The Winston Churchill Memorial Trust of Australia

Churchill Fellowship Report

Learning from international models that enable people to create systemic change through the courts.

Report by Isabelle Reinecke

2016 Churchill Fellow
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Signed

Isabelle Reinecke
2016 Churchill Fellow
Executive Director, Grata Fund
info@gratafund.org.au

Dated 25 September 2017

Grata Fund is Australia’s first people-powered fund for justice. We empower ordinary Australians to create extraordinary change through litigation on the issues of human rights, democratic freedoms, economic rights and the environment.

Grata works with the Australian community to pinpoint vital legal cases that protect or advance rights and freedoms. We unite expert legal teams, brilliant campaigners and brave champions willing to take unfairness on in court. Our community chips in to fund expensive litigation costs and unlock the power of the court.
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Public interest litigation
Strategic litigation
Digital fundraising
Crowdfunding
Movement lawyering
Jurisprudence
Adverse costs
Protective costs
Abstract

This Churchill Fellowship Report considers impact litigation practices and funding in Germany, Hungary, the Netherlands, the United Kingdom, and the United States and makes recommendations for how Australian impact litigators can learn from those jurisdictions.

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Executive Summary

“To improve is to change, so to be perfect is to have changed often.” ¹ - Winston Churchill

Impact litigation is a direct and powerful tool for change in democracies where other checks on political or corporate accountability have failed. Unfortunately though, Australia has a relatively underdeveloped impact litigation practice, largely thanks to a prohibitive costs regime.

Organisations visited in Germany, Hungary, the Netherlands, the United Kingdom, and the United States are using a range of Citizen Activist, Jurisprudential and Consumer approaches to create systemic change through the courts. These all provide inspiration for how Australian organisations could harness the power of impact litigation to create significant public benefit across the areas of human rights, civil rights, and the environment.

This Report concludes that Citizen Activist approaches are best placed to create longstanding litigation impacts and establish diverse, independent and sustainable revenue streams. Of particular note among organisations using Citizen Activist approaches is the work of the Centre for Constitutional Rights and the American Civil Liberties Union, both based in the United States.

Four recommendations, now being applied by the Grata Fund, are made for Australian impact litigators:

Recommendation 1: Where to start
Recommendation 2: Crowdfunding versus in-house digital fundraising
Recommendation 3: Strategic communications
Recommendation 4: Costs reform

Programme

London, United Kingdom

**Balance Legal Capital**  Simon Burnett, Partner

**Bertha Foundation**  Peter Noorlander, Bertha Justice Initiative Director

**CrowdJustice**  Jo Sidhu, Head of Legal and Partnerships

**Harbour Litigation Funding**  Stephen O'Dowd, Senior Director of Litigation Funding

**Justice**  Jodie Blackstock, Legal Director

**Liberty**  Martha Spurrier, Director

**Open Society Justice Initiative**  Rupert Skilbeck, Litigation Director

**Toby Collis, Associate Legal Officer**

**Sigrid Rausing Trust**  Jonathan Cooper OBE, Trustee

**The Guardian**  Paul Chadwick, Reader's Editor

Berlin, Germany

**European Centre for Constitutional and Human Rights (ECCHR)**  Wolfgang Kaleck, Founder, General Secretary and Legal Director

**Anna Ramskogler-Witt, Head of Fundraising**
### Budapest, Hungary

**European Roma Rights Centre (ERRC)**
- Adam Weiss, Managing Director

**Hungarian Civil Liberties Union (HCLU)**
- Dr Stefánia Kapronczay, Managing Director
  - Balázs Bartakovics, Chief Financial Officer

**Hungarian Europe Society**
- Istvan Hegedus, Chairperson

### Amsterdam, The Netherlands

**Clara Wichmann Fund**
- Anniek de Ruijter, Chairperson

**EasyJustice**
- Rob van Rooij, Founder and Owner

**Public Interest Litigation Project (PJLP)**
- Jelle Klaas, Project Coordinator

**Urgenda Foundation**
- Marjan Minnesma, Founder and Director
  - Dennis Van Berkel, Legal Counsel

### The Hague, The Netherlands

**Hiil**
- Dr Sam Muller, CEO

### New York City, USA

**American Civil Liberties Union (ACLU)**
- Dorothy Ehrlich, Deputy Executive Director
- Michele Moore, Communications Director
- KP Trueblood, Director of Strategy and Implementation
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A. Introduction

Impact litigation

Impact litigation, also referred to as public interest litigation and strategic litigation, is an incredibly powerful democratic tool. It has the ability to “bring significant change when legislatures prove unwilling or unable to act” and presents “a chance to change the conversation where ballot measures and bills have hit a wall.”2 It is “disruptive, cutting through the noise and the politics and allowing the facts to surface.”3

As Adriána Zimová of the Open Society Justice Initiative writes, impact litigation “can be stunningly effective, capable of breaking down longstanding injustices and opening new paths of human rights protection and enforcement.”4

Impact litigation typically targets unlawful action by governments or large corporations, seeking to change, advance or retain laws for the benefit of a specific groups of people or the environment. It achieves its goals in the courtroom through binding rulings that the target comply with the law or orders clarifying the operation and meaning of the law and the obligations of those who are subject to it.5,6 While often brought by an individual plaintiff, impact litigation seeks remedies that will to confer a benefit to much broader group.

5 Michael Kirby, Deconstructing the law’s hostility to public interest litigation, Law Quarterly Review (2011).
A popular mechanism across common and civil law systems internationally, impact litigation is a relatively underdeveloped practice in Australia. This is primarily due to a cultural hostility to impact litigation from Australian courts. This hostility is best exemplified by Australia’s uniquely punitive adverse costs system for impact litigation, which regularly prevents legally worthy and publicly important litigation from reaching court.

Adverse costs are ordered by courts and paid by the unsuccessful party to the successful party at the conclusion of litigation to cover (at least most of) the latter’s expenditure on proceedings, including court costs and legal fees. While reasonable in most civil or and even inter-governmental proceedings, adverse costs orders are wildly inappropriate and have “devastating consequences” when applied to impact litigation.

Adverse costs systems are a common feature of court systems internationally, however rules in every jurisdiction visited were in place to ensure protection from costs for public interest litigants.

In German public law cases, court costs and legal fees are not awarded against unsuccessful parties. While in German civil suits unsuccessful parties do pay the other sides’ costs, both court costs and legal fees are highly predictable (the rate of legal fees is even capped by the German Attorney’s Remuneration Act (Rechtsanwaltsvergütungsgesetz)).

In the United States, parties do not bear the cost of the other side, regardless of the outcome

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8 Hon. John Toohey, extra-curially while a Justice of the High Court of Australia, addressing an international conference quoted in Kirby (2011).
(unless the suit is vexatious). In civil rights litigation the courts may even order that the prevailing parties - *other than the United States* - recover reasonable attorney fees.

Even the United Kingdom, Australia’s most similar legal jurisdiction, has an advanced protective cost order regime. The UK Government recently attempted to wind back these protections in environmental litigation by allowing courts to vary or remove maximum cost limits. However, in September 2017 the the High Court determined that this would only be possible in very limited circumstances in response to litigation from environmental legal organisation ClientEarth.9

Yet, despite agitation from some of the most senior members of the Australian legal community, Australian courts continue to do little to address the issue. In the leading Australian judgment on the award of costs in public interest matters, *Oshlack*,10 the High Court upheld a lower court decision to make no adverse cost order. However, the Oshlack principle is extremely narrow and has rarely been applied successfully since. The Federal Court, while having the express power to make protective cost orders, does so in very limited cases and with little transparency as to the costs cap amount that will be set. Governments, which most benefit from the suppression of impact litigation, have little incentive to change the costs system.

Grata Fund (Grata) was established in 2015 to unlock impact litigation in Australia by providing much needed indemnity protection from cost risks and disbursement funding for public interest litigants. Grata partners with lawyers and campaigners to protect and advance human rights, democratic freedoms, economic rights and the environment for all Australians.

This Fellowship provided an opportunity to learn from the most experienced impact litigation

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organisations in the world. The learnings gained on the Fellowship and recommendations made in this Report will inform Grata’s strategy and development, ensuring it will be well-placed to meet the contemporary challenges to impact litigation and create significant and lasting public benefit.

