

# Interlink

Your local county voluntary council

## 3. Working with others

### 3.10 Public law remedies-challenging decisions made by public bodies.



## Introduction

News of funding cuts is the kind of news that every voluntary organisation dreads, yet many third sector organisations are finding themselves in this situation due to the current financial climate. While some cuts are unavoidable, public bodies sometimes make funding decisions which you may be able to challenge. This information sheet sets out what is expected of public bodies, when a decision may be challenged, how such a challenge can be raised, and who may be able to help.

## Background

The [Third Sector Scheme](#) ('the Scheme') is an agreement between the Welsh Government and the third sector in Wales, made under Section 74 of the Government of Wales Act 2006. It sets out how the Welsh Ministers propose to promote the interests of 'relevant' voluntary organisations, and specifies how they propose to provide assistance (including financial assistance) to those voluntary organisations.

In line with the Scheme, the Welsh Government has encouraged local authorities in Wales to enter in to local 'compacts' (partnership agreements) with third sector bodies operating in their areas. The majority of local authorities have now entered into local compacts.

The Scheme also sets out a series of objectives and commitments to be met by Welsh Government and other specified public bodies. These include a commitment to maintain a Code of Practice for Funding the Third Sector ('the Funding Code'), and a positive obligation on Welsh Ministers to ensure that policies in relation to the third sector include financial support for the sector.

## The Funding Code

The Funding Code sets the key principles that will underpin Welsh Government funding for the third sector, and what the Welsh Government expects from the third sector in return. There are three distinct parts of the Funding Code, and the first of those sets out the 17 principles that the Welsh Government, its departments, WGSBs (Welsh Government Sponsored Bodies such as the Arts Council of Wales), NHS bodies and so on **must** apply to funding the third sector. As it is mandatory for the principles to be applied, knowing them well can help you to use them to your advantage.

The principles are:

1. Delivery of strategic policy objectives
2. Respect for the sector's independence
3. Early and constructive dialogue
4. Timely decisions
5. Security of funding
6. Fair funding levels
7. Value for money
8. Full cost recovery
9. Commissioning principles
10. Payments
11. Fair and reasonable treatment
12. Joint approach to monitoring, evaluation and audit
13. Identifying expertise and developing capability to deliver
14. Diversity
15. Innovation
16. Good governance and due diligence
17. Monitoring the Funding Code.

The Welsh Government expects that local authorities will also adhere to the Funding Code, so while they are not compelled to do so some local authorities have expressly agreed to follow it.

Download a copy of the Funding Code [here](#) (it is published as an Annex to the Scheme) or request a paper copy from [thirdsectorqueries@wales.gsi.gov.uk](mailto:thirdsectorqueries@wales.gsi.gov.uk).

## **Are the Scheme and the Funding Code optional?**

The fact that the Welsh Government has signed up to the Scheme, and that local authorities have entered into local compacts, is a sign of their commitment to the third sector. This commitment may not be a contractual commitment, but that does not mean that it is an optional commitment.

Failing to comply with the Scheme, the Funding Code or a local compact could mean that the decision made by the Welsh Government or a local authority *may* have failed to comply with public law principles. In such cases, public law remedies *may* be available to provide redress to those affected by the decision.

## **Powers and duties of public bodies**

Unlike a living being, a public body is not free to do anything it chooses so long as it does not do anything illegal. A public body can only do what it has a *power* to do or which it has a *duty* to do:

- Duties are things which a public body 'shall' or 'must' do. There are a multitude of duties upon public bodies in relation to disability, race and gender, for example
- Powers are discretionary. Powers are things which the public body 'may' choose to do.

## Challenging a decision

Decisions by public bodies can be challenged in a variety of ways:

- Complaints procedures
- Ombudsman schemes
- Judicial review

Often the best method of resolving a dispute is to establish a dialogue with the public body in question, and explore whether it is possible to agree a way forward.

Different methods of dispute resolution will suit different circumstances, and it is usually recommended that these be explored before looking to take a matter to court.

Court proceedings may be the only remedy available in some circumstances and there are strict time restrictions for bringing a claim for judicial review (see below), so sometimes it is necessary to make such a claim even when other remedies have not been exhausted.

## Complaints procedures

- If you wish to raise a complaint about a decision made by Welsh Government, you will need to refer to their [Complaints Policy](#) and follow the procedure [set out on their website](#).
- Local authorities are obliged to appoint a monitoring officer to monitor decision making processes within the authority. The monitoring officer reviews the acts and omissions of the authority to ensure that there is no breach of statutory duty, code of practice or any rule of law. A third sector organisation can request the monitoring officer to review a process or outcome which it believes is unfair or unlawful. Details of the monitoring officer and how to refer a complaint to a monitoring officer should be available on your local authority website. If not, contact your local authority and ask to speak to the monitoring officer.
- It may be possible to prevent a local authority's decision from being implemented. There is a very brief period (five days!) before a local authority's decision can be implemented, when it is possible for the local authority's Scrutiny Committee to call in the decision for consideration. To take advantage of this method of complaint you will need to know when a decision is to be made, be familiar with the local authority's procedural rules and have lobbied the support of a sufficient number of members who will decide whether the decision should be called in.

