

Umbrellas & Parachutes: The SQA's Handling of Scotland's Coronavirus Exam Crisis

by

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Imagine a society in which children arrive at their lot in life not through their own achievement, but rather as the result of predetermination as accords with the vision beheld by that society's masters for its future, and for those children's respective roles in it — be they fretsawyers, stamp collectors, or philosophers. This process (some variant of gene-splicing, perhaps) is given effect in a squat grey building with shiny windows and a proud motto emblazoned over its entrance: 'Community, Identity, Stability'.^[1]

Or, perhaps it says: 'Scottish Qualifications Authority'.

Welcome to our own brave new world. This is a world where you can excel in exams you never even sat... or fail them.

On 4 August 2020, the SQA issued 138,000 Scottish school pupils with their 'results', over half a million of them (for National 5, Higher, and Advanced Higher). These were assessed not by square reference to the children's performance in exams or complete coursework, i.e. not on the basis of their own ability and effort. On 19 March, the Scottish Government had cancelled exams in response of the Coronavirus pandemic. Rather, these results were churned out by a computer algorithm, the synthesis of each school's own assessment of its pupils, on one hand, and, on the other, crucially, the SQA's conception of what results the children ought to receive — predetermined by their school's past attainment, and, therefore, inevitably, by social circumstances.

In total, about one quarter of these results deviated from teachers' estimates, and, in 93% of these cases, in a downward trajectory: A-grades became B-grades, Bs became Cs, passes became fails, top bandings for the most competitive UK university courses (e.g. medicine, law, and Oxbridge) evaporated. Dreams became regret. And regret became outrage. As an exercise in disappointment, this is hard to beat.

Total No. of Results ^[2]	511,070
Unaltered	377,308
Altered	133,762
Altered Down	124,564
Altered Up	9,198

The SQA calls this 'moderation'. Others might call it doctoring. And, whenever reference is made to the SQA, Scottish Ministers can be seen ducking behind the parapet of its executive non-departmental institution. At the centre of this situation, some mastermind has been pulling the strings of what some would allege to be, quite literally, social engineering.

What is the SQA ?

The Scottish Qualifications Authority is this nation's only public examination board for school-level qualifications. There are five across the rest of the UK. It was established on 18 September 1996 in terms of the Education (Scotland) Act 1996 and its commencement orders. The 1996 Act was itself amended by the Scottish Qualifications Authority Act 2002.

Therefore, the SQA is a product of the UK Parliament, while education is a devolved matter in terms of the Scotland Act 1998.

It assumed the roles previously held by the Scottish Examination Board (SEB: school-level qualifications) and Scottish Vocational Education Council (SCOTVEC: further education-level qualifications, excluding degrees).

The SQA's general **functions** are laid out in s.2 of Part I of the 1996 Act. They are framed in quite broad terms:

- 2(1) (a) to devise qualifications;
- (b) to determine the entitlement of individuals to SQA qualifications and, where a person is so entitled, to award and record such a qualification;
- (c) to keep under review and develop SQA qualifications;
- (d) to approve education and training establishments as being suitable for presenting persons for SQA qualifications; and
- (e) to make arrangements for, assist in or carry out the assessment of persons undertaking education and training.

And it also has the following **powers**:

- 2(2) (a) [to] determine what it is that a person is required to do and the level of competence he is required to demonstrate in order to attain the qualification;
- (b) [to] determine the means of assessing whether he has done what is required or demonstrated the level of competence required.

In particular, s.2(1)(d) is important. In its recent moderation of results, as said, the SQA relied on each school's own assessment of its pupils, having already approved these schools as suitable.

The SQA is an executive non-departmental institution. The now slightly old-fashioned term for this is QUANGO (quasi non-governmental organisation). What this means is that, to an extent, the SQA can set its own policies and procedures, i.e. it 'governs' its own activities. However, it is not the government. It was created by the government, and, as such, any authority that it possesses to make decisions derives from the government, or, more specifically, from government legislation approved by parliament.

The SQA is a decision-making institution whose authority has been delegated to it. Thus, it must and can only operate inside that authority, and in accordance with its scope and limits.