**Challenges to Impact Litigation**

Impact litigation faces a number of challenges across the world. Massively expensive, global impact litigation depends on the generosity of institutional and foundation funders. However, impact litigation can be time-consuming and funders can be fickle.

Peter Noorlander, Director of the Bertha Justice Initiative, which is one of the biggest players in global impact litigation funding, noted that while the demand from civil society continues to grow for litigation funding, funders have begun to lose interest. He explained that funders are fatigued from decades of European Court of Human Rights litigation, and burned by badly managed litigation in African human rights tribunals.

Jonathan Cooper, a Trustee of the Sigrid Rausing Trust (another very significant impact litigation funder) noted increasing scepticism that litigation alone could create lasting change. This was echoed by Noorlander, who agreed that funders are less interested in cases just for their jurisprudential impacts than they once were. To this end, the Open Society Foundation (which funds a vast array of global impact litigation) works through its Justice Initiative to develop the capacity of organisations to measure and communicate the impacts of strategic litigation on the lived experience of beneficiaries, community mobilisation efforts and rights awareness, rather than just on jurisprudence.¹¹

¹¹ See, for example, Adriána Zimová, *Strategic Litigation Impacts: Roma School Desegregation*, Open
In an increasingly polarised political environment across the globe, legal nonprofit organisations are being targeted by politicians sick of being given painful doses of legal accountability. This includes attempts to frame impact litigation as improper and regulatory changes that restrict impact litigation, like massive cuts to legal aid and legal advocacy funding, bans on funding from foreign sources (i.e. international foundations), and attempts to put in place more prohibitive costs regimes.

B. Three broad approaches to creating change

At a macro level, the majority of organisations visited sit along a spectrum of ‘Jurisprudential’ and ‘Citizen Activist’ approaches to creating change through the courts.

Organisations sitting at the Jurisprudential end of the spectrum are increasingly seeing the benefits of transitioning towards Citizen Activist approaches, which this Report will recommend is better suited to meet the goals of and face the challenges to public interest litigation.

While Citizen Activist and Jurisprudential approaches are the dominant modes of creating change through the courts among the organisations visited, ‘Consumer’ approaches are also emerging. These approaches use for-profit principles to open access to justice and drive change.

This Report examines in detail the work of several organisations visited that best demonstrate these three approaches.

1. Citizen Activist Approaches

Among impact litigation organisations sitting at the Citizen Activist end of the spectrum, the community is seen as central actor in creating change. Lawyers play a critical, but equal or even secondary role. These organisations are - to varying degrees - flipping the traditional narrative of ‘smart lawyer goes to court and creates change’ by recognising that social and political movements are often direct agents of legal change.12

Citizen Activist approaches include ‘movement-led' impact litigation organisations, or “Lawyering that supports and advances social movements, defined as the building and exercise of collective power, led by the most directly impacted, to achieve systemic institutional and cultural change.”13

Citizen Activist approaches include such movement-led organisations, as well as organisations that are better described as ‘movement-engaged’ or ‘movement stewards’, which provide opportunities for citizen engagement but that are led to a lesser degree by directly affected communities.

Citizen Activist approaches are pervasive in the United States. While there is a seemingly endless list of impact litigation organisations using these approaches, the style is well demonstrated through the work of the Centre for Constitutional Rights, NAACP Legal Defense Fund, EarthJustice and the American Civil Liberties Union.

12 This theory is well demonstrated in David Cole's recent book Engines of Liberty (2016). Cole is the current National Legal Director of the American Civil Liberties Union (ACLU).

Clarifying the cultural context that enabled these approaches to flourish in the United States, Legal Director for the Centre for Constitutional Rights, Baher Azmy explained that the NAACP Legal Defense Fund’s narrative is deeply held in the American legal psyche and is a core teaching of American law schools (the organisation is responsible for many of the most significant racial equality cases in the US, including securing a prohibition on school segregation in Brown v The Department of Education.)

However, Citizen Activist approaches are certainly not limited to in the United States, with organisations such as the Public Interest Litigation Project and the Urgenda Foundation in the Netherlands also recently using these approaches.

**NAACP Legal Defense and Education Fund, Inc., USA**

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is credited as the grandfather of citizen activist approaches in the United States. The organisation fights for racial justice by protecting the wins of the civil rights movement and pursuing further structural change to “expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans.”

LDF was founded in 1940 by Thurgood Marshall as an internal legal department for the National Association for the Advancement of Coloured People (NAACP). The NAACP, America’s oldest and largest grassroots civil rights organisation, was established in 1909 in response to continued lynching and the Springfield, Illinois race riot of 1908.

In 1957 LDF spun out as an independent and dedicated ‘law shop’ in order to maintain charitable tax status for its work after facing pressure from the Department of Treasury and the

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Internal Revenue Service.

Strategy and Operations

Today LDF is led by Sherrilyn Ifill (President and Director-Counsel) and Janai Nelson (Associate Director-Counsel) and staffed by thirteen attorneys. These attorneys manage and run LDF litigation, often working with pro bono or paid external lawyers as part of their cooperating attorney network, whose attorney fees and disbursements are paid for by LDF.

The organisation also employs 6 communications staff, 7 policy staff, 3 community organisers, 6 development (fundraising) staff, 5 fellows and a number of support staff.

Since separating, the organisation has become increasingly independent from the NAACP. Today LDF pursues its vision by combining a “multidisciplinary approach to advocacy with our traditional litigation strengths to advance a modern vision of racial justice.”

Working along four thematic streams, education (e.g. desegregation), political participation (e.g. barriers to voting), economic justice (e.g. employment discrimination), and criminal justice (e.g. capital punishment), its mission encompasses:

“not only precedent-setting litigation and policy initiatives, but also strategic campaigns informed by the latest and most innovative developments in social and political science and economics. In addition to litigation and policy advocacy, LDF employs public education, community organizing and communications strategies to bring about durable structural change.”

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Janai Nelson cited LDF’s most famous victory, in *Brown v Department of Education*, as demonstrative of the need for “all frontal campaigns” in public interest litigation. The decision that school segregation is unconstitutional was hugely significant in its own right. However, its impact was exponentially amplified through the marches and demonstrations of the civil rights movement that the case helped to inspire. Those campaigns eventually led to the enactment of a swath of racial justice legislation, which enabled the LDF to challenge discrimination in public accommodation, housing, employment and voting.

LDF campaigns today are increasingly using digital technologies, such as high quality minisites that educate the public on issues, like as voting barriers, and encourage them to take action, for example by reporting instances of voter suppression and intimidation.¹⁷ LDF also engages and educates its supporter base through digital surveys, for example “to find out what you think about America's most pressing civil rights challenges”.¹⁸

LDF’s dedicated community organising team is particularly unusual among nonprofit legal organisations. A strong American tradition, community organising is the coordination of cooperative efforts and campaigns carried out by local residents to promote the interests of their communities. Considered to be founded by Saul Alinsky in the 1930s, organising was employed to great effect by the American civil rights movement in the 1950s and 1960s.

LDF’s use of organising strategies can be traced to that period, through the work of Jean Fairfax who worked on the ground during the 1960s-1980s organising among black families and parents in school desegregation cases.

¹⁷ NAACP LDF, [Voting Rights Campaigns Minisite](https://www.ldf.org/votingrightscampaigns/).

¹⁸ NAACP LDF, [Election Poll Minisite](https://www.ldf.org/electionpoll/).
Today LDF’s organising work includes the Policing Reform Campaign, which uses community organising techniques to support LDF’s efforts to effect unbiased policing by supporting deeply impacted communities across the country. For example, by increasing the capacity of communities to change and monitor policing practices.

**Funding**

In the 2016 fiscal year, LDF raised over USD$12 million and benefited from over USD$20 million of temporarily restricted and permanently restricted endowments.

