

A Fact Sheet on Strategic Litigation to promote LGBTI rights in Europe

What is strategic litigation?

1. Strategic litigation is about using a legal case to advance the rights of LGBTI people, usually as part of a wider advocacy campaign.

What kind of issue is suitable for strategic litigation?

2. A law, or the way a law is interpreted or implemented, that affects many or all LGBTI people because it treats them unfairly due to their sexual orientation or gender identity. Examples might be failure by the police to investigate hate crimes against LGBTI people, or refusal by the State to give legal recognition to same-sex couples or similar rights to LGBTI families.

What factors should influence a decision to undertake strategic litigation?

3. There are several things to take into account before deciding to launch strategic litigation.

(a) **Timing.** Is it a good time to take a case? Are the courts open to arguments about legal equality for LGBTI people? Is the political climate ready for the debate such a case will bring about? Are there international standards that apply to your country which it is not observing, such as in the European Convention on Human Rights or in EU law? If you win the case, is this likely to lead to a change in the law, or how it is interpreted or enforced?

(b) **Good facts.** Do you have a good candidate whose situation will make for a sympathetic claim and who is willing to front the case? Is there sufficient information about the situation that can be proved in a court case, such as documents, witnesses, medical or official reports? Will the candidate be able to handle the situation if her/his identity becomes public and there is hostile media reaction that might lead to unpleasantness or worse?

(c) **Group support.** Is your Group willing and able to campaign around the case, including fund-raising for legal expenses, supporting the person bringing the case, taking part in public discussions about the case, and providing information to the media and other interested groups?

(d) **A suitable legal team.** Do you have access to lawyers who are knowledgeable about the LGBTI issues involved? Are they likely to work with you constructively and see the case as part of a wider campaign? How much money will they want to provide legal services for the case? Are they willing to accept help from international lawyers or organisations that provide free help in such cases?





(e) **Resources.** Will you be able to access sufficient resources to finance the case? You might get some services for free, but you will most probably have to pay legal expenses, such as court fees, preparing court documents, expert reports and so on. You might also have to pay some of the State's legal costs if you lose the case.

(f) **Other sources of support.** Are other progressive forces in your country likely to support the case, or support your organisation if it is attacked for backing the case? Are there parts of the media likely to report the case sympathetically?

How much effort will strategic litigation involve?

4. A strategic legal case will need careful planning. You will need to work out a campaign plan to gather evidence, to raise funds for the legal expenses, to support the person who is fronting the case (including if there are personal hostile reactions), to handle publicity, to liaise with other sympathetic organisations, to deal with opposition and any hostile reaction. You should also recognise that a case can take several years from beginning to end, especially if you lose in the national courts and have to use the international legal mechanisms.

Where and when would be best to bring strategic litigation?

5. Most cases have to start in the place where the person fronting the case has suffered the discrimination, even if you suspect that the courts will not rule in your favour. Where it is obvious they will not, for example because you cannot challenge the constitutionality of a law or the legal system is very clear that discrimination is permitted, then you can start the case in an international court. All countries in Europe (except Belarus) are subject to the jurisdiction of the European Court of Human Rights, established under the European Convention on Human Rights (ECHR). When a case is decided by a national court, the decision only concerns that country. But under the ECHR, the principles set out in the Court's decision apply to all European countries (except Belarus). In recent years, a significant number of LGBTI rights have been advanced under the ECHR – see the Strategic Litigation section of the ILGA-Europe website: http://www.ilga-europe.org/europe/what_we_do/litigation_in_the_european_courts.

This also gives a list of issues on which cases are still needed at European level.

What are the advantages of strategic litigation?

6. A successful strategic case can bring about a change in the law, or how it is interpreted or enforced, that benefits many, if not all, LGBTI people in the country, or even across Europe. Many ECHR cases are also influential in the way similar provisions are interpreted in both national and international laws in other regions. It will help the person in whose name the case was brought. It can also generate a lot of publicity about the situation of LGBTI people in your country, generate political and public debate, and help to bring about equality for LGBTI people. It can bring your organisation a lot of support from the LGBTI community as well as from other progressive groups in your country.

Are there any disadvantages to strategic litigation?

7. The process can be very lengthy, which requires a considerable degree of commitment and resilience by the person who fronts the litigation as well as the supporting organisations. It is sometimes difficult to control the process. Lawyers often have their preferred tactics that might not coincide with those of LGBTI activists. In order to end the legal proceedings, the government might make an offer (for

example, of compensation or an official review) to the person fronting the case that s/he will find difficult to refuse. One case might not be sufficient to bring about the desired change so you may have to consider taking a number of cases. You also have to plan what to do if you lose the case. Will your organisation lose too much morale? Can you still use this situation to press for change?

Who can I consult if my group is interested in undertaking strategic litigation?

8. ILGA-Europe has good contacts with international organisations that are willing to help LGBTI groups undertake strategic litigation. So you can write to the Executive Director of ILGA-Europe, with details of your proposed litigation, for further help and information, using this e-mail: evelyne@ilga-europe.org.