



Law Society  
of Scotland

# Law Society of Scotland Response

Judicial Review: Proposals for Reform Submission to  
the Ministry of Justice Consultation

April 2021



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law Sub-committee welcomes the opportunity to consider and respond to the Ministry of Justice Consultation on Judicial Review Proposals for Reform. The sub-committee has the following comments to put forward for consideration.

## General Comments

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### **1. Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?**

While it is not for the Law Society of Scotland to suggest what remedies the law of England and Wales should provide in judicial review cases, we think that it would be useful to give the courts a discretion to make a suspended quashing order.

#### **(a) Precedent for section 102 of the Scotland Act 1998**

Section 102 of the Scotland Act 1998 is derived from s.172 (1)(b) of the Constitution of South Africa which empowers a court, when declaring invalid any law or conduct" which is inconsistent with the Constitution, to make.

- "(i) an order limiting the retrospective effect of the declaration of invalidity; and
- (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

An example of where the Constitutional Court made such orders was the *First National Bank of South Africa v Land and Agricultural Bank of South Africa* 20 <http://www.saflii.org.za/za/cases/ZACC/2000/9.pdf>

#### **(b) Policy necessity for a similar provision in the Scotland Act**

The Scotland Act 1998 imposed a strict *vires* control over what it was competent for the Scottish Parliament and Scottish Executive (now the Scottish Government) to do. Section 29(1) provided that, if a provision of an Act of the Scottish Parliament (ASP) was outside its legislative competence, it is "not law".

There were similar provisions in relation to any subordinate legislation made, or other act, by a member of the Scottish Government (see, for example, sections 54 and 57(2)).

Given that background and the consequences which could follow if a court were to decide that some provision of an ASP or subordinate legislation made, or other act, by a member of the Scottish Government was outside legislative or devolved competence, and, therefore, strictly null and void, it was clearly appropriate, and even necessary, that the court should be given similar powers as in the South African Constitution to limit the retrospective effect of its decision and, in particular, to suspend the effect of its decision so as to enable the defect to be remedied.

### **(c) Legal necessity for an express provision**

At the time of the Scotland Act, there were doubts as to whether, when a court decided that some act was *ultra vires* or null and void, it had, or would consider it appropriate to exercise, any inherent powers to make any such order.

Given the background of the strict *vires* control in that Act, it was particularly doubtful whether a court would do so in the context of that Act,

The effect of section 102 is therefore to make it clear that, even although a court decided that some provision of an ASP or subordinate legislation made, or other act, by a member of the Scottish Government was outside legislative or devolved competence, and, therefore, strictly null and void, the court could nevertheless make an order limiting the retrospective effect, or suspending the effect, of its decision.

This express statutory power would override any qualms which a court might otherwise have had about the appropriateness of making any such order, such as were subsequently expressed by the Supreme Court in *Ahmed (No 2) v HM Treasury 2010 UKSC 5*. In that case, it was held, by a majority, that it would not be appropriate to suspend a quashing order because it would be inconsistent with its nullity effect.

In this context, it is noticeable that the Supreme Court did not have any similar qualms in *Cadder v. HMA [2010] UKSC 43 at 58* when it held that it had, and could appropriately exercise, its inherent discretionary power to limit the retrospective effect of its decision that some act of the Lord Advocate was *ultra vires*.

### **(d) Examples of cases where orders under section 102 have been used.**

Section 102 has been used in a number of cases for example:

- a. *Salvesen v Riddell [2013] UKSC 22*. This case was a “devolution issue” appeal, under paragraph 13 of Schedule 6 of the *Scotland Act 1998*, from the Court of Session. The case concerned a challenge to the legality of section 72 of the *Agricultural Holdings (Scotland) Act 2003* on the basis that it was incompatible with the applicant’s right to property, as protected by Article 1 of the First Protocol of the European Convention of Human Rights (A1 P1). The legislation under scrutiny sought to reform the regulation of the relationship between agricultural tenants and landlords. Section 72 of the *Agricultural Holdings (Scotland) Act 2003* sought to change the way that limited partnerships between tenants and landlords could be terminated.

Lord Hope made an order, under section 102 (2) (b) of the *Scotland Act 1998*, to suspend the effect of the finding that section 72 (10) of the 2003 Act was outside of competence for 12 months (or such shorter period as necessary for the Scottish Parliament to legislate). This was to enable the Scottish Government and Parliament to correct the “defect” in the legislation. In 2014 the Scottish Government produced *The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014* in response to the judgment, which was approved by the Scottish Parliament.

