIONAL  
CENTER; CFG HEALTH SYSTEMS,  
LLC; CLAUDETTE BLAKE; MELESSIA  
CYRUS; DR. MYRIAM STERLIN; DR.  
PAUL ITTOOP; JANE LOWE; and ERIC  
TAYLOR,  
  
Defendants.

Civil Action No. 2:20-cv-00777-CCC-MF

MEMORANDUM OPINION AND  
ORDER

CECCHI, District Judge.

I. INTRODUCTION

This matter comes before the Court on the motion to dismiss (ECF No. 18) (the “Motion”) filed by defendants CFG Health Systems, Claudette Blake, Dr. Myriam Sterlin, Dr. Paul Ittoop, Jane Lowe, and Melessia Cyrus (collectively “Defendants”).<sup>1</sup> The Defendants seek to dismiss plaintiff Geurys Sosa’s (“Plaintiff”) amended complaint (“AC”) (ECF No. 5). The Court decides the Motion without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below, the Motion is **DENIED**.



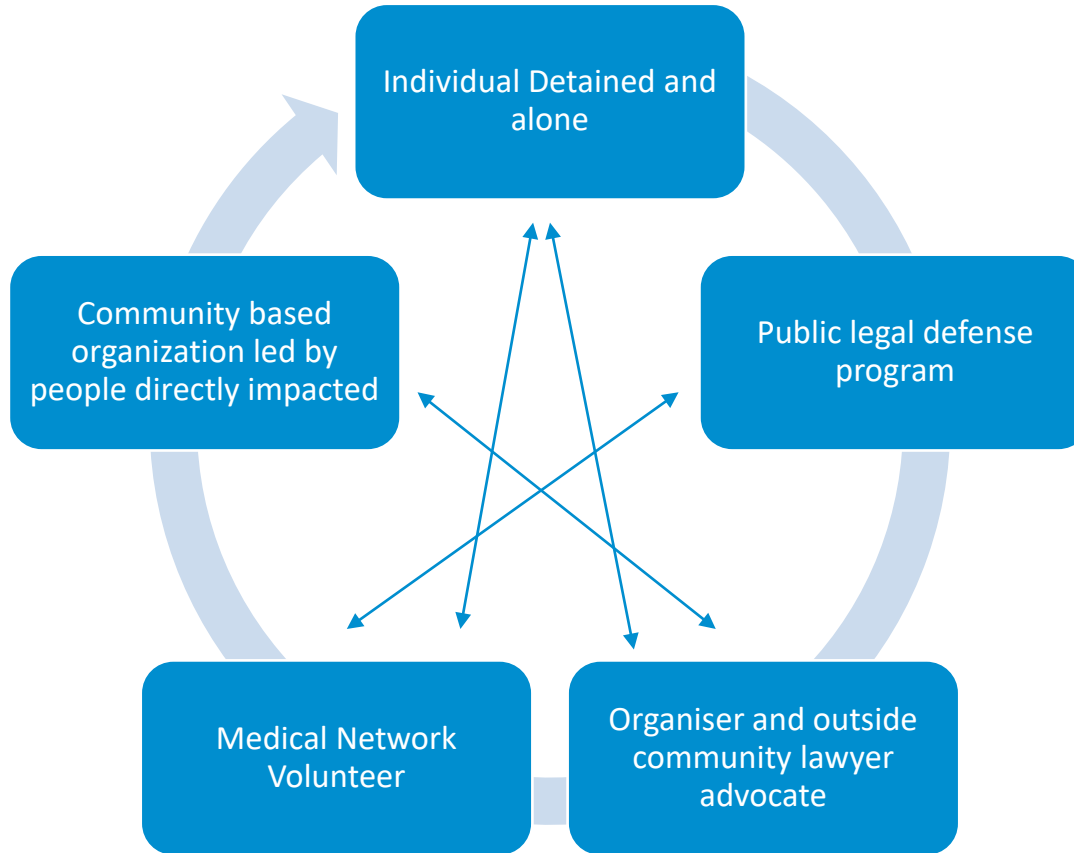
## Detained and Denied: Healthcare Access in Immigration Detention



Multi-pronged community engaged and led program:

- Individual advocacy for current and recently detained individuals in collaboration with immigration lawyers and families
- High-impact reports and Know Your Rights help for people detained
- Strategic litigation – cutting edge constitutional and civil rights cases
- Connecting with organisations led by people with direct experience
- Organising and convening directly impacted individuals and their families together with advocates
- Legislative campaigns directed by people with lived experience
- **Medical-Legal-Community Partnership**, including network of medical volunteers

# Medical – Legal – Community Partnership



# Strategic Litigation and Influencing

## 1. Cutting edge constitutional and civil rights litigation

- Establish right to mental health discharge planning (U.S. Court of Appeals for the Second Circuit)
- Wins against the United States and individual detention centres using civil rights and medical negligence together

## 2. Convening of advocates and people with lived experience of the detention system and their families

- Education and awareness raising session
- Brainstorm and input session

## 3. Policy and Legislative Action

- Establish Abolish ICE campaign (national, local, state)
- Establish medical oversight board (NJ detention centres)



## Thank you!

Laura F. Redman  
Justice Together Initiative  
[laura.redman@justice-collaborations.org.uk](mailto:laura.redman@justice-collaborations.org.uk)

To contact us please write to:  
[enquiries@justice-collaborations.org.uk](mailto:enquiries@justice-collaborations.org.uk)

Or visit our website:  
[www.justice-together.org.uk](http://www.justice-together.org.uk)

Follow us on Twitter:  
[@justice\\_tog](https://twitter.com/justice_tog)

## **20 Tools for Movement Lawyering**

*By Bill Quigley is a human rights lawyer and law professor at Loyola University New Orleans.*

Work for and with Organizations, Not Issues: This is Not Impact Litigation or Law Reform

Understand the Goal of Movement Legal Work is to Help Build the Power of the Organization

Organizations Make the Decisions about the Legal Work, Not the Lawyers: Just Like Paying Clients

Learn to be a Swiss Army Knife not a Hammer

There are No Voiceless: Lift Movement Voices as Primary Speakers Lawyers Take Back Seat with Media

Help Organizations Fight for Public Participation, Demand Public Meetings and Hearings

Help Organizations Fight for Transparency, Demand Release of Public Information

Help Organizations in Public Confrontations

Help Organizations Get Publicity and Lift up Community Leadership

Help Organizations with Investigations and Fact Sheets

Help Organizations Raise Money to Sustain the Movement

Never Say “No, you cannot do that”

Help Organizations Dismantle and Radically Restructure Current Systems of Law and Power

Help Organizations Work to Destroy White Supremacy and Institutional Racism

Lawyers Can Disempower Organizations: Understand and Fight Lawyer Privilege and White Privilege

Prepare to Be Regularly Uncomfortable

Be Prepared to Journey with Community and that includes Uncertainty, Conflict, and Chaos

Learn and Understand Building Community Power through Organizing

Learn About Other Movements and Learn How Social Change Happens

Rediscover Humility, True Partnership and Respectful Relationships in Solidarity for Liberation