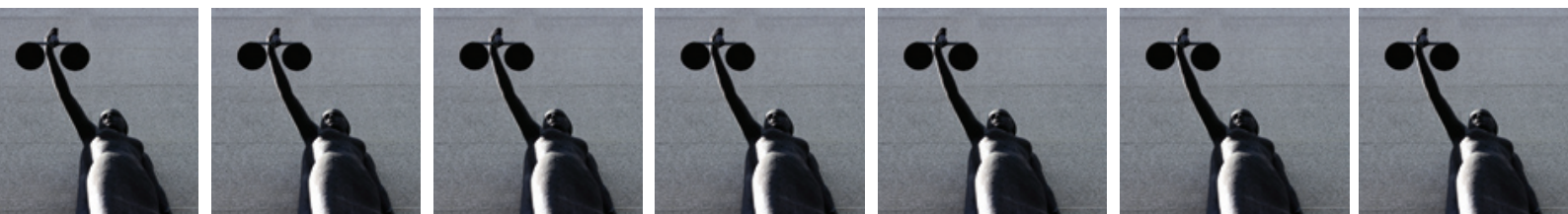
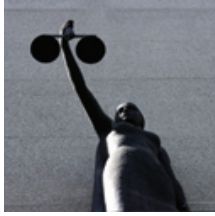


Empowering the voluntary sector

Using compact advocacy, public law and training to challenge unjust public body decisions

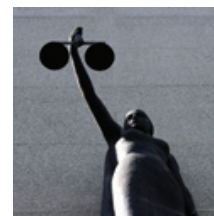
A short guide to using public law





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Introduction

This booklet is to support the information sharing session that you are attending. It should give you some pointers and tips to be able to make some basic decisions and give you some ideas on what to do and how to do things. There is also a full one-day workshop that you can attend full of useful case studies. If you are interested, details are in the 'Where you can get help' section.

Many organisations are worried that by challenging a funding public body they will be penalised in some way. Not only would this be unfair, and therefore a possible breach of public law, but our own experience shows that challenging a public body can actually improve relationships. Take the recent case where a PCT unfairly cut the funding of a number of third sector organisations. As a result of the challenge, the organisations' funding was re-instated and the third sector was publicly thanked via the local strategic partnership for not only demonstrating where the power in the relationship was based, but also for showing the PCT how it should be operating, in a fair, open and transparent manner.

There are contact details at the end of this booklet should you need more help or advice. The person who delivered the session will also be able to help if you need more support.

What is public law?

Public law is the set of legal principles that govern the way public bodies must behave and ensure:

- they act lawfully and fairly
- they do not exceed their powers.

Public law does not exist as an Act of Parliament, but arises from these principles and precedents set down by the courts.

When a public law case goes before the courts – a judicial review – there is no question of fines or compensation. The courts look at the behaviour of the public body in question, and if their behaviour is found to be unlawful, the judge:



- may quash the unfair decision or
- if the public body is failing to do something, the judge may order that it carries out its duty, and does so lawfully.

This is different to private law, which covers the legal issues and cases we are familiar with such as contract, employment, and accident claims. In these cases, the judicial system will decide who is right and who must pay.

The following example looks at the different issues and methods of reaching an outcome through public law and private law.

In a public law case about whether it was right for a local authority to stop funding a community centre, the court would look at the decision-making process and decide whether it was fair, open and transparent. In a private law dispute about how a community centre was funded, the court would look at the terms of the contract and whether these have been breached or complied with.

The public bodies you are most likely to have a relationship with are:

- local authorities (councils)
- NHS trusts
- central government departments and their agencies
- other funders such as the Learning and Skills Council and the Big Lottery.

There are many others that you may not come into contact with or whose status as a public body is unclear, such as a local strategic partnership. If in doubt about whether a body you are dealing with is a public body and public law principles apply, get advice (see below).

Public law only applies to public bodies and only applies to their public functions.

An example of a public function relating to voluntary and community organisations is a local authority awarding funding, therefore public law principles will apply to this process.