- b. *P v Scottish Ministers* [2017] CSOH 33 which concerned standard and enhanced disclosures issued under the Police Act 1997 (“the 1997 Act”) and disclosures of PVG scheme records are issued under the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”) – these types of disclosures are referred to collectively as ‘higher level’ disclosures. In 2015, the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (“the 2015 Remedial Order”) amended the 1997 and 2007 Acts in relation to the spent conviction information which could be disclosed in a higher level disclosure. That 2015 Remedial Order introduced lists of offences into schedules 8A and 8B of the 1997 Act.

Schedule 8A lists certain spent convictions for which will continue always to be disclosed due to the serious nature of the offence.

In *P v Scottish Ministers*, P raised a petition for judicial review in relation to the disclosure of a previous conviction for lewd and libidinous practices on his PVG scheme record. Although the conviction was spent, the offence was included in P’s record because it was on the Always Disclose List. The court declared that, insofar as the regulations require automatic disclosure of P’s conviction before the Children’s Hearing, the 2015 Remedial Order unlawfully and unjustifiably interfered with the petitioner’s right under Article 8 of the ECHR, and Scottish Ministers had no power to make the provisions in terms of section 57(2) of the Scotland Act 1998. The effect of the court order was suspended under section 102 for nine months to allow Ministers to remedy the legislation. The 2018 Remedial Order set out amendments to the 1997 and 2007 Acts. The effect of the amendments was that recipients of higher level disclosures under those Acts whose disclosure contains information about a conviction for an offence listed in the Always Disclose List will in certain specified circumstances have the right to apply to a Sheriff in order to seek removal of that conviction information before their disclosure is sent to a third party such as an employer.

- c. *Christian Institute & Ors v Lord Advocate (Scotland)* [2016] UKSC 51, the appellants sought judicial review of Part 4 of the Children and Young People (Scotland) Act 2014, averring that it was outwith the legislative competence of the Scottish Parliament under the Scotland Act 1998 because it related to matters reserved to the UK Parliament, that it was incompatible with ECHR rights and/or that it was incompatible with EU law. They had failed in both Houses of the Court of Session. The Supreme Court:
- allowed the appeal on the basis of the ECHR challenge and the EU law challenge (to the extent that it mirrored the ECHR challenge); and

- o invited written submissions as to the terms of its order under s 102 of the Scotland Act in order to give the Scottish Parliament and Scottish Ministers an opportunity to address the matters raised in the judgment.
- d. In a recent case, *Reverend Dr William JU Philip and others v Scottish Ministers* [2021] CSOH 32, where the Lord Ordinary in the Court of Session held that regulations closing churches for worship were beyond the devolved competence of Scottish Ministers, it was not necessary to consider making an order under section 102 to suspend the effect of the declarator in order to enable the defect to be remedied because the regulations were shortly to be superseded.

### **Section 102 in a non-devolution context**

We think that, in a non-devolution context and for similar reasons as are mentioned above, it would be useful if a court, when it is deciding, that some subordinate legislation or some administrative or executive act by a Government Minister or other body was ultra vires or null and void, to have a power to make an order similar to that contained in section 102(2)(b) suspending the effect of its decision for any period and on any conditions to allow the defect to be corrected.

It will be observed that the power to make an order under section 102(2)(b) is not restricted to where the court proposes to make a quashing order but applies in any case where a court decides, in whatever form, such as a declarator, that a provision of an ASP or subordinate legislation made, or other act, by a member of the Scottish Government was outside legislative or devolved competence, and, therefore, strictly null and void. However, it may be that, in the context of judicial review in England and Wales, it is only a quashing order which is the relevant court order.

### **Discretionary or mandatory criteria**

The IRAL Report recommended that it should.

“be left up to the courts to develop principles to guide them in determining in what circumstances a suspended quashing order would be awarded, as opposed to awarding either a quashing order with immediate effect or a declaration of nullity” (para 3.69)

However, section 102(3) requires a court, in deciding whether to make an order under section 102 “(among other things) have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected”.

