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Lord Faulks QC,
Chair of the
Independent Review
of Administrative Law

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20 October 2020

Dear Lord Faulks,

INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

Thank you for your letter to the First Minister (dated 7 September 2020) inviting the Scottish Government to offer views as part of the call for evidence from the panel of the Independent Review of Administrative Law (IRAL). I am responding on behalf of the Scottish Government, as administrative law and judicial review fall within my overall portfolio of responsibility as Cabinet Secretary for Justice.

I note from the call for evidence document that the questions are primarily aimed at UK Government departments rather than the devolved administrations and from your letter that you are seeking evidence from the Scottish Government, in relation to UK wide powers specifically.

In response, it is important to make the point that whilst the terms of reference and scope of the review are focused on the law of England and Wales and on reserved UK-wide law, the law underpinning judicial review of administrative action in Scotland is, as you and the panel will no doubt be aware, devolved and within the control of the Scottish Parliament. Furthermore any changes to UK law linked to judicial review will have implications for individuals in Scotland and potentially on the volume of judicial review cases, as well as processes, in the Court of Session.

As such, the Scottish Government has broad interest in any potential reform to judicial review in Scotland, and broader than may be suggested by the scope of your call for evidence. We have particularly seen it implied in a letter from the Lord Chancellor that the Scottish Parliament and the Scottish Government's interest is only in judicial review of the devolved institutions. That does not reflect the terms of the Scotland Act 1998, which provides that Scots private law – which is specifically defined in terms which include the law of actions and to include judicial review of administrative action - generally falls within the legislative competence of the Scottish Parliament.

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Taking into account that interest, we would make the following points.

Firstly, I would like to make clear that the Scottish Government is strongly of the view that effective judicial review is an essential part of a sound constitutional structure and a key mechanism for maintaining the rule of law. It provides a vital mechanism for individuals to hold the executive and other public bodies to account. We would have significant concerns about any attempt or proposals designed to restrict the reach of judicial review, limit the rights of individuals in this area and the accessibility of judicial review, or interfere with the powers of the independent judiciary and the ability of the courts to hold government to account, particularly if they were to extend to Scotland. I have noted that many stakeholders share those concerns.

I might add that the Scottish Government regards judicial review as of particular importance in ensuring that human rights are respected, protected and fulfilled. Any perception that existing safeguards are being eroded would be both unwelcome and unhelpful - not just as a matter of domestic policy and law, but because such perceptions inevitably serve to embolden regimes elsewhere, in states which lack the UK's historic commitment to democracy, human rights and the rule of law.

Secondly, whilst we appreciate the scope of your review confines itself to the litigation of matters that are reserved to the UK Parliament, we would have concerns if proposals are brought forward which would lead towards the development of fragmented procedures within Scotland. There is a serious danger in that the creation of a twin-track arrangement for reserved and devolved matters depending on the subject matter of dispute, would give rise to incoherence in Scots Law, in the operation of the Scottish Courts and additionally in public understanding of how these processes operate. This would be undesirable and something which we would wish to avoid.

Recent reforms in Scotland

Thirdly, judicial review in Scotland has already been overhauled in recent years as a result of a period of reflection and policy development

The panel may be aware that in 2007 Lord Gill was invited to lead a review of the Civil Justice system in Scotland. Lord Gill, who at the time was Lord Justice Clerk, was assisted in his work by a project board comprising other members of the senior judiciary. The board met with a wide range of interests within the legal community and beyond.

The review reported in 2009 and made numerous recommendations for the improvement of the civil justice system which they had concluded retained structures that were largely unchanged from the nineteenth century. The review considered and made recommendations in relation to judicial review procedures.

In response, the Scottish Government undertook a full public consultation process on the way in which it intended to progress the structural changes recommended by the review. There were 115 responses received and these were considered as part of the preparation of the draft Courts Reform (Scotland) Bill. After a thorough parliamentary process the reforms, including those in relation to judicial review were enacted via the Courts Reform (Scotland) Act 2014.