Institutional funders are the primary source of this revenue. However, Nelson explained that microfunding has been a key source of engagement with the community for almost two decades and the organisation is striving to strengthen its digital fundraising program. (Digital fundraising campaigns are conducted across digital channels - including email marketing, social media advertising (organic and paid), display ads, and SMS - and are typically geared towards raising a high volume of microdonations usually under about $200 each. Crowdfunding is essentially the same concept, although typically means campaigns hosted on external platforms and includes an advertised time-bound donation target and tracker.) Nelson explained that LDF has always felt owned by the community, and that the community has that same expectation. Enabling micro-donations was an important part of giving the community that sense of ownership.

In the early days of the Web, that meant a ‘click and pledge’ page, where community members could pledge a donation and the organisation would mail them a ‘pledge card’ (donation form); and about 7 years ago LDF began accepting online credit card donations.

Today, it means increasingly sophisticated multichannel digital fundraising and lead acquisition,
integrated with advocacy efforts. For example, LDF recently worked with Snaky Inc. to deliver a ‘First 100 days’ fundraising campaign, which sought to build, engage and retain a new audience in the first 100 days of the Trump administration. The campaign used uniquely branded web, email, social media advertising, display ads, and direct mail to target supporters, along with regular action alerts informing supporters of relevant breaking news. The campaign aimed to give donors the feeling that they were fighting alongside LDF, garnering more than 500 new recurring donors in its first two weeks and working to strengthen their civil rights movement well beyond the 100-day deadline.

Centre for Constitutional Rights, USA

Center for Constitutional Rights (CCR) pioneers “daring and innovative”\(^{19}\) legal strategies to advance and protect the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights.

Established in 1966 to support the work of civil rights activists in the South, the CCR has since “lent its expertise and support to virtually every popular progressive movement”\(^{20}\) in the United States. Recently that included partnering with civil rights group Color of Change and defending Black Lives Matter activists who were being surveilled by the government after mass protests against police violence in response to the fatal shooting of Michael Brown in Ferguson, Missouri.

\(^{19}\) CCR, *What we do - Active Cases*.

\(^{20}\) CCR, *What we do - Active Cases*. 
CCR employs 50 staff, including 12 full-time lawyers, 4 full-time advocacy/campaign experts, 4 communications experts and five development/fundraising experts. The organisation will partner with private law firms, but insists on being the lead solicitor in all cases.

The organisation is committed to a culture of creative and hard-hitting communications and, according to Legal Director Baher Azmy, is “less enamoured with [its] reputation in the courts” than most legal organisations.

Dedicated to “progressive principles, people’s movements, human rights” and “the creative use of law as a positive force for social change,” CCR employs a mix of litigation, advocacy and strategic communications to advance and protect a broad range of national civil and human rights issues.

Unlike many other civil rights organisations, CCR’s philosophy values legal principle only in so far as it can be used to support progressive social or political movements. The goal is squarely focused on the needs of vulnerable communities, rather than on a belief in inherent value of legal principle. To that end, the organisation does not use resources towards supporting the civil rights of non-progressive movements.

CCR views social and political movements as central actors in creating change. This is based on an understanding that legal decisions on their own - while powerful - are inherently unstable unless buttressed by political support. For CCR, that means challenging power in the courts, and building power in communities.

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21 CCR, What we do.
**Example: Movement-led litigation strategies**

In practice, that means CCR will partner with and be led by movements or community groups on litigation that advances the goals of that partner, and will refuse to shy away from addressing the political dynamics that influence impact.

For example, CCR has worked to stop the New York City Police Department’s (NYPD’s) aggressive stop-and-frisk practices. CCR first challenged the NYPD’s stop-and-frisk practices in 1999 with a landmark racial profiling case *Daniels, et al. v. City of New York, et al.*\(^{22}\) The 2003 settlement of that case led to the disbanding of the infamous Street Crime Unit\(^{23}\) and required the NYPD to provide stop-and-frisk data to CCR on a quarterly basis.

Nonetheless, stop-and-frisk practices escalated. In 2012, stop-and-frisks were being conducted in record numbers: over 700,000 times that year, 85 per cent of which targeted Black and Latino people.

Reflecting the importance of social movements to CCR, it worked with grassroots organisations to establish a police accountability group, Communities United for Police Reform, to campaign to end discriminatory policing practices in New York. (The group now comprises over 70 member organisations from across New York, representing many of the people most unfairly targeted by the NYPD.)

When the NYPD data, produced as a result of the *Daniels* settlement, revealed a continuing

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\(^{22}\) CCR, *Daniels, et al. v. the City of New York*.

\(^{23}\) NYPD’s Street Crime Unit (SCU) was an elite commando unit of more than 300 police officers who patrolled the streets at night in unmarked cars and in plain clothes.
pattern of widespread racial profiling and unconstitutional stops and frisks, CCR began preparations for another federal case against the City of New York. CCR spent two days convening with Communities United for Police Reform to discuss and decide on the remedy that would be sought in court: an order that community input be integrated into NYPD reform.

CCR went on to run and win *Floyd, et al. v. City of New York, et al.*, with the court finding in 2013 that the New York City Police Department was liable for a pattern and practice of racial profiling and unconstitutional stops. Critically, the judge ordered that the NYPC must implement community input into reform.

Baher recounted that the Communities United for Police Reform members packed the courtroom every day, listening to the hearings. He said the moment was “an empowering thing for a community that doesn’t usually have power” and that it “strengthened the police accountability movement”.

When the City of New York attempted to appeal the decision, the Communities United for Police Reform was able to direct this strength into a #droptheappeal campaign, that would make it politically untenable to the City of New York to continue the appeal. Bill De Blasio subsequently won the New York City mayorship in 2013 on a police accountability platform and the City dropped the appeal within a month of his election.

Baher explained that the organisation will also “pursue success without victory” where that is critical for movement partners. For example, the CCR supported Survivors of Abuse by Priests (SNAP) in their lawsuit against the Pope in the International Criminal Court.24 While CCR lawyers knew the case would not be successful in the traditional sense, the court case was able

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24 CCR, *SNAP v the Pope, et al.*
to catalyse a massive campaign resulting in sharp criticism from the UN Committee Against Torture and the Committee on the Rights of the Child and Committee Against Torture. The Vatican was also summoned to report to the UN Committee on the Rights of the Child, demanding it report its progress against UN recommendations.

Funding

With a total income of almost USD$10 million in 2016, CCR’s revenue comes in almost equal parts from institutional funding25 and private giving, mostly from wealthy individuals giving annual donations between USD$1,000 and USD$100,000.

The organisation has no membership fee structure, and has not focused on digital fundraising or micro-donations to date, although it is working to build its database list.

While the organisation has unsuccessfully attempted to use decentralised crowdfunding platforms, its close work with communities has helped it build a significant Facebook community of over 68,000, giving it the building blocks for a highly successful digital fundraising program.

EarthJustice, USA

Established in 1971 and modelled on the NAACP’s Legal Defense Fund, EarthJustice describes itself as “the legal backbone for the environmental movement”. The organisation “wields the

25 In 2015, significant funding came from the Bertha Foundation ($1,000,000), Fidelity Charitable Gift Fund ($729,450), The Atlantic Philanthropies ($661,393), the Open Society Foundation ($495,000), Warsh-Mott Legacy ($345,000), Ford Foundation ($342,500), the Oak Foundation ($250,000), and the Tides Foundation ($245,641).
power of law and the strength of partnership” to preserve the wild, advance clean energy, and fight for healthy communities.

*Strategy and Operations*

EarthJustice’s reach is enormous, with a national office headquartered in San Francisco, an international program and 12 regional offices spread across the United States. These regional offices play an essential role in keeping the organisation connected to the communities and organisations it supports through its work. Today EarthJustice’s national strategy is less driven by those regional groups than it once was, but only because the organisation is now large enough to be able to work on the big picture without losing its regional focus.

EarthJustice has an annual revenue of over USD$55 million, employs over 100 attorneys and over 100 researchers, policy experts, communications staff and development (fundraising) officers, and is currently involved in over 350 active cases.

While litigation sits at the core of EarthJustice’s mission, public campaigns and community participation is critical to their work. This is reflected in the questions they ask when deciding whether to support litigation, including ‘what more needs to be done beyond the case to ensure its impact is maximised/realised?’ (e.g. campaigning to engage the community in the outcome or lobbying to counter political backlash); and ‘who can do that work?’ (e.g. internally or through partner organisations).