Public bodies also have private functions, for example, their recruitment process and policies. These cannot be challenged using public law principles.

By knowing how a public body should behave, you can strengthen your relationship with them, challenge their bad behaviour and propose better working practices that are fair to you and your service users.

An organisation recently had a dispute with its local authority over its plans to cut grant funding by 25%. The authority had made no consultation on the cuts and had not shared its reasoning. By using the principles of public law to challenge this unfair process, not only did the local authority turn round on the proposed cuts but it also asked the organisation involved to help them design an open, transparent and fair consultation process on changes to grant funding.

Transparent decision making with a clear and open process will help organisations make better applications for funding and everyone involved will have more confidence in good quality, fair decisions as a result.

Where can you find the information you need on public bodies and how they should behave?

Public bodies can only do what they are legally allowed to do. The Acts of Parliament that brought them into existence give them specific duties and powers which govern how they should behave and what they can legally do.

A duty is something that must be done, for example, the Race Relations Act imposes a duty on public bodies to eliminate discrimination and promote good race relations.

A power, on the other hand, is where a public body has a discretion (it doesn't have to do it but it can), for example funding the voluntary sector.

These powers and duties can usually be found within the specific Acts of Parliament relating to the public body in question. They are also often fleshed out in guidance documents. These



documents are more accessible and user friendly than Acts of Parliament and it is advisable to look to these for assistance if you think you may have a problem about the way a public body is behaving.

You should be particularly aware of both internal guidance (that produced by the public body itself) and guidance that the public body should be following, usually issued by central government departments or non-departmental public bodies.

Examples of non-statutory guidance issued by central government or a NDPB:

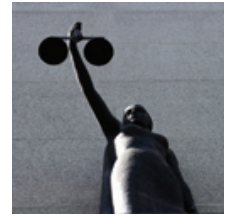
- The Commission for Racial Equality's "The duty to promote race equality: A guide for public authorities"
- The Treasury's "Improving financial relationships with the third sector: Guide to funders and purchasers"

Internal guidance is written by individual public bodies and not only covers documents that provide information to organisations and individuals but also documents that a public body will use in its decision-making processes that relate to its public functions, such as which voluntary sector organisations it wishes to fund.

An example of internal guidance

A public body puts into place a new funding stream. The range of documents relevant to this function that could be considered to be internal guidance may include:

- The application form and accompanying instructions on its completion
- The funding criteria and any related corporate outcomes
- Documents that explain what will happen to your application when it is received by the public body, including criteria for rejection of sub-standard applications
- Documents that explain how the applications that are accepted will be judged by the various bodies and committees within the public body
- Documents that explain how successful applications will be managed and funds paid



If you are seeking information on how and why a public body has made a particular decision or has taken a particular course of action do not forget to ask for copies of all documents relating to the issues, including minutes of meetings. Most of the documents that you will require should be made available to you. A public body may tell you are not entitled to see certain documents. If so, ask for them in writing using the Freedom of Information Act. You can get further information on using the Freedom of Information Act from the following websites:

- www.RightToKnowOnline.org for standard letters
- www.ico.gov.uk for fact sheets and other guidance from the Information Commissioner, the enforcement body for the Freedom of Information Act

What are public law wrongs?

We know that the principles of public law are concerned with the behaviour of public bodies when delivering their public functions. But how do we identify where they have gone wrong?

There are four categories of public law wrongs:

- Illegality
- Unfairness
- Irrationality
- Maladministration

The courts, in a Judicial Review, can deal with the first three of these if the breach of public law is serious enough. The Ombudsman deals with the fourth one, maladministration.

If you are facing a public law dispute, the legal team at the Public Law Project will help you identify the issues and put together a case for you. You do not need to worry about trying to identify the detail of the public law wrong and placing it in to one of the above categories, but the types of public law wrongs can help you work out where the public body has gone wrong and what they should do to put it right.

In order to help you identify some of the more common problems, here are some examples of public law wrongs and where they fit into the categories.

