



3. Working with others

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

What is the Third Sector Scheme?

The Third Sector Scheme is an agreement between the Welsh Assembly Government and the third sector in Wales. 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. If Welsh Ministers failed to have a scheme, or that scheme fails to specify the provision of support for the sector, then the Welsh Ministers would have failed to meet their statutory duty and would have acted unlawfully.

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

The Third Sector Scheme sets out a series of objectives and commitments to be met by the Welsh Assembly Government and specified other public bodies. These include:

- Recognising, valuing and promoting the third sector as it builds a genuine partnership with the third sector

- That the third sector will have an equal say about the arrangements by which the Welsh Assembly and the third sector will work together
- To participate in the statutory forum for dialogue between the third sector and Welsh Ministers-the Third Sector Partnership Council.
- To encourage the voluntary sector through cooperation and training as well as financial support
- To maintain a Code of Practice for Funding (Funding Code) the third sector and a positive obligation on Welsh Ministers to ensure that policies in relation to the third sector include financial support for the third sector.
- To the operation of the Funding and Compliance Sub Committee of the Third Sector Partnership Council which monitors the implementation of the Funding Code and investigates cases of non compliance with that code and reports on its finding to the Third Sector Partnership Council. To ensure that the voluntary sector has fair and reasonable access to public funds acknowledging that there is a link between the investment of resources in the voluntary sector and the ability to engage on an equitable basis.

- To support community development by direct and indirect funding and by ensuring local government support by promoting local compacts and agreeing levels of financial contribution to third sector regeneration projects.

Code of Practice on Funding (Funding Code)

The Third Sector Scheme sets out the key criteria contained in the Funding Code

- Clarity in the objectives of the grant schemes and their eligibility criteria
- Transparency and objectivity in the administrative and assessment procedures
- Consistency between funding programmes
- Arrangements for agreeing meaningful objectives and performance indicators commensurate with the level of funding by which an organisation is to be monitored and evaluated
- Progress towards three year funding arrangements for core grants as a means of promoting effective long term planning
- The effective targeting of resources

The Funding Code sets out the minimum standards and an appropriate standard which applies to the Assembly's funding of the third sector. Paragraph 2 sets out the following principles:

- Delivery of strategic policy objectives
- Respect for the sector's independence
- Early and constructive dialogue

- Timely decisions
- Security of funding
- Fairer funding levels
- Full cost recovery
- Fair procurement
- Payment in advance
- Fair and reasonable treatment
- Joint approach to monitoring and evaluation
- Who does what best

These principles are obligatory for all Assembly Government Departments and Sponsored Bodies and NHS bodies. The Assembly expects that local authorities will also adhere to the Funding Code. Although not compelled to do so some local authorities have agreed to follow the Funding Code.

For a copy of the Funding Code contact voluntarysectorbranch@wales.gsi.gov.uk

What is the status of the Third Sector Scheme and Funding Code, are they optional?

The fact that WAG has signed up to the Voluntary Sector Scheme and the unitary authorities have entered into local compacts is a sign of their commitment to the third sector. This commitment may not be a contractual commitment, however, that does not mean that it is an optional commitment. Failing to comply with the Voluntary Sector Scheme, Funding Code or local compact may mean the decision may have failed to comply with public law principles. No, they are not optional. Public law remedies may be available to provide redress.

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. 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

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. Court proceedings may be the only remedy available and it may be appropriate to bring a judicial review claim even where other remedies have not been exhausted.

Complaints procedures

- A complaint under the Funding Code should be made in writing to the Chair of the Funding & Compliance Sub Committee, c/o Voluntary Sector Unit, Communities Directorate, Welsh Assembly Government, Rhydycar Business Park, Merthyr Tydfil, CF48 1UZ. The complaint must be specific and must include the nature of the complaint, the section of the scheme or code of

practice that is at issue, supporting evidence and any attempts to remedy or resolve the issues.