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The panel may well wish to look at the Gill review's recommendations in detail (Chapter 12 refers) but the review looked at issues such as title and interest to sue, time limits, the need for a permission or leave stage and case management powers. The review and subsequent legislation were guided by the need for balance between the right to access justice and the practical considerations of ensuring efficiency by weeding out unmeritorious cases with the minimum of process and reducing uncertainty for those public bodies whose decisions, acts or omissions may be challenged.

Specific measures introduced through the 2014 Act include:

- A three month time limit for actions to be brought and where it is equitable to do so, allows the court to accept petitions outwith this time limit.
- A permission stage which includes both a 'real prospect of success' test and a requirement for sufficient interest.

As a result of the 2014 Act, Chapter 58 of the Rules of the Court of Session, containing the procedure for judicial review, was rewritten to reflect the introduction of the new time limit and permission requirements. The rules encourage judicial reviews to progress in a timely manner through the courts through the use of prescribed time limits for each stage within the process and also allows for unmeritorious cases to be sifted out at an early stage thereby permitting more of the courts time to be directed towards meritorious cases.

In relation to remedies, they remain at the discretion of the court however examples of orders which may be made are set out in the Court of Session Rules, Chapter 58 Rule 58.13(3).

The reforms and updated rules offer greater procedural clarity and brought the process in Scotland more in line than had previously been the case with the process applied to judicial review cases in England and Wales.

It is therefore the case that the law in relation to judicial review has been recently modernised in Scotland as a result of a lengthy process including an in-depth review, public consultation, parliamentary consideration and scrutiny. We are satisfied that it currently provides an efficient, proportionate response to the litigation of issues of public concern, however we remain open and interested in any proposals which would further increase its effectiveness, efficiency or accessibility, provided they do not fragment or endanger the protection which the law of judicial review provides.

Judicial review trends

The Scottish Government publishes civil justice statistics in Scotland on an annual basis which the panel may wish to consider to understand trends in judicial review in Scotland over time. The most recent publication, covering 2018-19 can be found at:

<https://www.gov.scot/publications/civil-justice-statistics-scotland-2018-19/>

Generally, the number of judicial reviews initiated at the Petition Department of the Court of Session has been highly variable over time.

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Conclusion

Whilst scrutiny by the courts is often uncomfortable for bodies and individuals subjected to it, it is entirely right in a civilised society that fundamental rights are protected by the judiciary.

As already outlined earlier within this letter, we are of the view that effective judicial review plays a key role in a sound constitutional structure and is a vital mechanism which allows members of the public to hold the government to account. Furthermore, judicial review provides an effective mechanism to help improve and inform decision making by public bodies.

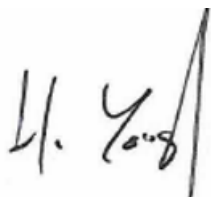
We would have serious concerns about any attempt to limit the scope or reach of judicial review and similarly would have concerns if proposals are brought forward which would lead to an incoherence arising in how reserved and devolved matters should be treated within Scots Law and by our courts.

Finally, having undertaken significant reforms to judicial review in recent years, we do not have particular issues to raise with the current system that give rise to concern that matters are being considered in ways which are not appropriate. The participation of Professor Page as a member of the review panel will undoubtedly assist in understanding the complexities of devolution in relation to judicial review however I would also hope that in carrying out your review, the panel will engage substantively and extensively with legal stakeholders in Scotland to ensure that due regard is given to the complexities of this relationship. It is also important that the panel is highly attuned to potential unintended consequences of any of its recommendations, particularly in relation to the operation of Scots Law and the devolution settlement.

Given the broad interest the Scottish Government has in the progress of the work of the panel and any UK Government proposals which stem from it, I would be keen to be kept updated on developments as they arise. Furthermore I would be happy for my officials to engage with the panel if further information is required. If this would be helpful, please contact Ryan McRobert, Head of Courts and Tribunals (ryan.mcrobert@gov.scot).

I trust this submission will be helpful in informing the panel of our position on these matters.

Yours sincerely,



HUMZA YOUSAF

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