

Judicial Review Consultation
Ministry of Justice
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1 November 2013

NCVO submission the Ministry of Justice consultation '*Judicial Review: Proposals for further reform*'

The following response is being submitted by the National Council for Voluntary Organisations (NCVO), the largest general membership body for charities and voluntary organisations in England. NCVO has over 10,000 member organisations, ranging from large household names to small groups working at the local level.

We are concerned about the potential impact of the government's new suite of proposals to reform judicial review. In response to the previous consultations we raised our concerns about how the changes would have a detrimental effect on the ability of individuals and organisations to hold public decision-makers to account. With regards to the current consultation, we do not accept the assertion that judicial review is being inappropriately used as a campaigning or publicity tool. We believe that charities and voluntary organisations have a right and legitimate role in protecting and supporting their beneficiaries through the use of judicial review.

Our comments reflect discussions we have had with NCVO members, many of whom are seriously concerned about how these proposals will have an impact on their ability to act on behalf of their beneficiaries, and ensure their rights are not affected by misuses of power or poor decision making. Our response is based not only on our previous work on judicial review, but also on a series of discussions with voluntary sector organisations, including a roundtable we organised with Bates Wells and Braithwaite solicitors. The event was attended by up to 40 representatives from organisations across the sector, all of whom raised serious concerns about how their work would be affected and how their ability to protect the rights of their beneficiaries would be curtailed.

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Our submission does not aim to respond to all the questions posed by the government's consultation. Our priority is to express concern around the lack of evidence justifying the need for the proposed changes, and the potentially adverse consequences that the new proposals will cause to voluntary organisation's beneficiaries if implemented.

Overview

Lack of evidence for proposals

The proposals in the consultation lack any underpinning evidence that supports the need for restrictions on access to judicial review. In particular there is no support for the assertion that judicial reviews are brought by interested groups or individuals solely as a campaigning tool or to get publicity.

The role of judicial review in the constitutional system

On the contrary, judicial review is an important accountability mechanism within our constitutional system. It is a fundamental part of the rule of law that acts as a check on potential misuses of public power. A judicial review claim is not about rights enjoyed by individuals but about duties owed by government and public bodies.

Furthermore there is a public interest in meritorious cases being heard by the courts, where there is a concern about the legality of public action or about the proper administration of power.

The use of judicial review by charities and voluntary organisations

Charities and voluntary organisations have a legitimate interest in supporting the people and causes they work for. As an extension of their charitable aims, seeking a judicial review to help an individual, or several individuals, is appropriate and valid.

In particular, charities and voluntary organisations have an important role in challenging decisions that might unlawfully affect individuals who are not able to bring a challenge themselves, for example children and vulnerable adults.

Case study: The children's charity Just for Kids Law is an organisation that works to protect and support children and young people. As part of its work it successfully brought a judicial review to ensure that all police stations would be required to treat 17-year-olds in custody as juveniles, thereby ensuring that they had access to an appropriate adult. This is a key example of the ways that judicial reviews can be used by an organisation in a legitimate manner, on behalf of its beneficiaries and in advancement of its charitable purposes, despite the organisation not being directly affected by the issues itself.ⁱ

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Changes to the Rules on Standing

We believe that the current standing test based on 'sufficient interest' is the appropriate method of determining whether an individual or organisation is properly placed to bring judicial review. It strikes the right balance by giving standing to both those with a direct or individual interest, and those organisations that have a public interest in a case.

We are particularly concerned that any changes to this test would impact on the ability of voluntary organisations to hold public bodies to account in valid and well-founded cases. Insisting claimants must have a 'direct interest' (if this is intended as a personal connection with the decisions concerned) could significantly narrow the scope for judicial review. This would mean that charities and voluntary organisations will not be able to bring claims, and some public actions would be impossible to challenge.

This is because there are times when an individual is not able to bring a challenge, either due to the fact that an unlawful policy exists but it has not yet affected anyone in particular, or due to the fact that there are specific circumstances which make it impossible for the individual to proceed. For example children or vulnerable adults.

Furthermore we do not agree with the government's assertion that judicial reviews are being brought by groups without a direct and tangible interest, and we are concerned by the assumption that organisations use judicial reviews 'sometimes for reasons only of publicity or to cause delay.' We do not believe that these are the motivations behind voluntary organisations seeking judicial reviews.

On the contrary, relatively few judicial review cases are brought by the voluntary and community sector. Excluding immigration, asylum and planning cases (on the basis that they are to be dealt with by alternative Tribunals), according to the consultation document there were approximately 2300 judicial reviews brought in 2011. Of these, around 50 were by voluntary organisations. This represents a very small proportion of all cases, and disproves the consultation's underlying conclusion that there has been a significant growth or massive expansion in judicial review justifying these reforms.

The majority of cases brought by voluntary organisations have been successful and this additionally offsets the suggestion that these organisations may be using judicial review as a means to further campaigns or attract publicity. In fact the number of successful cases indicated that they have played an important role in ensuring public accountability and securing justice.

