

Legal Action for Persons with Disabilities



Litigation Strategy



2018 - 2023

Table of contents

1. Background.....	1
2. Litigation Goal and Agenda.....	1
2.1. Goal.....	1
2.2. Agenda	1
2.2.2 Agenda Objective II: Removal of Accessibility barriers	3
3. Modalities for case selection.....	5
3.1. Intended beneficiaries of the litigation:.....	5
3.2. Nature of the respondents	5
3.3. Forum in which to file the cases	5
3.4. Timing of the case.....	7
3.5. Remedies.....	7
3.6. Amicus intervention.....	8
3.7. Resource implications of the case.....	8
4. Case preparation plan.....	9
Step 1: Research for the case	9
Step II: Assess LAPD capacity to pursue case.....	10
Step III: Identifying partners.....	10
Step IV: Determining evidence required	11
Step VI: Judicial mapping.....	13
4.1. Case surgeries	14
5. Case pursuit plan.....	15
5.1. Roles and responsibilities.....	15
5.2. Handling of evidence and witnesses	15
5.2. Preparing plan B.....	15
5.3. Media plan	16
5.4. Case post-hearing debrief.....	16
6. Post-judgment strategy.....	16

1. Background

This Litigation Strategy arose from a research and a reflective exercise that involved understanding the rights of persons with disabilities (PWDs) context Legal for Action for Person with Disabilities (LAPD) is operating in. This is in addition to LAPD's overall strategic direction, as well as documenting lessons learnt from the litigation activities LAPD has been involved in. From the exercise, it was established that LAPD is still working in a virgin area and has the potential to champion transformation in the area of PWD rights. LAPD's comparative advantage is its legal expertise, where it has developed its niche. In this, LAPD has built specialised legal services activities for PWDs. This includes the provision of legal aid services and undertaking strategic interest litigation (SIL) on issues affecting PWDs. This is in addition to creation of legal awareness on PWD rights and legal issues. LAPD will retain all these functionalities, while building each of them independently but in a synchronised manner. The Legal Aid Unit will be developed as an independent unit, while the Litigation Unit will also be positioned to grow and blossom but keeping tabs on what is happening in the Legal Aid Unit to inform litigation innovations. This Strategy is with respect to the SIL function. SIL as a form of litigation, sometimes also called impact litigation, is concerned mainly with bringing cases with the goal of creating broader changes in society. SIL is used by those who see the law as a tool to leave a lasting mark beyond just winning the matter at hand. These cases are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the cases themselves.

The Litigation Strategy outlines LAPD's litigation goal and agenda, modalities of case selection and preparation, case pursuit plan and post-judgment strategy.

2. Litigation Goal and Agenda

2.1. Goal

Enhanced access to justice, enjoyment of human rights and social and economic goods and services for persons with disabilities in a barrier free environment.

2.2. Agenda

The Litigation Goal, as indicated above, is informed by LAPD's litigation agenda. The litigation agenda is dual, focusing on access to justice and accessibility, both defined by two objectives:

- i. To enhance access to justice for persons with disabilities by litigating to remove both legal and practical barriers that hinder access to justice for PWDs and enjoyment of human rights; and

- ii. To promote independent living by litigating to remove barriers that constrains accessibility by PWDs.

Each of the above agenda objectives is elaborated below:

2.2.1. Agenda Objective I: Access to Justice and human rights for PWDs

This Agenda Objective is informed by LAPD's interface and experiences with providing legal aid services to PWDs. Through this, it has been realised that there are several structural problems that constrain access to justice for PWDs. This includes legal provisions and judicial/legal cultural/practices. Largely, the justice system is not PWD friendly. This is the case at all levels of interface with the justice system (both civil and criminal). In addition, various barriers prevent PWDs from enjoying their rights, including civil and political rights and economic, social and cultural rights.

For purposes of this strategy, the United Nations Development Programme (UNDP definition of access to justice has been adopted. UNDP views "access to justice" as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards. That there is no access to justice where citizens (especially marginalized groups) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. Access to justice involves normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight.