EarthJustice also provides digital and offline opportunities for their supporters to engage with their work, with over a million people - “our activists” as Martin Wagner, International Program Director called them - taking action on EarthJustice campaigns.
Critically, Wagner explained, EarthJustice attorneys “understand litigation is a tactic within a broader system.” Wagner also noted that to be a cultural fit with the organisation attorneys must see themselves as “storytellers”.

An example of EarthJustice’s integrated approach is their recent work to protect salmon stocks in Washington and Oregon. Working with their local partners, EarthJustice collected over 390,000 public comments asking federal agencies to remove aging dams that are stopping salmon from migrating upriver to spawn. While the agencies consider those public comments, the organisation has represented a number of fishing groups and conservationists in seeking short-term measures through the court to protect salmon, including stopping major dam spending.

The organisation’s communications and campaigns team is much smaller than their legal team. However, the organisation is able to leverage the capacity of its network of partners by regularly collaborating with campaign teams at other organisations.

EarthJustice’s clients are also typically environmental organisations, meaning strong relationships with other organisations are critical to EarthJustice’s success. While the organisation will occasionally work with individuals, for example in the Standing Rock Sioux Tribe’s Dakota Access Pipeline litigation, its preference is to work with organisations as they tend to be less likely to settle proceedings, ensuring that court precedents are set.

EarthJustice also spends about 3 per cent of its annual budget on lobbying to create the political dynamics required for lasting litigation impacts, for example by making backlash litigation for governments untenable. Interestingly, this work is considered so critical to EarthJustice’s vision that it is considering creating a separate lobbying arm.
Funding

EarthJustice raised over USD$55 million in revenue in 2016, 65 per cent of which came from individuals, 26 per cent from foundations and 9 per cent from bequests.

The organisation’s success with private giving can partly be traced to its longstanding use of digital fundraising through electronic direct mail. EarthJustice today finds that donors acquired through digital channels are more frequent and higher-value givers. International Program Director Noni Austin explained that the organisation had been beginning to see a plateau in the growth of online donations after having “scooped up the [initial] boom” during the last seven years. However, the election of Donald Trump in late 2016 provided a massive boost in online donations and new donors as people looked for ways to help defend against his political agenda.

The organisation has used decentralised petition platforms Care2 and change.org as acquisition channels with some success. EarthJustice prefers not to use decentralised crowdfunding platforms, which force organisations to tie donations to highly specific expenditure. Instead, it prefers to drive digital fundraising through its own website.

**American Civil Liberties Union, USA**

In 2017, the American Civil Liberties Union (ACLU) became nationally and internationally famous as the “defacto leader of what’s become known as ‘the resistance’ to Trump’s administration”. However the organisation has been a non-partisan civil liberties defender for almost 100 years. Since being founded in 1920 by civil liberties activists to “ensure the promise

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26 Kathleen Davis, *How the ACLU is leading the resistance*, Fast Company (5 April 2017).
of the Bill of Rights and to expand its reach to people historically denied its protections; it has brought cases against governments from all sides of politics.

That includes working on almost all of the United State’s landmark rights cases, including helping to end school segregation in Brown v. Board of Education (1954) (with the NAACP LDF); establishing lawful interracial marriage in Loving v. Virginia (1967); and confirming constitutional abortion rights in Roe v. Wade (1973).

Strategy and Operations

Today, the ACLU is the United States’ largest nonprofit legal advocacy organisation, with over 300 staff attorneys, national headquarters in New York, a legislative office in Washington DC and affiliate offices in all 50 states.

The ACLU litigates at the state and federal level, having appeared before the Supreme Court more than any organisation other than the Department of Justice. Its extraordinary reach crosses 14 project areas including free speech, LGBT rights, immigrant rights, privacy and technology, racial justice, and women’s rights. Most recently that includes litigating for trans bathroom rights, court challenges to reproductive freedom restrictions and some of the most prominent legal challenges to the Trump administration, such as early court wins against the Muslim travel bans.

However the organisation understands it “cannot rely on the courts alone. Politics and public opinion matter too.” To that end, the ACLU lobbies Congress and state houses, including

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27 ACLU, About ACLU.
28 ACLU, About ACLU.
through its dedicated legislative office in Washington DC, and uses strategic communications to engage supporters and build campaigns.

Led by Michelle Moore, its national communications department is a powerhouse, conducting the ACLU’s public relations, editorial, marketing, social media and digital advocacy campaigns. While the department’s digital advocacy campaigns are always tied to legal strategy, they are not necessarily tied to litigation. For example, its Stand With Snowden campaign was unattached to litigation and sought to pressure President Obama to pardon Edward Snowden. While unsuccessful in achieving its primary goal, the campaign has continued to mobilise the movement built around it by pivoting to “demand justice for Snowden and fight pervasive government surveillance.”

To manage the challenge of providing communications for such a vast organisation, the department works on six priority areas: surveillance, criminal justice, voting rights, reproductive rights, immigration rights, and LGBT rights. Communications staff meet with legal teams once every 3 - 4 months to map the work that is coming, determine resources and goals and create a communications framework. The department initially received some backlash from lawyers for narrowing its focus. However, Moore noted that the department was now seeing a positive change from lawyers, who were getting better at understanding how to frame their work in terms of these six priority areas.

To deal with the possibility of an incoming Trump presidency, a playbook of threats was created six months out from the election, the Trump Memos. Working from this playbook, Moore explained that the department’s messaging strategy was to “take the President at his

29 Stand With Snowden [website].

30 A playbook was also created to prepare for an incoming Clinton Presidency.

31 ACLU, [Trump Memos].
word”, create a sense of threat about what he was planning to do and push the message that the ACLU is “watching”. Focused on activating the ACLU’s base of progressives, the department sought to inform the public on why the issues mattered, giving them “something to rally around” and inspiring them with emotional and impactful communications materials.

In 2013 the organisation launched the ACLU Action sub-brand, which provides supporters with digital opportunities to take action on campaigns. For example, by adding their names to petitions as well as higher barrier actions like emailing or calling their Senators and governmental agencies on issues. Some ACLU staff noted that the organisation had not yet fully capitalised on the potential of ACLU Action, but that it was increasingly becoming a focus for the organisation.

The ACLU is now moving into a new phase, adding distributed community organising to its arsenal with the launch of a “grassroots volunteer resistance movement” titled People Power in March 2017. Through People Power, the ACLU is engaging volunteers across the country to “take our fight to the streets” through local communities that can “take action when Trump or his administration attempt to enact unconstitutional policies or trample on people’s constitutional rights.”

This means “that there can be multiple groups of people working on this goal in any community and there doesn’t have to be a single campaign with a single set of leaders in any city.” In so doing, the ACLU is building a massive digitally connected web of activists it can call on to reinforce and amplify its in-house strategies . Those activists are free to pursue different tactics or focus on different targets than other activists in their city or county and are facilitated by the

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32 People Power [website](#).

33 People Power, [Freedom Cities](#).
ACLUs through gatherings, slack-channel discussions and a virtual map\textsuperscript{34} of offline events that people can participate in.

For example, People Power’s Freedom Cities campaign seeks to engage communities across the country to fight for cities and counties to adopt the ACLU’s 9 Model Rules for law enforcement to protect people from mass deportations under the Trump administration. The campaign has spurred almost 1,000 meetings with law enforcement officers, not to mention many more meetings with mayors, city council members, and county commissioners. By mid-July the distributed campaign had resulted in full adoption of the ACLU’s 9 Model Rules by Washtenaw County, Michigan and Albany, California; as well as adoption of substantively equivalent rules in Silver City, New Mexico; Middlesex County, New Jersey; Rockville, Maryland; Berwyn, Illinois; New Castle County, Delaware; and Culver City, California.\textsuperscript{35}

People Power presents interesting challenges for the ACLU’s complex governance structure\textsuperscript{36} and federated strategy development process, with state affiliates owning strategy in their respective jurisdictions. This can cause conflicts where decentralised People Power campaigns cause confusion among or jeopardise state affiliate strategies and relations with local government officials.