## **Ombudsman schemes**

If there has been maladministration and you have suffered injustice you may be able to refer the matter to the relevant Ombudsman. It will be necessary to exhaust the public body's complaints procedure before referring the matter, although on occasions the Ombudsman will consider a complaint without the complaints procedure having been exhausted. The process has the advantage of not requiring legal advice, however, it can be slow and Ombudsman recommendations are not binding on the public body.

## **Judicial review**

The mechanism of 'judicial review' was developed with a view to improving the quality of decision making by public bodies. It is a form of court proceeding in which a judge reviews the lawfulness of a decision or action, or failure to act, by a public body: it does not attempt to overrule the powers of that public body.

Judicial review cases cannot be brought if someone is simply not happy with a decision that has been made, there must be a real concern that the decision in question was made in an unlawful manner. Also, the court will not consider a judicial review case unless there is a real risk that injustice will be caused to the aggrieved party as a result of that decision.

The grounds for bringing a judicial review are broadly stated as:

- Illegality
- Irrationality
- Legitimate expectation, and
- Procedural unfairness.

The first three grounds are known as substantive grounds because they relate to the substance of the disputed decision. Procedural unfairness is a procedural ground because it is aimed at the decision-making procedure, rather than the content of the decision itself. The three grounds are just indications though: the same set of facts may give rise to two or all three grounds for judicial review.

## **Illegality**

A decision may be illegal for many different reasons. There are no hard and fast rules for their classification, but common examples of cases where the courts hold administrative decisions to be unlawful are:

- The public body has acted outside or beyond its legal powers
- There has been an error of law or fact. The court will quash a decision where the public body in question has misunderstood a legal term or incorrectly evaluated a fact that is essential for making a decision that is lawful
- The public body has delegated a decision for which they are solely responsible, i.e. that sub-delegation is unlawful

## Irrationality

In order to succeed on this ground a court would have to decide that no public body that was properly following the relevant law could reasonably have reached the decision it did using the evidence before it, or that the decision was otherwise irrational. It is notoriously difficult to succeed with a judicial review claim based solely on the ground of irrationality due to the high threshold required, but it is not impossible to do so.

## Legitimate expectation

Where a public body has created a legitimate expectation that a person or other body may be entitled to a particular benefit or procedure, a breach of that expectation by a public body may be regarded as so unfair that it amounts to an abuse of power. Generally, a legitimate expectation arises where:

- the public body has made a clear unambiguous and unqualified representation that it will act in a particular way
- the person or body concerned has acted on that expectation to their detriment, and
- there is no overriding public interest justifying the decision not to honour that legitimate expectation.

For example, the Scheme and the Funding Code contain representations (i.e. information) about the way in which public bodies should act. A third sector organisation that relies on those representations will have a legitimate expectation that those representations will be followed by the public body in question. If that public body fails to follow them it then fails to meet that legitimate expectation, and the public body's decision may be so unfair that it is deemed to be an abuse of power.

There are circumstances where it would be justifiable for a public body to depart from its promise or practice because it is the public body's legal duty to do so, or because it is a proportionate response having regard to a legitimate aim that a public body is pursuing in the public's interest. The court will make an objective assessment of whether the public body's response has been proportionate to the situation.

## Procedural unfairness

Three aspects of procedural unfairness frequently arise in claims for judicial review:

1. **Failure to consult.** It is generally accepted to be good practice for a public body to consult with those who will be directly affected by a decision, before a final decision is made. Public bodies do not always have to consult though; there must be a failure of some legal obligation to consult for this aspect of procedural unfairness to succeed.
2. **Bias and predetermination.** If the individual decision-maker (or someone close to him or her) has a direct personal interest in the outcome of the decision, this might mean that the decision is corrupted by bias. Also, it is fine for a public body

to have a predisposition to a particular decision being made (i.e. an open but not necessarily empty mind), but it is not acceptable for a decision to be predetermined (i.e. the public body cannot have a closed mind to alternative decisions being made from the outset).

3. **Failure to give reasons.** If a public body is under a statutory duty to give reasons for its decisions, then those reasons must satisfy a minimum standard of clarity and must deal with all the substantial points that have been raised.

### **How can you bring a claim for judicial review?**

A claim for judicial review must be made within three months of the decision, act or omission which is being challenged. However, claims should be brought as soon as possible as the court may refuse to give permission to bring the claim even where it is within the three month timescale if it is thought that you could have brought the case earlier. A court may also refuse to grant a remedy where the remedy has become academic, or where an adequate alternative remedy could have been used.