In the criminal context, this is the case right from arrest, police detention, trial and imprisonment. The system is characterised by the following barriers:

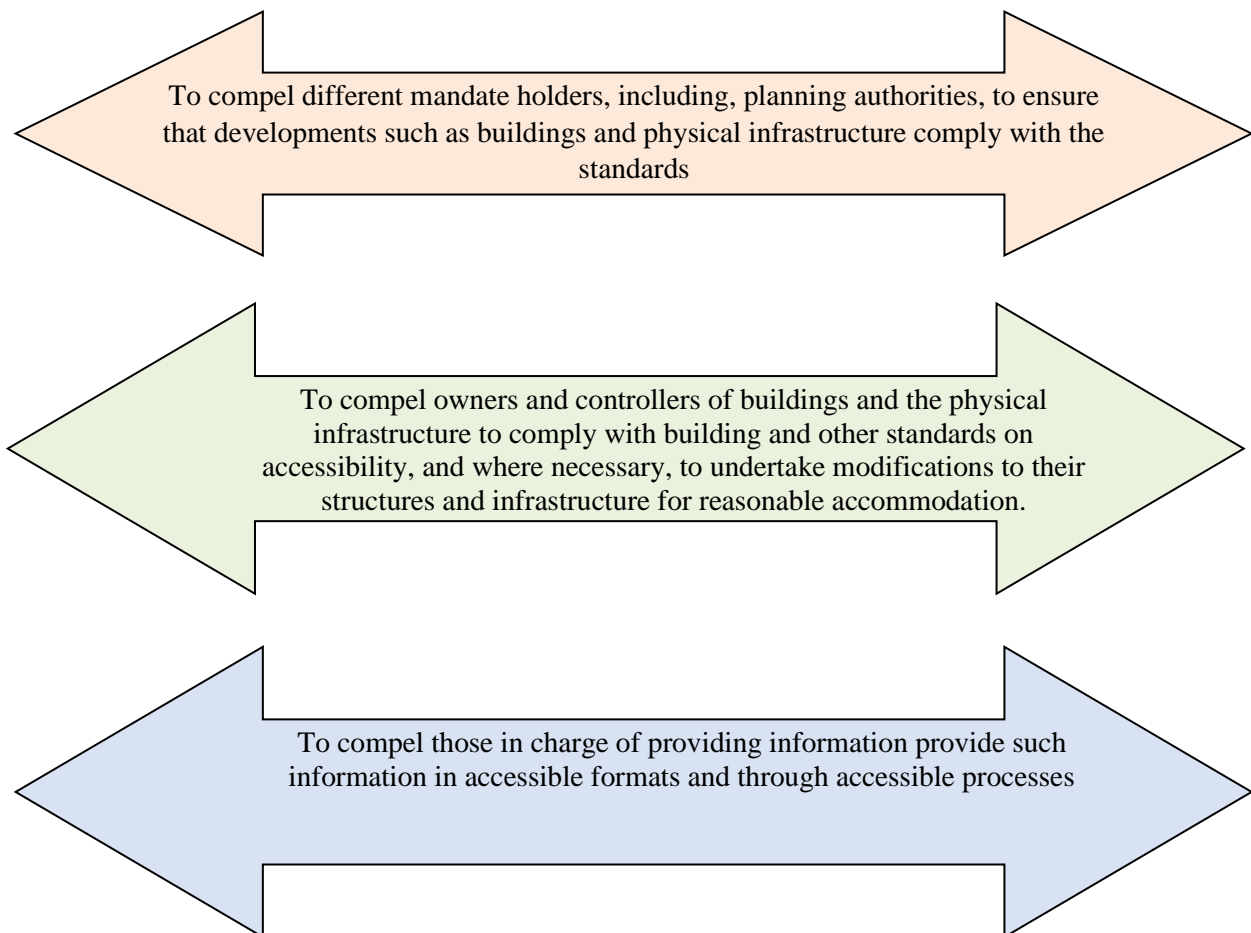
- i. The language used may be inaccessible, in some cases there are no sign language services for those in need;
- ii. Derogatory references to disability in the law;
- iii. Detention facilities not conducive for some disabilities;
- iv. Lack of support for those requiring the same to navigate system;
- v. Denial of legal capacity, especially for those with mental disabilities;
- vi. Prohibitive costs to access services and absence of PWD specific legal support;
- vii. Case backlogs and lack of affirmative measures in favour of PWDs; and
- viii. Inaccessibility of justice sector services, both physically and otherwise.