People Power is just one example of the significant changes the ACLU’s operations were undergoing at the time of visiting. KP Trueblood, former Obama White House staffer and Deputy-CFO of the Clinton campaign, is tackling this change management process as the new Director of National Strategy, helping the organisation modernise, tackle legal and

\textsuperscript{34} People Power, \textit{Map}.

\textsuperscript{35} ACLU, \textit{How People Power Activists Are Driving Change}.

\textsuperscript{36} State affiliates are required to participate in a revenue sharing model with the national office, and delegates of each of the 50 affiliates hold board positions at the national level.
communications department silos and deal with the challenges of conflicts between state and national level strategy.

Funding

In 2016, the ACLU and its consolidated entities drew over USD$138 million in revenue and support (including over USD$5.6 million in pro bono legal services), approximately 20 per cent of that came from unrestricted grants and 30 per cent in restricted grants (mostly institutional); 13 per cent from bequests; and 18 per cent from non-tax deductible member contributions (including 3 per cent from new members).

The organisation is able to pursue political lobbying, yet still also receive tax deductible charitable contributions thanks to its legal structure: two closely affiliated nonprofits, the ACLU and the ACLU Foundation, which share office space and staff. While the ACLU Foundation is a 501(c)(3) charitable entity that can receive tax deductible donations, the ACLU is a 501(c)(4) nonprofit social welfare entity that can engage in political lobbying.

All donations to the ACLU entity automatically qualify donors for membership, but those contributions are not tax deductible. Online donations are strongly pushed through this channel, with tax deductible donations to the Foundation typically of a higher value and not attracting membership status.

While only approximately $USD4 million of total revenue came from online donations in 2016, the volume of online donations and new member contributions has dramatically increased this year. As has been widely reported, in one weekend after the Trump Administration’s Muslim ban, the organisation was flooded with USD$24 million in online donations from over 356,000 people, about two thirds of whom were first-time donors. Since the election, the organisation
has raised over USD$83 million in online donations and grown from 400,000 members to 1.6 million members (about 200,000 of whom joined in the Muslim-ban weekend).  

This hasn’t always been the picture, with the organisation’s revenue declining in recent years. In 2010-2015 the ACLU’s annual operating deficit averaged over USD$15 million and the organisation was forced to lay off about 7 per cent of its national staff.

The organisation’s bottom line has obviously benefited from a perfect fundraising ‘villain’ in the Trump Presidency. However, the ACLU was well positioned to capitalise on the fundraising opportunity thanks to its already digitally engaged supporter base; optimised donations pathways on the website and for mobile; and SEO, SEM and Facebook marketing strategies.

Michael Whitney, responsible for raising USD$218 million online as the Digital Fundraising Manager for the Bernie Sanders campaign has consulted with the organisation to further reorient it towards online donations. In his view, with further optimisation, the organisation could raise its entire current annual revenue several times over from small online donations at massive scale during every year of the Trump Presidency.

While the organisation is growing its movement in sophisticated ways, this influx of new members is causing some challenges, forcing the organisation to find a balance between being member-led and stewarding and educating those members on bedrock strategy.

For example, the ACLU’s longstanding commitment to defending white supremacist groups’ free speech rights is a controversial strategy that has conflicted with the values of many new

37 Kathleen Davis, How the ACLU is leading the resistance, Fast Company (5 April 2017).
38 Catherine Ho, ACLU lays of 7 per cent of national staff, Washington Post (2 April 2015).
progressive members, who are increasingly demanding that hate speech be excluded from free speech protections.

This came to a head with the organisation suffering a strong social media backlash after litigating to preserve the rights of white nationalists to hold the now infamously violent Charlottesville rally in August this year. Since then ACLU Action, working with Color of Change, has launched a campaign to remove symbols that celebrate confederacy and slavery (the issue that first sparked the white nationalist rally).  

2. Jurisprudential Approaches

Among Jurisprudential approaches, lawyers are the central protagonists of change. These organisations tend not to be led by citizen movements and do not actively engage communities in creating change. Instead, change is principally created by establishing, extending and protecting court jurisprudence or through governmental advocacy by legal experts.

The European Centre for Constitutional and Human Rights in Germany and European Roma Rights Centre in Hungary, discussed here, are examples of organisations sitting at this Jurisprudential end of the spectrum. Also visiting during the Fellowship, Justice in the United Kingdom, sits at this end of the spectrum.

**European Centre for Constitutional and Human Rights, UK**

Founded in 2007, the European Centre for Constitutional and Human Rights (ECCHR) was

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established by a small group of human rights lawyers spurred on by the application of the legal
concept of ‘universal jurisdiction’ in the Pinochet case: that certain crimes are so egregious that
they constitute crimes against humanity and can therefore be prosecuted in any court in the
world. Importantly for ECCHR, this principle allows the German judiciary to "initiate first steps
towards the road to justice without [German] citizenship of the victims or perpetrators being a
prerequisite [to action]."40

Strategy and Operations

Led by founder Wolfgang Kaleck, the ECCHR team includes 11 lawyers (staff, fellows and
consultants), 4 operations and education staff, 2 communications staff, 1 advocacy staff and 1
fundraising staff.

Using litigation, particularly in European and transnational courts, the ECCHR protects and
enforces the rights guaranteed by the Universal Declaration of Human Rights, other
declarations of human rights and national constitutions.

The ECCHR does this by demonstrating the illegality of constitutional infringements and human
rights abuses through courts, and working to ensure state and non-state actors maintain
adherence to that jurisprudence.

This can involve litigation on multiple jurisdictional levels, often requiring the organisation to stay
active in target regions long-term. In order to build momentum while making incremental juridical
progress, the ECCHR runs a mix of cases that set up future success by breaking jurisprudential
ground and complementary cases that demonstrate clear wins.

40 ECCHR, Torture under Assad.
While they began life with a purely legal focus, they are beginning to cooperate with domestic and regional non-governmental organisations on campaigns related to local cases to help develop public consciousness of the illegality of human rights abuses.

The organisation is most experienced in targeting state actors. However, it is also involved in civil cases against non-state actors. For example, it brought a civil suit against Nestle for the company’s complicity in human rights crimes, including the murder of trade unionists opposing them.

For the most part, the ECCHR’s in-house lawyers develop cases without the support of private law firms, which tend not to be available to support long-term strategic legal work. The exception is in civil cases, where the ECCHR will work with private law firms on litigation. In addition to providing extra capacity, this helps to manage the conflicts that can arise in civil cases between the ECCHR and a plaintiff bringing the action. For example, where a monetary settlement offer is made by the target that is in the interests of the client to accept, but will not help the ECCHR secure its jurisprudential objectives.

The organisation has brought successful litigation against some of the grossest contemporary perpetrators of mass atrocities. Recently, this included a criminal complaint - currently underway - with Germany’s federal prosecutor against 12 senior officials from the Syrian intelligence service and military police for crimes against humanity and war crimes on behalf of Syrian torture survivors.

The ECCHR is also targeting French cement company Lafarge with a criminal complaint for aiding and abetting war crimes and crimes against humanity through their dealings with Islamic State in Syria, forcing the resignation of Lafarge’s CEO. A judicial investigation by the Paris High Court (Tribunal de Grande Instance) is currently underway.
According to Kaleck, strategic communications are not an operational priority for the ECCHR, relative to its legal work. Given the strong jurisprudential focus of the ECCHR’s theory of change, this is not necessarily surprising.

In Kaleck’s view the ECCHR also has a lesser need for well-resourced external communications than organisations in other countries thanks to a robust German media landscape. Kalack explained that organisation is able to rely on Germany’s strong independent press and high newspaper readership for balanced coverage of its work, in contrast with more politicised media landscapes including in the US, UK and Australia.

**Funding**

The ECCHR has benefitted almost exclusively from foundation and institutional funding for both operations and specific projects since its establishment in 2007, drawing €2,399,197 in revenue in the 2016 fiscal year. This includes funding from major players Sigrid Rausing Trust and the Bertha Foundation, and German Federal Government agencies such as the Federal Agency for Civic Education.

