Independent Review of Administrative Law Panel

Call for evidence

Response of the Senators of the College of Justice

1. **Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?**

None of the grounds of judicial review specified in parts *a.* to *f.* of Question 1 of the questionnaire is likely to impede the proper discharge of central or local government functions. We are not aware of any other ground of review, or of any judicial review remedy, which would be likely to have that effect.

The time limits for judicial review in Scotland (3 months) strike a reasonable balance between the interests of orderly public administration and the interests of those affected by decisions.

In Scotland the number of judicial reviews brought is not excessive nor do they place undue burdens upon public bodies. The most recent published figures are those for 2017-2018, set out in Table 24 of *Civil Justice Statistics in Scotland 2017-2018*. A copy of that table is appended to this response as Appendix 1. It shows that in 2015-2016 there were 496 judicial review petitions. However, that year represented a peak which has not been repeated since. In 2016-2017 343 petitions were registered and in 2017-2018 357 petitions were registered. Figures provided by the Keeper of the Rolls of the Court of Session indicate that in 2018-2019 there were 403 petitions and that in 2019-2020 there were 363. Copies of those figures are also appended as Appendix 2.

A requirement for permission to proceed was introduced on 22 September 2015 by section 89 of the Courts Reform (Scotland) Act 2014. The permission requirement operates satisfactorily. It sifts out petitions which have no real prospect of success.

Not all petitions which are registered proceed as far as a permission to proceed decision. Many are settled or otherwise resolved without the need for the petition to proceed. In 2019-2020 only 234 of the 363 petitions proceeded to a consideration of permission to proceed. In 2018-2019 the corresponding figure was 253 of the 403 petitions registered. In 2017-2018 it was 192 of the 358 petitions registered.

In 2019-2020 132 petitions of the 234 which proceeded to the permission stage were granted permission. The corresponding figures for 2018-2019 and 2017-2018 were 105 out of 253 and 80 out of 192.

In 2019-2020 the court made 52 decisions following a substantive hearing. The corresponding figures for 2018-2019 and 2017-2018 were 42 and 47. It is clear from these figures that a very substantial number of those cases where permission is granted are resolved by the parties or are discontinued without a substantive hearing.

A minority of the petitions which are granted permission are ultimately upheld following a substantive hearing. In the calendar year 2019 there were 42 cases where (i) the court issued an opinion disposing of a judicial review; and (ii) the opinion was published on the SCTS website. In 12 of those cases judicial review was granted. In 30 cases it was refused.

In 2019-2020 there were 53 reclaiming motions (appeals) in judicial reviews. The corresponding figures for 2018-2019 and 2017-1018 were 26 and 30. Those figures include reclaiming motions following refusal of permission and reclaiming motions following substantive hearings.

Accordingly, a large proportion of judicial reviews were resolved or discontinued before a permission determination. After the grant of permission, a further substantial

proportion were resolved or discontinued. For petitions which proceeded to a substantive hearing the success rate in 2019 was just under 30%.

These statistics do not suggest that there is a need to make access to judicial review more difficult. A very substantial proportion of petitions brought had a successful outcome for the petitioner. Moreover, a good number of the petitions which proceed to a substantive hearing, but fail, raise important points of law or practice which the court is able to clarify to the benefit of the parties and the wider public. It seems right that a petitioner with a real prospect of success should have access to a court in order to seek to vindicate his or her rights.

The prospect of being judicially reviewed improves the policy making and the decision making of public bodies. It encourages lawful and better reasoned decisions.

2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

Since this question raises issues of policy, we make no comment on it**.**

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

Our response to this question considers different possible approaches.

The heading of this section refers to codification. We would make the following observations on that issue.

At one end of the spectrum of theoretically possible approaches to codification, there could be an attempt to encapsulate or replicate in a statutory provision the existing

grounds of judicial review, such as illegality, procedural unfairness, or *Wednesbury* unreasonableness. Whilst such an exercise might be theoretically feasible, it would not assist to any meaningful extent. The grounds of challenge are well-known and well-understood. They have been developed and refined by the courts over many years. Recapitulating them in statutory form would not improve the clarity or accessibility of the law. Setting out the potential grounds at a high level of generality would not be of any practical benefit to the courts or to those seeking to invoke or resist judicial review.

