



Scottish Committee of the Administrative Justice & Tribunals Council

A Discussion Paper

Administrative Decisions made by Public Bodies in Scotland where there is no Right of Appeal against the Decision or where the Right of Appeal is Inaccessible or Inappropriate.

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ADMINISTRATIVE DECISIONS MADE BY PUBLIC BODIES IN
SCOTLAND WHERE THERE IS NO RIGHT OF APPEAL AGAINST
THE DECISION OR WHERE THE RIGHT OF APPEAL IS
INACCESSIBLE OR INAPPROPRIATE.

Chapter 1: Introduction

1.1 This discussion paper addresses an important issue for public policy and for those responsible for the provision of public services, namely the absence in some policy areas of accessible and appropriate means of challenging administrative decisions that users believe to be wrong.

1.2 The Administrative Justice and Tribunals Council (AJTC) has a statutory responsibility to keep the administrative justice system under review with the aim of making it 'fair, accessible and efficient'¹ and this responsibility extends to its Scottish Committee (SCAJTC). In drawing up a work plan for 2011, the SCAJTC considered a number of issues which were raised by the publication of its recent report *Tribunal Reform in Scotland: A Vision for the Future*² and which merited further consideration. Although the report did not give any consideration to administrative decisions made by public bodies in Scotland that affect the rights of individuals against which there is currently no right of appeal, this topic was considered to be of paramount importance for the future of administrative justice in Scotland and was selected as one of the projects that the SCAJTC wished to prioritise.

1.3 The AJTC has recently published a paper entitled *Principles for Administrative Justice*³, in which it proposes a set of seven principles that reflect an approach to administrative justice that is 'fair, accessible and efficient'. After stressing the importance of administrative agencies getting decisions right first time⁴, the report highlighted the importance of enabling people to challenge decisions and seek redress using procedures that are independent, open and appropriate for the matter involved. This is not only to ensure that wrong decisions are righted but also to enable administrative agencies to learn from their mistakes and to improve their standards of decision making. Where there are no procedures for challenging administrative decisions or where the procedures are inaccessible or inappropriate, wrong decisions will not be righted and administrative agencies will not be able to learn from their mistakes or to improve their standards of decision making.

¹ Tribunals, Courts and Enforcement Act 2007

² SCAJTC (2011) *Tribunal Reform in Scotland: A Vision for the Future*, January, available at <http://www.justice.gov.uk/ajtc/docs/tribunal-reform-scotland.pdf>

³ AJTC (2010) *Principles for Administrative Justice*, November, available at http://www.justice.gov.uk/ajtc/docs/principles_web.pdf

⁴ See also AJTC (2011) *Right First Time*, May, available at [http://www.justice.gov.uk/ajtc/docs/AJTC_Right_first_time_web\(7\).pdf](http://www.justice.gov.uk/ajtc/docs/AJTC_Right_first_time_web(7).pdf)

Chapter 2 : Background

2.1 Forty years ago, the Whyatt Report was set up by JUSTICE to enquire, *inter alia*, into the adequacy of the existing means for investigating the complaints against the decisions of government departments and other public bodies, where there was no tribunal or other statutory procedure available for dealing with them⁵. Whyatt started out from the position that it is always in the interests of an individual that there should be a tribunal that can give an impartial adjudication of an administrative decision and stated that individuals should be entitled to have an impartial adjudication of their disputes with authority unless there are over-riding considerations that make it necessary, in the public interest, for the government department or public body to retain responsibility for making the final decision. Whyatt noted that the initiative for establishing new tribunals rested (then as now) with the executive but felt that the principle of impartial adjudication should be applied uniformly and consistently. To achieve this end, the Report proposed that a standing body should keep the need for new tribunals under review and should make proposals for establishing new tribunals in suitable cases. It also noted that the Council on Tribunals, the predecessor of the AJTC, was in a good position to perform this function.

2.2 The principle of a general right to an appeal against administrative decisions with the onus placed on government to rebut that right where it is not in the public interest to assert it did not attract much support at the time and there is little evidence that support for it has grown since then. It was proposed by Adler and Bradley in a paper prepared for the Leggatt Review on Tribunals⁶ but it was not taken up in the Leggatt Report⁷. Nor was it mentioned in the subsequent White Paper on *Transforming Public Services: Complaints, Redress and Tribunals*⁸. However, the SCAJTC believes the principle, which informs this Discussion paper, to be a very important one.

⁵ JUSTICE (1961) *The Citizen and the Administration: the Redress of Grievances* (The Whyatt Report), London: Stevens.

⁶ Adler, Michael and Bradley, Anthony (2001) 'The Case for Systematic Reform and the Establishment of a Unified Administrative Tribunal' in Martin Partington (ed.) *The Leggatt Review of Tribunals: Academic Seminar Papers*, Bristol: The Bristol Centre of Administrative Justice, Faculty of Law, University of Bristol, 1-30 at 12.

⁷ Leggatt, Sir Andrew (2001) *Tribunals for Users: One system, One Service* (Report of the Review on Tribunals), London: The Stationary Office.

⁸ Department for Constitutional Affairs (2004) *Transforming Public Services: Complaints, Redress and Tribunals*, Cm 6243, London: HMSO.

Chapter 3: Aims and Methods

3.1 This Discussion paper sets out to identify administrative decisions made by Scottish government departments and public bodies where there is no right of appeal against the decision or where the right of appeal is inaccessible or inappropriate. The project was restricted to devolved decision making in order to reflect SCAJTC's primary concerns and to make the project more manageable. Since the identification of these decisions was, potentially, a rather time-consuming exercise, SCAJTC attempted to secure external funding for this project. The Nuffield Foundation agreed to fund the project and SCAJTC is pleased to record its gratitude to the Foundation.⁹

3.2 In the paper prepared for the Leggatt Review on Tribunals (referred to in para. 5 above), Adler and Bradley provided some examples of administrative decisions made by UK government departments and public bodies that could not be appealed to an independent tribunal by carrying out a quick examination of reports issued by the UK Parliamentary Ombudsman. It was evident from these reports that some people complained to the UK Parliamentary Ombudsman because there was no opportunity to appeal to a tribunal. The effectiveness of this approach suggested that we could use a similar approach in this project on administrative decisions made by Scottish government departments and public bodies. Since complaints against nearly all of these bodies fall within the remit of the Scottish Public Services Ombudsman (SPSO), we set out to systematically review recent complaints investigated by the SPSO and, in each case, to determine whether there was a right of appeal to a court or tribunal. A similar logic suggested that we should also review cases of judicial review in the Court of Session that dealt with devolved matters to ascertain whether applicants had resorted to judicial review because there was no other means of challenging the first-instance administrative decision.

