JUDICIAL REVIEW

The Health Practitioners Competence Assurance Act 2003 requires responsible authorities to regulate the practice of health practitioners under their jurisdiction. To do so, authorities are given a series of statutory powers. Authorities' use of their powers under the Act may be carefully scrutinised by both health practitioners and the general public. That scrutiny may lead to appeal against or judicial review of authorities' decisions.

What is judicial review?

Judicial review is a process for challenging the exercise of a public power, such as the power to control health practitioners' registration, in the courts. The person seeking review (the applicant) applies to the High Court for the decision under challenge to be struck down.

Judicial review does not (except in limited circumstances) allow applicants to attack the reasons why a decision has been made. Rather, the courts focus on the procedure by which the decision has been reached. If the procedure is flawed, the decision is likely to be struck down by the court.

Judicial review does not operate like an appeal. On appeal, the court remakes the decision for the decision-maker. In judicial review, on the other hand, when a decision is struck down it is sent back to the decision-maker to be remade. A second decision in exactly the same terms as the original decision is likely to be scrutinised very carefully by the courts to ensure that the decision-maker has gone through a proper process rather than just remaking the original decision without further consideration.

When exercising their powers under the Act, responsible authorities should bear in mind the principles of good administrative decision-making as a means of avoiding judicial review.

Grounds of review

Those affected by an authority's decision under the Act may successfully judicially review a decision if it can be established that the authority's decision was:

- Not reached in accordance with law
- In breach of the principles of natural justice
- In breach of a legitimate expectation
- Unreasonable.

Decision not reached in accordance with law

Authorities must ensure that they act consistently within their powers under the Act. An authority that goes outside its powers will risk having its decision set aside. Generally speaking, an authority has both those express powers set out in the Act, and the implied powers necessary to achieve the purpose of the Act (i.e. protection of the public). A further general principle is that statutory powers (whether express or implied) must always be read in light of the policy and object of the conferring Act. Relying on implied powers can be risky. An authority's decision relying exclusively on an implied power may be criticised for being outside the authority's power.

Authorities should ensure that they act consistently with the principal purpose of the Act and that purpose should be kept in mind when exercising all powers under the Act.

Authorities should also have careful regard to all considerations relevant to their decisions. These may be listed in the Act, or may arise from the policy background to their decisions. If an authority fails to take into account a relevant consideration when making a decision, the decision may be struck down. Similarly, if an authority takes into account an irrelevant or improper consideration it will be open to judicial review.

Finally, authorities should not adopt fixed rules of policy as to how they will exercise their powers. Whilst authorities are usually entitled to adopt general rules of policy, they must still consider each case on its individual facts. When authorities are considering complaints or concerns about practitioners, the authorities will be acting quasi-judicially. As such, a failure to treat like cases alike may well provide grounds for review.

Natural justice

Authorities making decisions should always ensure that they observe the rules of natural justice. Natural justice broadly requires that authorities:

- Give practitioners affected by their decisions fair notice of complaints made against them
- Provide practitioners with all the information relied on in support of the complaint
- Offer practitioners a fair chance to put their case
- Ensure that the decision-makers are free from bias and that the decision is not predetermined
- Generally deal with practitioners in a fair and reasonable way.

Natural justice is especially important for authorities because they will often be exercising a quasi-judicial power. Authorities must ensure that the process by which they reach decisions is as fair as possible, and that everyone affected by an authority's decision is given an opportunity to put forward his or her view. Authorities should also ensure that they are not open to any allegation of bias when exercising their powers. If there is any suggestion or appearance of bias, the biased decision-maker should step down and the decision should be made by someone else.

Legitimate expectation

Authorities can be held to legitimate expectations that they create, by word or deed, in the minds of people affected by their decisions. For example, a practice of consultation may create a legitimate expectation that the decision-maker will always consult even if the decision-maker is not actually required to do so by the legislation.

Unreasonableness

Unreasonableness is the major ground on which the substance of an authorities' decision can be challenged. Broadly, an authority's decision can be struck down if it is so absurd, outrageous or in defiance of logic that no sensible decision-maker would have arrived at the same conclusion. This is often referred to as *Wednesbury unreasonableness* (named after a historic UK case).

It is rare that a decision is struck down for unreasonableness.

The *Wislang* principles: Broad powers and deference to specialist tribunals

Consistent with general principles that authorities must act within the law, in accordance with natural justice, and reasonably, is the statement of the Court of Appeal in *Wislang v Medical Council of New Zealand* which related to the Medical Council's power to determine competence. The Court held that the Council had broad powers, and that there were two controls on the exercise of those powers being first, that the matter of concern must relate to public health and safety (being the principal purpose of the Medical Practitioners Act 1995) and second, that the Council's determination and the action taken in consequence must not be unreasonable, in an administrative law sense, in the circumstances.

The Court of Appeal (subsequently confirmed by the Privy Council on appeal) also made clear that the courts would accord respect for the Council's judgement on the measures necessary to maintain professional standards and provide adequate protection for the public. Although the decision related to competence, and to the Medical Practitioners Act 1995, the principles from this case are directly relevant to authorities acting under the HPCA Act; namely broad powers, with two controls, and the Court's respect for an authority's professional and specialist judgement.

Authorities must ensure that the process by which they reach decisions is as fair as possible

An erosion of the deference principle?

A recent High Court decision suggests that the extent to which the courts will defer to the decisions of specialist tribunals may be being eroded. The High Court rejected an argument raised by a complaints assessment committee (CAC) that its specialist skills in medical ethics had particular relevance in determining whether a charge should be laid against a health practitioner *(Dallison v A Complaints Assessment Committee)*. The applicant for judicial review alleged that, given the facts before the CAC, no decision-maker could have reasonably believed that appropriate grounds existed for disciplinary action. The basis of the applicant's argument was that where important interests are at stake a *Wednesbury* review should be abandoned for a less deferential "reasonableness" inquiry.

The applicant argued that the Court was in an ideal position to review the reasonableness of the decision given that the function performed by CAC was one well familiar to the Court – an assessment of whether the facts justified referral to a Tribunal. The High Court stated that *"although this is a specialist tribunal its function in this case is…finding the established facts and comparing these against the elements of the charge. The standard to be reached is as I have identified a statutory one. I reject the [CAC's] submissions that there is any pivotal specialist medical or professional knowledge required"*. The Court reviewed that aspect of the decision without deference to the CAC's specialist medical ethics knowledge on the basis that the reviewable decision was not coloured by any requirement for such specialist knowledge.

Authorities should therefore be mindful that their particular specialist judgement will only be relevant to matters requiring their specialist skills and assessment.

Conclusion

Following the principles of good decision-making will go a long way to avoiding judicial review. It is important to ensure that adherence to the principles is well documented, so that it can be clearly proved in court if necessary. Judicial review actions rely heavily upon the facts and circumstances of individual decisions.

Whilst courts will generally have regard to the specialist functions and knowledge of an authority, that regard will not extend to matters outside an authority's specialist area or outside the ambit of the authority's responsibilities at law.

The above summary and discussion is not a complete overview of the complex and evolving law of judicial review. If you have particular concerns about judicial review, we suggest seeking legal advice at an early stage in the decision-making process.

HEALTHLAW

For further information on any issue raised in this newsletter, please contact a member of our specialist medico-legal team:

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This article is provided for general information purposes only and not as legal advice. If you have any questions on issues covered please contact us.

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