

The Peter A. Allard School of Law

Allard Research Commons

All Faculty Publications

Allard Faculty Publications

2022

Submission the Ministry of Justice on Human Rights Act Reform Consultation – Q16: Should the Proposal for Prospective Quashing Orders Be Extended to Proceedings under the Proposed Bill of Rights?

Samuel Beswick

Allard School of Law at the University of British Columbia, beswick@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs



Part of the [Law Commons](#)

Citation Details

Samuel Beswick, "Submission the Ministry of Justice on Human Rights Act Reform Consultation—Q16: Should the Proposal for Prospective Quashing Orders Be Extended to Proceedings under the Proposed Bill of Rights?" (March 4, 2022).

This Response or Comment is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in All Faculty Publications by an authorized administrator of Allard Research Commons.



HRReform@justice.gov.uk

Human Rights Team

4 March 2022

International, Rights and Constitutional Policy Directorate, Ministry of Justice
102 Petty France, London SW1H 9AJ

Submission on Human Rights Act Reform Consultation—Q16: Should the proposal for prospective quashing orders be extended to proceedings under the proposed Bill of Rights?

1. I am an Assistant Professor of Law at the University of British Columbia in Vancouver, Canada. I previously practised and taught law in London, England. My scholarly research concerns the overlapping doctrines of Prospective Quashing (i.e. judicially quashing government acts with non-retrospective effect) and Prospective Overruling (i.e. judicially overruling court precedents with non-retrospective effect). I write this submission in my personal capacity and not behalf of my university or law school.
2. I oppose the proposal in Question 16 of the *Human Rights Act Reform Consultation* to extend prospective quashing orders to proceedings under human rights law. I express no view here on suspended quashing orders, although I would urge the Government to consider experiences and critiques of this doctrine in comparable common law jurisdictions such as Canada before enacting this novel reform.¹
3. I have previously expressed opposition to prospective quashing orders in my submissions to the *Judicial Review Reform Consultation*² and the *House of Commons General Committee on the Judicial Review and Courts Bill 152*,³ as well as in a contribution on the *UK Constitutional Law Blog*.⁴ My reasons, in summary, are as follows:
 - a. **Prospective Quashing violates Professor A.V. Dicey’s canonical three meanings of the Rule of Law:**⁵ (i) Supremacy of law: the technique allows unlawful executive action to govern past events without remedy, enabling rule by arbitrary power rather than rule by the regular law; (ii) Equality before law: the technique gives the Government a remedial shield in litigation that is not available to ordinary people, contrary to the principle of equality under law; (iii) Ordinary law: the technique undermines the aspiration that ‘*where there is a right, there is a remedy*’, by abolishing the ordinary retrospective remedies for rights-violations.

¹ See e.g. *R. v. Albashir*, [2021 SCC 48](#).

² 28 April 2021, <https://ssrn.com/abstract=3833022>.

³ 3 November 2021, <https://ssrn.com/abstract=3955344>.

⁴ S. Beswick, ‘Prospective quashing and the rule of law’, U.K. CONST. L. BLOG (23 Nov. 2021), <https://ukconstitutionallaw.org/2021/11/23/samuel-beswick-prospective-quashing-and-the-rule-of-law/>.

⁵ S. Beswick, ‘Prospective Overruling Offends the Rule of Law’ (2021) NEW ZEALAND LAW JOURNAL 261, <https://ssrn.com/abstract=3955235>.

- b. **The premise of prospective quashing, ‘that legal certainty, and hence the Rule of Law, may be best served by only prospectively invalidating’ impugned acts,⁶ is contradicted by the leading mainstream theories of adjudication in the common law world,** including the jurisprudence advanced by Professors H.L.A. Hart, Joseph Raz, John Finnis, Ronald Dworkin, and John Gardner.⁷ Legislating to create a prospective quashing power would usher in a radical change to the judicial method without any adequately articulated theoretical or Rule-of-Law justification.
- c. **Prospective Quashing draws judges into making policy and encourages judicial activism.⁸** This statutory reform has roots in an American doctrine developed by reformist jurists who sought to untether US judges from the constraint of retrospective judicial decision-making as a way to facilitate more radical judicial changes in the law. The technique leads to more uncertainty, instability, and inefficiency in the law, and more policy balancing in the courts, not less.
- d. **Prospective Quashing is inconsistent with the English common law judicial method and the declaratory theory of adjudication that underpins common law reasoning.⁹** The Government’s proposal would fundamentally change the nature of judging in the UK. The idea that judges can separate the forward-looking precedential effects of their decisions from the backward-looking retrospective effects contravenes orthodox understandings of the common law judicial method. Lord Devlin thought such a proposal ‘*crosses the Rubicon that divides the judicial and the legislative powers. It turns judges into undisguised legislators.*’ He warned that to cross that Rubicon—as the Government’s proposal does—‘*would be to make a profound constitutional change with incalculable consequences*’.¹⁰
- e. **Prospective Quashing is doctrinally unprincipled and has been denounced by prominent apex courts around the common law world.** The High Court of Australia has rejected the doctrine of judicial non-retrospectivity as ‘*inconsistent with*’ and ‘*a perversion of judicial power*’.¹¹ The United States Supreme Court has abandoned it.¹² In Canada it is a rarely-invoked exceptional resort. The Government’s prospective quashing proposal is an unprecedented reform. It would isolate the courts of the United Kingdom from influencing, and drawing influence from, comparable common law jurisdictions.
- f. **Prospective Quashing is unnecessary and has been rejected by scholars who have analysed the doctrine in England.¹³** It is superfluous given the (relatively

⁶ *The Government Response to the Independent Review of Administrative Law* ([CP 408, 2021](#)) 31.

⁷ S. Beswick, ‘Judicial Law-making’ (draft manuscript not yet published: <https://bit.ly/3EyGZw8>).

⁸ S. Beswick, ‘Prospective Overruling Unravelling’ (2022) 41 CIVIL JUSTICE QUARTERLY 29, <https://ssrn.com/abstract=3820990>.

⁹ S. Beswick, ‘The Overpaid Tax Litigation: Roadblocked’ (2021) 84 MODERN LAW REVIEW 1105, 1118–1120, <https://ssrn.com/abstract=3789334>.

¹⁰ Lord Devlin, ‘Judges and Lawmakers’ (1976) 39 MODERN LAW REVIEW 1, 11.

¹¹ *Ha v New South Wales* [1997] HCA 34, (1997) 189 CLR 465, 504, affirmed in *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, [55] *per* Kiefel CJ, Bell, Keane and Gordon JJ, [94]–[98] *per* Edelman J.

¹² S. Beswick, ‘Retroactive Adjudication’ (2020) 130 YALE LAW JOURNAL 276, <https://ssrn.com/abstract=3393077>.

¹³ C.J.G. Sampford, *Retrospectivity and the Rule of Law* ([Oxford: Oxford University Press, 2006](#)) 209–

more moderate) proposal of enacting a constrained suspended quashing power. When the Government disagrees with the reasoning or outcome of a judgment, the proper solution is to enact legislation changing the law (if necessary, with retroactive effect).

4. The Government should abandon its proposals to legislate for prospective quashing orders in the human rights and judicial review contexts.
5. If the Government does proceed with introducing prospective quashing orders into English law, it should not be in the form currently presented in clause 1 of the *Judicial Review and Courts Bill 152*. Regarding the specific provisions of Clause 1, subsection (9) should not be part of the law. The exercise of this extraordinary power should be left to the discretion of the judge having regard to the context of each case.

Assistant Professor Samuel Beswick
4 March 2022