3.3 Complaining to the SPSO and raising an action in the Court of Session are both important remedies but, in our view, neither of them constitutes an accessible or an appropriate means of challenging the majority of administrative decisions where those who are directly affected think that a mistake has been made. As far as access is concerned, before the SPSO can investigate a complaint, a complainant must have exhausted the initial decision maker's internal complaints procedure. Thus, the SPSO constitutes the third (or fourth) 'bite of the cherry' and many people give up before they get to that stage. In order to raise an action of judicial review, an applicant has to qualify for legal aid, which rules out the large majority of those who wish to challenge an administrative decision.¹⁰ As far as appropriateness is

⁹ The Nuffield Foundation is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the authors and not necessarily those of the Foundation. More information is available at <http://www.nuffieldfoundation.org>

¹⁰ For a discussion of the ways in which legal aid limits the number of actions of judicial review in Scotland, see Mullen, Tom, Pick, Kathy and Prossor, Tony (1996) *Judicial Review in Scotland*,

concerned, the SPSO investigates complaints that members of the public claim to have suffered injustice or hardship as a result of maladministration or service failure but, although maladministration and service failure may lead to 'wrong outcomes', most 'wrong outcomes' are not caused by maladministration or service failure. Judicial review is restricted to questions of 'illegality, irrationality and procedural impropriety' while tribunals have much wider powers to overturn administrative decisions. Tribunals can consider (a) errors of law, (b) errors of fact and (c) the incorrect or inappropriate exercise of discretion which falls short of the extremely high test of unreasonableness that would allow a court to quash a decision on judicial review.¹¹ Since most administrative grievances are about (b) and (c) rather than (a) and judicial review is limited to (a), it follows that it is not an appropriate mechanism for resolving the majority of administrative disputes.

3.4 To complement our reviews of SPSO and judicial review cases, we also interviewed a small sample of expert informants, who included two former Deputy Ombudsmen, three current complaints reviewers at SPSO, a university admissions officer, a law centre lawyer, a senior member of staff at the Scottish Legal Aid Board, and a number of academics and professionals.

Chichester: John Wiley, chapter 5.

¹¹ This very high standard was set out in *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 1 KB 223, which held that a decision is unreasonable only 'if it is so unreasonable that no reasonable person acting reasonably could have made it'.

Ombudsman Cases

3.5 SPSO investigations that are reported to the Scottish Parliament can be accessed on the Scottish Parliament's website. In addition, summaries of decisions, containing information about the body complained against and the nature of the complaint are available on the SPSO website.

3.6 In the year 2009-2010, the SPSO received 3,307 complaints and 903 enquiries. As shown in Table 1, the number of complaints has increased steadily over the last four years. Over this period, the number of enquiries has declined.

Table 1: SPSO Annual Statistics, 2006-2007 to 2009-2010

year	enquiries	complaints	total
2009-2010	903	3,307	4,210
2008-2009	1,165	2,953	4,118
2007-2008	1,779	2,418	4,197
2006-2007 ¹²	1,685	2,543	4,228

Source: *SPSO Annual Statistics – Top level cases received*, available at <http://www.spsso.org.uk/files/webfm/Stats/2010-11/Top%20Level%202010-2011%20v.1.0.pdf>

3.7 Of the total of 4,210 cases in 2009-2010, 669 cases (comprising 647 enquiries and 22 complaints) were deemed to be out of jurisdiction (OOJ). Table 2 shows that the remaining 3,541 cases were drawn from the following sectors:

Table 2: SPSO cases received by sector, 2009-2010

Sector	Enquiries	Complaints	Total
local authorities	125	1,734	1,859
health	45	859	904
housing associations	14	323	337
Scottish Government and devolved administration	22	241	263
further and higher education	13	91	104
other	37	37	74
total	256	3,285	3,541

Source: *Source: SPSO Annual Statistics – Cases received by sector*, available at <http://www.spsso.org.uk/files/webfm/Stats/2010-11/Top%20Level%202010-2011%20v.1.0.pdf>

¹² Since the basis for compiling statistics was changed in 2007, the actual figures for 2006-2007 have been adjusted to make them comparable to the statistics for later years.

It should be noted that the SPSO took over responsibility for dealing with prisoner complaints from the Scottish Prisons Complaints Commissioner in October 2010. However, since the statistics relate to the year 2009-2010, they do not include prisoner complaints. That said, the largest number of complaints related to local authorities and concerned (in descending order) housing (434), planning (265), social work – including community care (199), finance (142), education (94), roads and transport (94), legal and administration (90), recreation and leisure (73), environmental health and cleaning (71) and building control (36).

3.8 When the SPSO receives a complaint, a check is made to ensure that it is within jurisdiction and ‘mature’, i.e. that the complainant has exhausted the initial decision maker’s internal complaints procedure. If it is, it is passed to a complaints reviewer who will look into the complaint. Although the number of complaints that receive a ‘full investigation’ as defined in the SPSO Act 2002 is only a small fraction of the number of complaints received, this gives a misleading impression of the SPSO’s work.

3.9 Until recently, the SPSO operated a process called ‘examination’ to deal with cases that were within jurisdiction and ‘mature’ but that were either relatively straightforward to investigate or raised no issues of public interest. The examination procedure was basically the same as the investigation procedure except that it culminated in a decision letter rather than a report to the Scottish Parliament. Complaints that were ‘examined’, like cases that were ‘investigated’ included recommendations and comprised a mix of upheld and not upheld cases. The only difference between complaints that were ‘examined’ and those that were ‘investigated’ is that, in the case of the former, there was no formal report to Parliament. In 2009-2010, 850 complaints were ‘examined’ and 134 were ‘investigated’.¹³

3.10 More recently, the situation has been simplified and rationalised a little: the examination stage has been got rid of and all cases that are within jurisdiction are now said to be ‘investigated’; more minor cases are closed by decision letters to the parties and more important cases by a report to the Scottish Parliament. The SPSO still uses the term ‘full investigation’ for cases that are reported to Parliament, but this does not reflect the fact that cases that are closed by a decision letter and cases that are closed by a report are investigated to the same depth and with the same thoroughness. The difference is solely in the reporting process.

3.11 In 2009-2010, only 143 of the total of 3,541 complaints received were subject to a full investigation. Of these, 9 were discontinued and reports were issued in 134 cases. Of these, the complaint was fully upheld in 46 cases, partially upheld in 65 cases and not upheld in 23 cases. It is reports of these cases that can be accessed on the Scottish Parliament’s and the SPSO’s websites.

¹³ See SPSO (2010) *Annual Report 2009-2010*, 11.

3.12 We also interviewed a small sample of expert informants, who included two former Deputy Ombudsmen, three current complaints reviewers and a number of other staff at SPSO, who were asked to identify areas from their own experience where there is no practical possibility of appealing to a court or tribunal. We also reviewed all the cases of judicial review that dealt with devolved matters which appeared on the Court of Session website in 2009-2011. Finally, having identified a number of administrative decisions where there did not appear to be an accessible or appropriate right of appeal from the first instance decision, we followed this up by interviewing individuals who were in a position to check and comment on our findings. These included a number of academic experts and practitioners.