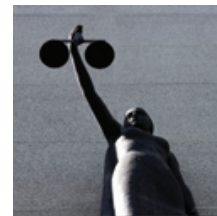


Illegality

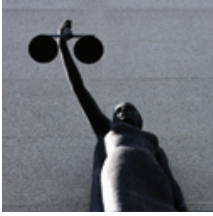
- Public bodies must take into account relevant information (and must ignore irrelevant information).
 - *It may be irrelevant for a public body to take into account the number of staff you have when considering an application for funding if you have explained how you will meet the criteria and achieve the outcomes required for that funding stream using your available resources.*
- Public bodies must have the power to do what they are doing.
 - *A public body must be able to refer to legislation or in some instances guidance that states that it has the power to do what it is doing, or how it should go about it. It cannot change the guidance to suit its own needs. For example, if a funding stream is in place to support vulnerable elderly people in the community it cannot be used to support a street art project.*
- Public bodies should consider each issue on its own merits: there should be no blanket policies and no fettering their discretion when making a decision.
 - *A public body might fetter its discretion by putting into place criteria that cannot be achieved by a broad range of voluntary and community organisations. For example, if it will only fund organisations that employ 10 or more people in a full-time capacity, this would rule out other organisations who can deliver the same outcomes using a wider variety of resources and so this may be unlawful.*
- Public bodies must ask themselves the right question and undertake sufficient enquiry when deciding something.
 - *For example, if a public body withdraws funding from a group due to an allegation of minor irregularity and refuses to reinstate its grant, it may have acted unlawfully by not asking the right question or undertaking sufficient enquiry as to whether the withdrawal of funding was justified.*

Unfairness

- All decisions must be based on a fair hearing, including elements such as disclosing relevant documents to those affected and allowing them the opportunity to comment.



- *For example, if a public body changes its definition of what it will fund in the sector, but fails to share this change and subsequently turns down applications on the basis that organisations have not met the criteria, this will not have given organisations a fair hearing.*
- Public bodies must follow agreed procedures.
 - *Public bodies cannot 'move the goalposts' when they are involved in a decision-making process. For example, a number of organisations have submitted references with funding applications despite not being asked for them in the original bid documents. The public body then decides only to take forward those organisations who have submitted references to the final round of decisions; this would be so unfair that the decisions arising from this process may be unlawful.*
- Public bodies should give reasons for their decisions.
 - *Where a decision is made that may have an adverse effect on your organisation, reasons for that decision should be given. Without this information, you will not know on what basis to challenge the decision-making process if you feel that it has been unfair.*
- Public bodies must consult properly. Consultation should be when proposals are at a formative stage, with sufficient information and time for the consultees to respond in a meaningful manner; the results of any consultation should be taken into account when the public body makes its decision.
 - *Failure to adhere to these basic steps in the consultation process may make it unlawful.*
 - *This includes plans to change the way the sector is funded or what services a public body is going to commission from the sector.*
- Public bodies must keep their promises. If a public body has made a promise to someone, they must not breach this legitimate expectation – you believe it is going to happen; individuals or organisations may also have a legitimate expectation that they will be consulted over a particular decision (see above point on consultation).
 - *Promises made by public bodies do not have to be in formal letters, they can be made by email, fax or verbally. If a public body has said it will do something, provide a service or fund an activity and an organisation has relied on this to their*



detriment, then the public body should not break this promise, or must have a very good reason for doing so – it cannot just change its mind!

Irrationality

- Public bodies must make rational and reasonable decisions.
 - *For example, if a public body had the power to fund a debt advice service and then used that power to fund a local playgroup, it could be argued that this decision was irrational.*

Maladministration

- This covers poor administrative practice delivered by a public body and the Ombudsman will intervene if this has caused injustice that has not been remedied.
 - *For example, you find out that the invoices you have been putting into the public body for payment on a service level agreement have not been dealt with. This has left you a number of payments short causing your organisation hardship.*

What can you do?