At the other end of the spectrum of possible approaches to codification would be an attempt to set out in statutory form the substantive rules which make up the whole body of public law as it has been developed by the courts over the years. This would be a massive exercise, resulting in a statute of enormous range and technical complexity. Such an endeavour would not promote the accessibility or clarity of the law. It would be liable to lead to much additional litigation over a period of many years.

Between these two ends of the spectrum there might be scope for other more limited attempts to codify some aspects of the existing body of public law. It is not clear what criteria would be used to select those parts of the law thought suitable for being set out in statutory form. Having some aspects of the substantive law contained in statute whilst others are left to be covered by the common law would generate confusion and uncertainty in practice.

Any codification of fundamental aspects of the law would be a highly specialised task which Parliament has conferred on the Law Commissions (Law Commissions Act 1965 section 3(1)); it would proceed on the basis of extensive research and analysis of the law and would involve wide-ranging public consultation. This is the well-established system for law reform. The type of detailed and comprehensive analysis of the law carried out by the Law Commissions is the obvious platform for considering possible options for reform of this area of the law.

If substantial consideration of reform of the law relating to judicial review is desirable, a full examination of the existing law could be carried out by the Law Commissions, who are best placed to perform that task and to scrutinise options for reform.

The law governing judicial review in Scotland has been subject to major recent statutory reform by section 89 of the Courts Reform (Scotland) Act 2014. The detailed implications of these reforms are still being worked through by the courts. Some recent examples include *PA* v *SSHD* [2020] CSIH 34; and *Odubajo* v *SSHD* [2020] CSIH 57. It would not be helpful for litigants or potential litigants for there to be further statutory intervention whilst the new law is still settling down.

In conclusion further statutory intervention in the judicial review process in Scotland is not merited.

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decisions not be subject to judicial review? If so, which?

It is important to understand that the nature (and origin) of the supervisory jurisdiction of the Court of Session differs from the power of the courts in other parts of the United Kingdom to grant judicial review. The supervisory jurisdiction has been developed by the Court of Session over more than 200 years, not on a case by case basis, but founded on the principle that where a particular matter has been entrusted to an administrative body or tribunal the court should not substitute its own view for that of the tribunal or body; the Court of Session does, however, have power to intervene for the purpose of controlling any excess or abuse of power or failure to act within the limits of the inferior jurisdiction.

In *West* v *Secretary of State for Scotland* 1992 SC 385 the Court of Session emphasised that the Scottish approach was different from that developed by the courts in England and Wales.

The First Division summarised the Scottish principles as follows: (1) The Court of Session had power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions were taken by any person or body to whom a jurisdiction, power or authority had been delegated or entrusted by statute, agreement or any other instrument. (2) The sole purpose for which the supervisory jurisdiction might be exercised was to ensure that the person or body did not exceed or abuse that jurisdiction, power or authority or fail to do what it required. (3) The competency of the application did not depend on any distinction between public law and private law, nor was it confined to those cases which English law had accepted as amenable to judicial review.

It was emphasised also: (a) that judicial review did not exist to provide machinery for an appeal on the merits; (b) that the categories of what might amount to an excess or abuse of jurisdiction, which in this context meant simply "power to decide", were not closed and were capable of being adapted in accordance with the development of public law; (c) that there was no substantial difference between English and Scots law as to the grounds on which the process of decision making might be open to review; and (d) that contractual (e.g. employer/ employee) rights and obligations were not as such amenable to judicial review: this was appropriate where a tripartite relationship existed between the person or body delegating the jurisdiction, power or authority, the person or body to whom it was delegated and the person in respect of whom the power was to be exercised.

Lord Reed explained the limited nature of the supervisory jurisdiction in *Crocket* v *Tantallon Golf Club* 2005 SLT 663 at para 37. He emphasised that the Court's function was confined to ensuring that bodies possessing legally circumscribed powers exercised those powers in accordance with the limitations and requirements to which they were subject. It followed that the jurisdiction was of a restricted nature, which was aptly described as supervisory.

The principles set out in *West*, as explained by Lord Reed in *Crocket*, provide a sound and stable framework for enabling the decisions and powers in respect of which

judicial review is available under Scots law to be clearly identified. The principles are well-understood in practice and are applied without difficulty on a daily basis. There is no difficulty in determining issues of amenability to judicial review.