LAPD's Agenda therefore is to use litigation to deal with some of the above bottlenecks. The litigation will mainly concentrate on challenging laws and practices that result into the above barriers at all levels of the justice sector. This is in addition to practices and laws that violate and result into abuse of PWDs rights.


2.2.2 Agenda Objective II: Removal of Accessibility barriers

The accessibility agenda is informed among others by the broad objective of promoting independent living for PWDs. Independent living requires among others that PWDs are empowered to address their needs through various aids and conditions for an accessible environment, services and information. Accessibility is broad. It includes accessibility to information, accessibility to services such as education, health, water and housing, and accessibility to employment. One key element though that directly affects all the dimensions of accessibility as described above is the physical environment. A physically inaccessible environment constrains the mobility of PWDs and may be dangerous to their health and physical wellbeing. Accessibility greatly impacts on the capacity of PWDs to access and enjoy the various services described above, including access to justice and financial services. In the justice context, challenges accessing information makes it hard for PWDs to follow their trials, push for timely processes, prepare their defences and challenge outcomes.

It is informed by the above that LAPD will focus on litigation to remove barriers to accessibility. In pursuing this, LAPD will focus its litigation on ensuring that accessibility standards as elaborate by the law and best practice are implemented. This will among others be done by bringing cases intended to achieve the following:



Matrix of LAPD Litigation Goal and Agenda Objectives

<p>LAPD Litigation Goal</p>	<p>Enhanced access to justice, enjoyment of human rights and social and economic goods and services for persons with disabilities in a barrier free environment.</p>	
<p>LAPD Litigation Agenda Objectives</p>	<p>Agenda Objective I</p> <p>To compel different mandate holders, including, planning authorities and those in charge of information, to ensure that developments such as buildings and physical infrastructure comply with the standards and that information is accessible.</p>	<p>Agenda Objective II</p> <p>To compel owners and controllers of buildings and the physical infrastructure to comply with building and other standards on accessibility, and where necessary, to undertake modifications to their structures and infrastructure for reasonable accommodation.</p>

3. Modalities for case selection

The following will guide LAPD in deciding the cases to litigate

3.1. Intended beneficiaries of the litigation:



Access to justice affects persons with all forms of disabilities. For this reason, LAPD's litigation activities will focus on all forms of disabilities, the critical consideration being whether the person(s) has/have access to justice and human rights challenges. Focus with respect to justice will be at all levels as defined by the different institutions in the Justice, Law and Order Sector (JLOS), as well as informal structures.

Accessibility to the physical environment mainly affects those with physical disabilities, as well as those with visual challenges. For this component, emphasis will be put on beneficiaries in this category.

With respect to both access to justice and accessibility, in addition to all groups, special attention will be given to matters affecting groups facing double discrimination and marginalisation, including women, children, the elderly and youths.

3.2. Nature of the respondents

Access to justice incidents are mainly at the instance of the state, arising either from laws and regulations or from practices. For this reason, access to justice related litigation will focus on challenging state laws and practices. In some special contexts, actions of private individuals and entities will be challenged. This is especially in cases involving loss of employment and related benefits without following due process.