Judicial Review Cases

3.13 Publication of *Civil Judicial Statistics* was suspended between 2002 and 2008 and, as a result, there is no statistical information on the number of actions of judicial review that were initiated and disposed of during this period.¹⁴ As shown in Table 3, about 200 actions were disposed of in 2008-09 and in 2009-10.

Table 3: Judicial Review Statistics, 2008-2009 and 2009-2010

year	number initiated	number disposed of
2008-2009	232	212
2009-2010	378	227

Source: *Statistical Bulletin: Crime and Justice Series: Civil Judicial Statistics Scotland, 2008-09 and 2009-10*, Tables 3a(i) and 3b(i).

3.14 Table 4 below indicates that by far the largest number of cases initiated (210 out of 378 or 55.5 per cent) and cases disposed of (168 out of 227 or 74.0 per cent) related to immigration and asylum and are therefore outside the scope of this study. Particular attention was given to the 'other' category.

Table 4: Judicial Review Statistics, 2009-2010

total	initiated	disposals		
		unopposed	opposed	total
Environmental	0			0
Housing	1		1	1
Immigration and Asylum	210	3	165	168
Licensing	1		1	1
Planning	10	2	5	7
Prisons	107	1	17	18
Social Security	0			0
Other	49		32	32
total	378	6	221	227

Source: *Statistical Bulletin: Crime and Justice Series: Civil Judicial Statistics Scotland, 2008-09 and 2009-10*, Table 3b(i).

¹⁴ Statistics covering the years 2003-2007 were published in Annex D of the Consultation Paper produced by the Scottish Civil Courts Review in 2007. Unfortunately, the Consultation Paper is no longer available on the internet.

3.15 Using a combination of these three methods (reviewing SPSO cases, interviewing expert informants and reviewing judicial review cases), we identified a number of devolved policy areas where there is no right of appeal against routine administrative decisions or where the procedures that can be used to challenge them are inaccessible or inappropriate. In some other policy areas, we considered that the procedures that can be used to challenge such decisions satisfied the tests of accessibility and appropriateness.

Chapter 4: Findings

4.1 The findings set out below deal with mechanisms for challenging routine administrative decision making in community care, higher education, housing, legal aid and planning. They are set out in tabular form and, in each case, specify the type of decision, the relevant statutes and/or regulations, the identity of the initial decision maker and the available modes of redress. In the first four policy areas, there is no accessible or appropriate mechanism for challenging administrative decisions. In the fifth policy area, planning, there is an accessible mechanism in that those who make an application for planning permission which is turned down can ask for it to be reviewed by a Local Review Board. However, for reasons that are set out below, we do not think this provides an appropriate form of redress.

4.2 We also looked at mechanisms for challenging routine decision making in health care. Patients' rights in relation to health care are pretty well protected in the NHS.¹⁵ If someone is unhappy with their GP or health centre, they can register with another one and, if they can't find one, one should be found for them; if they are unhappy about the diagnosis or the treatment plan proposed by one hospital consultant, they can ask for a second opinion; and if they are unhappy about the standard of care that is provided for them – by their GP, in hospital or in the community – or about the length of time they have to wait for treatment or about what types of treatment or drugs can be provided on the NHS, they can complain by using the NHS Complaints Procedure.

4.3 It has been suggested second opinions rarely lead to different outcomes both because professionals tend to make the same diagnosis and recommend the same treatment in a given case, but also because they may be reluctant to disagree with their colleagues. However, since second opinions are the characteristic means of redress for decisions involving the exercise of professional judgement,¹⁶ their availability provides an important safeguard for dissatisfied patients. Apart from clinical judgements, most of the decisions that patients might wish to challenge can, quite appropriately, be dealt with under the complaints procedure. Complaints are investigated by complaints officers. According to the NHS Complaints Procedure Guidance¹⁷, this investigation may involve a face-to-face meeting with the member(s) of staff concerned and, where it would be helpful, conciliation may be offered. It should normally be completed within 20 days. If the patient making the

¹⁵ Under the Patient's Rights (Scotland) Act 2011, Scottish Ministers must, within six months of the coming into force of the Act on 31 March 2011, publish a document to be known as the *Charter of Patient Rights and Responsibilities* setting out the rights and responsibilities of patients and health care providers. For an account of patients' right in Scotland, see also Citizens Advice Scotland, *NHS Patients' rights – Advice Guide from Citizens Advice*, available at http://www.adviceguide.org.uk/scotland/...scotland/nhs_patients_rights_scotland.htm

¹⁶ See Mashaw, Jerry L (1983) *Bureaucratic Justice: Managing Social Security Disability Claims*, New Haven: Yale University Press, 26-29 and Adler, Michael (2006) 'Fairness in Context', *Journal of Law and Society*, 33(4), 615-638.

¹⁷ available at <http://www.show.scot.nhs.uk/publications/me/complaints/docs/1guidance010405.pdf>

complaint is still dissatisfied, they can complain to the SPSO. Although one might regret the absence of an independent element in the investigation of a complaint until it reaches the SPSO, these arrangements seem to work well. Thus, the combination of second opinions and the NHS Complaints Procedure would appear to provide accessible and appropriate means of redress for the dissatisfied patient.

4.4 We looked briefly at the mechanisms for challenging administrative decisions relating to agricultural grants and subsidies but, following the acceptance by the Scottish Government of the findings of an independent review of the EU Agricultural Subsidies Appeals Procedure in 2008,¹⁸ all decisions concerned with agricultural grants and subsidies can now be appealed to the to the Scottish Land Court. We are satisfied that, since 2009, the procedures for appealing against administrative decisions relating to EU agricultural grants and subsidies pass the two tests of accessibility and appropriateness.

¹⁸ See Scottish Government, *EU Rural Payment Appeal Procedure*, available at <http://www.scotland.gov.uk/Topics/farmingrural/Agriculture/grants/Standardsservices/Appeals/EURuralPaymentsAppeal>

Community Care

4.5 There are no independent, external appeal procedures, apart from judicial review, that individuals who are dissatisfied with the outcome of a community care decision, can use to challenge the decision.