Changes to the SQA in Response to the Coronavirus

Since the outbreak of the pandemic in the early Spring of this year, the UK Government and Parliament, and the national devolved governments and assemblies, have proven themselves extremely industrious in their production of new legislation and regulations to cope with the virus in respect of a vast panoply of human activity: from general lockdown to the means by which our courts hear cases, and from new rules for funeral undertakers to those for MOT centres. For example, see the author's previous article: [Picking up the Pieces of Coronavirus Legislation & Regulation](#).

And, the decisions to shut down schools and to cancel exams were taken early.

Therefore, it is somewhat bewildering that apparently nowhere at any time did anyone in the Scottish Government consider it appropriate to make any kind of legislative or regulatory provision in respect of how the SQA should manage this crisis. To date this year, Holyrood has passed 15 Acts, while St. Andrew's House has laid 235 Statutory Instruments. Most of these relate to Covid-19.

What the Scottish Government has done is to issue 'educational continuity directions' in exercise of its power to do so as conferred on it by the Coronavirus Act 2020, i.e. the UK Act. This accords with s.38(2) and paragraph 11(1) of Part 2 of Schedule 17 to that Act. Paragraph 11(4)(i) empowers the Scottish Ministers to:

'require the taking of actions in general terms, or require the taking of particular actions, that the Scottish Ministers consider reasonable'.

However, the only mention made of exams appears in paragraph 11(4)(h), which empowers them to:

'require the alteration of term dates, holiday dates or examination dates'.

There are five educational continuity directions (in original and amended forms), dated from 21 May to 6 August, dealing with such matters as school closure and reopening, provision of remote schoolwork during term time, and free school meals. In respect of the SQA, the Scottish Government has used such a direction to relax school closure so

staff may access pupil achievement records, grades, and estimates to provide to the SQA.

However, it does not appear to have relied on its power to issue these orders for the purpose of regulating the moderation process itself. Either a view was taken that paragraph 11 of Schedule 17 to the 2020 Act was not wide enough for this, or that it was not necessary since the SQA's functions and powers under the 1996 Act were already broad enough anyway.

Therefore, what the nation has been left with is the SQA performing its usual functions and exercising its usual powers under the 1996 Act, yet going about this business in an entirely unprecedented manner.

This begs the question: was this lawful? (...in the broadest sense.)

SQA Functions & Powers thus Performed & Exercised

Also on 4 August, coinciding with its issuing the results, the SQA published its [Methodology Report](#). This spells out what the SQA has done, obviously after the fact. That said, as the institution engineered its approach, it did drip-feed information to other stakeholders, to greater or lesser extent, including: local education authorities, principals, teachers, parents and pupils. However, it is not unrealistic to say the full shape of Frankenstein's monster did not appear in focus until it was already at large and unstoppable. And, bear in mind this was at a time when teaching staff, in particular, were on their Easter or summer holidays, locked down, or self-isolating.

In any event, the Report also contains a timeline from 1 March, being the date of the first Coronavirus case in Scotland, to 29 May, being the deadline for schools submitting their own assessments of pupils (what the SQA calls 'estimates'), then onto June, when the moderation process was executed, and then onto July, when quality checks were undertaken.

The timeline also refers to the first meeting of the Scottish Government National Qualifications Contingency Group on 17 March, followed by the announcement of the cancellation of exams on 19 March, and various other government and SQA announcements. It does not refer to any of the SGNQCG's subsequent meetings, nor to any form of public consultation whatsoever.

However, the Scottish Parliament's website contains minutes for meetings of the SGNQCG on 17 and 27 March, and 7 and 22 April. The minutes for the first meeting appear to indicate that, at that time, consideration was still being given to staging exams this year, yet only two days later this position altered. Nowhere in any of these minutes is it explained who made this decision or how.

The Methodology Report's timeline also does not refer to any Coronavirus-specific legislation or regulations, because, as said, there are none — only said educational continuity orders, which tend to be rather ambiguous.

This situation engages a variety of legal principles, including: ***ultra vires***; legitimate expectation; legal certainty; equal and consistent decision-making; relevancy; proportionality; reasonableness; and, ***force majeure***.

Frankenstein's monster is indeed complex.

In respect of ***force majeure***, for the sake of completeness and avoidance of any doubt, in this context, this means the Coronavirus.