The ECCHR’s first fundraiser was hired in 2017. This reflects the ECCHR’s remarkable success with institutional funders, as well as its current need to diversify income streams as the organisation comes to the end of funding term limits from several major foundations.

The organisation is currently working to increase the number of private donors, but does not currently use digital fundraising techniques. For example, while the organisation does accept online donations via PayPal, it has no optimised Web donation portal and never solicits funds from its database of newsletter subscribers (most of whom are lawyers).
The organisation is resistant to investing in digital fundraising, noting that individual giving in Germany is low, partly due to a cultural expectation that philanthropy is a state responsibility and that ‘charity’ carries a negative connotation. The organisation is also resistant to fundraising from the ECCHR’s database of lawyers. However it is exploring crowdfunding platform options, such as the European site BetterPlace.org.

**European Roma Rights Centre, Hungary**

The European Roma Rights Centre (ERRC) is an international public interest law organisation that has been working to combat anti-Romani discrimination through strategic litigation, research, policy development, advocacy and human rights education since 1996.

**Strategy and Operations**

The ERRC has set in motion over 500 court cases in 15 countries against state and non-state actors for discrimination or violence against Romani people, and has helped secure over €2 million in compensation for Romani individuals. The ERRC was involved in 125 active legal cases at the time of meeting.

The organisation has recently gone through a significant restructure under the leadership of new American Managing Director, Adam Weiss. Weiss is focused on modernising the organisation, re-orienting around impact litigation at the European level and bringing a strategic eye to their work. Weiss noted that while Roma advocacy and research was being covered by many organisations, ERRC is the only group in the world that is litigating Roma rights at the European level.

His efforts are paying off. The organisation, once running two cases per year at the EU level, is
now running ten cases per year with a smaller team of 6 lawyers and 2 communications staff. The organisation has its sights set on intervening in all Roma related cases in European courts.

Outside of the European courts, the organisation provides legal expertise and financial support to local lawyers in domestic litigation. If domestic remedies fail, the ERRC prepares legal submissions to international tribunals (European Court of Human Rights, European Committee of Social Rights, UN treaty bodies). The organisation also brings litigation as the complainant, or intervenes as a third party.

ERRC is also reconsidering the legal pathways it uses to create change, including whether human rights statutes always provide the the most strategic pathway to protecting the rights of its clients. Instead they are increasingly using basic local laws, like eviction and tenancy legislation, to achieve their strategic goals more quickly.

This is particularly timely as the organisation has observed that European courts are becoming more conservative and tending to avoid discrimination cases. This is an interesting counterpoint to Australian human rights litigation, which is often forced to rely on local laws due to the lack of a national human rights charter or and regional human rights court.

The ERRC categorises its litigation into three groups: "set-piece battle", “reactive-strategic” and “awareness raising”.41

1. Set-piece battle litigation tests innovative legal arguments in court in order to establish jurisprudence to advance Roma equality. The claimant may be the ERRC, other NGOs, or a Romani victim of rights violations who is determined to protect others from similar violations.

41 ERRC, Strategic Litigation at the European Roma Rights Centre (2015).
2. Claimants in reactive-strategic litigation are seeking individual justice for themselves. There is a high risk of conflict in these cases between the goals of the litigant and ERRC’s strategic goals for the case. ERRC manages those risks by providing arms-length support to lawyers and NGOs, and only engaging deeply where those cases develop to the point that high-level appeal or regional/international litigation. Alternatively, the legal team may intervene as a third party in cases that have already been developed by other lawyers or NGOs in such a way that the ERRC’s input as an intervener is likely to ensure that a specific legal argument is validated.

3. Awareness-raising litigation: These cases are brought on well-understood legal points and are designed to raise awareness of the illegality of Romani rights violations in order to change behaviour.

Recognising the need to better engage the communities ERRC represents in an ongoing way, ERRC has also recently opened local law clinics to help educate Romani people on their rights.

**Funding**

ERRC has benefited exclusively from foundation funding since 1996: 30 per cent coming from Open Society Foundation and 70 per cent from the Swedish International Development Cooperation Agency (although only available for non-EU work).

However, as the political situation in Hungary becomes increasingly hostile to NGOs funded through foreign foundations, the organisation is considering moving its headquarters out of Hungary and is seeking to diversify its funding mix through a few key funders, particularly additional foundations. However, the goal presents a significant challenge as the ERRC has little internal fundraising capacity or experience. The organisation has unsuccessfully engaged
fundraising consultants and at the time of meeting was grappling with whether to focus on following structured foundation processes or on developing personal relationships and hosting events to engage private donors.

3. Organisations transitioning from Jurisprudential to Citizen Activist Approaches

Liberty in United Kingdom and the Hungarian Civil Liberties Union in Hungary are examples of organisations that sit somewhere in the middle of the spectrum. While both organisations have an emphasis on expert legal advocacy and provide legal aid services, they are also increasingly integrating Citizen Activist approaches into their work by providing their communities with digital and offline opportunities to meaningfully participate in creating change.

Liberty, UK

Liberty began life in early 1934 as the National Council for Civil Liberties (renamed in 1989), founded in response to serious police violence and unrest at the 1932 National Hunger March. The National Council for Civil Liberties' first action was to protect civil liberties by acting as neutral legal observers at the second National Hunger March in February 1934, where it helped to ensure a peaceful and safe protest.

Strategy and Operations

While Liberty has long held ambitions to pursue its vision through “public campaigning, media campaigning, test-case litigation, lobbying and policy analysis”, for many years the organisation principally provided free human rights legal advice and free representation in test-case rights litigation. Its campaign work for the most part has been inside track advocacy by legal experts
and public education.

Current Director Martha Spurrier, appointed in 2016, is tackling the challenge of honouring Liberty’s roots as a public campaigning organisation. Liberty is increasingly using the opportunities presented by digital technologies to engaging the wider community as agents of change, while working to maintain its role as a reputable advocacy organisation and provider of legal advice and representation.

Liberty is currently comprised of five small teams: litigation (3 staff), legal advice and information (2 staff), media and communications (3 staff), policy and advocacy (8 staff), digital and campaigns (2 staff) and fundraising (4 staff).

Liberty’s three-person litigation team represents their clients against the government and will occasionally bring cases in the organisation’s own name. While Spurrier would eventually like to double the size of this team, Liberty has begun to work with private firms when extra capacity is required.

About half of the cases it supports are generated via their free legal advice service, which received about 1000 calls in 2015. Of those calls, about 70 per cent are from potential clients (including people and non-government organisations). Another 30 per cent of calls come from lawyers looking for advice on human rights issues they are working on.

Liberty also proactively litigates cases where it identifies strategically important opportunities to protect human rights and civil liberties in the courts, for example in a landmark legal challenge against mass surveillance in 2014. Liberty’s responsive work includes managing cases from clients who approach them for advice and representation, or in response to Parliamentary action such as the introduction of a new Bill.
When deciding whether to support a case Liberty considers several factors, including:

- the merits of the legal argument,
- the strategic objectives of the case,
- whether Liberty is better placed than others to represent the client,
- whether there is strong communications potential of the case (e.g. does the story have a personal / authentic face?),
- while happy to run a mix of sympathetic and unsympathetic cases, they will consider whether the case presents an opportunity for campaign engagement (e.g. does it touch on a zeitgeist issue?).

Alongside this litigation work, Liberty has long run expert legal advocacy efforts to pressure Government over legislative changes that could infringe or expand human and civil rights. Increasingly, the wider community is being given the opportunity to participate in this advocacy work via digital campaigns, like through joining online petitions or contacting their MPs.

_Funding_

Liberty’s separate but closely related charitable entity, the Civil Liberties Trust, receives tax deductible donations which it uses to fund Liberty’s charitable work through grants for research, publications, advice and legal services. This separate structure enables Liberty to also conduct non-charitable work.

Liberty’s revenue for 2015 was almost £2 million: about half of that came from trusts and Foundations, including Oak Foundation, Open Society Foundations, and The Sigrid Rausing Trust. Major donations accounted for about 20 per cent of revenue (with about 95 per cent coming from private individuals and the rest from corporates gifts).
The remaining 30 per cent of Liberty’s revenue comes from their membership of 11,000 people, raising £576,264 in 2015. Donors are pushed through a tiered membership channel, starting at £1/month for student members, to £2.50/month for individual members, £5/month for lawyers or £26/year for organisations, although it is possible to make one-off donations of any amount online.

