CONSULTATION QUESTIONS

CHAPTER 1
Moving civil business from the Court of Session to the sheriff courts

Q1. Do you agree that the provisions in the Bill raising the exclusive competence and providing powers of remit will help achieve the aim of ensuring that cases are heard at the appropriate level?

Yes ☐ No ☐

Comments

Q2. Do you think that the Court of Session should retain concurrent jurisdiction for all family cases regardless of the value of the claim?

Yes ☐ No ☐

Comments

Q3. Do you think that the Court of Session should retain concurrent jurisdiction in any other areas?

Yes ☐ No ☐

Comments

Q4. What impact do you think these proposals will have on you or your organisation?

Comments
CHAPTER 2
Creating a new judicial tier within the sheriff court

Q5. Do you think that the term "summary sheriff" adequately reflects the new tier and its jurisdiction?

Yes ☐ No ☐

Comments

Q6. Do you agree with the proposal that the qualifications for appointment as a summary sheriff should be the same as that for a sheriff?

Yes ☐ No ☐

Comments

Q7. Do you agree with the proposed competence of summary sheriffs in family cases?

Yes ☐ No ☐

Comments

Q8. Do you agree that summary sheriffs should deal with referrals from children’s hearings?

Yes ☐ No ☐

Comments

Q9. Do you think that in addition to summary crime, summary sheriffs should have powers in other areas of criminal jurisdiction?

Yes ☐ No ☐

Comments

Q10. Do you agree that the allocation of cases where there is concurrent competence between sheriffs and summary sheriffs should be an administrative matter for the relevant Sheriff Principal?

Yes ☐ No ☐

Comments

Q11. What impact do you think these proposals will have on you or your organisation?
CHAPTER 3
Creating a new sheriff appeal court

Q12. Do you agree that criminal appeals should be held in a centralised national appeal court?

Yes □ No □

Comments

Q13. Do you think that civil appeals should be heard in the sheriff appeal court sitting in the sheriffdom in which they originated?

Yes □ No □

Comments

Q14. Do you agree that the sheriff appeal court should be composed of appeal sheriffs who are Sheriffs Principal and sheriffs of at least five years experience?

Yes □ No □

Comments

Q15. What impact do you think these proposals will have on you or your organisation?

Comments
CHAPTER 4
Creating a specialist personal injury court

Q16. Do you agree that establishment of a specialist personal injury court?

Yes ☐ No ☐

Comments

Q17. Do you agree that civil jury trials should be available in the specialist personal injury court?

Yes ☐ No ☐

Comments

Q18. What impact do you think these proposals will have on you or your organisation?

Comments
CHAPTER 5
Improving judicial review procedure in the Court of Session

Q19. Do you agree with the three month time limit for judicial review claims to be brought?

Yes ☐ No ☑

Comments
This is a response to questions 19 to 22 of the section entitled Improving judicial review procedure in the Court of Session in the Scottish Government’s consultation regarding Making Justice Work – Courts Reform (Scotland) Bill.

The respondents are the immigration practitioners of the Murray Stable of the Faculty of Advocates. All are practising advocates engaged in immigration and asylum work. Although most work for individuals, a number act or have acted for the Home Secretary in immigration cases. Collectively, they appear in a substantial majority of such cases in Scotland, on one side or indeed on both. This response is confined to the questions as they affect this area of practice.

19 Do you agree with the three month time limit for judicial review claims to be brought?

19.1 We do not agree. Under these proposals the same three month time limit applies to all applications for judicial review, regardless of the nature of the claim. Although immigration and asylum cases represent a significant proportion of judicial review petitions in the Court of Session1, there is no