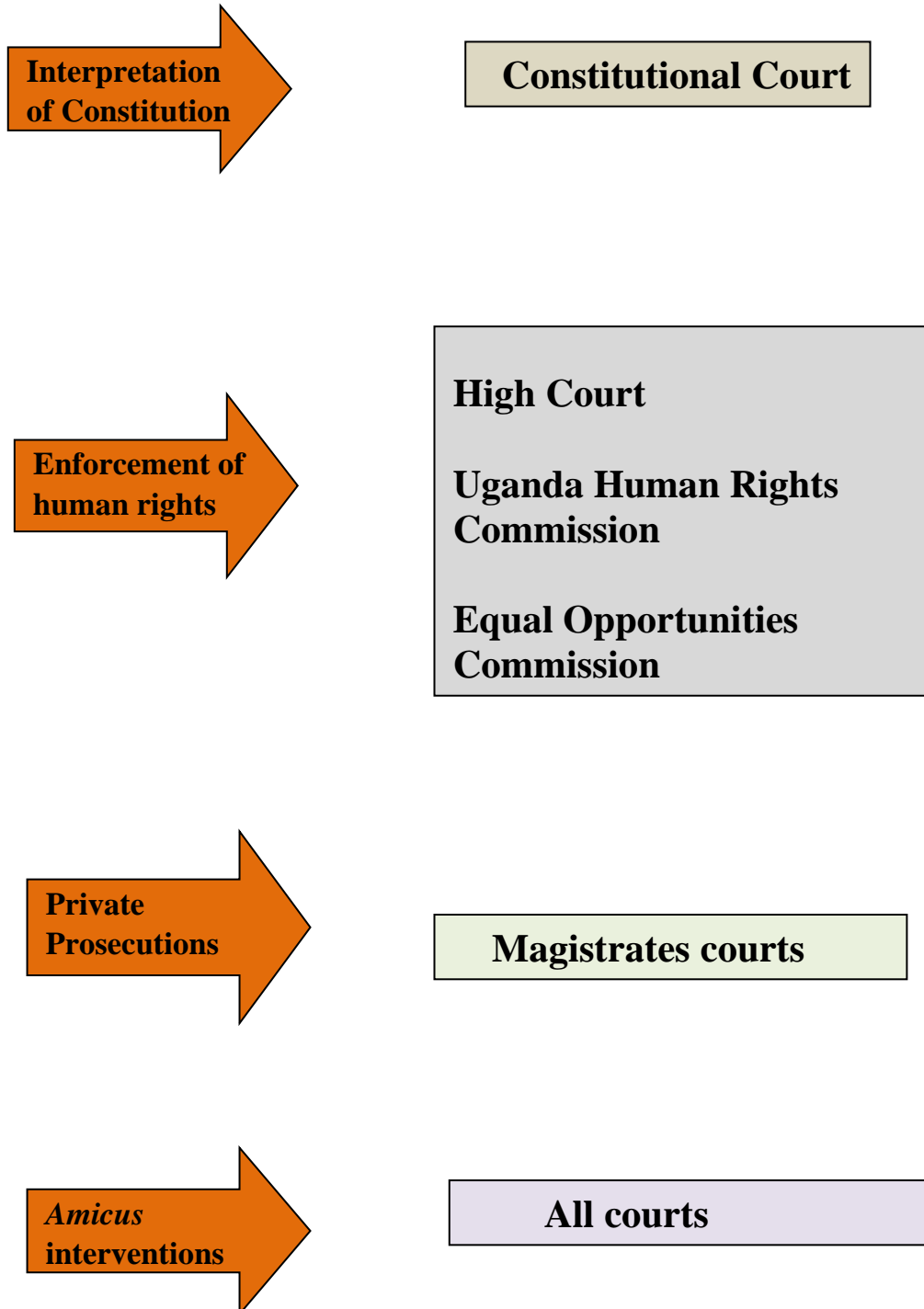
In the context of accessibility, focus will be had on both public and private actors as both have an influence on the nature of the physical environment. In addition, both have legal obligations.

3.3. Forum in which to file the cases

The goal of LAPD being to pursue SIL, the forum of every case will be determined by the strategic nature of the case and the forum. In this, if a case will be deemed strategic, it will be litigated in the forum where it rightly and legally falls, including in both judicial and

quasi-judicial forums. One important consideration though, were there are multiple forums with jurisdictions will be the most strategic of all.