Depending on their level, members receive access to newsletters, Liberty’s annual member conference, AGM and other events. Traditional fundraising appeals are also occasionally sent out to these members for further support.

While Liberty does have a Facebook community of 25,000 and is continuing to grow its membership base, the organisation has not yet optimised its website or electronic direct mail campaigns for digital donations and there appears to be some cultural reluctance from some parts of the organisation about targeting those members using digital fundraising strategies.

Nonetheless, the organisation is starting to see the benefits of integrating public campaigning and digital fundraising efforts. For example, Liberty collected 200,000 signatures in a petition against the introduction of invasive surveillance laws under the Investigatory Powers Act. When the government proceeded with enacting the law despite public resistance, Liberty was able to target petition signatures with a crowdfunding campaign to fund litigation against the law. Using the CrowdJustice platform, the organisation raised more than its target of £50,000 from over 1,800 donors.

**Hungarian Civil Liberties Union, Hungary**

Since beginning life in 1994 as a legal aid organisation for vulnerable populations, the Hungarian Civil Liberties Union (HCLU) or Társaság a Szabadságjogokért (TASZ) has become
one of Hungary’s three key civil organisations and a major target of the current national conservative and right-wing populist government.

**Strategy and Operations**

The organisation uses a mix of legal advocacy, legal aid (including representing clients in impact litigation), and public education in three priority areas: privacy, equality, and political freedom.

The HCLU’s program staff includes a Litigation Director, 10 attorneys and a 2-person communications department, responsible for campaigns and content creation.

The HCLU has provided legal counsel and representation in 118 unique cases. It generates case leads using three sources:

- responding to calls for legal assistance via their free legal aid service;
- soliciting clients via tracking media coverage of relevant issues and reaching out to potential plaintiffs directly; and
- field workers who provide legal education to the community.

When deciding whether to support a case, the HCLU focuses on the strategy and potential impact of the case.

**Example: Integrating litigation and public campaigns**

Similarly to Liberty in the UK, the HCLU has been undergoing a transition to integrate campaign approaches into its strategic mix. Increasingly the organisation is complementing legal action
with campaign tactics to engage the Hungarian people as agents of change.

After securing judgements from Hungarian Constitutional Court and the European Court of Human Rights that the Hungarian Church Act was unlawful and that the Hungarian state should pay billions of forints in compensation to the complainants, the Hungarian Government attempted to circumvent the decisions with a bogus amendment to the Act. As the Government’s intention to circumvent the legal ruling became clear, the HCLU pivoted from a pure legal strategy to engage the Hungarian community in a successful petition campaign targeting Parliamentarians to defeat the new law.

The campaign has since pivoted to fight for new religious freedom laws to be brought into line with international human rights standards and Hungarian constitutional traditions. It uses high quality video and Web content to persuade people to join the campaign. Other campaign tactics include the use of offline petitions to engage Hungarians in rural areas and stretch beyond their Budapest-centric supporter base, as well as letter writing campaigns to Parliament.

When asked why the HCLU was pursuing high profile campaign tactics, their response was simple: the Government was refusing to talk to them. Where the organisation has previously had success influencing governments using inside track strategies, the current Government has shut down contact with all civil society organisations other than those they directly fund.

This change has had ultimately had a positive impact on the operations of HCLU, motivating it to increase their engagement with Hungarian people and to start to build grassroots movements.

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42 For example, the 4 Point campaign Minisite.
Funding

The HCLU is approximately 90 per cent funded via major institutional grants, including from the Media Legal Defense Initiative, Open Society Foundation and the Sigrid Rausing Trust.

The remainder of funding comes from private individuals, encompassing small recurring gifts and major donations. This includes donations generated via:

- a Hungarian tax allowance, that enables Hungarians to nominate a charity to receive 1 per cent of their tax payment;
- two annual parties and auctions;
- some limited digital fundraising via email and Facebook campaigns and crowdfunding platforms.

The organisation is striving to further diversify its income streams by increasing private individual donations to 50 per cent of revenue by 2023, with a focus on growing their subscriber list and increasing their recurring donations program.

The HCLU also relies on significant in-kind support, including postal services, venue hire, accounting services and free Facebook and Google services.

4. Consumer Approaches

Consumer approaches, while less frequent, are also emerging. Some of these approaches use for-profit principles to open access to justice, while others create social change as a default of their profit-making activities.
The Urgenda Foundation (Urgenda) is responsible for one of the most globally significant pieces of impact litigation in recent years. Its case against the Dutch government was the first case worldwide in which citizens held their government accountable for failing to take sufficient action to protect them from the harm of climate change. The District Court of the Hague found in June 2015 that the Dutch government must reduce its carbon emissions by at least 25 per cent of 1990 levels by the end of 2020. The organisation used a Citizen Activist approach to the litigation, for example by including 900 ‘co-plaintiffs’ in the action and engaging in a significant movement-building, including with a pre-election campaign to pressure the government into not to appealing the decision.

While ultimately ineffective in this campaign, with the appeal currently on foot, the win is responsible for creating significant change in Dutch government policies on climate change, mobilising Dutch citizens to demand effective climate policies, moving the Dutch political debate beyond inaction, and stimulating similar litigation worldwide including in Belgium and Norway.

Interestingly though, Urgenda (a contraction of ‘urgent agenda’), founded and run by Marjan Minnesma, is not an impact litigation organisation. It is a social enterprise, responsible for the first bulk purchase of 50,000 solar panels in the Netherlands through its We Want Sun initiative, negotiating a bulk discount (30-40 per cent below market prices) and extended payment timeline in order to solarize thousands of Dutch homes and businesses. The organisation has also used this approach with electric cars and today works to convert Dutch homes to be ‘energy neutral’ with its ThuisBass initiative.

It was Urgenda’s consumer-driven model, disruptive even within its core focus of consumer
energy transition, that enabled organisation to fund some of the most legally innovative and
daring impact litigation in global history. While private donations to Urgenda have increased
since the climate case, they still represent less than 5 per cent of sales revenue.\textsuperscript{43} Urgenda
demonstrates the possibilities for social enterprises to finance and harness vision-aligned
impact litigation, while delivering on their missions.

\textbf{Crowdfunding platforms}

Crowdfunding platforms have found popularity in recent years, successfully facilitating digital
fundraising across creative, product, nonprofit, and business sectors. Given the high costs of
public interest litigation and often compelling personal stories behind those cases, it was only a
matter of time before existing nonprofit platforms began targeted litigation fundraising
campaigns. Several specific legally-branded platforms have since launched, but few have
survived, including the Canadian JusticeFundr which closed in May 2017.

CrowdJustice has emerged as the dominant player in the space, having raised over USD$4
million to date from over 90,000 pledges for “legal challenges that create real change for
individuals, communities and even countries”.\textsuperscript{44} CrowdJustice, like other non-legally branded
crowdfunding platforms, receives a 5 per cent cut of funds raised from campaigns that reach
their funding targets. (Organisations only receive the funds raised if they meet these targets.
Donors are reimbursed when campaigns fail to do so.) CrowdJustice’s appeal for users - versus
using non-legally branded platforms - is the platform’s experience in “building communities
around legal cases” and developing processes that are “sensitive to the needs of legal cases.”.\textsuperscript{45}

\textsuperscript{43} The organisation has also benefited from a €500,000 grant towards its ThuisBass initiative from the
Dutch Postal Code Lottery.

\textsuperscript{44} CrowdJustice, \textit{CrowdJustice Success Stories}.

\textsuperscript{45} CrowdJustice, \textit{How it works}. 

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The organisation does not seek to pursue any particular agenda through the cases that it supports and does not conduct a merit review of the cases on its platform, seeing itself simply as a fundraising tool that can provide access to justice for many who would otherwise be locked out of courts due to the massive costs of litigation. However, given vulnerable communities and nonprofit organisations tend to be most in need of financial relief for litigation costs, the cases supported on the platform tend to group around equality and human rights, criminal justice, employment and discrimination, civil liberties, the environment, and immigration rights issues.