Problems in Deviating from Assessment by Examination & Coursework

Ultra Vires

There being no Coronavirus-specific legislation or regulations to deal with the situation, is s.2 of the 1996 Act broad and flexible enough to justify the SQA operating as it has done?

In terms of the pre-existing 1996 Act, which functions and powers did the SQA actually exercise?

Functions

- | | | |
|----------|--|---|
| 2(1) (a) | Devising qualifications | <i>No, these already existed.</i> |
| (b) | Determining entitlement to qualifications and awarding them? | <i>Yes, clearly.</i> |
| (c) | Reviewing and developing qualifications? | <i>No.</i> |
| (d) | Approving schools as suitable? | <i>No, this has already been done.</i> |
| (e) | Arranging for / assisting in / carrying out assessment? | <i>Yes, but only inasmuch as exams and course work were cancelled, and the SQA replaced them, as the assessment method, with its moderation process.</i> |

Powers

- | | | |
|----------|--|---|
| 2(2) (a) | Determining what pupils should do and the level of competence they should demonstrate? | <i>In a manner of speaking.</i> |
| (b) | Determining the means of assessment? | <i>Yes (see s.2(1)(e), above).</i> |

Therefore, on relatively superficial analysis, and interpreting these functions and powers in their broadest sense, the SQA does appear to have stayed inside their authority, scope and limits.

However, clearly the Act was originally drawn up to reflect what had, by 1996, already become long-established practice, i.e. pupils sitting exams, their performance in those exams being marked, and the SEB or its statutory predecessors awarding results and grades accordingly. Indeed, the Higher can be traced back to the establishment of the Scottish Leaving Certificate in 1888. It is actually one of the oldest school qualifications in the world.

By corollary, the Act was not drawn up to provide a framework for the SQA to replace the long-established method of assessment with its moderation process. In short, it was not drawn up to deal with the Coronavirus pandemic.

On a foundering aeroplane, a brolly might resemble a parachute, but it is important to remember its purpose at the time of its invention.

Therefore, on closer analysis, the context in which the 1996 Act was drawn up predisposes it towards more purposive and narrower interpretation of the SQA's functions and powers. Indeed, their very breadth itself calls for restraint in interpretation, as does compliance with the ECHR and its jurisprudence.

Purposive interpretation, in essence, consists of appreciating the overall context in which a legislative instrument was drawn up. By extension, it also entails cross-reference to legislative provisions *inter se*. In other words, s.2 is not a menu for the SQA to pick and choose from. This is reinforced by the introductory text of s.2(1) (author's emphasis):

2(1) SQA ***shall*** have the following general functions—

Thus, SQA has a duty to perform its functions (from L. *fungor*, to perform, to do). Its functions are not discretionary powers. Rather, they come as a whole package. This is reinforced by the use of the word 'and' at the end of s.2(1)(d) (which, by contrast, is absent from the end of s.2(2)(a), where s.2(2)(a) and (b) set out the SQA's powers).

In this regard, ss.2(1)(e), 2(2)(a) and 2(2)(b) are perhaps the provisions where the SQA has taken the greatest liberty with its duty. Section 2(1)(e) makes it incumbent on the SQA 'to make arrangements for, assist in or carry out the assessment of persons undertaking education and training'. In the context in which the 1996 Act was drawn up, the word 'assessment' can have no other meaning but exams or coursework.^[3]

Section 2(2)(a) empowers the SQA to 'determine what it is that a person is required to do and the level of competence he is required to demonstrate in order to attain the qualification'. However, in its moderation process, it has exercised this power to require that pupils actually do quite little, whereas it has shifted the requirement for demonstration onto schools. This is a rather strained and perhaps even *ultra vires* exercise of this provision.

And, Section 2(2)(b) empowers the SQA to 'determine the means of assessing whether he has done what is required or demonstrated the level of competence required'. On the face of it, this might appear to justify the SQA in replacing the long-established method of assessment with its moderation process. However, taking a contextual interpretation, as said, 'assessment' can have no other meaning but exams or coursework. Therefore, it might, for example, be proper that the SQA replace exams in an examination hall with some form of online process. However, to ditch exams altogether is, again, a rather strained and perhaps even *ultra vires* exercise of this provision.