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1 The most recent civil law statistics published by the Scottish Government show a ten per cent decrease in the number of petitions initiated in the Court of Session in 2011-2012 (see paragraph 4.12 and Table 1 of the Civil Law Statistics in Scotland 2011-2012 published December 2012). Unlike in previous years, the most recent statistics do not give a breakdown of how many petitions are judicial review petitions as opposed to company petitions and of those, how many are immigration petitions. However, in 2010-11, one in four petitions were judicial reviews. Of the 342 judicial reviews initiated, immigration was the most common type (78 per cent of all reviews). In 2009-2010, 24 per cent of petitions were judicial review petitions and of those immigration petitions were the most common at 58 per cent. In 2008-
hard evidence either in the Scottish Civil Courts Review or in the Consultation Paper on this Bill that the Court is being burdened with large or unmanageable numbers of petitions challenging old decisions in this field\(^2\). Moreover, we are not aware of any particular concern about the Court being burdened with large numbers of challenges to old decisions in this field, although concerns have been expressed in relation to other fields of law such as public procurement and planning. We have a concern that these proposals are being put forward without proper hard evidence gathering to support them; without an understanding of the different considerations applicable to different areas of law; and without an analysis of their likely practical consequences.

19.2 Furthermore, we have particular concerns as to the suitability of a time limit for immigration and asylum cases. Immigration and asylum cases are a peculiar class of case, as recognised by the Ministry of Justice in its consultation paper on judicial review reform in England\(^3\). The Scottish Legal Aid Board recognised in its recent assessment of civil cases in the Court of Session that asylum and immigration judicial reviews are relatively low cost cases, with 90% costing under £3000, and an average cost to the legal aid fund of £1728 (compared with £6240 for other classes of judicial review)\(^4\). Further, immigration and asylum judicial review cases alone are now subject to the terms of a new Practice Note which sets out a new procedure to be followed in this particular class of judicial review. The Practice Note

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2  See *Eba v Advocate General* 2012 SC (UKSC) 1, where statistics were presented to the court on behalf of the Lord Advocate showing that the Scottish courts had not been flooded by large volumes of unmeritorious petitions, as the English courts apparently had been: in the Case for the Lord Advocate, it was rightly said “*statistics show that the courts have not been overburdened, either before or after TCEA, with applications to the SJ challenging administrative decisions.*”


4  Material supplied by SLAB by letter of 25 April 2013, attached. These figures are for 2010-12.
No 1 of 2012 has effect from 4 February 2013 and is appended to this response. It provides that prior to raising judicial review proceedings an individual’s agent will send a pre-proceedings letter to the UK borders agency (“the UKBA”). Except in cases of special urgency the UKBA has 14 days to respond to the letter before the individual commences proceedings. On commencing proceedings, the individual’s agents must produce relevant documents including the pre-proceedings letter and any response to it. Thereafter at the first order stage the court will decide whether to grant first orders and also to fix a procedural hearing. At the procedural hearing parties exchange short statements of the issues and an estimate of the duration of the hearing. The Keeper of the Rolls is to maintain a record of court days allocated to immigration and asylum judicial reviews and the issues raised in those cases.

19.3 The Practice Note has only very recently introduced these significant changes to procedure. Its aim is to avoid unnecessary proceedings in immigration and asylum cases, encouraging the parties to negotiate before the formal raising of proceedings thereby avoiding litigation if possible. The new procedures aim to ensure that once proceedings are raised, issues are focused at an early stage and proceed to a hearing quickly thereafter. We are not aware of these new provisions encountering any difficulties so far. Having only very recently introduced these procedures, we consider it would be shortsighted and counterproductive to introduce a time limit. The new procedures should at the very least be given the opportunity to bed in and for an accurate record to be gathered from the Keeper’s rolls of how many cases are proceeding to hearings and on what issues, focusing on whether the court is particularly burdened with old decisions.

19.4 In any event, we consider that in the asylum and immigration context, the concept of a statutory time limit on the right to seek judicial review is fundamentally misconceived: if enforcement is expeditious, any challenge by judicial review will have to be within a short period in order to
suspend removal. If enforcement is not expeditious, a time-bar to a judicial review challenge at the stage when belated enforcement is proposed runs the risk of leaving arbitrary power in the hands of the executive in the form of the United Kingdom government in violation of Convention rights. If the three month time limit is introduced, we think it likely that parties would be encouraged to circumvent the pre-proceedings letter and move immediately to litigation undermining the Practice Note of 2012 with the result that the court will be burdened with additional and unnecessary cases. There is a risk that decisions that are brought to agent and counsel’s attention late in the day and near the deadline will cause them to raise a petition on an urgent basis to protect the client’s position without full instructions or a mature view on prospects having been reached and curtailing any time for a negotiated settlement prior to litigation.