Although it may be thought that it would be helpful to the court to require them, in deciding whether to make a suspended quashing order, to have regard to certain non-exhaustive factors or criteria in addition to section 102(3), it may be difficult to frame such factors without causing more uncertainty. It may therefore be preferable to leave it to the courts to develop and work out the factors on a case-by-case basis.

## **2. Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?**

The justification for abolition in England and Wales seems to be the high volume of applications and low number of successful outcomes. It is worth noting that the evidence in England has been disputed <https://ukconstitutionallaw.org/2021/03/29/joe-tomlinson-and-alison-pickup-putting-the-cart-before-the-horse-the-confused-empirical-basis-for-reform-of-cart-judicial-reviews/>. We have no evidence that there is the same problem in Scotland.

On the contrary there is a good example of a recent successful Cart/Eba Judicial Review: *CM (Petitioner) 2021 CSIH 15*, in which the First Tier Tribunal (FtT), Upper Tribunal (UT), and the Lord Ordinary misunderstood the petitioner's evidence and the Inner House intervened to reduce the UT's decision refusing permission to appeal – <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021csih015.pdf?sfvrsn=0>

We are not persuaded that the justification that the UT has already considered and dismissed the case is well founded. This suggests a detailed adversarial hearing took place with a reasoned judgement being issued by the UT, but this is not what happens. Only the FtT issues a reasoned judgement. Applications for permission to appeal to the FtT, and subsequently to the UT, are both considered by a single judge and decided on the papers. The reasoning is usually very brief.

A hearing before a Lord Ordinary in a Cart/Eba judicial review is the first opportunity to put forward detailed oral submission addressing why the FtT erred in law.

In our view this provides an important safeguard which is necessary to prevent injustice.

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

Yes, the proposals in this document should be limited to England and Wales only. We raised this issue when responding to IRAL. In that response we highlighted

- a. the Courts Reform (Scotland) Act 2014 (asp 18), as the most significant legislation impacting on judicial review in Scotland. This Act made provision for wide-ranging reforms to the Scottish civil courts system in Scotland, as well as several important reforms to court procedure for judicial review.
- b. The IRAL Terms of Reference and Call for Evidence may have misunderstood how judicial review applies in Scotland. Scottish courts do not apply different judicial review principles, grounds and procedures depending upon whether the decision being reviewed relates to a reserved matter, such as the Home Secretary's decision in an immigration or a devolved matter, such as the decision of Scottish Ministers relating to salmon fishing.

It may, however, be envisaged that IRAL might have considered whether there should be special rules of judicial review applying to specific reserved areas. This could be regarded as part of the law on reserved



matters by virtue of paragraph 2(3) of Schedule 4 to the Scotland Act 1998 because judicial review forms part of Scots private law by virtue of the definition in section 126(4) of that Act. However, this would fragment the general approach of Scots law to judicial review. It could involve the Court of Session applying different principles and procedures according to the subject matter of the case. It might even be unworkable. This fragmentation is therefore considered to be inappropriate.

- c. There is a further matter to be taken into account, namely that the supervisory jurisdiction of the Court of Session, within which judicial review falls, is a matter of constitutional significance. This can be seen from Article XIX of the Acts of Union of 1706 and 1707, whose opening provision states:

“That the Court of Session or College of Justice do after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same Authority and Privileges as before the Union subject nevertheless to such Regulations for the better Administration of Justice as shall be made by the Parliament of Great Britain.”.

This preserves the Court and its jurisdiction, whilst permitting reforms for its better operation. Indeed, a modern example of new provision for the better administration of justice in the Court of Session's supervisory jurisdiction can be seen in section 89 of the Courts Reform (Scotland) Act 2014 - an Act of the Scottish Parliament, under devolution amending the UK Parliament's Court of Session Act 1988. But care always has to be taken so as not to render the Court's jurisdiction in judicial review ineffective. If matters went that far it could be argued that this would be in breach of the Acts of Union and that the matter was justiciable. Although the courts so far have been able to sidestep whether such a challenge would be justiciable, we do not consider that the IRAL should attempt to resolve this particular issue of justiciability - that would be a highly controversial move in Scotland. The fundamental law issues raised by this matter can be seen from the speech of Lord Hope of Craighead in a case that went before the Committee for Privileges of the House of Lords, namely *Lord Gray's Motion* 2000 SLT 1337 at page 1345.

In view of our response to question 3 we have no further comments to make to the remaining questions in this consultation which are focussed on aspects of court rules and process in England and Wales.



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