

Scottish Parliament Social Justice and Social Security Committee

Wellbeing and Sustainable Development (Scotland) Bill

Written submission by UKELA Scotland, November 2025

In the context of the WSD Bill, provide an example of who might bring forward a judicial review and the process for doing so.

In order for a judicial review action to proceed, the applicant must obtain permission from the Court of Session and according to section 27B(2) of the Court of Session Act 1988: “the Court may grant permission ... for an application to proceed only if it is satisfied that—

- (a) the applicant can demonstrate a sufficient interest in the subject matter of the application, and
- (b) the application has a real prospect of success.

The test for standing is a broad one, but the courts will reject cases raised by a “mere busybody” who has no real interest in the case. The starting point for deciding who may bring forward a judicial review within the context of the WSD Bill is that it may be anyone that has an interest or may be affected by an unlawful or unreasonable decision, act or omission relating to the provisions for wellbeing and sustainable development.

The range of persons or organisations that may bring a case is wide and by analogy, Andrew Wightman MSP brought judicial review proceedings in the Scottish Court of Session in relation to Brexit: see e.g., *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62. For further examples please see: *Open Seas v Scottish Ministers* [2024] CSIH; *Alexandria Gallagher v The Scottish Information Commissioner* [2025] CSIH 26; *Caz Rae v Glasgow City Council* [2024] CSOH 74; *Fanning v Secretary of State for Work and Pensions* [2025] CSOH 105. There is nothing conceptually different from the provisions in the WSD Bill than those in other examples of judicial review. It is not necessary for an individual or organisation to have their property rights affected before they can establish standing.

In relation to the test for a “real prospect of success”, the Inner House of the Court of Session has said that: “The threshold is a relatively low one - whether the proposed grounds have a real prospect of success. The question

is whether there is a point of substance to be argued.” (AB v Scottish Public Services Ombudsman [2025] CSIH 8). The test is designed to exclude cases which are “manifestly devoid of merit” (Ineos Upstream Ltd v Scottish Ministers [2018] CSOH 15).

So, for instance, assuming s. 1 of the Act remains as in the Bill, and that a public body (e.g., a local authority or government department) must have due regard for the need to promote wellbeing and sustainable development, then if a body failed to do so in the exercise of its functions, that could be subject to judicial review. Experience is that challenges based on a failure to have regard to statutory considerations usually fail, since the body challenged simply has to show that it did recognise and think about the relevant consideration, even though it gave it little weight, but successful challenges do occur, e.g., where authorities have failed to comply with the public sector equality duty. Nevertheless, the focus is more procedural (how a decision was reached) than substantive (what the outcome was).

A second example of where judicial review could arise in the context of the WSD Bill would be a potential judicial review of the Future Generations Commissioner for Scotland once established. As a public body and what is referred to as a juristic person in the WSD Bill, Schedule 1, Part 1, para 1, the Commissioner would not have immunity from judicial review. Thus, if they did something outside of their powers e.g., undertook an investigation on a matter expressly outwith their remit under section 6(2) or proceeded without taking reasonable steps to notify those likely to be affected by an investigation as required by section 8(1). More technical failings, such as acquiring land without the approval of the Parliamentary corporation contrary to Schedule 1, Part 3, para 13 would also be subject to judicial review.