When you are faced with a public law dispute, there are a number of things you need to consider and take action on before getting legal advice or taking more formal action. By taking these steps, when you do contact the lawyers at the Public Law Project you will be better placed to brief them on the dispute or you may be in a better position to resolve it without advice if you think it is appropriate.

- Work out precisely what has gone wrong and what you are complaining about; if possible summarise it in one sentence.
- Is this backed up by all the documents available?
- When did all this happen and are there any deadlines coming up?
- Has the public body been asked to reconsider and put matters right?
- Are there any public law wrongs?
- If so, what are they and how serious are they?
- What is the impact of the decision on the organisation concerned?
- Is this administrative action gone wrong or a merits based decision? (Do you disagree with the process or the final decision?)



- Can you make a complaint or go to the Ombudsman?
- Do you need a court to intervene?
- Can the Compact help you?

The formal remedies that are open to you are outlined below. The Public Law Project may be able to help you with each if necessary, but bear in mind you must consult them or another public law specialist if you are considering judicial review.

- a) Complaints procedures: you can use public law arguments when you make a complaint to the public body you are dealing with; they may just need you to point out where they have gone wrong (e.g. how they have acted unfairly), to encourage them to reconsider their decision. Will a complaint resolve what you think has gone wrong?
- b) Ombudsman schemes: if there has been maladministration causing injustice and you have tried the public body's internal complaints procedure but the issue is still not resolved, you can take a complaint to the Ombudsman. NB: the Ombudsman will only consider administrative actions and will not look at the merits of a decision.
- c) Compact: the codes generally overlap with public law principles and therefore a Compact breach is also likely to be a public law wrong; you can use the Compact to try to put matters right. If the public body has not signed up to the local Compact use the national Compact and its codes. Do recognise though that it is not legally binding.
- d) Judicial review: a special type of court case where the judge looks at the public body's behaviour and decides if it is lawful or not; if it isn't, the judge may quash the decision or action and the public body will have to do it again, lawfully. The threat of proceedings might be enough to make a public body reconsider; judicial review proceedings need to be started within three months of the decision complained of and you need specialist legal advice as soon as possible.

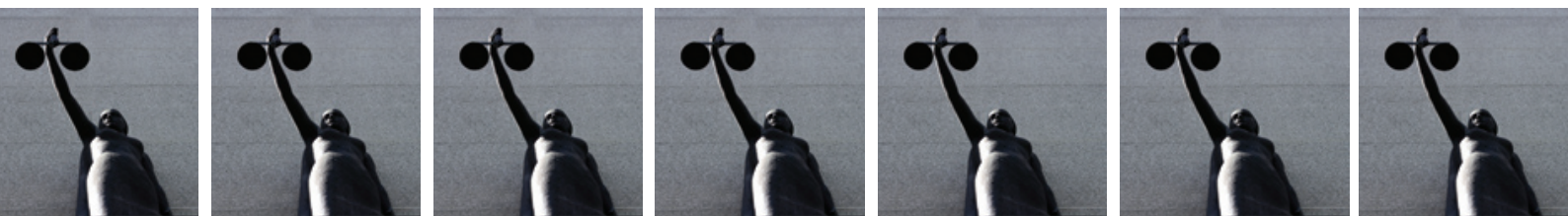
Where can you get help?

The advice line run by Compact Advocacy provides free detailed legal advice to voluntary organisations on disputes involving public bodies' decisions and failures. The advocates will refer cases to the Public Law Project where legal advice and other methods of dispute resolution will be required.

The advice line is available NOW on ????? from Monday to Friday, 10am to 4pm.

Alternatively email: evsAdvice@ncvo-vol.org.uk

If you wish to access the one-day workshops, log on to the NAVCA website www.navca.org.uk/evs for details of workshop dates and locations. You can also download copies of the project newsletter from this site. If you wish to have the newsletter emailed to you (quarterly) then please email your full contact details to terry.perkins@navca.org.uk.



My local contact for support is