Type of decision	Relevant statutes/regulations	Identity of initial decision maker	Modes of redress
Assessment of Care Needs.	Social Work (Scotland) Act 1968, and NHS and Community Care (Scotland) Act (1990). Community Care (Assessment of Needs) (Scotland) Regulations 2002 made under the Community Care and Health (Scotland) Act 2002. There is also published guidance on the national standard eligibility criteria and waiting times.	Decisions made by individual local authority social work or health care staff who carry out an 'Assessment of Care Needs' (also known as a 'Community Care Assessment' or a 'Joint Needs Assessment' or a 'Single Shared Assessment', the latter two in relation to joint working arrangements with health and other bodies.	Every local authority must have a complaints procedure which individuals can use to if they are unhappy with the way in which they were treated. Some local authorities have generic complaints procedures, others have 'functional' procedures, e.g. for social work. If dissatisfied with the outcome, individuals can complain to an (independent) Complaints Review Committee. If still dissatisfied, they can complain to the SPSO.
Assessments of Carers' needs.	Carers Recognition and Services Act 1995 and Community Care and Health Services Act 2002.	Decisions made by individual local authority social work or health care staff.	
Decisions about services that are provided.	Made by comparing assessed care needs with local authority's eligibility criteria for community care services.	Decisions made by individual local authorities	
Whether care services qualify as 'free personal care'.	Community Care and Health (Scotland) Act 2002. Schedule 1, introduced by section 1(1)(c), sets out which items are ordinarily not charged for.	Decisions made by individual local authorities.	
Financial assessment (for those personal and nursing care services that have to be paid for), including assessment of residential care	Health and Social Services and Social Security Adjudication Act 1983, which contains the 'deprivation of capital' rules – often the most	Decisions made by individual local authorities who will determine how much an individual has to pay.	

<p>contribution and, in relation to care at home, anything which is not 'free personal care' including services for those under 65.</p>	<p>contentious. Various other bits of legislation deal with other matters – these are hugely complex and include things like the treatment of a partner's income.</p> <p>Some financial decisions are up to local authorities e.g. how much to charge for domestic services that don't count as free personal care, but certain rules, e.g. personal allowances and capital limits for residential care, are national. They are amended annually by amending regulations.</p>		
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4.6 It should be noted that some local authorities have what they call an 'appeal' but this is really an internal administrative review. The independent element in community care complaints procedures has been addressed by the courts in terms of whether Complaints Review Panels in England are compatible with Article 6 of the ECHR. The Court of Appeal has held that, although the panel is not in itself independent, the decision making procedure, along with the availability of judicial review, is compatible with Article 6¹⁹. Although this case confirmed that Complaints Review Panels do not have to be fully independent of the council concerned, a report by the SPSO²⁰ highlights one of the problems that can arise when there is no independent appeal procedure. The case concerned a dispute about financial assessment for residential care, which had not been to a Complaints Review Committee and where neither the complainant nor his solicitor had been informed of this option. The Ombudsman said:

"I am concerned again that the current system is confused and inconsistent throughout Scotland and in particular that there is no recognised, independent, appeals process for such financial assessments and decisions". (SPSO 2006, para. 36).

In making this statement, the Ombudsman recognised that, although councils have a statutory requirement to arrange hearings of the Complaints Review Committee, in this case the council had failed in its statutory duties. While this may have been an isolated incident, it raises the issue of whether an 'independent' review can be considered to be independent if the authority complained about controls the procedure.

4.7 The Local Government Ombudsman (LGO) in England has also raised concerns about the operation of Complaints Review Panels, arguing that many complainants' dissatisfaction with the process often arises when local authorities fail to implement the recommendations of review panels²¹ (White 2007). A number of recent cases illustrate the problem. In one LGO report, maladministration was found where the council had no mechanism 'to resolve the conflict between what the Grants Section would fund and what the community occupational therapist and the complainant felt was necessary to meet his wife's needs',²² and it was also found when the council 'delayed responding to the Review Panel findings, and disregarded them'.²³

¹⁹ *R v Dorset CC, ex parte Beeson* [2002] EWCA Civ 1812.

²⁰ See SPSO (2006) *East Dunbartonshire Council Report Number 20050353* and Gulland, J. (2009) 'Independence in complaints procedures: lessons from community care', *Journal of Social Welfare and Family Law*, 31(3), 59-72.

²¹ White, J. (2007) 'Social Welfare and Family Law Issues and the Local Government Ombudsmen for England', *Journal of Social Welfare and Family Law*, 29(1), 77-86.

²² Local Government Ombudsman (2007) *Leeds City Council 05/C/13157*, available at <http://www.lgo.org.uk/complaint-outcomes/housing/housing-archive-2007-08/leeds-city-council-05c13157/>

²³ Local Government Ombudsman (2008) *Birmingham City Council 05/C/18474*, available at <http://www.lgo.org.uk/complaint-outcomes/social-care/social-care-archive-2007-08/birmingham-city-council-05c18474/>

4.8 Recognising that the current arrangements may not be satisfactory, the Law Commission's review of social care law in England and Wales included a review of redress mechanisms including 'consideration of whether there is a need to establish a tribunal to provide independent merits review of local authority community care decisions'.²⁴ In an earlier 'Scoping Report',²⁵ the Law Commission put forward the view that the efficacy of the legal structures in place for complaining about, and seeking redress for, failures in decision making and service provision by local authorities should be considered. However, although the Department of Health approved the scoping report as providing an agenda for the Law Commission's substantive law reform project, the one area they did not want the Law Commission to cover was the system of redress. Accordingly, the Law Commission's consultation paper did not examine the efficacy of the complaints and redress system, or put forward any proposals on this issue. In spite of this, the issue of complaints and redress came up at many of the consultation events organised by the Law Commission.²⁶ Many of those who attended argued that a community care tribunal was needed to provide a merits review of local authority decisions in this area.

²⁴ Law Commission (2011), *Adult Social Care*, HC 941, London: The Stationery Office, available at <http://www.justice.gov.uk/lawcommission/publications/1460.htm>

²⁵ Law Commission (2008) *Adult Social Care Scoping Report*, available at http://www.lawcom.gov.uk/docs/adult_social_care_scoping_report_2008.pdf

²⁶ Law Commission (2011), *op. cit.*, at 294.

Higher Education
(Tuition fees and financial support for students)

4.9 There are no independent, external appeal procedures, apart from judicial review, that students can use to challenge their tuition fee status or the assessment of their financial support.

Type of decision	Relevant statutes/regulations	Identity of initial decision maker	Modes of redress
Tuition fee status (for university students)	Education (Fees and Awards) (Scotland) Regulations 2007.	Decisions about fee status, which determine the level of tuition fee paid by the student, are made by individual universities.	Dissatisfied applicants may request an internal review of the decision. At Edinburgh University (EU), there are two levels of internal review, first by the Fees and Student Support Manager and then by the Head of Scholarships and Student Funding Services.
Type of decision	Relevant statutes/regulations	Identity of initial decision maker	Modes of redress
Financial support for students in higher education	Education (Fees, Awards and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2009 and a number of other regulations governing student support.	Decisions about financial support to students undertaking a course of higher education, taken by Student Awards Agency for Scotland (SAAS).	Dissatisfied applicants may 'appeal' about outcome of an application or 'complain' about the way in which it was made. 'Appeals' consist of a two-tier internal review, first by a senior member of staff and then by the Chief Executive. Complaints have the same structure but those who are dissatisfied with the CEO's decision can complain to the SPSO.