The actions and forums which will be taken include the following:



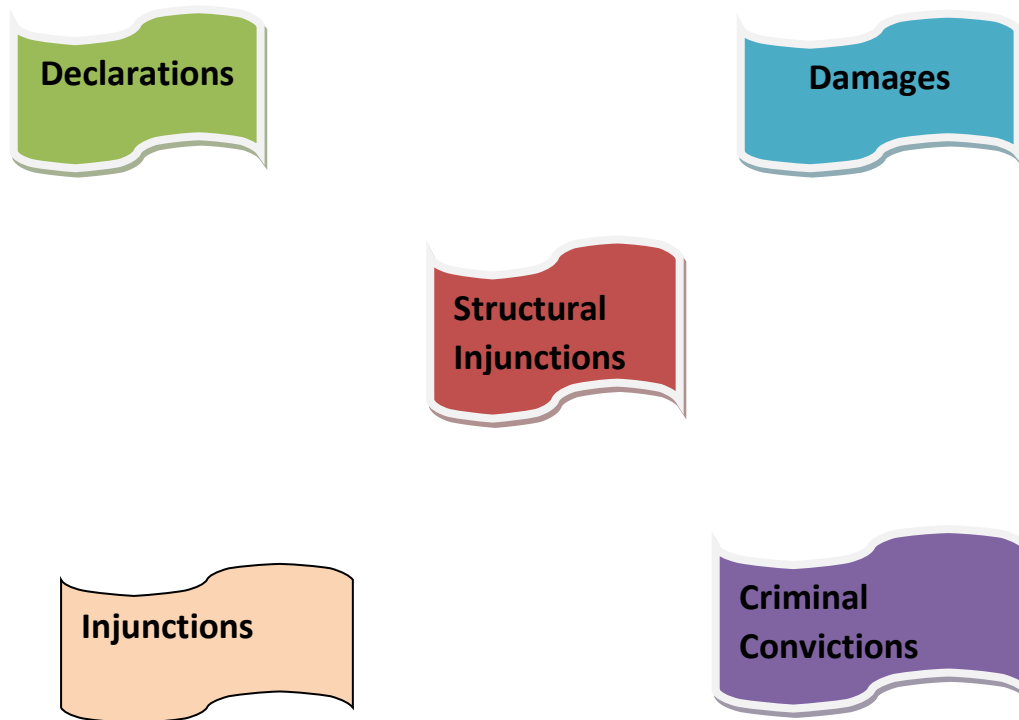
3.4. Timing of the case

The timing of every case will be determined by the strategic needs and direction of the case. Each situation will be analysed, and a decision made on the most appropriate time to file or pursue a matter. This though will be guided by the principle of timeliness—the need to ensure timely outcomes. On some occasions, strategy may require that a case is delayed or even abandoned. Timeliness will also inform the nature of the forum from which to pursue a case. Some forums deliver remedies faster than others.

3.5. Remedies

Like with forum, the remedies to be pursued will be determined by the strategic objects and direction of the case. However, when pursuing cases arising from systemic situations, structural remedies, including the structural injunction, will be considered. Nonetheless, if required, private and unstructured remedies too may be pursued, including the following.

Remedies to be pursued by LAPD



One important principle that will guide the choice of remedies is feasibility: extent to which the remedy is realistic, implementable and will likelihood of implementation of the same.