- Complaints which relate to refusal of a tender bid should be made in writing to the head of Corporate Procurement Services, Value Wales, WAG, Cathays Park, Cardiff CF10 3NQ
- Complaints are governed by the Welsh Assembly Government Code of Practice on Complaints
- 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 or 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 the monitoring officer should be available on your local authority website. If not, please call 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 executive's decision can be implemented when it is possible to call in the decision for consideration by the local authority's Scrutiny Committee. 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 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

A judicial review is not an application to review the merits of the decision rather it is an application that challenges the lawfulness of the decision making process itself. The grounds for bringing a judicial review broadly stated as

- Error of law.
- Procedural impropriety
- Irrationality
- Abuse of power generally

Error of law occurs when a public body makes an error of law in performing or failing to perform its public duties.

Public bodies must not act unlawfully. They must apply the law correctly, take into account relevant information and ignore the irrelevant, undertake proper enquiry when making a decision and address the right questions when making a decision. They must not exceed their powers, fetter their

discretion or delegate decisions for which they are solely responsible. For example, the Welsh Assembly Government would err in law if it failed to have a scheme to promote the interests of the third sector in Wales or if that scheme failed to specify how Welsh Ministers proposed to provide assistance to the relevant third sector organisations.

Procedural impropriety occurs when there has been a breach of the common law principles of procedural fairness or where there has been a failure to comply with a statutory procedural obligation. You have a right to a fair hearing, the opportunity to argue your case and to have sight of the documents on which the decision has been reached. There must be no bias or perception of bias. Reasons for actions and decisions should be given in most circumstances.

Decisions of public bodies can also be challenged on grounds of **irrationality**. In order to succeed on this ground a court would have to conclude that no public body properly directing itself as to the relevant law could reasonably have reached the decision it did on the material before it or that the decision was otherwise irrational.

The courts have developed other principles of public law enforceable by judicial review to ensure that public bodies do not abuse their powers. In exceptional circumstances, where a public body has created a **legitimate expectation** that a person or other body may be entitled to a particular benefit, a breach of that expectation by a public body may be regarded as so unfair as to amount to an **abuse of power**.

Generally, a legitimate 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 Voluntary Sector Scheme and the Code of Practice on Funding and local compacts contain representations as to the actions of public bodies. A third sector organisation acting in reliance on those representations will have a legitimate expectation that those representations will be carried out. If the public body fails to do so, then it fails to meet that legitimate expectation and its decision may be so unfair as to be an abuse of power.

There are circumstances which would justify a public body from departing from its promise or practice where to do so is the public body's legal duty or is a proportionate response having regards to a legitimate aim pursued by a public body in the public interest. The court will make an objective assessment of whether the response is proportionate. 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. 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. However, a judicial review may be commenced even where other remedies have not been exhausted. Don't wait for the outcome of any relevant complaints procedure as this may result in delay in bringing the claim within the three month time limit.

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 these individuals to obtain legal aid to pursue a case for judicial review.

Some charities such as Business in the Community, Bar Pro Bono Unit and the Public Law Project may also be able to provide access to legal representation for organisations. Contact details are set out below.

Managing disputes with a public body

- Gather information
- Analyse the problem
- Prepare your evidence
- Decide tactics

Gather information

1. Nature of funding. Ascertain the legal foundation upon which the funding had been or was to be provided. If it has been or is to be provided under contract then the remedies may lie outside public law. If the decision does not relate to funding, then check the legal and regulatory framework within which the decision was to have been made. What policies, procedures and guidance apply to the decision making process?
2. Find out how budgets are set, 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 Assembly Government, an AGSB or an NHS body?
6. If the decision was made by a local authority is there a compact or partnership agreement in place with the third sector 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—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.
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 judicial review. It is preferable to try to exhaust other remedies before bringing judicial review; however, you must observe the judicial review time limit.

Further information

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

Tel: 020 76119500

www.barprobono.org.uk

Business in the Community: provides free professional advice. The ProHelp scheme was launched in South and West Wales in 2009 and covers Pembrokeshire, Swansea, Carmarthen, NPT, and Ceredigion

Tel: 07715510930

www.bitc.org.uk

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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: 020 76972198

www.publiclawproject.org.uk

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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