There is no apparent need for statutory intervention on the matters referred to in question 4 of the call for evidence. The decisions and powers that are subject to judicial review under Scots law are already clear. The question asks whether "certain decision" should not be subject to judicial review. There are many decisions which are not amenable to judicial review under the existing law. Those which are subject to judicial review can be readily ascertained by application of established principles.

There is no apparent need to restrict by statute the scope of the supervisory jurisdiction in any respect. The supervisory jurisdiction has been sensitively developed and exercised for centuries. It operates to protect individuals against the abuse of power. That is one of the core functions of any system of justice in a mature democracy. There is no obvious example of the supervisory jurisdiction having been exercised inappropriately or unjustly.

5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/Supreme Court clear?

Each of these processes is clear. Procedural issues of this type are governed by the rules of the Court of Session. Possible amendments to the Court's rules fall within the responsibility of the Scottish Civil Justice Council under the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. The Council is responsible for preparing draft rules of procedure for the Court of Session. It also has the function of providing advice and making recommendations to the Lord President on the development of the civil justice system in Scotland. It has made no recommendations about judicial review. In Scotland an appeal from a decision of a Lord Ordinary is to one of the Divisions of the Inner House of the Court of Session.

The Supreme Court of the United Kingdom has its own procedural rules.

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

An application to the supervisory jurisdiction of the Court of Session must be made within three months of the grounds giving rise to the application first arising or within such longer period as the court may consider equitable in all the circumstances; section 27B(1) of the Court of Session Act 1988, as amended by the Courts Reform (Scotland) Act 2014, section 89. This provision came into effect on 22 September 2015 and followed the publication of the Scottish Civil Courts Review in 2009 (the Gill Review). Formerly there was no time limit within which to bring an application for judicial review but a respondent could take a common law plea of *mora*, taciturnity and acquiescence which, if successful, prevented the petition from proceeding.

The legislative reforms, together with changes in practice following the Gill review, have put in place a much more structured approach where judicial reviews are case managed. Unmeritorious applications are weeded out at the permission stage.

The figures show that petitions for judicial review are completed with reasonable expedition. Those cases which take longer are those which raise complex issues of law.

So far as balance is concerned, while judicial review places a burden on particular respondents it is also instrumental in ensuring effective government and good administration.

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

The general rule in Scottish courts is that expenses follow success. That will only be departed from in particular circumstances, such as delay by one party causing the other party extra expense. Unmeritorious claims will not get permission to proceed and the respondent will be awarded expenses. Protective Expenses Orders (PEOs) are available in Scottish courts. Chapter 58A of the Rules of Court applies to environmental appeals and judicial reviews, but it is also possible to apply for such an order in ordinary actions at common law. There are comparatively few applications for PEOs and they have predominantly been granted in environmental cases. The criteria laid out in *R. (on the application of Corner House Research)* v *Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 W.L.R. 2600, [2005] 3 WLUK 75 are generally applied.

The present system of expenses works reasonably well in Scotland.

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

The substantive remedies which are usually sought by petitioners in judicial review are the quashing of the decision complained of and/ or the making of a declaration as to the petitioner's rights. Ancillary orders such as interim suspension and interdict may also be granted. It is difficult to see what other remedies might appropriately be granted. Any order quashing a decision has the effect of passing the decision back to the decision maker. It is important that the court does not make an order which trespasses into the realm of decision making.

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

We have no comment on this question.

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

As we have explained in response to question 1, the figures show that a substantial number of judicial review cases are resolved without having to proceed to a substantive hearing. It seems clear therefore that the current system serves to encourage a party to reappraise its position in the light of the arguments to be advanced by its opponent. Parties have extensive notice of the arguments by virtue of the pleadings and the process, which applies in every case for lodging written arguments.

12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

We have no comment on this question.

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

The law on standing so far as Scotland is concerned has been addressed and substantially altered relatively recently in *AXA General Insurance Company Ltd* v *Lord Advocate* 2012 SC (UKSC) 122. As a result, standing has been widened to encompass, in the public law field, all those with sufficient interest in the subject matter. The older test of title and interest has been superseded. In practical terms, this has meant that issues as to standing arise relatively rarely. There are no difficulties for the Court in applying the law as set out in *AXA*.