19.5 We are also concerned that the operation of a time limit will not improve efficiency but will bring about more litigation and pressure on court time. Clause 84 of the Bill proposes that the application must be made before the end of the period of 3 months beginning with the date on which the grounds giving rise to the application arose, or such longer period as the court considers equitable having regard to all the circumstances. Thus the time limit does not necessarily run from the date of a particular decision letter which has been intimated to an individual. The grounds may arise from multiple decisions or over a continued period. As has been experienced in England, much uncertainty remains as to the operation of the time limit in such cases. These concerns are particularly relevant in the asylum and immigration context, where for example applicants often rely upon the right to private and family life under Article 8 of the European Convention on Human Rights. Difficult questions arise as to when the grounds for judicial review arise in such circumstances. If the proposals for time limit under discussion were to be introduced, it would be unjust if the

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5 See Ministry of Justice, Proposals for Reform December 2012 CP25/2012: paragraphs 47 and 64.
court were not to take into account the date when the applicant became aware of the grounds of review in granting any extension to the time limit, and the date on which such grounds could be said to have reasonable prospects of success. Such questions are likely to lead to uncertainty, more litigation and an increased burden on the court.

Q20. Do you agree that the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases?

Yes ☐ No ☒

20.1 No; we suspect that they will have the opposite effect. Again, we are concerned that these proposals proceed without any hard evidence that the Court is burdened with large volumes of unmeritorious petitions for judicial review in immigration and asylum cases. We predict that with the introduction of a leave requirement, more unmeritorious cases will as a consequence be raised. Government may not be aware of the extent to which counsel presently filter out to a significant (albeit varying) degree unmeritorious cases. If a leave requirement were introduced, we consider that counsel would be more prone to putting very weak or borderline cases to the court for it to consider whether the claim should be granted leave. The outcome may then be a significantly greater burden on the court and its administration in processing petitions and hearing applications for leave. Experience in England, where there has long been a leave requirement, is that far more applications are made to the court than in Scotland; because the court operates a leave filter, counsel do not do so themselves. We would contrast the current arrangements in Scotland whereby the court ultimately hears few full applications that do not reach a friendly settlement which have made it through counsel’s informal sift. This proposal is a proposal that Scotland, an efficient system in this regard, move to the English system which has proved inefficient in this regard.

20.2 In our view, the introduction of a leave requirement would also introduce delay and undermine the initiatives of the recent Practice Note
and current efficiency with which these cases are dealt with. Under the Bill proposals, a petitioner who is refused leave without a hearing would have the right to request an oral hearing before a different Lord Ordinary to review the earlier decision. Following a refusal of leave after an oral review hearing, the petitioner then has a right of appeal. Experience in England shows that in 2011 it took on average 11 weeks for a decision on permission to be taken on the papers and a further 21 weeks if the matter went to an oral review; all at substantial cost to the public purse. The system is thus both slower and more expensive than current practice in Scotland. Experience in England also shows that applicants’ success rate on obtaining leave to appeal almost doubled if an oral hearing was given. This suggests that applicants will be likely to request such hearings and that these may become a common feature of procedure. It may be that such oral hearings become “rolled up hearings” with the full merits of the case being argued and the hearing taking up as much time as a first hearing would under current procedure. If following an oral review hearing, there is thereafter an appeal hearing, more extensive delay would inevitably ensue.

