

## Response ID ANON-VWW6-T4QT-7

Submitted to **Judicial Review: Proposals for Reform**

Submitted on **2021-04-28 10:35:53**

### Personal information

#### a What is your name?

**Name:**

The Society of Legal Scholars (SLS)

#### b What is your email address?

**Email:**

brian.c.jones@sheffield.ac.uk

#### c What is your organisation?

**Organisation:**

The Society of Legal Scholars (SLS)

### Introduction

#### Section 4: The IRAL panel's recommendations

##### 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?

###### Question 1:

These are interesting suggestions in which we see the logic. There are potential advantages and a useful precedent in the Scotland Act but, we firmly believe that any steps in this direction must be taken cautiously; it is of crucial importance to ensure that in cases of illegality remedies are possible. That being said, leaving the decision to suspend the effect of a quashing order to the courts is the correct approach in this context. We would not support the suggestion (at para. 56) that 'criteria could also be set out in legislation which must be considered by the courts, and which, if met, mandate the court to use a suspensive order unless there was an exceptional public interest in not doing so'. Guidance on the factors which the court may consider might be helpfully included in legislation, but this should be a non-exhaustive list and retain the court's discretion in application. The weight allocated or attributed to the various factors in making decisions about suspending quashing orders should also be left to the court's judgment and discretion.

##### 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?

###### Question 2:

NO ANSWER PROVIDED

#### Section 5: Additional Proposals for Consultation

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

###### Question 3:

NO ANSWER PROVIDED

##### 4 (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies?

###### Question 4a:

In relation to the suggestion of prospective-only remedies, we note the commitment (at para. 61) that 'this would be a discretionary power for the court to order if it saw fit to do so, and is by no means the Government compelling remedies to be granted with prospective effect only'. As with our comments on suspended quashing orders above we would urge that discretion remains with the court to award such remedies in the limited circumstances in which they see fit. We would urge caution against the adoption of any mandatory approach.

##### 4 (b) If so, which factors do you consider would be relevant in determining whether this remedy would be appropriate?

###### Question 4b:

SEE ANSWER TO 4(A) ABOVE.

**5 Do you agree that the proposed approaches in para 68 (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?**

**Question 5:**

NO ANSWER PROVIDED

**6 Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in para 69 (a) or the mandatory approach in para 69 (b) would be more appropriate?**

**Question 6:**

These are interesting suggestions in which we see the logic. There are potential advantages and a useful precedent in the Scotland Act but, we firmly believe that any steps in this direction must be taken cautiously; it is of crucial importance to ensure that in cases of illegality remedies are possible. That being said, leaving the decision to suspend the effect of a quashing order to the courts is the correct approach in this context. We would not support the suggestion (at para. 56) that 'criteria could also be set out in legislation which must be considered by the courts, and which, if met, mandate the court to use a suspensive order unless there was an exceptional public interest in not doing so'. Guidance on the factors which the court may consider might be helpfully included in legislation, but this should be a non-exhaustive list and retain the court's discretion in application. The weight allocated or attributed to the various factors in making decisions about suspending quashing orders should also be left to the court's judgment and discretion.

**7 Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?**

**Question 7:**

Whilst we support the recognition of the importance of the fundamental principle of parliamentary sovereignty we note that, as the consultation acknowledges, this must be balanced with upholding the rule of law and ensuring legal accountability mechanisms remain. Given the approach of courts to purported ouster clauses in the past we are unconvinced that legislation is appropriate, necessary, or desirable.

**8 Would the methods outlined in paras 85-95, or a different method, achieve the aim of giving effect to ouster clauses?**

**Question 8:**

Whilst we support the recognition of the importance of the fundamental principle of parliamentary sovereignty we note that, as the consultation acknowledges, this must be balanced with upholding the rule of law and ensuring legal accountability mechanisms remain. Given the approach of courts to purported ouster clauses in the past we are unconvinced that legislation is appropriate, necessary, or desirable.

**9 Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.**

**question 9:**

NO ANSWER PROVIDED

**10 Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?**

**Question 10:**

NO ANSWER PROVIDED

**11 Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?**

**Question 11:**

NO ANSWER PROVIDED

**12 Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?**

**Question 12:**

NO ANSWER PROVIDED

**13 Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?**

**Question 13:**

This proposal has merit but is likely to be extremely difficult to apply effectively in practice. We would be concerned about any 'duty' being imposed on parties to 'identify' potential interveners (para. 103). We suggest that it would be best left to courts to decide on relevant parties/interveners in public interest cases. There are obviously well-known reputable organisations, to draw upon one obvious example, Greenpeace, which could legitimately make a valuable contribution to, in particular, Environmental JRs. However, there will also be instances where much smaller/low profile/local/specialist bodies might be helpful and it would be hard to identify these in advance.

On a related point, an attempt to provide clearer guidelines for what is actually in the public interest might be useful.

**14 Do you agree that the CPRC should be invited to include a formal provision for an extra step for a reply, as outlined in para 104?**

**question 14:**

NO ANSWER PROVIDED

**15 As set out in para 105(a), do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?**

**Question 15:**

NO ANSWER PROVIDED

**16 Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?**

**Question 16:**

NO ANSWER PROVIDED

**17 Do you have any information that you believe it would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?**

**Question 17:**

NO ANSWER PROVIDED

## **Section 7: Economic Impacts**

**18 Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals?**

**Question 18:**

NO ANSWER PROVIDED

**19 Are there any mitigations the Government should consider in developing its proposals further? Please provide data and reasons.**

**Question 19:**

NO ANSWER PROVIDED

## **Confidentiality**