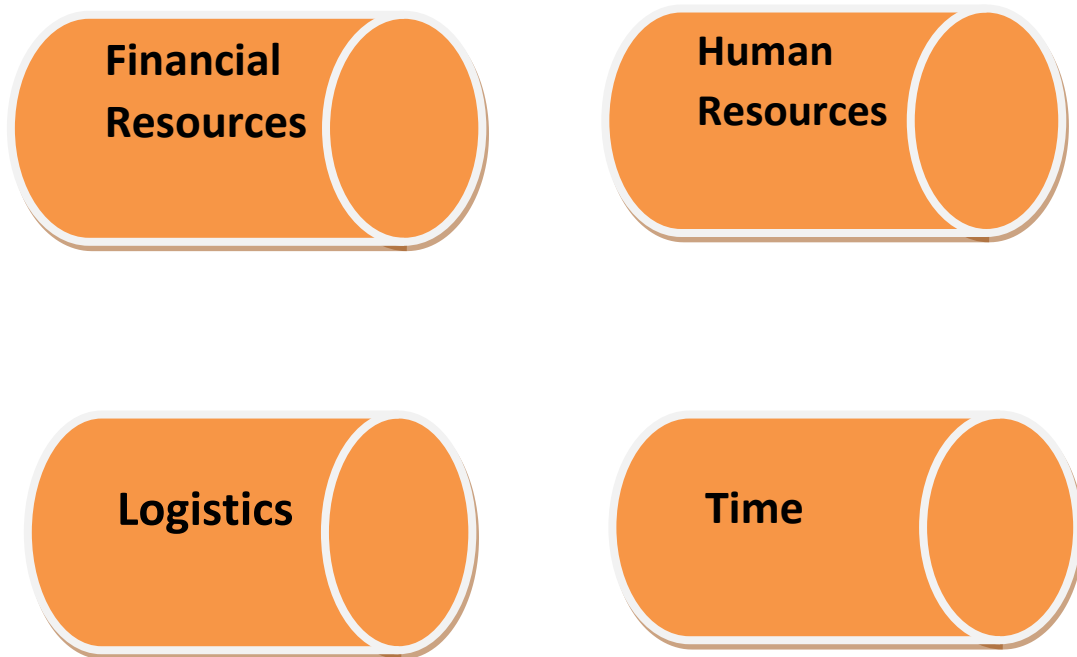
3.6. Amicus intervention

In some cases, when deemed appropriate, LAPD will see to intervene in ongoing cases through *amicus* intervention. Amicus interventions will be used to intervene and give directions to the case. This will be done in those cases considered strategic and, in whose intervention, PWD rights will be advanced or injustices against this group avoided. This will include cases interpreting the legal provisions with a bearing on PWD rights and access to justice as well as cases that have policy implications that impact on PWDs and their rights. One of the determinations for intervention will be the expertise and resources at the disposal of LAPD.

3.7. Resource implications of the case.

A decision to pursue a case will be guided by the resource implications of the case. LAPD will not pursue cases which are or are likely to be beyond the resources available to it for the purpose. Litigation will be guided by the LAPD budget and any resources committed by partners.

In evaluating the resource implications of a case, LAPD will be guided by the following.



Only when all the above are available will LAPD pursue a case.

4. Case preparation plan

This Strategy is guided by the adage: *failing to prepare is preparing to fail*. For this reason, LAPD considers case preparation an important component of SIL. LAPD's preparation for a case will pertain to both logistical and substantive aspects of the case. To achieve this, LAPD will follow the case preparation plan described in the following steps.

Step 1: Research for the case



At this stage, research will be undertaken to establish the following:

- Legal issues involved
- Nature of violation/abuse
- Persons affected by violation/abuse
- Persons/entity responsible for violation/abuse
- Feasibility of case
- Comparative perspectives from other jurisdictions on similar cases
- Appropriate forum
- Required evidence
- Possible remedies
- Likely impact of case
- Possible challenges and barriers
- Resource implications
- Required partners and their role
- Strategic options of pursuing case
- Comparative approaches to problem

Step II: Assess LAPD capacity to pursue case



As step II, LAPD will assess its capacity to pursue case. This will involve evaluating the following:

- Available financial resources
- Required expertise
- Logistics available
- Available time

Step III: Identifying partners



At step III, LAPD will identify possible partners to work with on the case. The choice of partners could among others be informed by the deficits identified at Step II. Partners will be identified who can cover those gaps. In addition, partners may be required for other purposes beyond resources gaps. This includes coalition building and building strategic relationships. The need for partners and the required partners will be determined on a case by case basis. Factors to be considered in determining the partners to work with include the following:

- Goal and objectives of partner
- Experiences of persons who have worked with partner before, if any
- Role(s) partner is willing to assume
- Strategic strength of partner

Step IV: Determining evidence required



LAPD will at step IV determine the nature of evidence required to pursue the case and will work out modalities of assembling the same as well as the resources required for this purpose. This will include the following forms of evidence, depending on the nature of the case:

**Expert
Evidence**

**Factual
Evidence**

**Data &
Statistics**

In all cases, the security of evidence and safety of witnesses will be assessed, and measures taken to secure the same. Under all circumstances, safety in obtaining evidence will be a primary consideration.

Step V: Determining the advocacy plan for a case



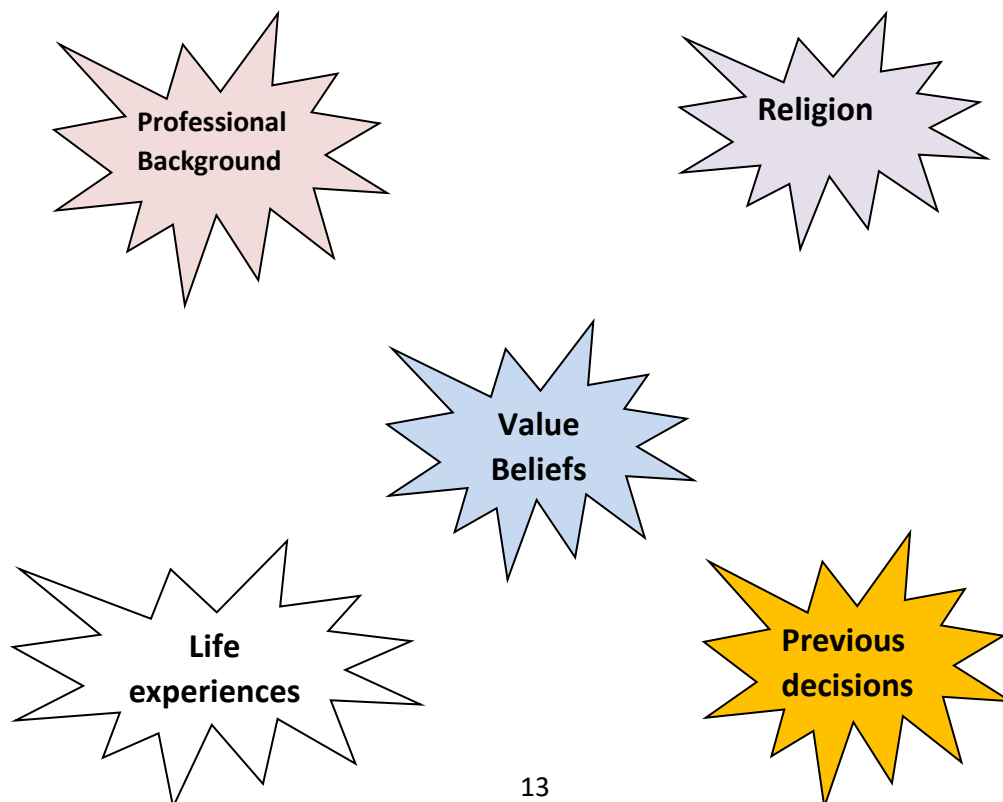
Every LAPD case will be accompanied by an advocacy plan, which will determine modalities of how the process and outcome of the case will be publicised as well as support for the same obtained. The Plan for every case will have the following:

- Objectives of advocacy - what is to be achieved
- Issues to form part of advocacy
- Message(s) to be put out
- Audiences to be reached and modalities of this
- Activities forming part of advocacy
- Partners on advocacy and their role
- Resource implications of advocacy

Step VI: Judicial mapping



It has been established that the backgrounds of judges, their experiences and value beliefs have an impact on how they decide matters. It is therefore important to establish these and determine the best strategy to present the case. LAPD's judicial mapping will involve profiling the judicial officers likely to hear the case. The profiling will be aimed at establishing how the backgrounds and views of judges could impact on their perceptions and decisions of the case, as well as guiding LAPD on the best way to present the case. The mapping exercise will consider the following about each judge:



4.1. Case surgeries

LAPD will use case surgeries for the purposes of conceptualising and supporting case pursuit. The surgeries will be held to determine the viability of a case, conceptualise the legal arguments, define the pursuit strategy and to support the hearing of the case. In the course of hearing, case surgeries may be held whenever it is deemed necessary. LAPD shall strive to secure experts to guide and be part of the surgeries.



