

Written Evidence to the UK Government Consultation on Judicial Review Reform and Devolved Jurisdictions

29 April 2021

Question 3: Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?

We are in favour of limiting the proposals in this consultation, where they impact the devolved jurisdictions, to England and Wales only.

Judicial Review is a devolved matter in Scotland

Judicial review of administrative action is a devolved matter in Scotland, being defined as a question of Scots private law in s126(4) of the Scotland Act 1998 that is neither reserved nor excepted.

The Independent Review of Administrative Law (IRAL) panel report acknowledges this clearly, stating: “any changes to the procedures by which judicial review may be obtained in Scotland..., whether or not of the “minor or technical” nature referred to in our call for evidence, and whether or not arising from our recommendations, will be a matter for the institutions of devolved government in Scotland.”

Judicial Review in Scotland was recently reformed, and key stakeholders in Scotland do not see the need for any further reform

The Scottish Government committed to reform the civil court structure in Scotland and a judicially-led review was undertaken between 2007-2009.

Some recommendations around reforms to the process for Judicial Review were taken forward in the Court Reform (Scotland) Act 2014, which came into effect in 2015.

Scotland's Legal Centre for Justice and Human Rights

JustRight Scotland is a Scottish Charitable Incorporated Organisation (SC047818) which provides legal services through its limited liability partnership, JustRight Scotland LLP which trades as JustRight Scotland (SO305962). This firm has been authorised to act as solicitors by the Law Society of Scotland (Registered No 53703).

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Five years on, the Scottish Government submission to IRAL stated it was satisfied that the recently “modernised” law of judicial review provides an “efficient, proportionate response to the litigation of issues of public concern” and that the permission requirement “sifts out petitions which have no real prospect of success.”

The Scottish Government was particularly opposed to reform if it would “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.”

UK Government reforms in relation to “UK wide” reserved or excepted matters could create complexity and have unwelcome consequences in Scotland, if they lead to a “dual” or “fragmented” system where reserved or excepted matters are dealt with one way, and “other” matters are treated differently

We submit there is a risk of a “dual” or “twin-track” approach arising, if the UK Government proposals under review in this consultation are extended to Scotland.

The Scottish Government noted its opposition in submitting to IRAL: “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.”

The Law Society of Scotland, added: “[F]ragment[ing] the general approach of Scots law to judicial review...could involve the Court of Session applying different principles and procedures according to the subject matter of the case. It might even be unworkable. This fragmentation is therefore considered to be undesirable.”

The Faculty of Advocates in their response also noted that there are not separate rules of procedure for “UK challenges” and “Scottish challenges” and cautioned against over-stepping the terms of the Review in exploring those options.

The Scottish Human Right Commission similarly cautions that a two-track system would lead to additional “complexity” and “uncertainty” for the Scottish judiciary (in adjudicating matters of administrative law) and for Scots lawyers (in advising their clients). Part of that uncertainty, the submission notes, will arise around the authority of pre-enactment cases setting out the principles and procedures that govern Judicial Review in Scotland.

In summary, we submit that:

- Any further reform of the Judicial Review system in Scotland is a matter devolved to the Scottish Parliament.
- If the UK Government aims to extend any of the proposed reforms to Scotland, on the basis that they are “UK wide” reserved or excepted matters, we would advocate for a separate and independent review on the impact - intentional or otherwise - of doing so.
- This review should involve consultation not only with the Scottish Government, Scottish Parliament, Scottish judiciary and legal sector – taking full account of the impact on procedure and practice in the Scottish courts and justice systems – but also key stakeholders including people and organisations who have used or may require to use Judicial Review as a remedy for securing their rights and holding the executive accountable for its actions.