Legitimate Expectation

Broadly speaking, where a decision-making institution, such as the SQA, has had its authority delegated to it, then not only must it operate inside that authority and its scope and limits, but moreover, where it has regularly undertaken its decision-making in a certain way, or followed a particular course of conduct, then it should not make a decision at odds with that pattern. This is particularly so where persons affected by the decision expected that pattern to continue, and have acted in reliance on it. Thus, legitimate expectation is similar to common law personal bar or estoppel.

However, and again broadly, the principle of legitimate expectation is usually contingent on the ***status quo*** remaining the same. Plainly, this has not been anyone's experience since March. Therefore, legitimate expectation alone is probably not enough to render the SQA's approach unlawful.

Nonetheless, this is subject to one caveat as follows. Where, as said, in response to the pandemic, Holyrood and St. Andrew's House have acted with such industry in producing laws for so many human activities, their doing so itself has become a form of ***status quo***. Thus, one might have expected them also to put the SQA's activities on like Coronavirus-specific statutory footing. They failed to do so.

Legal Certainty

As said, it was only on 4 August that the SQA published its Methodology Report, being the same day as the results. And, again as said, there was no public consultation. In this era of Covid, certainty as to the law, like certainty as to much else in life, is perhaps an inevitable casualty of the virus. Nonetheless, the recent strength of feeling demonstrated across the nation throws into sharp contrast how unexpected the impact of modification has been on pupils, parents, grandparents, teachers, schools, education academics, and politicians.

With the possible exception of the Scottish Government and SQA themselves, nobody was expecting this.

Problems in the Modification Process, per se

Equal & Consistent Decision-Making

A decision-maker, such as the SQA, should treat like for like, and strive for consistency as between persons affected by its decisions. In Section 2 of its Methodology Report, the SQA states its three 'guiding principles':

- Fairness to all learners
- Safe and secure certification of our qualifications, while following the latest public health advice
- Maintaining the integrity and credibility of our qualifications system, ensuring that standards are maintained over time, in the interests of learners

Here, the first and third are the most significant. However, in effect what the SQA has done is to attempt to arbitrage between them, i.e. to achieve fairness for this years' pupils while also ensuring consistency across other years — hence its modification process. John Swinney tweeted on results day:

'In a year of so many worries, young people should be very proud of their achievements... Pass rate in National 5, 81.1% (UP 2.9%), Higher, 78.9% (UP 4.2%), and Advanced Higher, 84.9% (UP 5.5%). Skill based awards UP 18%.^[4]

Mr Swinney typed the word 'UP' in upper case, perhaps to cast a rosy glow on the news for that day when so many children would feel let down by the system. And, his tweet is interesting for a number of other reasons. First, it refers to young people's 'achievements', whereas their results were actually largely the product of the SQA's modification process.

Secondly, it contrasts with his and Nicola Sturgeon's subsequent call on aggrieved pupils to put in appeals. It is rather as though the certificates delivered/emailed on 4 August were more in the nature of proposals for settlement than actual hard and fast confirmation of results. This is reinforced by the SQA's decision to waive the appeal fee that it usually charges (£39.95 per result in 2019).

Thirdly, further education-level results are 'UP' by a significantly greater margin of appreciation than school-level results.

This all begs the question: why?

Remember Huxley's squat grey building with shiny windows and a motto emblazoned above its entrance: 'Community, Identity, Stability'.

When, in defending the 'results' (read: 'proposals for settlement'), the Education Secretary speaks of upholding 'standards', and the First Minister of ensuring 'a credible system', such notions of standards, credibility and system feel uncomfortably reminiscent of science fiction's nine decade-old dystopian admonition.

Therefore, it seems obvious that the modification process was driven by the Scottish Government's own policy, and this itself was motivated by a concern for maintaining stability, not one for fairness to pupils. The order in which the SQA states its guiding principles might place learners on top, but in reality this year's learners were always at the bottom — and how near the bottom depended on which school they attended.

Relevancy

A decision-maker, such as the SQA, should take account of relevant factors, and should not have regard to irrelevant ones. In essence, what the SQA has done is to 'moderate' (which 93% of the time meant 'downgrade') pupils not by reference to their own work, and not even by reference to the nation as a whole, but rather by reference to their schools. Part of the problem here lies in the fact that prelims are not standardised. Schools set their own prelims based on the national curriculum.