4.10 Regarding the determination of tuition fee status, The Head of Undergraduate Admissions in the College of Humanities and Social Sciences at Edinburgh University told us that he was aware that individual universities sometimes made different decisions on the same information and noted that there is no mechanism for dealing with this. Students who do not qualify as 'home students' at one university

sometimes apply to another one.

4.11 According to a complaints investigator specialising in HE complaints at SPSO, few if any complaints about tuition fee status find their way to the SPSO. He pointed out that there is some overlap between appeals and complaints and that a few appeals do find their way to the SPSO. He felt this was unsatisfactory and checked with the Scottish Public Services Ombudsman, who said he would welcome the establishment of an independent appeals body for dealing with them.

Housing

4.12 There are no independent, external appeal procedures, apart from judicial review, that tenants can use to challenge a number of important housing decisions.

Type of decision	Relevant statutes/regulations	Identity of initial decision maker	Modes of redress
Assessment of housing need and placement on a waiting list	Sections 9 and 10 of Housing (Scotland) Act 2001.	Decisions are taken by housing officer <input type="checkbox"/> everyone aged 16 or over is entitled to apply to a social landlord to have their needs assessed and their application held on a housing list.	Every social landlord must have a complaints procedure that people who are unhappy about the way in which they have been treated can use. However, there is no right of appeal, apart from judicial review, against a refusal to admit an applicant to a housing list, the assessment of their needs or the failure to allocate them suitable accommodation.
Allocation of tenancy	Sections 9 and 10 of Housing (Scotland) Act 2001.	Decisions are taken by housing officers. The allocation of housing is based on a 'points system' <input type="checkbox"/> applicants have the right to refuse an offer of housing but, if they refuse one or more 'reasonable' offers within a given period, no further offers will be made for a specified period.	
Provision of housing for those who are homeless or threatened with homelessness.	Part 2 of the Housing (Scotland) Act 1987 as amended the Housing (Scotland) Act 2001 and the Homelessness etc (Scotland) Act 2003	Decisions are taken by homelessness officers. Anyone who is homeless or threatened with homelessness can apply to their local council, who will assess their situation and decide whether they are eligible for assistance, and, if so, whether they pass the four homelessness tests ²⁷ This will determine the kind of help the council is legally obliged to offer.	Every local authority must have a complaints procedure that people who are unhappy about the way in which they have been treated can use. There is no right of appeal, apart from judicial review, against a refusal to provide assistance or accommodation to a homeless person. ²⁸

²⁷ Homelessness, priority need, intentionality and local connection.

²⁸ The position in Scotland differs from that in England where, under s204 of the Housing Act 1996, an individual who is dissatisfied with the outcome of a review can appeal to the county court on a point of law. This includes decisions about whether someone is eligible for assistance, homeless or threatened with homelessness, in priority need, intentionally homeless or has a local connection, and whether the accommodation the council has provided is suitable.

4.13 Everyone aged 16 or over and who is an EU national is entitled to apply to a local authority or a registered social landlord (RSL)²⁹ for housing, have their needs assessed and have their application held on a housing list. Asylum seekers are entitled to be admitted to a housing list but have no right to be given a secure tenancy. However, individual RSLs are not required to maintain a housing list and may, for example, give 100 per cent nomination rights to a local authority. The use of common waiting lists between RSLs has complicated these procedures. Applicants may be removed from the housing list if they repeatedly fail to respond to a request for information in connection with the annual review of the housing list or to other correspondence, or are suspended e.g. for significant, outstanding rent arrears or for anti-social behaviour. In these circumstances, they will not be offered accommodation even if they demonstrate housing need. Cases can be reconsidered by the landlord but there is no independent right of appeal.

4.14 Traditionally, allocation of housing has been determined by points systems that reflected the circumstances of those on waiting lists, with properties being offered first to those with the most points. Applicants can express preferences in relation to area and property type but allocation decisions are still largely points-based. Some local authorities and RSLs have now, to varying extents, introduced a 'choice' element into allocation procedures, whereby applicants can apply to specific landlords or in some areas for specific properties. Although applicants may not be happy with the assessment of their housing needs, with the housing they are offered or with the fact that they are not offered housing that they regard as appropriate, and may complain about the way in which they were treated, they cannot challenge these decisions directly.

4.15 In Edinburgh, there appears to be a peculiar situation in which there is no right of appeal against the standard of work carried out where the City Council has issued a statutory notice, the costs of the work or the apportionment of costs.³⁰ The City Council has had local legislation available to it since 1967 to enable it to intervene to carry out repairs to tenements when owners fail to reach agreement. The 1967 Edinburgh Corporation Order was replaced by the City of Edinburgh District Council Confirmation Order Act in 1991. At that time, following the abolition of domestic rates on 1 April 1989, there was no readily accessible database of owners and problems with updating the database can result in owners knowing literally nothing about the work until it starts. A second issue is that the right of appeal of the sheriff is very limited and occurs at the very start of the process. This situation has resulted in a number of complaints to the SPSO³¹. The SPSO is

²⁹ Registered Social Landlord is the technical name for social landlords who are registered with the Tenant Services Authority. They are government-funded not-for-profit organisations which work with local authorities to provide affordable housing. Most of them are housing associations, but they also include trusts, co-operatives and companies.

³⁰ We are indebted to a Complaints Reviewer at SPSO for drawing our attention to this situation.

³¹ See, for example, the SPSO's Investigation Reports on the following complaints: *City of Edinburgh Reports* 200802060, 200802077 (August 2009); *City of Edinburgh Report* 200802763 (September 2009);

also aware of issues raised by tenure diversification and participation that have led to new patterns of accountability. When appeals have been made, the test of 'ultimate responsibility' is used but this is complex especially in relation to, for example, shared ownership and tenant or community organisations.

4.16 In a paper published by the Chartered Institute of Housing in Scotland,³² O'Carroll and Scott noted that many of the rights and duties contained within the secure tenancy regime in Scotland are not associated with any form of appeal or any method of dispute resolution. These include but are not limited to rights and duties relating to the assessment of housing need, placement on a waiting list, the allocation of tenancies and applications under homelessness legislation that were considered above.³³ In these cases, the only means of challenging the decision of the landlord is judicial review in the Court of Session. Because judicial review is very formal and, in the absence of legal aid, very expensive, relatively few cases are brought (see Tables 3 and 4 above). O'Carroll and Scott argued that new primary legislation which would create rights of appeal where none currently exist should be introduced, and favoured taking all housing cases out of the sheriff court and establishing a specialist housing tribunal with jurisdiction over a wide range of housing issues. O'Carroll recently reiterated this view in his response to Consultation by the Scottish Civil Courts Review³⁴ However, it was not embraced by the Review Team, which recommended that housing disputes should come under the jurisdiction of the (third-tier) District Judge,

4.17 The SPSO is also aware of issues raised by tenure diversification and participation that have led to new patterns of accountability. When appeals have been made, the test of 'ultimate responsibility' is used but this is complex especially in relation to, for example, shared ownership and tenant or community organisations.