5. Case pursuit plan

Pursuit of every LAPD case will be guided by a Plan, which will set out modalities of pursuing the case in a systematic manner. The Plan will deal with the following:

5.1. Roles and responsibilities

The case preparation plan will define the roles and responsibilities of the partners, in those cases in which LAPD is involved with other actors. This will ensure advance knowledge of the roles and enable the different actors to prepare appropriately. The roles to be agreed on could range from research, legal representation, advocacy, resource mobilisation, managing the evidence, and media interfaces, among others.

5.2. Handling of evidence and witnesses

The handling of evidence will be determined by the nature of evidence. In the first place, all evidence will be documented and properly stored with appropriate backups, considering the principle of confidentiality. For storage purposes, LAPD will develop an evidence documentation, storage and backup system. This will include digitising all evidence. Evidence shall be kept even after the end of a case.

All evidence will be verified, and double checked, with all deliberate efforts taken to rely on primary sources. Oral accounts will be verified, recorded and stored. Video, voice and all other forms of evidence will be utilised after verification.

In cases requiring witnesses, these will be handled guided by the following:

- Witness evidence will be based on informed consent of the witness;
- Witnesses will be informed in clear terms the purpose of their evidence and the responsibilities which go with this;
- Nothing will be done to compromise the safety, believes or welfare of a witness;
- Deliberate steps will be taken to ensure witness protection, whenever this is deemed necessary;
- Witnesses will only interact with professionals, including paralegals and lawyers;
- All testimonies will be recorded, properly stored and were necessary translated; and
- The special needs of witness, including those arising among others from disability, age, and gender will be addressed as much as is practically and reasonably possible.

5.2. Preparing plan B

In every case, LAPD will develop a Plan B of achieving intended purpose when case is lost or delayed. This could include any of the following:

- Appeal or/review
- Continued advocacy
- Re-strategising for another case;
- Further research;
- Taking political action; and

- Appealing to public opinion.

5.3. Media plan

As part of advocacy, LAPD will utilise the media to popularise cases, prepare the ground and update the public on progress. Media utilisation will be guided by the following:

- Evaluation of the relevance of the media in each case, bearing in mind that the use of the media may be inappropriate in some cases;
- Identifying the media outlets and forms to utilise in the case, determined by the demands of the case and audience one intends to reach;
- Identifying the person/partner responsible for media engagement;
- Determining the resources required to engage the media;
- Harmonising the messages to be shared with the media;
- Determining the most appropriate timing for engaging the media; and
- Determining strategies to deal with any media backlashes.

5.4. Case post-hearing debrief

In every case, LAPD will convene a case debrief after every session and at the close of the hearing. The debrief will focus on determining what went well and what did not go well, as well as documenting lessons learnt for future cases. At the end of the hearing, in each case, a strategy will be crafted on how to handle the period between the end of the hearing and delivery of judgment.

6. Post-judgment strategy

In each case, the post-judgment strategy applied will depend on whether the case is successful. In all cases, LAPD will do the following:

- Internalise the judgment and its implications. Experts will be engaged for this purpose, if necessary;
- Debrief on experiences and lessons learned;
- Develop an action plan for dissemination of the decision with partners and stakeholders, including the public if appropriate;
- Evaluate the remedies and determined their nature and how these will be implemented;
- Identify potential actors in implementing decision
- If case lost, activate plan B.
- Determine how best to utilise the decision. Thresh positive outcomes and determine how to utilise these.