Appendix 1

Table 24: Petitions for judicial review initiated and disposed of in the Petition Department of the Court of Session, 2008-09 to 2017-18

		2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	% change since 2016-17	% change since 2008-09
Initiated	**Judicial review**												
	Environmental	*0*	*0*	*2*	*2*	*1*	*3*	*4*	*1*	*3*	*0*	*z*	*z*
	Housing	*2*	*1*	*4*	*1*	*0*	*1*	*2*	*13*	*15*	*15*	*0*	*650*
	Immigrants	*177*	*210*	*266*	*195*	*224*	*231*	*323*	*393*	*262*	*267*	*2*	*51*
	Licensing board	*0*	*1*	*1*	*0*	*1*	*1*	*1*	*0*	*0*	*0*	*z*	*z*

	Planning permission	*5*	*10*	*8*	*11*	*8*	*6*	*12*	*7*	*4*	*6*	*50*	*20*
	Prison authorities	*18*	*107*	*7*	*3*	*10*	*17*	*17*	*24*	*6*	*20*	*233*	*11*
	Social security benefits	*0*	*0*	*0*	*0*	*1*	*0*	*1*	*3*	*5*	*4*	*-20*	*z*
	Other	*30*	*49*	*54*	*31*	*48*	*49*	*39*	*55*	*48*	*45*	*-6*	*50*
	Total	**232**	**378**	**342**	**243**	**293**	**308**	**399**	**496**	**343**	**357**	***4***	***54***
Disposed	**Judicial review**												

	Environmental	*0*	*0*	*1*	*2*	*1*	*2*	*0*	*1*	*1*	*1*	*0*	*z*
	Housing	*5*	*1*	*3*	*1*	*0*	*1*	*1*	*7*	*17*	*15*	*-12*	*200*
	Immigrants	*153*	*168*	*182*	*267*	*229*	*203*	*229*	*314*	*397*	*308*	*-22*	*101*
	Licensing board	*1*	*1*	*0*	*2*	*0*	*1*	*1*	*1*	*0*	*0*	*z*	*-100*
	Planning permission	*4*	*7*	*5*	*11*	*12*	*4*	*7*	*12*	*5*	*6*	*20*	*50*
	Prison authorities	*15*	*18*	*12*	*95*	*101*	*19*	*10*	*23*	*13*	*24*	*85*	*60*

	Social security benefits	*0*	*0*	*0*	*0*	*1*	*0*	*1*	*1*	*2*	*5*	*150*	*z*
	Other	34	32	39	34	26	40	38	43	50	51	*2*	*50*
	Total	**212**	**227**	**242**	**412**	**370**	**270**	**287**	**402**	**485**	**410**	***-15***	***93***

1. Changes were made to the case types and final disposals recorded by the Court of Session from 2009-10 which affects the ability to compare petition type.

2. Figures for initiations and disposals do not necessarily refer to the same cases.

3. z refers to data not being applicable.

APPENDIX 2

JUDICIAL REVIEW

J/R Petitions resulting in a court decision following a Substantive Hearing	2017-18	2018-19	2019-20
Environmental	2	0	0
Housing	0	1	2
Immigration	25	19	21
Licensing Board	0	0	0
Other	15	18	20
Planning Permission	4	2	2
Prison Authorities	0	2	7
Social Security Benefits	1	0	0

Average period from registration to final disposal within the Outer House (in weeks)	2017-18	2018-19	2019-20
Environmental	33	104*	nil
Housing	15	20	16
Immigration	27	17	23
Licensing Board	nil	nil	nil
Other	37	28	26
Planning Permission	27	26	49
Prison Authorities	95	63	64
Social Security Benefits	16	32	nil

**substantive hearing on 13/1/17*

JR Petitions involving PEOs	2017-18	2018-19	2019-20
Environmental	nil	nil	nil
Housing	nil	nil	nil
Immigration	nil	nil	nil
Licensing Board	nil	nil	nil
Other	nil	1	2
Planning Permission	1	nil	nil
Prison Authorities	nil	nil	nil
Social Security Benefits	nil	nil	nil