City of Edinburgh Report 200801344 (November 2009); and *City of Edinburgh Report 200903096* (September 2010).

³² O'Carroll, Derek and Scott, Suzie (2004) *A Housing Tribunal for Scotland: Improving Rented Housing Dispute Resolution*, Edinburgh: Chartered Institute of Housing in Scotland, available at <http://www.cih.org/scotland/policy/resproject014.pdf>

³³ They also include disputes over repairs, access for inspections and repairs, sub-letting, joint tenancies, rent levels, service charges and tenancy succession.

³⁴ O'Carroll, Derek (2008) *Response to Scottish Civil Courts Review Consultation*, available at http://www.scotcourts.gov.uk/civilcourtsreview/Responses_to_the_Consultation_Paper/O/Derek_OCarroll.pdf

Legal Aid

4.18 There is no independent, external appeal procedure, apart from judicial review, that individuals can use to challenge the refusal of Advice and Assistance, Civil Legal Aid or Criminal Legal Aid.

Type of decision	Relevant statutes/regulations	Identity of initial decision maker	Modes of redress
Applications for advice and assistance (A&A), including assistance by way of representation (ABWOR)	The Legal Aid (Scotland) Act 1986 and the Advice and Assistance (Scotland) Regulations 1996 and 2003.	Solicitors have to satisfy themselves that clients are eligible. In some cases, ABWOR requires pre-approval from SLAB.	If one firm of solicitors decides that an applicant is ineligible for A&A, the only recourse that the applicant has is to approach another solicitor. If SLAB does not give pre-approval for ABWOR, an individual can ask for the decision to be reviewed. If new information is supplied, the original decision-maker will reconsider it, if not, a more senior member of staff will do so.
Applications for civil legal aid.	The Legal Aid (Scotland) Act 1986 and the Civil Legal Aid (Scotland) Regulations.	A SLAB solicitor decides questions of probable cause and reasonableness ³⁵ and a member of staff at SLAB assesses financial eligibility.	Individuals whose application for civil legal aid is turned down can ask for the decision to be reviewed. If it concerns the merits test, it will be decided by a SLAB solicitor. If it concerns financial eligibility, it will either be decided by the original decision-maker (if new information is supplied) or by a more senior member of staff (if not). A reconsidered decision could be reviewed again by SLAB's Legal Services Case Committee and thereafter by SLAB's Legal Services Policy Committee.

³⁵ Except in sensitive, high profile or high value cases, or if the applicant wishes to raise an action in the UK Supreme Court, where the merits test is decided by SLAB's Legal Services Cases Committee.

Type of decision	Relevant statutes/regulations	Identity of initial decision maker	Modes of redress
Applications for criminal legal aid in summary proceedings	The Legal Aid (Scotland) Act 1986 and the Criminal Legal Aid (Scotland) Regulations 1996.	A member of staff at SLAB decides whether granting legal aid is in the interests of justice and whether refusal would result in undue hardship.	If requested, SLAB will reconsider an application. If new information is supplied, the original decision-maker will reconsider it; if not, a more senior member of staff will do so. If it concerns the interests of justice, it can only be refused if authorised by a SLAB solicitor.
Applications for criminal legal aid in solemn proceedings. (The power to grant legal aid in solemn proceedings was transferred from the courts to SLAB on 25 November 2010).	The Legal Aid (Scotland) Act 1986 and the Criminal Legal Aid (Scotland) Regulations 1996.	A member of staff at SLAB decides whether refusal would result in undue hardship.	If requested, SLAB will reconsider an application. If new information is supplied, the original decision-maker will may grant legal aid if satisfied that the required information has now been supplied; if not the decision must be referred to a more senior member of staff.

4.19 In addition to applications for the main types of legal aid which are summarised in the table above, SLAB considers applications for increases in authorised expenditure on advice and assistance (including ABWOR); and sanction for employing counsel, using expert witnesses or incurring 'work of an unusual nature likely to involve unusually large expenditure'. In these cases, there are somewhat different arrangements for reconsideration and review. These are very elaborate and all of them involve varying forms of internal review rather than appeals to an external forum that is completely independent from SLAB

4.20 SLAB publishes a series of information leaflets for members of the public. Leaflet 7 (Complaints and comments about the Scottish Legal Aid Board)³⁶, describes its internal complaints procedure but makes it clear, in paras. 1 and 9, that this should not be used to challenge decisions concerning applications for legal aid. Complaints about the service provided by legal practitioners are handled by the independent Scottish Legal Complaints Commission.

4.21 Individuals whose application for legal aid is turned down can, as described above, ask for the decision to be reviewed internally. Para. 9

³⁶

Available at http://www.slab.org.uk/getting_legal_help/pdf/complaints_and_comments_about_slab_2009.pdf

makes it clear that the only way to take the matter further is by raising an action of judicial review³⁷. The problem here is that an applicant would need legal aid to do so. Where an applicant seeks legal aid to judicially review SLAB's decision to refuse it in the first place, the merits test is decided by SLAB's Legal Services Cases Committee. If this Committee decides against the applicant, the matter can be referred to the Sheriff Principal of Lothian and Borders, whose decision is final.

4.22 Leaflet 8 (Guidance for opponents in civil legal aid cases)³⁸ describes the procedures individuals should adopt if they believe that their opponent in a civil action should not have been granted legal aid. They may make representations to SLAB if they believe that their opponent is not eligible financially for legal aid, there is no legal basis for the case or it is unreasonable to use public funds for the case. SLAB will then decide whether it should grant, refuse or withdraw the opponent's legal aid.

³⁷ In recent years, there have been a number of judicial reviews of legal aid decisions, e.g. *DW v Scottish Ministers* [2009] CSOH 151, *McAllister v Scottish Legal Aid Board* [2010] CSOH 112, and *EM(AP) v Scottish Legal Aid Board* [2011] CSOH 134.

³⁸ Available at available at http://www.slab.org.uk/getting_legal_help/pdf/1_opponents_2008.pdf.

Planning

4.23 There is an external appeal procedure that individuals who are dissatisfied with the outcome of a planning decision, can use to challenge it. However, it is not independent and gives scant attention to individual cases.