If you are still within the time limit, and you have a case that can potentially be made on the basis of one or more of the grounds outlined above, then you will need to follow a three-stage process to bring a claim:

1. Send a letter to the relevant public body. This will be known as the 'letter before claim' and it must
  - identify the decision, act or omission that you are challenging
  - set out a summary of the facts, including the reasons for your challenge
  - state what you want the public body to do to rectify the situation, and by when (you should allow them 14 days to respond before you launch any claim).
2. If the matter cannot be resolved by sending a letter before claim, you can then look to file a claim form with the court, setting out in detail the grounds for your application for judicial review (this will need to be accompanied by written evidence such as witness statements and supporting documents). You will also have to apply to the court for permission to bring a claim for judicial review.
3. If permission is given for a claim to be brought, the matter will then proceed to a hearing of the case.

### **Funding your case**

Organisations will not be entitled to legal aid, however, where an individual or group of individuals such as service users are affected by the decision, it may be possible for those individuals to obtain legal aid to pursue a case for judicial review.

Some charities such as the Bar Pro Bono Unit and the Public Law Project may also be able to provide access to legal representation for organisations.

## **A step-by-step guide to managing disputes with a public body**

If it becomes necessary to enter in to a dispute with a public body about a decision that they have made, it is recommended that you follow these steps:

1. Gather information
2. Analyse the problem
3. Prepare your evidence
4. Decide tactics

### **Gather information**

1. Determine the nature of the funding.
  - Find out what legal foundation the funding had been, or was to be, provided on. If it has been, or is to be, provided under contract then the remedies available to you may lie outside public law.
  - If the decision does not relate to funding, check the legal and regulatory framework within which the decision was supposed to have been made.
  - What policies, procedures and guidance should apply to the decision making process?
2. Find out how budgets are set because it may demonstrate that the funding cut is a disproportionate response.
3. What factors were or were not taken into consideration by the body making the decision?
4. What reasons were given for the decision you wish to challenge?
5. Who made the decision? Local Authority, a division of Welsh Government, a sponsored body or an NHS body?
6. If the decision was made by a local authority, is there a compact or partnership agreement in place with third sector bodies in that local authority area, and has the local authority adopted the Funding Code?

### **Analyse the problem**

1. Be clear about the nature of the decision you wish to challenge. Is it a decision not to award grant funding, reduce grant funding or terminate funding? Identify what it is you wish to challenge in one simple sentence.
2. Be clear as to what went wrong. Was it one major error or a series of mistakes?

3. Review your own conduct. Have you articulated your case clearly? Could you have taken any action which would have prevented the problem from arising?
4. Identify what it is you wish to challenge in one simple sentence. Be clear about the process that led to the decision being made.
  - Was the process fair? If not, in simple terms what was wrong with the process? Do not concentrate on the merits of the decision. Instead consider whether there was a period of prior consultation? If there was, was that period sufficient and did you have the information you needed to make that consultation process effective?
  - Is there any evidence of the third sector being discriminated against?
  - Were you given the legitimate expectation of funding which was later dashed? If so, how was the expectation raised and have you suffered any prejudice as a result of that legitimate expectation? What were you told about the level and availability of funding when you applied for funding?

### **Gather evidence**

1. Draft a chronology of events.
2. Collate your application forms, grant agreements, funding letter and all correspondence on the relevant matter with the public body.
3. Find and retain all evidence which relates to the reasoning process, including guidance notes, policy documents, contemporaneous attendance notes of discussions and meetings, minutes and press cuttings.
4. Confirm discussions by way of letter.
5. Ask questions and keep written notes of the answers and names dates and times.

### **Decide tactics**

1. Make a note of time limits. A judicial review challenge must commence within three months of the decision being made, and you must make the claim as soon as you can within that period.
2. What do you seek to achieve? Do you want the decision quashed? Do you wish to enforce a decision upon which a public body has not yet acted? Do you simply wish to complain so that future practice can be better informed?
3. Consider which route you are going to follow; complaints procedure, ombudsman and/or judicial review. It is preferable to try to exhaust other remedies before bringing judicial review, but you must observe the judicial review time limit if you decide to bring a judicial review challenge.

## Further information

**Bar Pro Bono Unit:** a charity which helps to source pro bono (free) legal advice from barristers. Only available to those who cannot afford to pay and cannot obtain public funding.

Tel: 020 7611 9500

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

**Public Law Project:** an independent national charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers.

Tel: 0845 345 9253

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

**Wales Council for Voluntary Action (WCVA):** WCVA's Legal Services Officer provides free information and guidance on a wide variety of legal issues.

Freephone 0800 2888 329

Email [help@wcva.org.uk](mailto:help@wcva.org.uk)

Text 07797 805 628

### Disclaimer

The information provided in this sheet is intended for guidance only. It is not a substitute for professional advice and we cannot accept any responsibility for loss occasioned as a result of any person acting or refraining from acting upon it.

For further information contact

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