PETER A. ALLARD SCHOOL OF LAW
THE UNIVERSITY OF BRITISH COLUMBIA

Assistant Professor Samuel Beswick
Allard Hall, Room 444
1822 East Mall | Vancouver
BC Canada V6T 1Z1
+1 604 822 3151
beswick@allard.ubc.ca
https://blogs.ubc.ca/beswick/
http://ssrn.com/author=2369910

scrutiny@parliament.uk

Commons General Committee on Judicial Review & Courts Bill
House of Commons
Parliament of the United Kingdom

3 November 2021

Submission on Judicial Review & Courts Bill 152 2021-22 (Prospective Quashing Orders)

1.1. 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).

1.2. In light of my research,[1] I oppose the proposal in Clause 1(1)(29A)(1)(b) to create prospective-only remedies in judicial review, because:

a. **Prospective Quashing violates Professor A.V. Dicey's canonical three meanings of the Rule of Law:**[2] (i) Supremacy of law: Subsection (1)(b) 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: Subsection (1)(b) 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: Subsection (1)(b) undermines the aspiration that '*where there is a right, there is a remedy*', by abolishing the ordinary retrospective remedies for rights-violations.

b. **The premise of Subsection (1)(b), '*that legal certainty, and hence the Rule of Law, may be best served by only prospectively invalidating' impugned acts,*[3] 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.[4] Subsection (1)(b) ushers 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.**[5] This statutory reform has roots in an American doctrine developed by

[1] Summarised in greater detail in S. Beswick, *Submission on Judicial Review: Proposals for Reform – 'Prospective Invalidation/Overruling'*, Judicial Review Reform Consultation, Ministry of Justice, UK (28 April 2021), https://ssrn.com/abstract=3833022.

[2] S. Beswick, 'Prospective Overruling Offends the Rule of Law' (2021) NEW ZEALAND LAW JOURNAL 261, https://bit.ly/3mz29nP.

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

[4] S. Beswick, 'Judicial Law-making' (draft manuscript not yet published: https://bit.ly/3EyGZw8).

[5] S. Beswick, 'Prospective Overruling Unravelled' (2022) 41 CIVIL JUSTICE QUARTERLY _, https://ssrn.com/abstract=3820990.

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.**[6] Subsection (1)(b) 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 Subsection (1)(b) does—'*would be to make a profound constitutional change with incalculable consequences*'.[7]

e. **Prospective Quashing is doctrinally unprincipled and has been denounced by prominent apex courts around the common law world.**[8] The High Court of Australia has rejected the doctrine of judicial non-retrospectivity as '*inconsistent with*' and '*a perversion of judicial power*'.[9] The United States Supreme Court has abandoned it. In Canada it is a rarely-invoked exceptional resort. Subsection (1)(b) 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.**[10] Subsection (1)(b) is superfluous given the (more moderate) proposal of Subsections (1)(a) and (6). 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).

1.3. Regarding the specific provisions of Clause 1, I favour:

a. removing subsections (1)(b) and (4) entirely;

b. in any event, removing subsection (9) so as to leave the exercise of this new power to the discretion of the judge having regard to the context of each case.

Assistant Professor Samuel Beswick
3 November 2021

---

[6] S. Beswick, 'The Overpaid Tax Litigation: Roadblocked' (2021) 84 MODERN LAW REVIEW 1105, 1118–1120, https://ssrn.com/abstract=3789334.

[7] Lord Devlin, 'Judges and Lawmakers' (1976) 39 MODERN LAW REVIEW 1, 11.

[8] S. Beswick, 'Retroactive Adjudication' (2020) 130 YALE LAW JOURNAL 276, https://ssrn.com/abstract=3393077.

[9] *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.

[10] C.J.G. Sampford, *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006) 209–227; B. Juratowitch, *Retroactivity and the Common Law* (London: Bloomsbury Publishing Plc, 2008) 209–218.