Type of decision	Relevant statutes/regulations	Identity of initial decision maker	Modes of redress
Decisions on planning applications, or a failure to take such decisions (including those appeals recalled for a decision by Scottish Ministers); Enforcement notices; Notices requiring replacement of trees; Amenity notices; Refusals of certificates of lawful use or development ³⁹	The Planning (Scotland) Act 2006 and the The Town and Country Planning (Appeals) (Scotland) Regulations 2008.	Planning officers	Planning decisions can be appealed to a Local Review Board (LRB), which is a committee of the (local) planning authority.

4.24 Considerable changes to local planning procedures were introduced by the Planning (Scotland) Act 2006. Planning applications are now divided into three-tiers, known as 'national developments', 'major developments' and 'local developments'. 'National developments' relate to the long term strategy for the development of Scotland over the next 25 years and are reviewed by the Scottish Government every four years; 'major developments' are developments that exceed the size limits or meet one of the other criteria set out in the 'Hierarchy' Regulations; while 'local developments' comprise other developments that require planning permission but fall below the size limits for 'major developments'. Our major concern here is with 'local developments'.

4.25 Decisions about whether or not to grant planning permission are taken by planning officers in the planning authority⁴⁰ with a right of review to a Local Review Body (LRB) comprising at least three members of the authority. The Town and Country Planning (Schemes of Delegation and Local Review Procedure Regulations) (Scotland) Regulations 2008 do not define an upper

³⁹ There are a small number of appeals against other decisions which are unaffected by the 2006 Act because the arrangements for dealing with them are contained in other legislation. These include appeals against decisions in relation to applications for: listed building consent; conservation area consent; advertisement control; and hazardous substances consent. The Scottish Government has stated that it intends to formally align these appeals with the procedures set out in the Town and Country Planning (Appeals) 'when an opportunity arises to review the relevant primary legislation'.

⁴⁰ There are 34 local planning authorities and five strategic planning authorities in Scotland

limit on the number of members that should comprise the review body: its size is for the planning authority to determine.⁴¹ The procedure for deciding how cases should be considered is for the LRB itself to determine and there is no automatic right for the applicant, or anyone else, even if they are affected by the planning decision, to make oral representations. Requests for review may be made in writing or online, no fees are charged and meetings of the LRB take place in public. The right to request a review of a planning decision in Scotland is only available to the applicant and does not apply to third parties even if they are directly affected by the planning decision.

4.26 In its response to the Scottish Government's consultation paper on the modernisation of the planning system, the Scottish Committee of the Council on Tribunals (SCCT), the predecessor of the Scottish Committee of the Administrative Justice and Tribunals Council (AJTC) made it clear that, although it was content with the majority of proposals, it was concerned that LRBs as an appeal body went 'against the grain of necessary reform for tribunals in Scotland where it is generally accepted that the principle of independence of the tribunal from the decision maker is essential and where independent and impartial members who have been properly trained are required', that 'no provision has been made to place the training of panel members on a formal footing' and that 'no provision has been made for an automatic right to an oral hearing other than to the Court of Session'.⁴²

4.27 Whenever the LRB wishes to hear oral evidence, the rules set out in Schedule 1 to the Town and Country Planning (Scotland) Appeals Regulations 2008 apply. Hearings are not intended to be adversarial and are expected to take the form of a discussion led by the LRB. Only exceptionally is it envisaged that cross-examination will be required in order to provide a thorough examination of a particular issue.

4.28 Statistics prepared by the Scottish Government Directorate for the Built Environment (SGDBE) for the second LRB Forum, held on 22 March 2010, indicate that most LRBs heard appeals against refusals of planning permission for the erection of dwelling houses (50 per cent); house alterations and extensions (25 per cent) and change of use (10 per cent); most were decided on the basis of the written submission alone, site visits were conducted in about one third of the appeals but hearings were very uncommon indeed. One third of the appeals were allowed and two thirds dismissed.

4.29 It was expected that the arrangements for reviewing planning decisions that were put in place by planning authorities would follow a process that was demonstrably fair and transparent and that the majority of cases coming before an LRB would be accompanied by sufficient information for the appeal

⁴¹ Statistics prepared by the Scottish Government Directorate for the Built Environment (SGDBE) for the second LRB Forum, held on 22 March 2010, indicate that the average number of members at hearings throughout Scotland was 5.

⁴² SCAJTC (2009) Annual Report for 2008-2009, available at <http://www.justice.gov.uk/ajtc/docs/scot-com-ann-rep-08-09.pdf>, at 18.

to be determined quickly. There is clearly a tension here between speed, on the one hand, and fairness and transparency, on the other, and all the available evidence suggests that speed is given priority.

4.30 A recent review of the first two years of the operation of LRB's carried out by the Scottish Committee of the Administrative Justice and Tribunals Council (SCAJTC) indicates that reviews of planning decisions are often dealt with in a perfunctory way. Many of the cases that were observed were dealt with in a couple of minutes, with little or no discussion and with few, if any, references to the written submissions. The only plausible explanation for the fact that the SGDBE statistics referred to above indicate that one third of the appeals were allowed is that, in light of further information contained in the appeal letter or obtained at the site visit, the planning authority had reviewed its previous decision and decided to grant planning permission prior to the hearing. Oral hearings at which applicants have an opportunity to address the LRB were the exception rather than the rule and LRBs were free to determine whether or not to hold an oral hearing without reference to the applicants' wishes.

4.31 The limited review carried out by the SCAJTC also indicated that there were wide variations in the ways in which different LRBs dealt with appeals. Some of the most significant variations are set out below.

- (i) There was no clear consensus on the extent to which the function of the LRB is to determine an appeal *de novo* or to carry out a more restricted review of the planning officer's decision. In spite of a letter from the Chief Planner and Director of the Scottish Government Directorate for the Built Environment (SGDBE) to Heads of Planning Authorities,⁴³ confirming the Scottish Government's view that the 'de novo' approach should be adopted in determining cases brought before Local Review Bodies, a significant number of local authorities regard the function of the LRB as limited to a review of the appointed officer's decision.
- (ii) Site visits are rarely undertaken although they are often requested. In each of four LRB's that were visited, the board dispensed with a site visit although many applicants requested that one should be undertaken. Given that many applicants request the matter to proceed by way of written submissions (by ticking a box) and ask for a site visit (again by ticking a box) but have no rights to speak at an LRB (other than at a 'hearing session') and therefore rarely attend, they may assume (incorrectly) that a site visit has taken place prior to the determination of their case. Where site visits do take place, there is significant variation in whether or not a local authority planning officer is present to assist the LRB members.
- (iii) There are wide variations in the use of planning and legal advisers.

⁴³ 29 July 2011, available at <http://www.scotland.gov.uk/Resource/Doc/1070/0119911.pdf>

⁴⁴ At the

other extreme, some planning authorities use an unqualified committee clerk to provide legal and procedural advice to the LRB.