Case study: In 2011, the National Deaf Children's Society initiated legal proceedings for a judicial review against a local authority, regarding disproportionate cuts to the authority's services for deaf children. As a result, the proposals for further cuts to the service were withdrawn. Legal proceedings were initiated as a last resort for the charity after it became clear that the council would not engage meaningfully with NDCS and local parents and were

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acting unlawfully in not considering the impact of their decision. The legal action made a significant difference to a very specific and vulnerable group in society, for whom the prospect of legal action would have been considered daunting, if not impossible.ⁱⁱ

It is also important to note that there are already measures in place to prevent claimants without sufficient interest in bringing judicial reviews, including section 31(1) of the Senior Courts Act 1981, and part 54 of the Civil Procedure Rules, as the consultation document itself acknowledges.

Standing and Protective Cost Orders

We are very concerned that the combined proposed changes to both standing and PCOs would prevent the use of judicial review by charities and voluntary organisations on behalf on the individuals and communities they represent.

If introduced alongside the proposed standing reforms, charities and voluntary organisations would be in a particularly difficult position, regardless of the merits of the claim and the public interest involved. The proposals on standing, if implemented, would mean that charities and voluntary organisations not be able to bring claims unless they were directly affected by the decision; but the proposals on PCOs would mean that any organisation able to meet the standing test would be barred from obtaining a PCO.

This would also mean that only those representing well-resourced financial interests would be able to bring a claim, at the detriment of democracy and good decision making.

Changes to the rules on third party interventions

We are opposed to the proposal to shift liability for costs in intervening, as this will restrict the ability of expert voluntary sector organisations to provide input to important cases. Many won't have the necessary financial resources and the result will be that the court will not be able to hear the full range of arguments. Ultimately the quality of judicial decision making could be affected.

Interveners have an important role in cases where there are matters of public interest involved, and their contribution can be valuable. In particular, many charities and voluntary organisations are connected and concerned with large sections of society that could be affected by the courts' decisions, and they can therefore contribute to a case with specialist arguments or evidence.

Case Study: Age UK launched a judicial review of the Employment Equality (Age) Regulations 2006, following the government's decision to restrict the Act's protection only to people under the age of 65, thus creating a new 'default retirement age'. Age UK argued that the Age Regulations improperly implemented equality directive by including a national default retirement age for all UK workers. Although the judge decided that the Default Retirement Age

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was lawful when it was first introduced, the judge also acknowledged the ‘very substantial weight’ of the arguments put forward by Age UK to stop people being forced out of work at 65.ⁱⁱⁱ

Procedural Defects

We do not agree that the right to judicial review should be limited if there has been a procedural defect. Procedural defects make a decision unlawful, and it is therefore appropriate that such a decision should be reviewed. Once again, this proposal appears to be based on the misconception that charities and voluntary groups use judicial review based on a procedural defect as a campaigning activity.

Furthermore, contrary to the assertion made in the consultation document, reconsideration of decisions on the basis of procedural defects in most cases has led to a different substantive decision. There is currently a ‘no difference’ principle in judicial review. Courts can already refuse a case brought on a procedural flaw, if they have reason to judge that the outcome will be the same. In addition to this, the claimant has to establish that there was a real, as opposed to a purely minimal, possibility that the outcome would have been different had the alleged flaw not occurred.

Moreover, measures and checks to make sure that the system cannot be misused over procedural issues already exist. The stages of judicial reviews are timed so that the process is as efficient as possible, and therefore would not be used as a mechanism for delaying a decision being made.

The Public Sector Equality Duty and judicial review

We do not accept the argument that the potential for public bodies to adopt an overly risk-averse approach to managing legal risk should be a justification for restricting judicial review. The PSED should continue to be a requirement of any public decision making, and it is appropriate that a breach of such duty can be challenged in the courts by way of judicial review.

The principle for individuals and organisations to be able to hold public bodies to account is an important one, and one that should not be diminished because of concerns regarding public bodies acting with ‘too much’ caution.

The importance of judicial review

We have already highlighted the importance of judicial review as a building block of the UK’s constitutional system. Judicial review enables individuals and organisations to seek justice by ensuring government and public bodies are legally accountable and their decisions are lawful, fair and transparent. NCVO’s previous responses to the Ministry Of Justice consultations on

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judicial review and legal aid strongly opposed the previous changes, on the basis that they would set up a number of unfair barriers even for valid and well-founded cases.

These further changes would create yet another obstacle to charities and voluntary organisations acting on behalf of their beneficiaries to ensure that public bodies make fair and transparent decisions, and ultimately that the rule of law is upheld.

To discuss this response in further detail, please contact Katie Howe, at Katie.Howe@ncvo.org.uk (tel. 020 7520 2424) or Elizabeth Chamberlain, at Elizabeth.Chamberlain@ncvo-vol.org.uk (tel. 020 7520 2559).

ⁱ The Guardian 'Judicial review funding cuts may leave vulnerable teenagers at risk', 29 July 2013 (<http://www.theguardian.com/society/2013/jul/29/judicial-review-cuts-teenagers>)

ⁱⁱ Third Sector 'National Deaf Children's Society seeks judicial review of local authority cuts', 22 August 2011 (<http://www.thirdsector.co.uk/Governance/article/1085787/National-Deaf-Childrens-Society-seeks-judicial-review-local-authority-cuts/>)

ⁱⁱⁱ Age Regulations legal challenge, the 'Heyday case' (<http://www.equalityhumanrights.com/legal-and-policy/legal-updates/age-regulations-legal-challenge-the-heyday-case/>)

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