

## Changes to judicial review divide opinion

The ability of charities and not-for-profit organisations to challenge the decisions of public bodies may be curtailed further by controversial proposed reforms to judicial review. Charities have been successful in using judicial review as one of a number of tools to ensure their beneficiaries are not unduly disadvantaged as a result of public sector funding cuts. In particular, charities working with disabled people have sought to ensure that public bodies have undertaken an equality impact assessment.

The proposals have divided opinion: in a Daily Mail article the Justice Secretary, Chris Grayling, said that the changes are designed to limit the use of judicial review as a “promotional tool for countless Left-wing campaigners”. David Pannick QC, a leading public law barrister responded in a column in The Times that the proposals are “an affront to the rule of law”.

The government says its proposed reforms are designed to address concerns about the use of unmeritorious judicial reviews to cause delay, generate publicity and frustrate proper decision making. The government has recently consulted on the following issues of concern:

- the impact of judicial review on economic recovery and growth;
- the inappropriate use of judicial review as a campaign tactic;
- the use of the delays and costs associated with judicial review to hinder actions the executive wishes to take.

In July 2013 the government implemented changes shortening the time limit for bringing a judicial review of certain planning and procurement decisions, and removing the right to seek an oral hearing where permission for judicial review has been refused on the papers.

The latest proposals include the following:

- Where requests are based on minor procedural defects that would have made no difference to the final decision, it is proposed that either:
  - ‘no difference’ arguments should be tested at the permission stage; and/or
  - a new statutory threshold should be introduced so that a case based on a procedural flaw should be dismissed where it is “reasonably clear” that the flaw would not or could not make a difference.
- Costs and funding changes “to encourage claimants and their legal representatives to consider more carefully the merits of bringing a judicial review and the way they handle proceedings”. These include:
  - Restrictions on the availability of legal aid so that providers are only paid for work carried out on an application for judicial review in cases either where

permission is granted, or where the Legal Aid Agency exercises its discretion to pay the provider in a case where proceedings are issued but the case concludes prior to a permission decision.

- The introduction of a principle that the costs of an oral permission hearing should usually be recoverable and that it should be possible for an unsuccessful claimant to be ordered to pay the defendant's reasonable costs of defending the unsuccessful application.
  - Changes to the process for obtaining wasted costs orders.
  - Restrictions on the availability of protective costs orders.
  - A presumption that where a party intervenes into a case, it should bear its own costs of doing so.
- Speeding up appeals to the Supreme Court in important cases by making changes to the "leapfrogging" procedure.
  - A new specialist "planning chamber" for challenges relating to major developments.

The government also sought views on the following:

- Whether standing to bring a judicial review claim should be restricted to parties with a "direct and tangible" interest.
- The use of judicial review as a mechanism for resolving disputes about the public sector equality duty.

The proposals if implemented would represent a further erosion of the right to seek judicial review of the decisions of public bodies, which could have serious implications for charities and not-for-profit bodies both in relation to case work and campaigning.

While judicial review is often not a meaningful remedy for many charities its availability is extremely useful for charities negotiating with public bodies, especially where those bodies often make arbitrary and illogical decisions in relation to particular beneficiary groups.

The consultation closed on 1 November 2013. Further details can be found at:

<https://www.gov.uk/government/consultations/judicial-review-proposals-for-further-reform>

The Justice Secretary's article can be found at:

<http://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html>

David Pannick QC's article is accessible only to subscribers to The Times online at:

<http://www.thetimes.co.uk/tto/law/article3914855.ece>

For further information, please contact:

**Tom Bradford**

Barrister

+44 (0)20 8394 6471

Tom.Bradford@russell-cooke.co.uk

**Michael Stacey**

Solicitor

+44 (0)20 8394 6448

Michael.Stacey@russell-cooke.co.uk

**Andrew Studd**

Partner

+44 (0)20 8394 6414

Andrew.Studd@russell-cooke.co.uk

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