- (iv) There is disagreement over the extent to which new material is deemed to be admissible. Regulations require that an applicant must submit all documents, materials and evidence that they intend to rely on when submitting an appeal to the LRB and further or new material may only be submitted after this point at the request of the LRB. There have been cases where the applicant has not submitted documents with their review application because they had submitted them with the original application. Some authorities interpret the Regulations strictly and will not include these documents as part of the report they must provide for the Board, which can deny the LRB access to substantial evidence in support of the applicant's case.
- (v) There are wide variations in the extent to which planning authorities add, alter or vary conditions in determinations made by an LRB. Where an LRB has decided to grant planning permission, officers appear to have to have discretion to add, alter or vary conditions to the decision that were not necessarily discussed or agreed by the LRB. This is an extremely questionable practice since the LRB ought to be accountable for its own decisions. An applicant who finds the conditions unacceptable would have to submit a further application to vary the conditions and, if this is refused by an appointed officer, it would have to be considered again by the LRB.
- (vi) There are wide variations in what is regarded as a 'material consideration' that would justify departure from a development plan. The statutory test, in Scotland and in the remainder of the UK, is that the proposed development must accord with the development plan unless 'material conditions' indicate otherwise. Whilst the question of what may be a relevant material consideration is ultimately a matter for

⁴⁴

A 'Chinese Wall' is an ethical barrier between different divisions of an organisation that is intended to avoid conflicts of interest.

the courts to decide, there are wide variations in what is regarded as a 'material consideration' by LRBs, indicating that there is a need for further guidance to be issued. In the absence of such guidance, the limited evidence available suggests that LRBs may view this as a much wider area of discretion than is legally sustainable by reference to the large body of decided cases on this issue.

4.32 The procedure for challenging planning decisions clearly differs from the procedures encountered in courts or in tribunals. Although LRBs are accessible, at least for those who have submitted a planning application, who may submit their application in writing or online and are not charged a fee, they are not really independent and the training received by members is clearly variable in quality and quantity. There is considerable variation in the procedures that are adopted, and LRB decisions are therefore neither coherent nor consistent. Moreover, cases are dealt with in a perfunctory manner. In our view, the procedure cannot be described as appropriate.

Chapter 5: Summary

5.1 In four of the policy areas that have been identified in this paper (community care, higher education, housing and legal aid), there are no independent, external appeal procedures, apart from judicial review, that can be used by individuals who are dissatisfied with the outcome of a decision made by a public official to challenge the decision, and, for the reasons set out in para. 8 above, judicial review is neither accessible nor appropriate as a procedure for doing so. Thus it is extremely difficult for someone to challenge a community care decision, a decision about a student's tuition fee status or the assessment of financial support, a large number of housing decisions, or a decision about entitlement to Advice and Assistance or to Civil and Criminal Legal Aid. In the fifth area (planning), procedures for challenging local planning decisions do exist and are relatively easy to access. Although Local Review Committees, which are committees of the (local) Planning authority, are quite easy to access, they are not really independent and do not appear to give more than perfunctory attention to the appellant's case. Thus, they fail the test of appropriateness. These findings are summarised in the table below.

Policy area	Do external procedures for challenging administrative decisions exist?	Are these procedures accessible	Are these procedures appropriate
Community care	no	–	–
Higher education	no	–	–
Housing	no	–	–
Legal aid	no	–	–
Planning	yes	yes	no

Chapter 6: Recommendations

6.1 As noted in para. 5 above, the SCAJTC believes that the principle of a general right to an appeal against administrative decisions, with the onus placed on government to rebut that right where it is not in the public interest to assert it, is a very important one. It follows that the absence of procedures that would enable someone who is dissatisfied with the outcome of an administrative decision to challenge it constitutes something of a 'judicial deficit' and that, unless the public interest favours the status quo, something should be done to remedy the situation. However, what should be done is not at all clear since there are a number of alternative ways of enabling someone to challenge an administrative decision.

6.2 Nevertheless, we think that there are a number of important principles that should be borne in mind and used to judge the appropriateness of any procedures for enabling someone to challenge an administrative decision that may be introduced. The SCAJTC believes that any new procedures should:

- be quick and easy for members of the public to access;
- enable those who used them to put their case;
- be proportionate to what is at issue;
- be independent from the initial decision maker;
- be able to consider errors of fact and the incorrect or inappropriate exercise of discretion as well as errors of law;
- provide 'feedback' to initial decision makers in order to improve standards of administrative decision-making.

6.3 There would appear to be four ways in which someone who cannot currently challenge an administrative decision could be enabled to do so.⁴⁵ This could be achieved by means of:

- establishing a right of appeal to a court, presumably, in such cases, to the sheriff court either to an existing court such as the small claims court or the heritable property court, or to a newly-constituted court;
- establishing a right of appeal to a tribunal, either to an existing tribunal or to a newly-constituted tribunal within the Scottish tribunals Service;

⁴⁵ A very helpful comparison of the characteristics of these four means of dispute resolution can be found in Mullen, Tom (2010) 'A Holistic Approach to Administrative Justice', in Michael Adler (ed.) *Administrative Justice in Context*, Oxford: Hart Publishing.

- establishing a right to an independent review of the decision, like independent review of discretionary Social Fund decisions, which are usually made in Jobcentre Plus offices, that is provided by the Independent Review Service (IRS)⁴⁶.
- expanding the jurisdiction of the SPSO to enable it to investigate the correctness of all decisions. Such an arrangement would give the SPSO powers that are similar to those of the New Zealand Ombudsman, who can investigate all 'administrative acts, decisions, omissions or recommendations of central and local government agencies'. In New Zealand, someone can complain to an Ombudsman if they believe that any administrative act, decision, omission or recommendation is 'illegal, unreasonable, unjust, oppressive, improperly discriminatory, based on a mistake or fact or law or was wrong'⁴⁷.

6.4 Rather than itself considering whether and, if so, which of the above modes of redress should be introduced in each of the policy areas that have been identified in this paper (community care, higher education, housing, legal aid and planning) where there are no independent, external procedures, apart from judicial review, that are both accessible and appropriate, the SCAJTC proposes to consult with key stakeholders in each of these areas. Stakeholders would be asked the following questions:

- whether they regard the existing arrangements for challenging decisions as satisfactory;
- if not, whether they think something should be done to remedy the situation;
- whether, on the other hand, public interest considerations require that nothing should be done;
- if they think something should be done, which of the alternatives set out in para. 50 above they would favour.

⁴⁶ The IRS is a hybrid institution, which combines some of the characteristics of ombudsmen and tribunals. Like an ombudsman, it has the power to investigate and to consider how a decision was made but, unlike an ombudsman, it also has the power to consider the merits of the original decision. The Government plans to abolish the IRS when it replaces the Social Fund with 'locally-administered assistance'. See Welfare Reform Bill 2011.

⁴⁷ Office of the New Zealand Ombudsman, *Frequently Asked Questions*, available at <http://www.ombudsmen.parliament.nz/>