Law Society of Scotland

# Supplementary Memorandum of Comments by the Constitutional Law Sub-Committee

## Independent Review of the Human Rights Act

April 2021

## Introduction

The IHRAR was established by the UK Government to consider if the Human Rights Act needs updating after two decades of being in force. The Society's recent consultation response to the IHRAR was submitted to the IHRAR on 3 March 2021. The Law Society held a roundtable discussion with the Independent Human Rights Act Review (IHRAR) on Monday 29 March 2021.

Sir Peter Gross, Chair of the IHRAR, Professor Tom Mullen (Panel member, Glasgow University), Sir Stephen Laws QC (Panel member) and Simon Davis (Panel member, Past President Law Society of England and Wales) joined members of the solicitors' profession, the shrieval bench and academics for a discussion on the terms of reference of the IHRAR.

During the discussion a number of points were raised, and the Society's Constitutional Law Sub-committee has decided to submit a Supplementary Memorandum of Comments to the IHRAR.

## Section 102 of the Scotland Act

The issue of section 102 (Powers of courts or tribunals to vary retrospective decisions) of the Scotland Act 1998 was raised.

Section 102 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

At that time, there were doubts as to whether a court in the UK had inherent powers to make such an order. Since then the UK Supreme Court has shown in the case of *Cadder v. HMA [2010] UKSC 43* https://www.supremecourt.uk/cases/uksc-2010-0022.html : see paragraphs 56-60, that there were already dicta of the House of Lords and Supreme Court to the effect that the Court has a general, inherent power to limit the effect of its decisions (para 58).

We take the view that the Court would take a similar view about their inherent power to suspend the effect of their orders- and indeed the English Courts already have such a general statutory power to this effect– see Rule 40.7(1) of the Civil Procedure Rules 1998 However, in *Ahmed (No 2) v HM Treasury 2010 UKSC 5*, the Supreme Court held , by a majority, that it was not appropriate to exercise this power in the case where they held that some act or order was ultra vires and should be quashed.

Given this background, it would seem that the effect of s 102 is not so much to confer upon a court powers which it does not have but to limit the inherent powers of court to make such an order by requiring it to comply with section 102(3) and (4).

It does, however, make it clear that, when the court finds that some provision of an Act of the Scottish Parliament or some legislative or administrative act by a member of the Scottish Government was beyond its competence and therefore of no effect, Parliament intended that the court should nevertheless be able to exercise the powers to limit the retrospective effect of, or to suspend its order but only when complying with subsections (3) and (4).This should be enough to override the scruples which the Supreme Court had in *Ahmed (No 2)* about suspending the effect of an order which was ultra vires.

However *Cadder* also illustrates that care has to be taken, when giving the courts such an express power , to avoid unintended consequences. In that case the Court pointed out that section 102, as then enacted, did not apply to acts of the Lord Advocate, as one of the Scottish Ministers, which the Lord Advocate did not have power to make. Applying the principle of *inclusio unius est exclusio alterius* to the statutory regime of section 102, the Court did not consider that it had the power to limit the effect of a decision, against an act of the Lord Advocate, by holding that it is not to have retrospective effect (see para 57). The Court was able, however, to apply principles of legal certainty such that the retrospective effect of its decision was excluded from other cases that had been finally determined.

Section 102 has since been amended by the Scotland Act 2012 inserting section 102(1)(c). That extends the provision to cover the purported exercise of a function by a member of the Scottish Government that was "outside devolved competence".

We note that section 4 of the HRA already achieves (for primary legislation) a similar result. Suspended remedies are used when the court thinks that the Government or Parliament are better placed to deal with the complexity of the issue, but that is already one reason why a court might prefer to use section 4 rather than section 3.

The issue, then, is really about secondary legislation and decisions of public authorities under section 6. We are not able to state that section 102 has been used in relation to secondary legislation or the decisions of Scottish Ministers but as was noted at the meeting, it was not used in the recent right to worship judicial review: *Reverend Dr William JU Philip and others [2021] CSOH 32*.

In this context the Review may be considering potential amendments to the HRA, primarily based on policy considerations. If such amendments are to be made, the lesson from *Cadder* would be to raise the question whether any provision akin to section 102 was necessary to implement their policy. If so, care must be taken to avoid unintended consequences.

## Statements of Convention Compliance

We favour amendment of section 19 of the HRA so that that a Minister of the Crown, in addition to making a statement under that provision, should present a memorandum giving reasons for that statement.

The current process of making a statement under section 19 concentrates minds within Government to be sure that a particular Bill, in all its provisions, complies with Convention rights. It is a valuable discipline. The lack of any reasons accompanying section 19 compatibility statements has been a persistent criticism. Although performing an even wider function, we draw attention to section 14 of the UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill (recently passed by the Scottish Parliament (and has been referred to the UK Supreme Court)) which requires primary and secondary legislative proposals to be accompanied by a child rights and wellbeing impact assessment. These statements are not just about requiring those drafting Bills or secondary legislation to address their minds to vires issues, but they allow others – particularly parliamentarians – to make an informed assessment for themselves.

When a Bill goes in draft before the relevant Cabinet Committee, for consideration whether it is ready for introduction, a detailed memorandum on Convention compatibility (or otherwise) will be presented. That will detail the legal analysis, also disclosing any weaknesses in argument. It should not be expected that the full legal advice given to the Government should be publicly disclosed, but it would seem reasonable that the Government should provide a memorandum of reasons to Parliament that explains why it has been able to make the statement it has under section 19.

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