This year's pupils sat their prelims just before the outbreak.

The SQA asked schools to assess their pupils in accordance with prelim results and other coursework in order to submit predicted grades (assuming the hypothesis that exams would proceed this year as normal). Then, it looked at each school's past prelim results and actual results, and determined a variation between these for each school. Thus, it has calculated what it considers each school's typical margin of error. And, it has applied this across the board.

Bear in mind that, in terms of s.2(1)(d) of the 1996 Act, the SQA has already approved schools as suitable — suitable to be involved, but not, it seems, suitable enough to be trusted.

And, turning again to s.2(1)(b), it makes it incumbent on the SQA, 'to determine the entitlement of individuals to SQA qualifications and, where a person is so entitled, to award and record such a qualification'.

This refers to individuals, not schools.

It seems strange that the SQA would ask its own approved schools for individuated data, then embark on all out de-individuation of this on account of, as said, a policy of stability. It seems strange, and it also seems irrelevant. It is not irrelevant to the policy. It is easy to see why the government wanted moderation. However, it is irrelevant to individual pupils. And, more crucially, in a legal context, it is also irrelevant to the Act.

Proportionality

A decision-maker, such as the SQA, when faced with a choice of options, should usually choose the one likely to cause the least collateral damage. In other words, 'a steam hammer should not be used to crack a nut'.^[5]

Given the lack of public consultation, it is not clear what options the Scottish Government National Qualifications Contingency Group did consider. However, two obvious other options would be:

- Simply accept the assessments undertaken by schools in respect of their own pupils
- If undertaking any moderation process at all, look at the entire nation's past prelim results and actual results, and determine a variation between these on a nationwide basis

The first of these would have meant an unprecedented improvement on the previous year's results of in the order of 14% 'UP', or thereabouts. Obviously, this was not consistent with the Scottish Government's concern for stability. However, in a sense one wonders if it would really pose any problem at all. While it might have given this year's pupils overall better grades than those in other years, past and future, nonetheless this year's pupils are competing for university and college places *inter se*. And, in terms of future employment prospects, employers are hardly likely to forget this Covid year, thus would be aware of it in taking account of candidates' exam results across various years. Moreover, as Mr Swinney tweeted, it seems an improvement of 18% was deemed perfectly acceptable for further education-level results.

And, what if 2020's pupils really are that bright?

In any event, the second other option would have allowed the government to maintain stability, while also tempering the impact of the moderation process across Scotland as a whole. It is hard to see how it could have caused any greater collateral damage than schools-based moderation.

Reasonableness

No other decision-maker having faced Covid before, it is hard to draw comparison such as might frame the SQA's conduct in terms of Wednesbury^[6] reasonableness. For example, even during the world wars, British schoolchildren sat exams. That said, there could be some merit in looking south of the border. From the terms of said minutes for meetings of the SGNQCG, it appears some consideration was given to a cross-border approach. However, the outcome of that is not stated, while A-Level and GCSE results are not issued until 13 August and 20 August respectively.

However, in a broader sense, all the foregoing observations about the SQA's approach point in this direction of travel, i.e. that its conduct and exercise of decision-making authority may very well have been irrational as well as procedurally unfair, disproportionate, and, ultimately, illegal.

One can only earnestly hope that the current appeals process shall prove expeditious and robust enough to salvage this crisis, or that the government will remedy it by some other means. As current SNP MSP and former Government Minister, Alex Neil, put it, the government 'must reverse the decisions it made about examination results that saw the poorest children in many of the most deprived areas downgraded on the altar of a manufactured algorithm prepared in secret'.^[7]

Other Considerations

In terms of legal challenge, time limit is a consideration with an uncertain answer, and not one that the author proposes to attempt to tackle in this article. Also, the potential implications of any such challenge might actually create more problems than an eventual judicial remedy would solve. However, again, it is not the author's intention to tackle these here.

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1. A Brave New World, Aldous Huxley, 1932
 2. Figures per The Scotsman, 4 August 2020
 3. Section 21, being the interpretation section for Part I of the 1996 Act, does not provide a definition of assessment
 4. Figures per The Scotsman, 4 August 2020
 5. R v Goldstein [1983] 1 WLR 151, per Lord Diplock
 6. Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
 7. Sunday Times, 9 August 2020