20.3 It is not clear how the leave provisions would work with the procedures under the new Practice Note. Presumably, any procedural hearing would have to await the outcome of the leave decision. Indeed any review hearing or appeal against a refusal of leave on certain grounds only would also run the risk of delaying the procedural hearing on the other grounds which had already been given leave. We consider that although a leave requirement may at the end of the review process filter out unmeritorious cases, it does so at the expense of the existing efficiency and speed with which cases are currently dealt with. R (Burkett) v Hammersmith & Fulham LBC [2002] UKHL 23 provides evidence of the difficulties and

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Q21. Do you agree that these proposals to amend the judicial review procedure will maintain access to justice?  

Yes [ ] No [X]  

21.1 No. We consider that time limits and leave requirements are one-sided impediments to access. The time limit proposals, in particular, are likely to cause substantial injustice to members of the community who may have substantial difficulties in accessing the justice system.

21.2 A leave requirement is likely to be only manageable with changes to legal aid provision of which we have no information. Legal aid is presently not provided for in relation to leave applications and it would be wrong to introduce it without knowing what provision there is to maintain access to the Court.

Q22. What impact do you think these proposals will have on you or your organisation?  

The proposals will generally increase the volume of work undertaken by solicitors and counsel on both sides in immigration and asylum cases. They will lead to an increase in applications being presented to the Court prematurely to avoid problems as to the time limit; to more petitions being presented in the hope that leave will be granted (and in particular to more poor-quality petitions); and to satellite litigation as to whether the petition should be permitted to proceed.
CHAPTER 6
Facilitating the modernisation of procedures in the Court of Session and sheriff courts

Replace the existing rule making powers with more general and generic powers

Q23. Do you agree that the new rule making provisions in sections 85 and 86 of the draft Bill will help improve the civil procedure in the Court of Session and sheriff courts?

Yes ☐ No ☐

Comments

Q24. Are there any deficiencies in the rule making provisions that would restrict the ability of the Court of Session to improve civil procedure in the Court of Session and sheriff courts?

Yes ☐ No ☐

Comments

Q25. What impact do you think these proposals will have on you or your organisation?

Comments

The creation of new powers in the Inner House of the Court of Session to sift and dispose of appeals with no reasonable prospects of success.

Q26. Do you agree that a single judge of the Inner House should be able to consider the grounds of an appeal or motion?

Yes ☐ No ☐

Comments

Q27. What impact do you think these proposals will have on you or your organisation?

Comments

The abolition of the distinction between ordinary and petition procedure in the Court of Session.
Q28. Do you agree that the distinction between ordinary and petition procedure should be abolished?

Yes ☐ No ☐

Comments

Q29. Do you foresee any unintended consequences for this change?

Yes ☐ No ☐

Comments

Q30. What impact do you think these proposals will have on you or your organisation?

Comments

New procedures for dealing with vexatious litigants.

Q31. Do you agree that the new procedure will ensure that courts are able to deal appropriately with vexatious litigants?

Yes ☐ No ☐

Comments

Q32. What impact do you think these proposals will have on you or your organisation?

Comments

Scotland-wide enforcement of interdict and interim orders

Q33. Do you agree that an order for interdict should be capable of being enforced at any sheriff court in Scotland?

Yes ☐ No ☐

Comments

Q34. Should interim orders and warrants have similar all-Scotland effect and be capable of enforcement at any sheriff court?
Q35. What impact do you think that these proposals will have on you or your organisation?

Comments
CHAPTER 7: THE PROPOSALS: Alternative Dispute Resolution

Q36. Do you think that ADR should be promoted by means of court rules?

Yes ☐ No ☐

Comments

Q37. What impact do you think these proposals will have on you or your organisation?

Comments
ASSESSING IMPACT

Equality

Q38. Please tell us about any potential impacts, either positive or negative, you feel any or all of the proposals in this consultation may have on a particular group or groups of people.

Comments

Business and Regulatory

Q39. Please tell us about any potential economic or regulatory impacts, either positive or negative, you feel any or all of the proposals in this consultation may have.

Comments

Legislation

Q40. Please give any comments on the legislation as set out in the Draft Bill. Are there any omissions or areas you think have not been covered.

Comments