	2017-18		2018-19		2019-20	
	No. of opinions issued	**Period of time from registration to date opinion issued (in weeks)**	**No. of opinions issued**	**Period of time from registration to date opinion issued (in weeks)**	**No. of opinions issued**	**Period of time from registration to date opinion issued (in weeks)**
Environmental	1	32	nil	nil	nil	nil
Housing	nil	nil	nil	nil	1	38
Immigration	18	45	13	38	12	55
Licensing Board	nil	nil	nil	nil	nil	nil
Other	9	60	13	59	15	25
Planning Permission	4	34	2	28	1	46
Prison Authorities	nil	nil	2	49	4	51
Social Security Benefits	nil	nil	nil	nil	nil	nil

PETITIONS REGISTERED/RECLAIMED

Petitions Registered 2017-18	
Environmental	1
Housing	15
Immigration	268
Licensing Board	0
Other	44
Planning Permission	6
Prison Authorities	20
Social Security	4
Total	**358**

Petitions Registered 2018-19	
Environmental	0
Housing	9
Immigration	316
Licensing Board	0
Other	63
Planning Permission	5
Prison Authorities	10
Social Security	0
Total	**403**

Petitions Registered 2019-20	
Environmental	0
Housing	18
Immigration	258
Licensing Board	0
Other	66
Planning Permission	6
Prison Authorities	15
Social Security	0
Total	**363**

Number of JR Reclaiming motions lodged 2017-18	
Environmental	1
Housing	0
Immigration	18
Licensing Board	0
Other	8
Planning Permission	1
Prison Authorities	2
Social Security	0
Total	**30**

Number of JR Reclaiming motions lodged 2018-19	
Environmental	0
Housing	2
Immigration	6
Licensing Board	0
Other	16
Planning Permission	0
Prison Authorities	1
Social Security	1
Total	**26**

Number of JR Reclaiming motions lodged 2019-20	
Environmental	0
Housing	1
Immigration	34
Licensing Board	0
Other	15
Planning Permission	1
Prison Authorities	2
Social Security	0
Total	**53**

BREAKDOWN – JUDICIAL REVIEW PERMISSIONS

2017-2018		JRs Passed to Keepers for Permission	JR Petitions Granted Permission	JR Petitions Refused Permission	JR Petitions Appointed Oral Hearing	Granted Permission at Oral Hearing	Refused Permission at Oral Hearing
Totals		**192**	73	90	29	7	20

* x 2 Oral Hearing did not take place, JR Petition dismissed via motion by petitioner's agents

2017-2018		Petitions Request to Review	Review decision Refused without Oral Hearing	JR Petitions Review Oral Hearing RC 58.8 Granted	JR Petitions Review Oral Hearing RC 58.8 Refused	Total Granted Reviews per Month
Total Review Requests		**89**	66	20	1	**20**

* x 2 Oral Hearings did not take place, JR Petition dismissed via motion by petitioner's agents

2018-2019		JRs Passed to Keepers for Permission	JR Petitions Granted Permission	JR Petitions Refused Permission	JR Petitions Appointed Oral Hearing	Granted Permission at Oral Hearing	Refused Permission at Oral Hearing
Totals		**253**	93	126	34	12	19

* x1 Oral Hearing did not take place, JR Petition dismissed via motion by petitioner's agents

2018-2019		Petitions Request to Review	Review decision Refused without Oral Hearing	JR Petitions Review Oral Hearing RC 58.8 Granted	JR Petitions Review Oral Hearing RC 58.8 Refused	Total Granted Reviews per Month
Total Review Requests		**133**	88	38	7	**38**

2019-2020		**JRs Passed to Keepers for Permission**	**JR Petitions Granted Permission**	**JR Petitions Refused Permission**	**JR Petitions Appointed Oral Hearing**	**Granted Permission at Oral Hearing**	**Refused Permission at Oral Hearing**
Totals		**234**	107	31	96	25	52

* Oral Hearing did not take place due to -

x 2 JR Petition cases being dismissed via motion by petitioner's agents.

2019-2020		**Petitions Request to Review**	**Review decision Refused without Oral Hearing**	**JR Petitions Review Oral Hearing RC 58.8 Granted**	**JR Petitions Review Oral Hearing RC 58.8 Refused**	**Total Granted Reviews per Month**
Total Review Requests		**29**	8	9	11	**8**

* Oral Hearing did not take place due to -

x 1 JR Petition cases being dismissed via motion by petitioner's agents.