Despite the clear potential for the platform to massively open access to justice, founder and CEO Julia Salasky recounted her frustration with finding the initial funding to launch the platform. Originally set up as a non-profit organisation, Salasky first turned to foundations, whose processes were too slow and provided too little capital at a time. She then turned to impact investors, who were either too risk averse or wanted the platform to deliver returns on unrealistic timeframes. Finally, she found success with a for-profit model, successfully raising USD$2 million in seed funding from US venture capital firms who moved quickly and were willing to take on the risk of a long wait until CrowdJustice delivered a return.

Like all crowdfunding platforms, CrowdJustice's success depends on a high volume of high value cases fundraising for and reaching their target. To this end, Salasky relocated the platform the US from the UK in early 2017 in order to have access to a larger market. This highlights one limitation of the model: it is dependent on large markets and requires strong relationships with the legal communities it is trying to support.

**Private for-profit litigation funders**

Litigation funders, such as Harbour Litigation Funding, UK (worth £400 million) and Balance
Legal Capital, UK (worth about £60 million), are principally investment vehicles that provide returns through financing litigation claims for loss or damage on a contingent basis. These funders cover the costs of litigation, including legal fees, expert testimony and the risk of adverse costs in relevant jurisdictions, and receive a share of financial rewards ordered by courts in successful cases, usually a multiple factor of the invested amount.

Unlike nonprofit legal organisations, litigation funders have relatively simple case selection criteria (‘investment criteria’), based on the likelihood of a significant financial return. However, by funding class actions, the models do remove significant financial barriers to access to justice in cases that create a public benefit.

Corporate social responsibility (CSR) is an underdeveloped practice among litigation funders. This is particularly notable when compared to the very significant CSR programs of related sectors operating in the same jurisdictions, including almost all large law firms and investment banks. This plays into the dominant rhetoric among legal professionals that litigation funders are vultures thriving in a Wild West cowboy culture.

There is are opportunities here for both:

- **litigation funders to distinguish themselves** by seriously investing their enormous wealth in public interest cases that provide declaratory relief, and

- **socially-minded for-profit funds to be developed** that prioritise claims that meet their values standards (for example, by supporting disadvantaged groups to counter systemic wrongs through compensation - a powerful motivator for change); driving a strong client base by undercutting the returns demanded by other funders while still providing a financial return for investors.
Fixed fee payment structures

EasyJustice is attempting to open access to justice with a for-profit fixed fee legal advice service, which redirects part of those profits into access to justice initiatives in developing countries.

While EasyJustice is not an impact litigation organisation, its model is described here as it may provide food for thought for social enterprises or legal aid organisations that are attempting to open access to justice in regulatory environments that are unlikely to:

- regulate lawyer remuneration, as is done in Germany; or
- increase legal aid funding to meet the level of need.

People access the service by submitting their legal enquiries via an online form. Those questions then are automatically tagged by topic area(s), including labour, administrative, consumer, contract, rental, and family law, and distributed through a network of self-employed legal experts who make contact with the enquirer.

If the individual decides to proceed, their lawyer reviews relevant documents (for example, letters or contracts), provides initial advice and, for disputes, advise whether resolution is feasible for a fixed fee of €150 (maximum of 2 hours work). According to EasyJustice approximately 15 per cent of people go on to request their lawyer attempt to resolve a dispute through negotiation, for which they pay a €600 fixed fee for a maximum of 6 six hours work. EasyJustice claims that approximately 90 per cent of its clients’ disputes are resolved at this point.

The remaining 10 per cent of disputes proceed to court. Court work is charged out at a fixed fee
of €900 for up to 10 hours of legal work. EasyJustice retains 30 per cent of all fixed fees, with its self-employed legal network retaining 70 per cent of the fee. EasyJustice then provides 50 per cent of its profits to its XS2 Justice Foundation, which seeks to create a lower cost version of the model in developing countries.

EasyJustice provides training to its legal network on how to resolve legal issues out of court to ensure clients receive the lowest-cost pathway to resolving their legal complaints. For example, in EasyJustice’s experience, at first instance lawyers typically seek to resolve disputes through an exchange of letters, but doing so increases the chance of clients needing to resort to court to resolve the dispute. Instead, EasyJustice encourages its legal team to phone their clients’ opponents and mediate solutions that will be acceptable to both parties.

EasyJustice’s biggest challenge, like CrowdJustice, is lead generation. To be sustainable, the organisation needs to generate about 200 new requests for advice per month. EasyJustice is attempting to generate those leads from clients that legal aid is unable to support, but it has faced resistance to the proposal.

While far from affordable for many, this fixed fee structure is an interesting way of opening access to justice for people who do not qualify for government-funded legal help (particularly, in jurisdictions where governmental funding for legal aid is unlikely to increase.)
C. Conclusions and Recommendations

Citizen Activist, Jurisprudential and Consumer approaches to creating systemic change through the courts all provide inspiration for how Australian organisations could harness the power of impact litigation. Nonetheless, this Report concludes that:

- **Citizen Activist approaches are best placed to create longstanding litigation impacts**, for example by working with communities to create untenable political pressure on governments or corporations who seek to circumvent court rulings through appeals or redrafted legislation.

- By regularly engaging communities in their work, organisations using **Citizen Activist approaches are better placed to diversify their revenue streams beyond foundation and institutional funders**. In particular, by capitalising on the opportunities presented by digital fundraising, which can be seen by supporters who are already used to engaging online as simply another way of contributing to change.

*Almost all Australian legal non-profit organisations are failing to capitalise* on the impact and funding opportunities presented by Citizen Activist approaches to impact litigation.

**Recommendation 1: Where to start**

Impact litigation organisations that would like to harness the long-term impact and funding opportunities presented by Citizen Activist approaches should **start by building their supporter lists and engaging them in meaningful action using tools long used by digital campaign groups.**
Recommendation 2: Crowdfunding versus in-house digital fundraising

Legal crowdfunding platforms may be most useful for organisations, individuals or communities seeking funds for highly specific time-bound projects, including impact litigation.

Organisations that have the capacity or inclination towards using Citizen Activist approaches may be better advised to focus on building digital fundraising tools into their operations and using their own websites to host crowdfunding campaigns. This way they will be able to derive the maximum donor potential from their supporters.

Recommendation 3: Strategic communications

Impact litigation organisations often struggle to achieve harmony between their legal and communications/campaign teams. This challenge runs across organisations using Jurisprudential and Citizen Activist approaches, even at the highly sophisticated, but painfully siloed, ACLU.

This is understandable as legal and communications disciplines generally use opposite approaches to persuasion. Lawyers are taught to persuade through *logos*: logical arguments backed with detail, evidence, accuracy, and precision. Communications experts are taught to prioritise *pathos*: brevity, framing, narrative, and plain words. Conflicts are therefore bound to appear. However, some organisations are managing this challenge more effectively than others, including EarthJustice and CCR. The following recommendations are based on their experience.

Impact litigation organisations seeking to address this challenge should:
• embed a culture of storytelling into their organisations;
• train lawyers the basics of effective framing in public messaging;
• take care to recruit lawyers who understand the value, importance and specialist expertise of communications professionals;
• recruit communications professionals who are flexible and willing to accommodate the idiosyncrasies of lawyers;
• increase trust between teams by addressing underlying operational tensions, for example on time delivery of outputs like legal briefs and media releases.

Recommendation 4: Costs reform

Australia legal organisations must prioritise costs reform to expand the ability of ordinary people to hold governments and large corporations accountable when they abuse power, using both:

• strategic impact litigation designed to expand existing public interest costs jurisprudence to, at least, bring it in line with English precedent, and
• public campaigning to create pressure for regulatory change at the federal level.

Grata Fund will be well placed to integrate these recommendations into its development and strategy, and will evangelise Citizen Activist approaches throughout the Australian legal community through its partnerships with local legal organisations.

This will position Australia to develop a sophisticated impact litigation culture that is capable of regularly holding governments and large corporations to account through the courts and on the streets.