



# FACULTY OF ADVOCATES

## RESPONSE

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### to the Court of Session Practice Note on Judicial Review

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The Faculty welcomes the opportunity to comment on the proposed Court of Session Practice Note in relation to the new Judicial Review rules. As the draft Practice Note largely follows the wording of the new rules and of the new sections 27A-D of the Court of Session Act 1988, our comments are relatively limited in scope.

1. Paragraph 8 contains an important indication that the Lord Ordinary who fixes an oral hearing on the issue of permission to proceed should normally produce a brief note setting out the Lord Ordinary's concerns about granting permission. In order for parties to properly prepare for the oral hearing which must be held within 7 days and will normally be limited to 30 minute in duration, it appears to the Faculty that the provision of a note from the Lord Ordinary will be necessary in all but the most straightforward of cases. Presumably the note would, at the very least, identify whether the Lord Ordinary was concerned as to whether the petitioner had a sufficient interest in the subject matter of the

application<sup>1</sup>, or whether the petitioner had real prospects of success<sup>2</sup> with some explanation for those concerns. It must be remembered that some oral hearings will take place as a form of review after the Lord Ordinary has refused permission. In that situation, the parties will have been provided with reasons for the refusal<sup>3</sup> and it is reasonable to assume that those oral hearings will be particularly focused on the reasons for refusal. By their nature, oral hearings ordered under rule 58.7(b) will differ insofar as a determination has not previously been made but the Faculty consider it desirable that oral hearings under rule 58.7(b) should, insofar as possible, proceed on a comparable basis where parties can focus on the particular issues concerning the court.

2. Paragraph 9 – This paragraph refers to the right to seek an oral hearing if the Lord Ordinary refuses permission. A petitioner who has been granted permission but subject to conditions, or on restricted grounds, also has a right to seek an oral hearing to review that decision<sup>4</sup>. To fully reflect the legislation, it is suggested that the words “*(or is granted permission subject to conditions or on particular grounds only)*” might be added after “*refused*”.
  
3. Paragraph 11 - The Faculty considers that the word “*to*” in the second line might be replaced with the word “*must*”. This better reflects the wording of the relevant rule. The final sentence is also, arguably, inaccurate. While a failure to notify does lead to the loss of a right to contest the petition, the relevant rule 58.6(3) does contain an overriding provision. To properly reflect the rule within the practice note, the final sentence could have the following words added at the end, namely “*unless the Lord Ordinary or Inner House otherwise direct.*”

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<sup>1</sup> Section 27B(2)(a)

<sup>2</sup> Section 27B(2)(b)

<sup>3</sup> rule of court 58.7(2)

<sup>4</sup> section 27C(1)(b)

4. Paragraph 13 – The Faculty considers that the final sentence in this paragraph could be usefully reformulated. In dealing with correspondence indicating a readiness or otherwise to proceed to a substantive hearing, the current draft paragraph refers to these letters “*to be sent by 7 days before the date fixed*”. As drafted, the practice note refers to a time limit by reference to the parties sending these letters. In the Faculty’s view, there would be merit if the paragraph focused on the receipt of the notification by the Court. Both paragraph 15 and 23(x) of the draft practice note reflect receipt by the court as being the important event for time periods. The Faculty suggests that paragraph 13 might be re-drafted such that the final sentence states “*to be received by the Court at least 7 days before the date fixed for the procedural hearing*”.
  
5. Appendix 4 – It is a minor point but the legislative reference for lodging a petition shown in the right hand column should be rule 58.3 rather than rule 58.2.

**30 August 2015**